Liability for transboundary pollution in private international law: a duty to ensure prompt and adequate compensation

Guillaume Laganière
Faculty of Law, McGill University, Montreal

May 2020

A thesis submitted to McGill University in partial fulfillment of the degree of Doctor of Civil Law (DCL)

Abstract

Our legal response to transboundary pollution depends not only on the adoption of preventive measures and regulatory oversight but also on the existence of civil liability mechanisms. Victims fundamentally seek to hold polluters liable for breaching their duties or deviating from basic standards of diligence, to obtain redress for the damage that ensued and to prevent it from continuing. The process becomes difficult, however, when pollution crosses borders and several domestic regimes are involved. This is where private international law comes into play.

This thesis investigates the regulatory function of private international law with respect to transboundary pollution. It uses the International Law Commission's *Principles on the Allocation of Loss in the Case of Transboundary Harm* as a benchmark and assesses Canadian private international law accordingly. It suggests that states have a duty to ensure the availability of prompt and adequate compensation for all victims of transboundary pollution (local or foreign). States must implement domestic measures to facilitate claims against transboundary polluters. This includes equal access to justice and equal remedies for all victims. Private international law plays a crucial role in this context: courts must have jurisdiction to hear cross-border claims and apply a law that is favourable to compensation under choice of law rules.

This thesis builds from international environmental law to identify preferable rules of jurisdiction and choice of law for transboundary pollution in the Canadian context. It also addresses the enforcement of foreign judgments against local polluters. The conclusions of this thesis have implications for all cross-border environmental litigation, including climate change litigation against greenhouse gas emitters currently unfolding in domestic courts around the world.

This research was supported by the Social Sciences and Humanities Research Council of Canada

Social Sciences and Humanities Research Council of Canada | Conseil de recherches en sciences humaines du Canada | Canada

Résumé

Le traitement juridique de la pollution transfrontalière dépend non seulement de l'adoption de mesures préventives et de l'application de la règlementation, mais aussi de l'existence de mécanismes de responsabilité civile. Les victimes cherchent fondamentalement à retenir la responsabilité des pollueurs pour le manquement à leurs obligations ou leur écart par rapport aux normes élémentaires de diligence, obtenir une indemnisation pour le préjudice subi et faire cesser celui-ci pour l'avenir. Ce processus devient toutefois difficile lorsque la pollution traverse les frontières et que plusieurs régimes nationaux sont impliqués. C'est ici que le droit international privé entre en jeu.

Cette thèse examine la fonction régulatrice du droit international privé à l'égard de la pollution transfrontalière. Elle prend comme point de repère les *Principes sur la répartition des pertes en cas de dommage transfrontière découlant d'activités dangereuses* de la Commission du droit international et évalue le droit international privé canadien en conséquence. Elle suggère que les États ont l'obligation d'assurer la disponibilité d'une indemnisation prompte et adéquate à toutes les victimes de pollution transfrontalière (locale ou étrangère). Les États doivent notamment mettre en œuvre des mesures pour faciliter les plaintes contre les pollueurs transfrontaliers. Ces mesures incluent un accès égal à la justice et aux recours de droit interne pour toutes les victimes. Le droit international privé joue un rôle crucial dans ce contexte : les tribunaux doivent posséder la compétence nécessaire pour entendre les litiges internationaux et appliquer une loi favorable à l'indemnisation en vertu des règles de conflit de lois.

Cette thèse formule, à partir du droit international de l'environnement, des règles de compétence et de droit applicable adaptées au phénomène de la pollution transfrontalière dans le contexte canadien. Elle examine également la question de l'exécution des jugements rendus à l'étranger contre des pollueurs locaux. Les conclusions de cette thèse fournissent des leçons importantes pour tous les litiges environnementaux transfrontaliers, incluant les litiges contre des émetteurs de gaz à effet de serre qui se déroulent actuellement devant les tribunaux nationaux à travers le monde.

Cette recherche a été financée par le Conseil de recherches en sciences humaines du Canada

Conseil de recherches en sciences humaines du Canada | Social Sciences and Humanities Research Council of Canada | Canada

List of acronyms

ABA	American Bar Association
CBA	Canadian Bar Association
CEC	Commission for Environmental Cooperation
EC	European Commission
ECJ	European Court of Justice
EPA	Environmental Protection Agency
EU	European Union
HCCH	Hague Conference on Private International Law
OECD	Organisation for Economic Co-operation and Development
ICJ	International Court of Justice
IIL	Institute of International Law
IJC	International Joint Commission
ILA	International Law Association
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
ULCC	Uniform Law Conference of Canada
UNCC	United Nations Compensation Commission
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

Table of Contents

Foreword

The catalyst for this thesis came during my graduate studies at the University of Cambridge in 2012–2013. Private international law was my primary research interest at the time, but I was keen to study environmental issues, which I had not done so far in law school. I therefore signed up for a class on international environmental law.

Throughout the year, we discussed the international regulation of air and water pollution, biodiversity, climate change, waste management, nuclear energy, and other fascinating subjects. It struck me that private actors were involved in almost all areas. It also struck me that enforcement mechanisms—including liability—were often described as lacklustre or insufficiently developed in international environmental law. Most textbooks identified domestic liability regimes as one of the solutions, but only depending on the rules of private international law in force in any given state. We did not discuss those rules much further. This is by no means a criticism of the excellent teaching I received at Cambridge. As with most classes, the vastness of the field prompts difficult choices. But the connection between the two discipline sparked my interest, particularly given its superficial treatment in the literature. I was a private international lawyer with a keen interest in environmental issues and a willingness to delve deeper into international environmental law. If I ever embarked on a doctoral project, it would be to help fill this gap. Not for the sake of filling a gap, but to find new ways of approaching the liability conundrum in international environmental law and to explain exactly how private international law deals with transboundary environmental problems. This project, I hoped, would connect with broader work on the role of private international law in global governance, currently undertaken by private international law scholars around the world.

The project stayed in the back of my mind as I graduated from Cambridge and moved on to law practice. I eventually returned to McGill to begin my research in 2015. Four years later, I can say that I answered some of the questions I asked myself when I began to study international environmental law. I hope that my work convinces other scholars to study the connections between international environmental law and private international law, no matter what their primary expertise is.

Montreal, May 2020

GENERAL INTRODUCTION

This thesis concerns clouds of smoke stretching over borders and toxic waste flowing down international rivers and lakes; facilities located here but emitting greenhouse gas that affect the lives of millions there; nuclear fallout causing environmental destruction in multiple territories; and even the legitimate day-to-day operations of a plant located at the border. Most states have detailed legal regimes regulating incidents that occur within their borders. Domestic laws impose preventive measures, regulatory oversight and criminal penalties on polluters, and provide civil remedies to local populations who seek to take legal action against them.[1] But the interdependence of natural ecosystems reveals the obvious transboundary implications of pollution.[2] And when pollution spans political

[1] For a discussion of private actions in Canadian environmental law, see Jamie Benidickson, *Environmental Law*, 5th ed (Toronto: Irwin Law, 2019), ch 5 [Benidickson]; CED 4th (online), *Environmental Law* (West), "Liability for Environmental Damage: Common Law" (I.1) at § 1–15 (2019); CED 4th (online), *Environmental Law* (Ont), "Liability for Environmental Damage: Common Law" (I.1) at § 1–13.3 (2018); Halsbury's Laws of Canada (online), *Environment*, "Civil Liability for Environmental Damage" (IV.1) at HEN-351ff (2018 Reissue); David Grinlinton, "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62:3 McGill LJ 633 [Grinlinton]; Marie-Ève Arbour, "Liability Law and Nuisance in the Civil Law Tradition" in LeRoy Paddock, David L Markell & Nicholas S Bryner, eds, *Elgar Encyclopedia of Environmental Law*, vol 4: Compliance and Enforcement of Environmental Law (Cheltenham: Edward Elgar, 2017) 74; Lynda Collins & Heather McLeod Kilmurray, "Common Law Tools to Protect the Environment" in Paddock, Markell & Bryner, *ibid*, 85; Robert Mansell, "Civil Liability for Environmental Damage" in Alastair Lucas, ed, *Canadian Environmental Law*, vol 1, 3rd ed (Markham: LexisNexis, 2017) (loose-leaf updated 2019, release 171), ch 18; Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) [Collins & McLeod-Kilmurray]; Marie-Claude Desjardins & Hélène Mayrand, "Recours des citoyens en vertu du droit commun" in Dominique Amyot-Bilodeau et al, eds, *Recours en droit de l'environnement* (Montreal: LexisNexis, 2014), ch 5; Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 2nd ed (Toronto: Carswell, 2013), ch 2 [Doelle & Tollefson]; Tim Wood, "Sticks and Carrots: *Rylands v Fletcher*, CSR, and Accountability for Environmental Harm in Common Law Jurisdictions" (2012) 91:2 Can Bar Rev 275 [T Wood]; Mario D Faieta, "Civil Liability for Environmental Torts" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2004* (Toronto: Carswell, 2005) 21; Elaine L Hughes, Alastair R Lucas & William A Tilleman, *Environmental Law and Policy*, 3rd ed (Toronto: Emond Montgomery, 2003), ch 3–4; Odette Nadon, "Civil Liability Underlying Environmental Risk-Related Activities in Quebec" (1998) 24 CELR (NS) 141; Jutta Brunnée, "From a Black Hole into a Greener Future? Comparative Perspectives on Environmental Liability Law in Quebec and its Reform" in John EC Brierley et al, eds, *Mélanges Presented by McGill Colleagues to Paul-André Crépeau* (Cowansville: Yvon Blais, 1997) 155; Mario D Faieta et al, *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996) [Faieta et al].

[2] See *United States of America v Ivey* (1995), 26 OR (3d) 533 at 549, 1995 CanLII 7241 (Gen Div), aff'd (1996), 30 OR (3d) 370, 1996 CanLII 991 (CA), leave to appeal to SCC refused, [1997] 2 SCR x [*Ivey* Gen Div/CA]; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 436, 1988 CanLII 63 [*Crown Zellerbach Canada*].

borders, environmental law suddenly becomes unstable.[3] If the harmful activity happened in state *x* but the victim suffered harm in state *y*, who should be held liable, by whom and under what set of rules?[4] As one commentator puts it, "[t]he problem is not only that pollution and resource degradation cross national borders, but also that decision-making in one country can affect the environment in another country."[5] Transboundary pollution also overlaps with numerous and often conflicting concerns in international relations: environmental protection *per se* but also trade, human rights and armed conflicts, making it even more difficult to grasp.

In some cases, the absence of an all-encompassing international authority creates regulatory gaps[6] which result in the significant under-regulation of transboundary pollution, particularly in the global commons. In other cases, it creates regulatory overlap which results in conflicting assertions of extraterritorial authority.[7] These gaps and overlaps lead to regulatory competition.[8] They can also lead in some cases to the much maligned (but vigorously debated[9]) race to the bottom in which environmental standards

[3] See generally S Jayakumar et al, eds, *Transboundary Pollution: Evolving Issues of Law and Policy* (Cheltenham: Edward Elgar, 2015).
[4] I use the word "victim" in the general sense of the persons affected by transboundary pollution. Victims become "plaintiffs" or "claimants" when I refer to environmental litigation specifically. The same goes for the words "polluters" and "defendants". Note that the word polluter is not meant to be presumptuous or pejorative, although I am aware of the symbolism surrounding the "victim vs polluter" terminology. I use it in a general sense, to refer to a person whose activities impact the environment in a way that may or may not engage liability in private law.
[5] Michael Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" (2002) 41:3 Washburn LJ 399 at 399 [Anderson]. See also Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (The Hague: Kluwer Law International, 2001) at 375–83 [Bergkamp].
[6] See Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age" (2002) 40:2 Colum J Transnatl L 209 at 250–58 [Wai, "Regulatory Function"].
[7] See Shi-Ling Hsu & Austen L Parrish, "Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity" (2007) 48:1 Va J Intl L 1 [Hsu & Parrish].
[8] See Thomas W Merrill, "Golden Rules for Transboundary Pollution" (1997) 46:5 Duke LJ 931 at 968–70 [Merrill].
[9] See Huiyu Zhao & Robert Percival, "Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China" (2017) 6:3 Transnatl Envtl L 531 at 541–47; Wai, "Regulatory Function", *supra* note 6 at 255–56; Bergkamp, *supra* note 5 at 384–85; Merrill, *supra* note 8 at 969, n 186.

decrease to the benefit of disaggregated private actors moving somewhat autonomously across jurisdictions.[10]

Gaps and overlaps mean that the persons threatened with or affected by transboundary pollution face many procedural uncertainties when they seek the liability of a polluter through litigation. They must determine where to sue for injunctive relief or compensation. They must assess the applicable law, including the territorial scope of local environmental statutes. They must deal with the enforcement of a judgment abroad if the defendant fails to comply and has no assets in the jurisdiction.

The near-mythical *Trail Smelter* arbitration between Canada and the United States of America over the toxic fumes of a Canadian facility at the border illustrates the difficulties associated with this process.[11] The case is widely considered a cornerstone of public international law, but it arose out of a simple private dispute. Old jurisdictional obstacles stood in the way of a civil lawsuit against the polluter as neither Canadian nor American courts would have had jurisdiction under the rules of private international law in force at the time.[12] Governments eventually took up the case and initiated an interstate process which quickly overshadowed an essentially private nuisance dispute.

Arbitrators issued their final award in 1941 but litigation resumed many years later over the very same smelter, in the midst of a citizen suit under the *Comprehensive*

---

[10] See Uglješa Grušić, "International Environmental Litigation in EU Courts: A Regulatory Perspective" (2016) 35 YB Eur L 180 at 187–88 [Grušić].

[11] See *Trail Smelter Arbitral Decision (United States v Canada)* (1941), 3 RIAA 1905, 33:1 AJIL 182 & 35:4 AJIL 684 (ad hoc) [*Trail Smelter*]; *Convention Related to Certain Complaints Arising from the Operation of the Smelter at Trail, British Columbia*, Canada and United States, 15 April 1935, Can TS 1935 No 20, 49 Stat 3245 (entered into force 3 August 1935).

[12] See Walter F Baber & Robert V Bartlett, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law* (Cambridge, Mass: MIT Press, 2009) at 88; *Restatement (Third) of the Foreign Relations Law of the United States* § 601 (1987), as commented by the American Law Institute, *Restatement of the Law, Third: Foreign Relations Law of the United States*, vol 2 (St Paul: American Law Institute, 1987) at 109 [*Restatement of Foreign Relations Law*]. This is widely reported in the literature, typically by relying on the account of John Erskine Read, who advised the Canadian Ministry of External Affairs during the dispute and was later appointed to the International Court of Justice. See Neil Craik, "*Trail Smelter* Redux: Transboundary Pollution and Extraterritorial Jurisdiction" (2004) 14:2 J Envtl L & Prac 139 at 143 [Craik, "*Trail Smelter* Redux"]; H Scott Fairley, "Private Remedies for Transboundary Injury in Canada and the United States: Constraints Upon Having to Sue Where You Can Collect" (1978) 10:2 Ottawa L Rev 253 at 255 [Fairley]; John E Read, "The *Trail Smelter* Dispute" (1963) 1 Can YB Intl L 213 at 222.

Environmental Response, Compensation, and Liability Act (CERCLA)[13] and unilateral action by American authorities. The *Pakootas* lawsuit targeted the operator of the facility, Teck Cominco, for the contamination of the United States side of the Columbia River. The defendant Teck Cominco, argued that the lawsuit inappropriately sought to apply domestic legislation on Canadian soil. Courts denied Teck Cominco's extraterritoriality argument and allowed the lawsuit to proceed in the United States in 2006.[14] The judicial saga continued for years.[15] In September 2018, the United States Court of Appeals for the Ninth Circuit held Teck Cominco liable for more than 8 million USD in cleanup costs incurred by plaintiffs, and the Supreme Court refused to hear the case.[16] Throughout the proceedings, the Canadian and British Columbia governments filed briefs in support of Teck Cominco as *amicus curiae*.[17] Meanwhile, Teck Cominco (now Teck Resources) faced pressure on other fronts, as American authorities blamed Canadian officials for withholding information on the contamination of a Montana reservoir connected to

[13] See *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, Pub L No 96-510, 94 Stat 2767 (1980) (codified as amended at 42 USC § 9601–9628 (2017)) [*CERCLA*].
[14] See *Pakootas v Teck Cominco Metals Ltd*, 452 F (3d) 1066, 2006 US App Lexis 13662 (9th Cir 2006), certiorari denied, 552 US 1095, 128 S Ct 858 (2008) [*Pakootas* 9th Cir 2006].
[15] See *Pakootas v Teck Cominco Metals Ltd*, 830 F (3d) 975, 2016 US App Lexis 13662 (9th Cir 2016) [*Pakootas* 9th Cir 2016] (striking out plaintiffs' claims of air pollution and remanding the case for remaining claims of water pollution); *Pakootas v Teck Cominco Metals Ltd*, 646 F (3d) 1214, 2011 US App Lexis 15885 (9th Cir 2011) (dismissing plaintiffs' claim for non-compliance with an administrative order issued by the EPA). See also *Anderson v Teck Metals Inc*, 2015 US Dist Lexis 1035, 2015 WL 59100 (WL Int) (ED Wash 2015) (class action brought by US residents against Teck alleging illnesses linked to heavy metals exposure—claims partly dismissed on the basis that *CERCLA* displaces federal common law claims and that state law public nuisance claims cannot apply extraterritorially).
[16] See *Pakootas v Teck Cominco Metals Ltd*, 905 F (3d) 565, 2018 US App Lexis 26098 (9th Cir 2018), rehearing denied, 2018 US App Lexis 34173 (9th Cir 2018), certiorari denied, 2019 US Lexis 3928 (USSC) [*Pakootas* 9th Cir 2018] (exercising jurisdiction and finding defendant liable for response costs and attorney fees incurred by plaintiffs).
[17] See *Pakootas* 9th Cir 2018, *supra* note 17 (Brief for *Amicus Curiae* the Government of Canada in Support of Petitioner), online (pdf): *Supreme Court of the United States* <www.supremecourt.gov> [perma.cc/S7Z6-7QHP]; *Pakootas* 9th Cir 2018, *supra* note 17 (Brief of *Amicus Curiae* Her Majesty the Queen in Right of the Province of British Columbia in Support of Petitioner's Request for Certiorari), online (pdf): *Supreme Court of the United States* <www.supremecourt.gov> [perma.cc/UXN5-VMJX]; *Pakootas* 9th Cir 2016, *supra* note 15 (Government of Canada's *Amicus Curiae* Brief in Support of Appellant and for Reversal of the Orders of the District Court), reprinted in Hugh Adsett, "At Global Affairs Canada in 2015" (2015) 53 Can YB Intl L 435 at 436–48, online (pdf): *United States Chambers Litigation Center* <www.supremecourt.gov> [perma.cc/BEJ4-VP7F]; *Pakootas* 9th Cir 2006, *supra* note 14 (Government of Canada's Brief as *Amicus Curiae* in Support of Petitioner), online (pdf): *SCOTUS Blog* <www.scotusblog.com> [perma.cc/AU7C-3P5N]; *Pakootas* 9th Cir 2006, *supra* note 14 (Brief of *Amicus Curiae* Her Majesty the Queen in Right of the Province of British Columbia in Support of Petitioner), online (pdf): *SCOTUS Blog* <www.scotusblog.com> [perma.cc/A9TB-RR4V].

watercourses flowing near Teck's coal facilities in Southern British Columbia.[18] The heated debate that took place in courthouses and among scholars and commentators as a result of the *Pakootas* lawsuit (and Teck's activities generally) shows that while the stakes in the *Trail Smelter* saga may have evolved, the legal treatment of the underlying issue remains frustratingly elusive.

Gaps and overlaps are also amplified by the vast discrepancy in the environmental laws applied around the globe. Discrepancies may appear minor among developed and friendly neighbours such as Canada and the United States. After all, regulatory architecture and enforcement priorities may vary but what is outright prohibited in one is rarely allowed in the other. Canadian regulations on vehicle emissions, for instance, go as far as to incorporate American standards by reference.[19] Yet the election of President Donald Trump is a sharp reminder that regulatory harmony is the result of political convenience, not an inevitable truth. On the one hand, Canada may have weaker standards than the United States, as illustrated by *Pakootas* or Canada's controversial exportation of tar sands.[20] On the other hand, the Trump administration has dramatically altered the environmental protection framework in the United States, including by announcing withdrawal from climate commitments[21] and overhauling Obama-era Clean Power Plan, positioning itself as a strong political ally for the local coal industry.[22]

These measures have obvious implications for its Northern neighbour. The Canadian government is reviewing its vehicle emission standards and recently declared that Canada would not follow EPA's announced rollback of American standards. Instead, it would align with the state of California's own more severe standards,[23] currently attacked by the

[18] See Bob Weber, "U.S. Officials Accuse Canadians of Delaying Report on Toxins in Transboundary River", *The Globe and Mail* (9 July 2018) A10, also online: <www.theglobeandmail.com> [perma.cc/TRP6-RXT3].
[19] See *On-Road Vehicle and Engine Emission Regulations*, SOR/2003-2.
[20] See Brandon D Cunningham, "Border Petrol: U.S. Challenges to Canadian Tar Sands Development" (2012) 19:3 NYU Envtl LJ 489.
[21] See "Statement by President Trump on the Paris Climate Accord" (1 June 2017), online: *White House* <www.whitehouse.gov> [perma.cc/ET8B-PJY9].
[22] See Juliet Eilperin & Brady Dennis, "EPA Rolls Back Rule on Carbon Emissions", *The Washington Post* (20 June 2019) A1, also online: <www.washingtonpost.com> [perma.cc/5ZBH-8ZZ7].
[23] See Brandie Weikle, "Canada and California Sign Deal to Cut Vehicle Emissions", *CBC* (26 June 2019), online: <www.cbc.ca> [perma.cc/P5CM-SK6J].

Trump administration.[24] Faced with the prospect of regulatory discrepancies in several areas, Canadian businesses lobby to preserve their competitive edge.[25] Meanwhile, Canadian politicians denounce the potentially disastrous consequences of American budget cuts on cross-border initiatives such as the conservation and restoration of the Great Lakes ecosystem.[26] Environmental groups oppose American measures to expand offshore drilling, arguing that an oil spill could affect the environment along Canadian and French (Saint-Pierre-et-Miquelon) shores.[27] Drilling projects on the Canadian side of the border (in the Great Lakes or the Gulf of St. Lawrence, for instance) pose the same risk for its neighbours.[28] The list of potential disputes goes on.

It is too early to tell where this (perhaps temporary) change of political orientation will lead us in the long run. But the assumption that there are no gaps and overlaps between friendly and like-minded countries such as Canada and the United States is misleading, if not entirely false depending on the political context and the intricacies of international diplomacy.[29] The *Trail Smelter* saga demonstrates that clashes between Canada and the United States have always been a possibility, long before the drastic changes in environmental policy undertaken by the Trump administration. Policymakers can

[24] See Juliet Eilperin & Brady Dennis, "EPA to Curtail California Air Rules", *The Washington Post* (18 September 2019) A1, also online: <www.washingtonpost.com> [perma.cc/XXA9-9XKS].
[25] See The Honourable John P Manley, Business Council of Canada, "Letter to the Prime Minister on President Trump's Economic Agenda and the Impact on Canadian Competitiveness" (14 February 2017), online (pdf): *Business Council of Canada* <www.thebusinesscouncil.ca> [perma.cc/HZU7-PDTK].
[26] See Michelle McQuigge, "Canadian, U.S. Politicians Denounce Trump's Great Lakes Funding Cuts", *The Globe and Mail* (17 March 2017) A14, also online: <www.theglobeandmail.com> [perma.cc/7RXU-B9Q9].
[27] See Mylène Crête, "Forages pétroliers en mer: Trudeau appelé à s'opposer à Trump", *La Presse* (19 January 2018), online: <www.lapresse.ca> [perma.cc/5RF7-CT3M]; Lisa Friedman, "Trump Moves to Open Coasts for Oil Drilling", *The New York Times* (5 January 2018) A1, also online: <www.nytimes.com> [perma.cc/U6FL-RNWK].
[28] See Stéphanie Roy, "Le projet de loi nº 49 et la responsabilité civile en cas de déversement d'hydrocarbures extracôtiers dans le golfe du Saint-Laurent" (2016) 57:3 C de D 355, reprinted in Christophe Krolik, ed, *Le droit des ressources naturelles et de l'énergie: où en sommes-nous? Où allons-nous?* (Montreal: LexisNexis, 2017) 65; Stéphanie Roy, *La responsabilité civile pour déversements d'hydrocarbures: l'exemple d'Old Harry* (Cowansville: Yvon Blais, 2016); Noah D Hall, "Oil and Freshwater Don't Mix: Transnational Regulation of Drilling in the Great Lakes" (2011) 38:2 Boston College Envtl Aff L Rev 305 [Hall, "Drilling in the Great Lakes"].
[29] See Sean D Murphy, "Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste" (1994) 88:1 AJIL 24 at 48 [Murphy].

disagree on reasonable environmental priorities, and their policy choices seldom benefit from scientific certainty.[30] Regulatory disparities inevitably follow.

Gaps and overlaps affect the prospect of liability, an important means of ensuring compliance with environmental law. Victims fundamentally seek to hold polluters liable for breaching their statutory duties or deviating from basic standards of diligence, to obtain redress for the damage that ensues and to prevent it from continuing.[31] They can avail themselves of a variety of causes of action, loosely referred to as environmental torts.[32] But this process becomes particularly difficult when the polluting act and its consequences do not occur in a single jurisdiction. Environmental laws may clash, overlap or suffer from a lack of enforcement such that polluters escape liability *vis-à-vis* the victims.[33]

Addressing this problem ideally requires an international legal regime that prevents as many gaps and overlaps as possible from arising in the first place. Such international legal regime could also deal robustly and effectively with the gaps and overlaps that remain inevitable. This would ensure that transboundary polluters are never in a better position than local polluters. The issue of liability, however, has proven to be excessively difficult and controversial in international law. States committed in Stockholm (1972)[34] and Rio (1992 and 2012)[35] to develop international liability law and compensation for

---

[30] See Collins & McLeod-Kilmurray, *supra* note 1 at 17–37.
[31] *Cf* Grušić, *supra* note 10 at 181–82 (environmental litigation is not just about who bears the environmental risk of economic activities but also the victims' human rights).
[32] See *Smith v Inco Ltd*, 2012 ONSC 5094, 70 CELR (3d) 150, aff'd 2013 ONCA 724, 79 CELR (3d) 1, leave to appeal to SCC refused, [2014] 2 SCR vii (accepting that "[the] claim could be described as an "environmental tort", which may be a way of describing the collective use of several traditional causes of action for the purpose of advancing environmental claims" at para 95).
[33] See Wai, "Regulatory Function", *supra* note 6 at 251.
[34] See *Declaration of the United Nations Conference on the Human Environment*, 21st Plenary Mtg, in United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment: Stockholm: 5–16 June 1972*, UN Doc A/CONF.48/14/Rev.1 (1972) 3, Principle 22, 11:6 ILM 1416 [*Stockholm Declaration*].
[35] See *Rio Declaration on Environment and Development*, UNCED Res 1, 19th Plenary Mtg in United Nations Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–4 June 1992*, vol 1, UN Doc A/CONF.151/26/Rev.1(Vol 1) (1992) 2, Annex I, Principle 13, 31:4 ILM 874 [*Rio Declaration*]. See generally Malgosia Fitzmaurice, "Principle 13: Liability and Compensation" in Jorge Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 351. At the Rio+20 Summit of the United Nations Conference on Sustainable Development in 2012, states reaffirmed the principles expressed in the *Rio Declaration* and their commitment to fully implement them. See *The future we want*,

victims of transboundary pollution. Their governments later recognized the importance of compliance, liability and enforcement in ensuring environmental protection.[36]

States, however, have repeatedly failed to meet their commitments. Today, there is still no general international liability regime for transboundary pollution.[37] Early approaches treated transboundary pollution as a problem of state responsibility.[38] But states have jealously maintained their sovereignty over natural resources and consistently avoided articulating a clear doctrine of state responsibility for environmental damage.[39] Today, the difficulties in applying the rules of state responsibility to an environmental dispute remain legion.[40] Forty-six years have now passed since Stockholm. Determining whether

---

GA Res 66/288, UNGAOR, 66th Sess, Supp No 49, UN Doc A/RES/66/288 (2012) Annex at paras 14–18 [*Rio+20 Declaration*].

[36] See *Malmö Ministerial Declaration*, UNEPGC Dec SS.VI/1, 6th Special Sess, 5th Mtg, UN Doc UNEP/GC/DEC/SS.VI/1 (2000) at para 3. Meanwhile, the International Law Commission (ILC) undertook a decades-long project on liability which ended in 2006. For further discussion on this project, see subsection 1.2.2 below.

[37] The ILC's 2006 *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities* have the basic features of an international liability regime, but they are non-binding and were met with lukewarm response from the states. For the text of the instrument, see *Allocation of loss in the case of transboundary harm arising out of hazardous activities*, GA Res 61/36, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/36 (2006) Annex, reprinted in United Nations, *The Work of the International Law Commission*, vol 2, 9th ed (New York: UN, 2017) at 418–21 [*ILC Principles on the Allocation of Loss*]. See also *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, GA Res 74/189, UNGAOR, 74th Sess, Supp No 49, UN Doc A/RES/74/189 (2019); *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, GA Res 71/143, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/143 (2016); *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, GA Res 68/114, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/114 (2013); *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, GA Res 65/28, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/28 (2010); *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, GA Res 62/68, UNGAOR, 62nd Sess, Supp No 49, UN Doc A/RES/62/68 (2007). For further discussion on the *ILC Principles on the Allocation of Loss*, see subsection 1.2.2 below.

[38] See Günther Handl, "State Liability for Accidental Transnational Environmental Damage by Private Persons" (1980) 74:3 AJIL 525; Pierre-Marie Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle* (Paris: Pedone, 1976); Kenneth B Hoffman, "State Responsibility in International Law and Transboundary Pollution Injuries" (1976) 25:3 ICLQ 709; LFE Goldie, "International Principles of Responsibility for Pollution" (1970) 9:2 Colum J Transnatl L 283; C Wilfred Jenks, "Liability for Ultra-Hazardous Activities in International Law" (1966) 117 Rec des Cours 99.

[39] See Noah Sachs, "Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law" (2008) 55:4 UCLA L Rev 837 at 838 [Sachs]; Jutta Brunnée, "Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection" (2004) 53:2 ICLQ 351 at 352–54 [Brunnée, "Sense and Sensibility"].

[40] See Jacqueline Peel, "Unpacking the Elements of a State Responsibility Claim for Transboundary Pollution" in Jayakumar et al, *supra* note 3, 51 at 75–76 [Peel].

these decades of hesitation come from conceptual confusion or a lack of political interest has become a rhetorical question that simply fails to advance the environmental agenda.

Since Stockholm, states have chosen to focus on preventive measures rather than compensation or have deliberately avoided state responsibility by imposing civil liability on private persons (typically the operator of a facility). The International Law Commission (ILC) took the same stance in its 2006 *Principles on the Allocation of Loss*. This set of principles—highly relevant to this thesis—calls for states to ensure the availability of prompt and adequate compensation for victims of transboundary pollution and to adjust their rules of private international law accordingly.[41] They come from a prominent and authoritative organization mandated by the United Nations (UN) to promote the codification and progressive development of international law.[42]

Relying on civil liability makes sense. While prevention is always preferable, *ex post facto* remedies nonetheless help internalize the costs of pollution, provide incentives for compliance and act as a backup to regulatory efforts.[43] Furthermore, the dynamics of transboundary pollution reflect a conflict between industrial firms—from small operators to large multinationals[44]—and private victims, fuelled only indirectly by the states'

[41] See *ILC Principles on the Allocation of Loss*, *supra* note 37.
[42] See *Statute of the International Law Commission*, GA Res 174 (II), UNGAOR, 2nd Sess, UN Doc A/519 (1947) Annex, art 1(1), reprinted as amended in UN, vol 1, *supra* note 37 at 283–90 [*Statute of the ILC*]; *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI, art 13(1)(a), Can TS 1945 No 7 (entered into force 24 October 1945).
[43] See Sachs, *supra* note 39 at 845–46; Brunnée, "Sense and Sensibility", *supra* note 39 at 365–66.
[44] The environmental discourse often focuses on big corporations but as Natasha Affolder suggests, "[t]he 'private' sector extends far beyond the handfuls of multinationals that have achieved global name recognition. A project of 'greening' human rights can be deepened, and enriched, by looking beyond the headline-grabbing visions of saints and sinners, and of multi-billion dollar litigation, to gain an understanding of how environmental rights and wrongs are constructed through the mundane, and less examined, day-to-day activities of businesses and private organizations, small and large." Natasha Affolder, "Square Pegs and Round Holes? Environmental Rights and the Private Sector" in Ben Boer, ed, *Environmental Law Dimensions of Human Rights* (Oxford: Oxford University Press, 2015) 11 at 12–13 [Affolder]. *Cf* Murphy, *supra* note 29 ("[i]f claimants are conceptualized as farmers or fishermen seeking redress for damage from an exporter or generator who is across the globe, the difficulty [of transnational litigation, ed] is apparent" at 38–39). On the narratives of mass tort litigation, see also Jeff Todd, "Ecospeak in Transnational Environmental Tort Proceedings" (2015) 63:2 Kan L Rev 335 [Todd, "Ecospeak"]; Christopher A Whytock, "Some Cautionary Notes on the "Chevronization" of Transnational Litigation" (2013) 1:2 Stan J Complex Litig 467; Steven Penney, "Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film" (2004) 30:1 Queen's LJ 205.

political settings.[45] On this view, claiming compensation from a government for pollution caused by the industry undermines the polluter-pays principle.[46] Advancing civil liability thus seems sensible and realistic given the dearth of sufficiently precise and enforceable rules binding states. But even this modest alternative approach to state responsibility has proven difficult to accept. States have rejected most civil liability treaties other than for marine oil pollution and nuclear incidents. Victims of environmental damage still struggle to obtain redress while corporations freely externalize the environmental consequences of their activities in other jurisdictions. Liability for transboundary pollution remains an "empty abstraction" in international law.[47]

Attempts at creating international liability regimes for transboundary pollution ought to be taken seriously, but optimism has waned after the failure of too many regimes. As time passed, negotiators gradually put their faith in domestic liability regimes to address the gaps and overlaps in the regulation of transboundary pollution. Priorities shifted from

[45] The seemingly never-ending saga of Canadian waste in the Philippines illustrates how government action and private action can be inextricably intertwined in a transboundary pollution dispute. In 2013–2014, Chronic Inc, a Canadian plastic exporter, sent 103 mislabelled containers to the Philippines. The containers allegedly contained recyclable plastics, but in fact contained unrecyclable mixed waste. Most of the containers remained unprocessed in the port of Manila for years. Strong diplomatic tensions between Canada and the Philippines culminated in 2019 with the recall of the Philippino ambassador and consuls-generals in Canada. The Canadian government arranged for the containers to be shipped back by the Canadian affiliate of Bolloré, a French shipping company. Canadian officials declared they were weighing all legal options against Chronic itself (a company which no longer operates). See Michelle Zilio, "Ottawa to Ship Tonnes of Garbage Back to Canada from Philippines by End of June", *The Globe and Mail* (23 May 2019) A3, also online: <www.theglobeandmail.com> [perma.cc/AWM2-CS53]. The saga raises many questions, including the legality of Chronic's actions, Canada's compliance with the international regime governing the transport of waste and its responsibility in granting exportation permits to Canadian companies sending waste abroad.

[46] See Patricia Birnie, Alan Boyle & Catherine Redgewell, *International Law and the Environment*, 4th ed (Oxford: Oxford University Press, 2009) at 222–23 [Birnie, Boyle & Redgewell]; AE Boyle, "Globalising Environmental Liability: The Interplay of National and International Law" (2005) 17:1 J Envtl L 3 at 8 [Boyle, "Environmental Liability"]. See also Priscilla Schwartz, "Principle 16: The Polluter-Pays Principle" in Viñuales, *supra* note 35, 429 at 447. *Cf* René Lefeber, "The Legal Significance of the Supplementary Protocol: The Result of a Paradigm Evolution" in Akiho Shibata, ed, *International Liability Regime for Biodiversity Damage: The Nagoya–Kuala Lumpur Supplementary Protocol* (Abingdon: Routledge, 2014) 73 at 76 [Lefeber, "Supplementary Protocol"] (suggesting that the polluter-pays principle could extend to the state that allowed the polluting activity); Jutta Brunnée, "International Legal Accountability Through the Lens of the Law of State Responsibility" (2005) 36 Nethl YB Intl L 3 at 36 [Brunnée, "State Responsibility"] (cautioning against relieving the states from the legal consequences of their own actions by focusing exclusively on non-state actors).

[47] Merrill, *supra* note 8 at 959; "Developments in the Law: International Environmental Law" (1991) 104:7 Harv L Rev 1484 at 1500; Sanford E Gaines, "International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?" (1989) 30:2 Harv Intl LJ 311 at 313.

substantive regulation at an international level to the articulation of minimum procedural standards destined to be implemented in domestic law. The shift is pragmatic, not dogmatic. It does not question the legitimacy or adequacy of international environmental law but settles for the implementation of its underlying policies into domestic law to achieve a form of accountability that is otherwise out of reach, at least for now. Environmental liability thus slowly but surely became a laboratory of paramount importance for the study of the interactions between domestic and international law.

Regulatory coordination under the umbrella of international law can effectively achieve what we expect from an international liability regime—allocating the burdens and benefits of activities that are potentially harmful yet condoned by the states for political or economic reasons.[48] It rests on the idea that "the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives."[49] But an important piece of the puzzle is still missing. Most proposals implicitly rely on private international law to facilitate "good" forum shopping: for instance, how to maintain a claim under the jurisdiction of a domestic court or to apply a law that is favourable to compensation. In fact, the doctrines designed to operationalize what the ILC referred to as a duty to ensure prompt and adequate compensation primarily involve the reform of private international law. Yet little meaningful dialogue between public and private international law occurs over these issues. Only one scholar has gone as far as to explicitly link a state's duty to ensure prompt and adequate compensation of environmental damage with the procedural standards found in private international law.[50] The connection remains frustratingly undertheorized.

In this thesis, I argue that a useful and often overlooked way to approach gaps and overlaps in transboundary environmental protection is by ensuring that private

[48] See Jonas Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009) 270 at 275–77 [Ebbesson].
[49] Anne-Marie Slaughter & William Burke-White, "The Future of International Law Is Domestic (or, The European Way of Law)" (2006) 47:2 Harv Intl LJ 327 at 328 [Slaughter & Burke-White].
[50] See René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague: Kluwer Law International, 1996) at 260–69 [Lefeber, *Transboundary Environmental Interference*].

international law reflects the policies entrenched in international environmental law, particularly that of prompt and adequate compensation. Private international law "provides rules for governing people, relationships, or situations that in some way or another cannot be confined within the remit of any one particular [s]tate or territory."[51] We refer to these rules as "conflict rules". Private international law, as it is generally conceived in Canada, has three branches—jurisdiction, choice of law and the recognition and enforcement of foreign judgments. Jurisdiction refers to the possibility for a domestic court to hear a transboundary dispute on the basis of a sufficient connection with the forum. Choice of law refers to the law applied by the court to that dispute (local or foreign). Foreign judgments refer to the ability of a domestic court to recognize a foreign civil judgment as if it were its own, such that it can be enforced against the assets of the defendant in the forum.

Suggesting that private international law offers appropriate tools to deal with the consequences of transboundary pollution is hardly a novel proposition. But this proposition depends on an acute understanding of its regulatory function, the implementation of environmental policy through conflict rules, and the ways in which this process relates to the articulation of liability standards for transboundary pollution. Today's literature lacks this understanding. This thesis fills the gap by providing the missing piece of the puzzle—one that sheds new light on existing proposals to hold polluters liable for transboundary pollution—and by treating the *ILC Principles on the Allocation of Loss* as the contemporary benchmark that they can be.

In the remainder of this introduction, I introduce my theoretical framework and explain the scope of my research, my contribution to legal knowledge and the structure of my thesis.

[51] Horatia Muir Watt, "Private International Law's Shadow Contribution to the Question of Informal Transnational Authority" (2018) 25:1 Ind J Global Leg Stud 37 at 38 [Muir Watt, "Informal Transnational Authority"].

Introduction to theoretical framework

My research finds its inspiration in the ongoing work on private international law and global governance.[52] Current research seeks to improve the response of private international law to global challenges such as the regulation of transnational corporations or the protection of natural ecosystems, positing that the field can help deal with those challenges alongside public law and public international law. Horatia Muir Watt's work, for instance, seeks to redefine the role of private international law on the premise that it can no longer ignore the private causes of injustice affecting the world.[53] Her project

---

[52] See Matthias Lehmann, "Regulation, Global Governance and Private International Law: Squaring the Triangle" (2020) 16:1 J Priv Intl L 1 [Lehmann]; Horatia Muir Watt et al, eds, *Global Private International Law: Adjudication Without Frontiers* (Cheltenham: Edward Elgar, 2019); Christopher A Whytock, "Conflict of Laws, Global Governance, and Transnational Legal Order" (2016) 1 UC Irvine J Intl Transnatl & Comp L 117; Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) [Muir Watt & Fernández Arroyo] (particularly the contributions of Robert Wai and Alex Mills); Laura Carballo Piñeiro & Xandra Kramer, "The Role of Private International Law in Contemporary Society: Global Governance as a Challenge" (2014) 7:3 Erasmus L Rev 109. I refer to global governance broadly as "the mechanisms, public or private, formal or informal, which induce some form of discipline on the part of both institutional and private actors in the pursuit of their own political and economic goals." Horatia Muir Watt, "Further Terrains for Subversive Comparisons: The Field of Global Governance and the Public/Private Divide" in Pier Giuseppe Monateri, ed, *Methods of Comparative Law* (Cheltenham: Edward Elgar, 2012) 270 at 272, n 10. See generally Axel Marx & Jan Wouters, eds, *Global Governance* (Cheltenham: Edward Elgar, 2018); David Levi-Fleur, ed, *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012).

[53] See Horatia Muir Watt, "Private International Law Beyond the Schism" (2011) 2:3 Transnatl Leg Theory 347 at 347 [Muir Watt, "Beyond the Schism"]. For other important pieces by Muir Watt on related themes, see eg Horatia Muir Watt, "Globalization and Private International Law" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 845; Horatia Muir Watt, "Theorizing Private International Law" in Anne Orford & Florian Hoffmann, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 862 [Muir Watt, "Theorizing Private International Law"]; Horatia Muir Watt, "The Relevance of Private International Law to the Global Governance Debate" in Muir Watt & Fernández Arroyo, *supra* note 52, 1; Horatia Muir Watt, "La globalisation et le droit international privé" in Vincent Heuzé, Rémy Libchaber & Pascal de Vareilles-Sommières, eds, *Mélanges en l'honneur du Professeur Pierre Mayer* (Issy-les-Moulineaux: LGDJ Lextenso, 2015) 591; Horatia Muir Watt, "Politique du droit international privé: réflexion critique" in François Collart Dutilleul & Fabrice Riem, eds, *Droits fondamentaux, ordre public et libertés économiques* (Bayonne: Institut Universitaire Varenne, 2013) 245; Horatia Muir Watt, "Concurrence ou confluence? Droit international privé et droits fondamentaux dans la gouvernance globale" in Jacques Foyer et al, eds, *Le droit entre tradition et modernité: mélanges à la mémoire de Patrick Courbe* (Paris: Dalloz, 2012) 461, reprinted in (2013) 27:1/2 RIDE 59; Horatia Muir Watt, "La fonction économique du droit international privé" (2010) 24:1 RIDE 103 [Muir Watt, "Fonction économique"]; Horatia Muir Watt, "Rome II et les « intérêts gouvernementaux »: pour une lecture fonctionnaliste du nouveau règlement du conflit de lois en matière délictuelle" in Sabine Corneloup & Natalie Joubert, eds, *Le règlement communautaire « Rome II » sur la loi applicable aux obligations non contractuelles: actes du colloque du 20 septembre 2007, Dijon* (Paris: LexisNexis, 2008) 129 [Muir Watt, "Intérêts gouvernementaux"]; Horatia Muir Watt, "European Integration, Legal Diversity and the Conflict of Laws" (2005) 9:1 Ed L Rev 6 [Muir Watt, "European Integration"]; Horatia Muir Watt, "Aspects économiques du droit international privé: réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions"

involves the deconstruction of the walls surrounding private international law and the revision of its centuries-old methods. She posits that "[p]rivate autonomy should be concerned with responsibility as much as it means freedom of parochialism; [that] voice should be given to affected communities; [that] multiple legalities should be re-anchored; [and that] process-based methodology should give way to clear preferences."[54] As I explain in the first chapter, the regulatory failings of private international law in today's globalized world should not be overstated. The discipline already plays a role in the substantive regulation of transnational actors and phenomena. But we have yet to fully understand how it can do so in environmental law.

My thesis pushes that debate forward and identifies its implications for the regulation of transboundary pollution. I investigate civil jurisdiction[55] and choice of law to create an alignment with the objectives pursued by international liability regimes dealing with transboundary pollution. My argument rests on the idea that private international law has a substantive regulatory function. This theory, extensively developed by Robert Wai and Horatia Muir Watt[56] and explained in the first chapter below, frames private international law as a means to preserve and increase global welfare through the allocation of regulatory authority, in order to respond to important international concerns such as "distributive justice, democratic political governance, or effective transnational regulation."[57]

Wai's account of private international law describes regulation as occurring through touchdown points: domestic sites such as tort law where third parties seek compensation

(2004) 307 Rec des Cours 25 [Muir Watt, "Aspects économiques"]; Horatia Muir Watt, "New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?" in Mark van Hoecke, ed, *Epistemology and Methodology of Comparative Law* (Oxford: Hart, 2004) 271; Horatia Muir Watt, "Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy" (2003) 9:3 Colum J Eur L 383 [Muir Watt, "Political Economy"]; Horatia Muir Watt, "Droit public et droit privé dans les rapports internationaux (Vers la publicisation des conflits de lois?)" (1997) 41 Arch phil dr 207 [Muir Watt, "Publicisation"].

[54] *Ibid* at 428.

[55] Hereafter designated simply as jurisdiction unless specifically referring to jurisdiction in public international law.

[56] Wai coined the expression "regulatory function of private international law" in an article published in 2002. Muir Watt used it in an article published the next year, crediting Wai for the term. See Wai, "Regulatory Function", *supra* note 6; Muir Watt, "Political Economy", *supra* note 53 at 399.

[57] Wai, "Regulatory Function", *supra* note 6 at 266.

for the externalities of transnational conduct.[58] Thus "[d]ecisions of courts and legislators can enable regulation of transnational business networks by instituting different kinds of legal liability and facilitating other forms of direct action by non-state actors."[59] His work ultimately allows us to conceptualize private international law as part of a representative process relied upon by marginalized individuals and groups to regulate private conduct and complement domestic public regulation.[60] From this perspective, "expanding rather than limiting such [private] claims is a defensible policy goal to increase possibilities for contestation of transnational private actors by other private actors."[61] As I explain in the first chapter, this proposition offers a sound theoretical basis for solving the liability conundrum in international environmental law.[62]

My theoretical framework rests on a particular understanding of the place of public law within private international law. Indeed, framing private international law as a regulatory device depends on tight coordination with the public sphere,[63] particularly in areas such as competition law, securities law or environmental law. The international ramifications of the problems tackled in those areas are obvious—a group of multinationals conspiring to fix the price of goods sold worldwide, for instance, involves transnational private actors who affect other private actors located in multiple jurisdictions. Those problems call for solutions typically provided by private international law. State intervention, however, looms large. The same regulatory statutes—reflective of a state's public policy—often gives rise to public enforcement and private litigation. Plaintiffs' reliance

---

[58] See *ibid*.
[59] See *ibid* at 268.
[60] See Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society" (2005) 46:2 Harv Intl LJ 471 at 479–81 [Wai, "Transnational Private Law and Private Ordering"]. For other important pieces by Robert Wai on related themes, see Robert Wai, "Private v Private: Transnational Private Law and Contestation in Global Economic Governance" in Muir Watt & Fernández Arroyo, *supra* note 52, 34 [Wai, "Private v Private"]; Robert Wai, "The Interlegality of Transnational Private Law" (2008) 71:3 Law & Contemp Probs 107; Robert Wai, "Transnational Private Litigation and Transnational Governance" in Markus Lederer and Philipp S Müller, eds, *Criticizing Global Governance* (New York: Palgrave Macmillan, 2005) 243 [Wai, "Transnational Private Litigation"]; Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct Through the Migration of Human Rights Norms: The Potential Contribution of Transnational "Private" Litigation" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism: International Studies in the Theory of Private Law* (Oxford: Hart, 2004) 287 [Scott & Wai].
[61] See Wai, "Private v Private", *supra* note 60 at 49.
[62] For further discussion on the regulatory function of private international law, see subsection 1.3.2 below.
[63] See Muir Watt, "Political Economy", *supra* note 53 at 401–405; Wai, "Regulatory Function", *supra* note 6 at 270.

on civil causes of action found in regulatory statutes makes it difficult to avoid dealing with public law in private disputes. Yet public law has always been an awkward fit for private international law (the infamous public law taboo).[64] How to escape this paradox?

For one thing, we should not adhere too closely to the public/private distinction. The distinction is hard to grasp in a local setting and difficult to work with in private international law.[65] Transboundary pollution itself defies easy legal categorization.[66] Unlocking the full regulatory potential of private international law with respect to transboundary pollution requires what Muir Watt called a "*mise en perspective publiciste*" of its underlying principles.[67] Public law should not only be approached from the periphery of conflict rules (through stringent and rigid exceptions such as overriding mandatory laws or the public policy exception) but also from within. Acknowledging and valuing the role of public law within private international law enhances the effectiveness of regulatory regimes, promotes a fruitful dialogue between public and private stakeholders and contributes to a better transboundary regulation of private actors. For example, the recognition and enforcement of a foreign judgment granting the reimbursement of cleanup costs pursuant to a foreign regulatory scheme reflects a legitimate form of regulation anchored in international cooperation.[68] This thesis identifies significant implications for environmental liability in a better understanding of the regulatory function of private international law and the increasing irrelevance of the public/private divide within its methodology.

---

[64] See generally Celia Wasserstein Fassberg, "The Public in Private International Law" in Yaëll Emerich, ed, *Le public en droit privé* (Cowansville: Yvon Blais, 2019) 23; Horatia Muir Watt, ed, *Private International Law and Public Law* (Cheltenham: Edward Elgar, 2015); William S Dodge, "The Public-Private Distinction in the Conflict of Laws" (2008) 18:2 Duke J Comp & Intl L 371; William S Dodge, "Breaking the Public Law Taboo" (2002) 43:1 Harv Intl LJ 161; Philip J McConnaughey, "Reviving the Public Law Taboo in International Conflict of Laws" (1999) 35:2 Stan J Intl L 255; Hans W Baade, "The Operation of Foreign Public Law" (1995) 30:3 Tex Intl LJ 429. See also the sources cited *infra* note 1049.
[65] See Ralf Michaels, "Two Economists, Three Opinions? Economic Models for Private International Law—Cross-Border Torts as Example" in Jürgen Basedow & Toshiyuki Kono, eds, *An Economic Analysis of Private International Law* (Tübingen: Mohr Siebeck, 2006) 143 at 149.
[66] See Neil Craik, "Transboundary Pollution, Unilateralism and the Limits of Extraterritorial Jurisdiction: The Second *Trail Smelter* Dispute" in Rebecca M Bratspies & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 109 at 121 [Craik, "Second *Trail Smelter* Dispute"]; Craik, "*Trail Smelter* Redux", *supra* note 12 at 152.
[67] Muir Watt, "Publicisation", *supra* note 53 at 214. See also Lehmann, *supra* note 52 at 20–21, 29.
[68] See *Ivey*, *supra* note 2.

Scope of research

Ths section contains six important comments regarding the scope of my research.

1. Law is not the only tool to address transboundary environmental issues. At the outset, we must recognize the limitations of the law when it comes to studying transboundary pollution.[69] Within international environmental law, it is often difficult to distinguish law from politics.[70] More generally, law is but one method allowing us to better understand the creation of international liability regimes. Political science and international relations can also explain how states negotiate them.[71] It is also possible to approach transboundary pollution from an economic[72] or historical[73] perspective, among other angles.

Several structural barriers may account for law's struggle to regulate transboundary pollution: the general lack of seriousness of the damage, the episodic nature of some forms of transboundary pollution, the conflicting interests at stake or the small number of states involved in any given scenario.[74] In economic terms, the costs of a comprehensive legal regime often exceed its benefits and make them unattractive for states to adopt.[75]

Nonetheless, there remains compelling reasons to look at transboundary pollution from a legal perspective. Merrill, for instance, argues that existing legal norms evidently factor

[69] See Cameron SG Jefferies, Sara L Seck & Tim Stephens, "International Law, Innovation, and Environmental Change in the Anthropocene" in Neil Craik et al, eds, *Global Environmental Change and Innovation in International Law* (Cambridge: Cambridge University Press, 2018) 1 ("[l]aw, by itself, is not a panacea" at 7).
[70] See Daniel Bodansky, *The Art and Craft of International Environmental Law* (Cambridge, Mass: Harvard University Press, 2010) at 13–15 [Bodansky, *Art and Craft*].
[71] See Sachs, *supra* note 39 at 849–67.
[72] See Antonio Nicita & Matteo M Winkler, "The Cost of Transnational Accidents: Lessons from Bhopal and Amoco" (2009) 43:4 J World Trade 683; Andrew R Eckert, Todd Smith & Henry van Egteren, "Environmental Liability in Transboundary Harms: Law and Forum Choice" (2008) 24:2 JL Econ & Org 434; Kathleen Segerson, ed, *Economics and Liability for Environmental Problems* (Burlington: Ashgate, 2002).
[73] See John D Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* (Lawrence: University Press of Kansas, 2000); John D Wirth, "The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927-1941" (1996) 1:2 Envtl History 34; James R Allum, ""An Outcrop of Hell": History, Environment, and the Politics of the Trail Smelter Dispute" in Bratspies & Miller, *supra* note 66, 13.
[74] See Merrill, *supra* note 8.
[75] See *ibid*.

in stakeholders' cost-benefit analysis because they influence the size of the costs.[76] A better set of norms can also provide the tipping point to successful action.[77] Merrill finally advances a further, perhaps more pragmatic point: "[h]uman energies are best channel[l]ed in directions where they can have some influence, and with respect to transboundary pollution this may include consideration of the applicable legal norms."[78] And when environmental problems devolve into environmental disputes, belligerents use the law as "the language of dispute, [...] [unwilling] to defend their positions on purely political or economic grounds; it matter[s] to all that their actions be perceived as lawful."[79] Legal reform thus provides suitable lenses to examine transboundary pollution, bearing in mind its inherent limitations.[80]

2. Liability is not the only way to achieve (and may not even achieve) environmental protection. This thesis builds on the idea that holding polluters liable for their actions in private law is a sensible approach to provide victims with remedies and further the objectives of international liability regimes, assuming we understand how jurisdiction and choice of law reflect those objectives. This private approach to transboundary pollution typically unfolds in litigation before domestic courts and between private parties or public authorities acting in a private-like capacity.[81] The International Law Association (ILA) referred to this process as the transnational enforcement of environmental law, namely "actions by private persons or non-governmental organizations (NGOs) in national courts or administrative bodies to secure compliance

[76] See *ibid* at 989.
[77] See *ibid* at 989–90.
[78] *Ibid* at 990.
[79] Allen L Springer, *Cases of Conflict: Transboundary Disputes and the Development of International Environmental Law* (Toronto: University of Toronto Press, 2016) at 227–28 [Springer].
[80] See Jaye Ellis, Book Review of *The Environment, Risk and Liability in International Law* by Julio Barboza, (2012) 26 Ocean YB 685 at 689 [Ellis, "Book Review"]; Allen L Springer, "From Trail Smelter to Devils Lake: The Need for Effective Federal Involvement in Canadian-American Environmental Disputes" (2007) 37:1 Am Rev Can Stud 77 at 81–86; PS Elder, "Sustainability" (1991) 36:3 McGill LJ 831 at 838–39.
[81] Howarth defines private law in this context as "any rule or body of legal rules that purports to govern legal relationships or disputes between parties who are not acting as state officials or bodies." His conception "refers to what the rules themselves purport to do and not directly to the nature of parties, so that the possibility that a rule might be used additionally to govern a relationship between a citizen and the state, for example when the state acts as a fisc and not as a sovereign, does not disqualify the rule as a rule of private law." David Howarth, "Environmental Law and Private Law" in Emma Lees & Jorge E Viñuales, eds, *The Oxford Handbook of Comparative Environmental Law* (Oxford: Oxford University Press, 2019) 1091. I subscribe to Howarth's definition in this thesis.

with environmental law, including both national and international, in cases involving more than one state, or a state and areas beyond the limits of national jurisdiction."[82] Prominent figures such as the former Secretary General of the Hague Conference on Private International Law (HCCH) Hans van Loon note that "transnational tort law has gained increased prominence in environmental matters [and] its role may well further expand in light of the concerns about climate change."[83]

The transnational enforcement of environmental law involves individuals and organizations who pursue their own interests. While these individual interests do not always align with the protection of the environment *per se*, its proponents argue that private actions have legitimate regulatory implications. They supplement and can even replace state intervention. Considerable scholarly debate has occurred over this proposition and the value of private law as a response to transboundary pollution is by no means self-evident. Reality poses the first objection. Aside from countries with a strong litigation culture (the United States comes to mind), private environmental lawsuits rarely end with a judgment on the merits. Of course, this does not necessarily reflect the number of actions settled to the satisfaction of the parties. Class actions, for instance, remain an important vehicle for mass environmental claims in Canada[84] even though they rarely

[82] International Law Association, "Committee on Transnational Enforcement of Environmental Law: First Report" (2002) 70 Intl L Assn Rep Conf 824 at 825–26 [ILA, "First Report on Transnational Enforcement of Environmental Law"].

[83] Hans van Loon, "The Global Horizon of Private International Law" (2016) 380 Rec des Cours 9 at 98 [Van Loon, "Global Horizon"]. In recent publications, Van Loon repeatedly insists on the importance of private international law in transboundary environmental disputes. See also, on this point, Hans van Loon, "The Present and Prospective Contribution of Global Private International Law Unification to Global Legal Ordering" in Franco Ferrari & Diego P Fernández Arroyo, eds, *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham: Edward Elgar, 2019) 214 at 231–34 [Van Loon, "Global Legal Ordering"]; Hans van Loon, "Principles and Building Blocks for a Global Legal Framework for Transnational Civil Litigation in Environmental Matters" (2018) 23:2 Unif L Rev 298 [Van Loon, "Principles and Building Blocks"].

[84] On the value of class actions to pursue environmental claims, see *Carrier c Québec (Procureur général)*, 2011 QCCA 1231 at para 80, [2011] RJQ 1346; *Pearson v Inco Ltd* (2006), 78 OR (3d) 641 at 672, 2006 CanLII 913 (CA), leave to appeal to SCC refused, [2006] 2 SCR viii; *Hollick v Toronto (City)*, 2001 SCC 68 at paras 35–37, [2001] 3 SCR 158; *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 26, [2001] 2 SCR 534; *Nadon c Anjou (Ville)*, [1994] RJQ 1823 at 1827, 1831–32, 1994 CanLII 5900 (CA); *Comité d'environnement de La Baie Inc c Société d'électrolyse et de chimie Alcan Ltée*, [1990] RJQ 655 at 661–62, 1990 CanLII 3338 (CA), leave to appeal to SCC refused, [1990] 2 SCR xi. On environmental class actions, see generally Benidickson, *supra* note 1 at 122–26; Ward Branch, *Class Actions in Canada*, 2nd ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2019) at §5.1110; Janet Walker, *Class Actions in Canada: Cases, Notes, and Materials*, 2nd ed (Toronto: Emond, 2018), ch 9; Kirk Baert & Janeta Zurakowski, "The Past, the Present and the Future: Environmental Class Actions in

reach trial.[85] But the high settlement rate hides a more fundamental problem. The cost, complexity and high evidentiary threshold associated with legal proceedings evidently make it difficult for litigants to claim redress in certain cases (especially small and recurrent, episodic, incremental or uncertain environmental damage), all the more when the dispute involves more than a single legal system.[86] The harsh reality of traditional litigation easily explains why the body of jurisprudence in countries such as Canada is so small. In this sense, litigation faces the same fundamental struggle as the law in general when dealing with transboundary pollution.

As we will see in the first chapter, the case for the regulatory implications of private law and litigation remains plausible. But legal proposals of this kind should not be treated as a zero-sum game.[87] With respect to transboundary pollution, this zero-sum game translates most prominently into three counterproductive dichotomies: regulation/liability, public/private law and domestic/international law. Each dichotomy bears the risk that we focus on the antagonism of its parts rather than their complex and often understated relationship.

First, clearing up the conceptual problems associated with liability for transboundary pollution and emphasizing the potential role of civil liability and litigation does not imply the rejection of preventive and regulatory approaches. We may disagree on the extent to

---

Canada" in *Colloque national sur l'action collective: développements récents au Québec, au Canada et aux États-Unis* (Cowansville: Yvon Blais, 2019) 71; André Durocher, *Environnement et actions collectives au Québec* (Cowansville: Yvon Blais, 2019); André Durocher, *Environmental Class Actions in Canada* (Toronto: Thomson Reuters, 2018); Collins & McLeod-Kilmurray, *supra* note 1, ch 11; Christie Kneteman, "Revitalizing Environmental Class Actions: Quebecois Lessons for English Canada" (2010) 6:2 Can Class Action Rev 261; Heather McLeod-Kilmurray, "*Hollick* and Environmental Class Actions: Putting the Substance into Class Action Procedure" (2002) 34:2 Ottawa L Rev 263.

[85] For data on North America, see Catherine Piché, *L'action collective: ses succès et ses défis* (Montreal: Themis, 2019) at 62–63; Catherine Piché, *Le règlement à l'amiable de l'action collective* (Cowansville: Yvon Blais, 2014) at 2, nn 3–4; Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011) at 2, nn 3–4. See also Catherine Piché, "Judging Fairness in Class Actions Settlements" (2010) 28:1 Windsor YB Access Just 111 at 115.

[86] See Mihail Danov & Paul Beaumont, "Effective Remedies in Cross-Border Civil and Commercial Law Disputes: A Case for an Institutional Reform at the EU Level" in Paul Beaumont et al, eds, *Cross-Border Litigation in Europe* (Oxford: Hart, 2016) 603 at 618.

[87] Natasha Affolder used this expression to describe the relationship between public international law and private standards. See Affolder, *supra* note 44 at 11; Natasha Affolder, "The Market for Treaties" (2010) 11:1 Chicago J Intl L 160 at 161; Natasha A Affolder, "The Private Life of Environmental Treaties" (2009) 103:3 AJIL 510 at 512.

which regulation and civil liability respectively contribute to deterrence or environmental protection, but civil liability plays *some* role in this process. At a minimum, it "can guide the implementation and interpretation of regulation, fill gaps in regulatory regimes, and provide alternative avenues and new innovations to protect environmental values and incentivize sustainable development of natural resources."[88] Simply put, it acts as a safety valve in case of regulatory or political failure. This thesis deals with the significant public policy implications of this safety valve in a transboundary context, where gaps and overlaps increase the chance of state failure.

Second, and in a similar vein, focusing on private remedies does not imply that public law serves no purpose in regulating transboundary pollution, nor that it is necessarily ineffective. Scholars rightfully portray environmental law as a hybrid field.[89] Landowners, for instance, used private law as a source of legal remedies long before states enacted the first comprehensive environmental statutes.[90] They too sought to protect the (their) environment through legal action. Conversely, the claims made by public authorities for the reimbursement of cleanup costs against polluters often bear all the characteristics of a private claim, despite being rooted in public law.[91] This is a familiar issue for jurists who grapple with the notion of civil and commercial matters[92]

---

[88] Grinlinton, *supra* note 1 at 636. On environmental regulation and tort law, see generally Douglas A Kysar, "The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism" (2018) 9:1 Envtl L 48; Mark Latham, Victor E Schwartz & Christopher E Appel, "The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart" (2011) 80:2 Fordham L Rev 737; Michael G Faure, "Regulatory Strategies in Environmental Liability" in Horatia Muir Watt & Fabrizio Cafaggi, eds, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009) 129 and the proceedings of the Ahrens Advanced Torts Seminar held on 19–20 October 2001 at Washburn University School of Law, Topeka (Kan), United States, (2001) 41:3 Washburn LJ 379–628.

[89] See Benidickson, *supra* note 1 at 6–8; Bergkamp, *supra* note 5 at 208–11, 471–79. See generally Mustapha Mekki & Eric Naïm-Gesbert, eds, *Droit public et droit privé de l'environnement: unité dans la diversité? Actes du colloque international organisé à Paris le 12 juin 2015 par l'Université Paris 13—Sorbonne Paris Cité* (Issy-les-Moulineaux: Librairie générale de droit et de jurisprudence, 2016).

[90] See McLeod & Kilmurray, *supra* note 1 at 51; Benidickson, *supra* note 1 at 6–7; Mark Wilde, *Civil Liability for Environmental Damage: Comparative Analysis of Law and Policy in Europe and the US*, 2nd ed (Alphen on the Rhine: Kluwer Law International, 2013) at 3–4 [Wilde]. For a case study of Oregon farmers who managed the risk of pollution emanating from an aluminum plant through tort law in the 1950s, see Douglas A Kysar & Conor Dwyer Reynolds, "Regulation Through Recourse: Rediscovering Tort Law as Regulation" (2019) at 13–57, online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449770> [Kysar & Reynolds].

[91] See *Ivey*, *supra* note 2.

[92] See generally Burkhard Hess & Cristian Oro Martinez, "Civil and Commercial Matters" in Basedow et al, vol 1, *supra* note 53, 346.

which defines the scope of the European Union (EU)'s private international law instruments[93] and HCCH conventions,[94] and another indication of the difficulties associated with the public/private divide in this area. The same goes for *international* environmental law and its combination of public and private approaches to liability.[95] The point is not "to pit one discipline against another, or to wage a battle of academic expertise",[96] but to explore the connections between public and private law in the context of transboundary pollution. Private law remedies can (and should) coexist with other mechanisms designed to increase public participation in transboundary issues (citizen submissions under trade agreements, for instance).[97]

Third, positing the lack of consensus over existing international instruments pertaining to state responsibility or treaty-based state/civil liability does not imply that we should stop working towards an international solution. As Sand puts it, "most transnational environmental fact situations require a multilevel regulatory approach, because their "public" international law features tend to be inextricably mixed with equally relevant aspects of international and comparative private law, commercial law, administrative law,

---

[93] See eg Katia Fach Gómez, "Environmental Liability" in Basedow et al, vol 1, *supra* note 53, 657 at 661–62 [Fach Gómez]; Grušić, *supra* note 10 at 199–204; Gerrit Betlem & Christophe Bernasconi, "European Private International Law, the Environment and Obstacles for Public Authorities" (2006) 122:1 Law Q Rev 124 [Betlem & Bernasconi]. Case law on this point is extensive, albeit not specifically in relation to environmental law. See eg *AB FlyLAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS*, C-302/13, ECLI:EU:C:2014:2319 at paras 23–38, [2014] 5 CMLR 1277; *Lechouritou v Dimosio tis Omospondiakis Dimokratias tis Germanias*, C-292/05, [2007] ECR I-1519 at paras 27–46, [2007] 2 All ER (Comm) 57; *Netherlands State v Rüffer*, C-814/79, [1980] ECR 3807 at paras 6–16, [1981] 3 CMLR 293; *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol*, C-29/76, [1976] ECR 1541 at paras 3–5, [1977] 1 CMLR 88.

[94] See *Convention on Choice of Court Agreements*, 30 June 2005, 44:6 ILM 1294, art 1(1) (entered into force 1 October 2015), reprinted in Hague Conference on Private International Law, *Collection of Conventions: 1951–2009* (The Hague: Hague Conference on Private International Law, 2009) 476 [HCCH]. See also *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 2 July 2019, art 1(1), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/P2HL-39GR] (not yet in force) [*Convention on the Recognition and Enforcement of Foreign Judgments*].

[95] See Emanuela Orlando, "Public and Private in the International Law of Environmental Liability" in Frederico Lenzerini & Ana Filipa Vrdoljak, eds, *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Oxford: Hart, 2014) 395 [Orlando, "Public and Private"].

[96] Muir Watt, "Beyond the Schism", *supra* note 53 at 355. See also Jessie Connell, "Trans-National Environmental Disputes: Are Civil Remedies More Effective for Victims of Environmental Harm?" (2007) 10:1 Asia Pac J Envtl L 39 at 47.

[97] See generally Jeff Todd, "Trade Treaties, Citizen Submissions, and Environmental Justice" (2017) 44:1 Ecology LQ 99 [Todd, "Environmental Justice"].

human rights, and even criminal law."[98] Disputes can also unfold simultaneously in domestic and international tribunals.[99]

Inspired by a growing interest in informal regulatory coordination as an alternative to multilateral treaty negotiation,[100] this thesis seeks to identify how the ideal of prompt and adequate compensation and its implementation in domestic law depends on a certain conception of private international law. It does not rest on a demonstration of the conceptual flaws of other approaches but merely on their failure to achieve consensus.[101] Assigning responsibility to the state may still be a valid response to transboundary pollution, even though international environmental law has a short and ill-defined list of internationally wrongful acts. It may also be useful to incorporate liability rules into a wide-ranging treaty. It is simply not the point I am making here.

Overall, "[l]iability for loss or damage is an elementary feature of a legal system" and "an important part of most systems of environmental law […]."[102] Yet its role in the implementation, compliance, enforcement and effectiveness of international environmental law is often misunderstood. States can rely on liability to *enforce* their own environmental laws (which sometimes *implement* international environmental law). A broader concept, *accountability*, refers to the oversight and constraint of power against certain standards. Enforcement through liability is but one way of encouraging *compliance* with those laws if deterrence ensues. Liability is not the preferable way to ensure compliance in all circumstances. Neither does it necessarily guarantee the *effectiveness* of the regime, that is, the fulfillment of its objectives. We must bear these

[98] Peter H Sand, "The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective" (2012) 1:1 Transnatl Envtl L 183 at 186–87 [Sand, "Transnational Environmental Law"].
[99] See Christopher Ward, "National and International Litigation: Partners or Competitors?" in Natalie Klein, ed, *Litigating International Law Disputes: Weighing the Options* (Cambridge: Cambridge University Press, 2014) 42.
[100] See Robert V Percival, "Global Law and the Environment" (2011) 86:3 Wash L Rev 579 at 585–86. See also Tseming Yang & Robert V Percival, "The Emergence of Global Environmental Law" (2009) 36:3 Ecology LQ 615.
[101] This said, lack of consensus *is* itself a flaw in an international regime that operates based on consent.
[102] Birnie, Boyle & Redgewell, *supra* note 46 at 216; Boyle, "Environmental Liability", *supra* note 46 at 3.

concepts in mind when we deal with the subject of liability and treat it for what it is: one way of encouraging compliance with international environmental law.[103]

3. Private international law is one discrete aspect of liability. This thesis focuses on certain specific aspects of liability—ones that traditionally belong to the field of private international law. Existing literature often addresses all aspects of liability at once—definition of the harm, choice between fault-based, no-fault, strict and absolute liability, causation, damage ceilings, insurance coverage, defences, etc. Civil liability treaties are examined as if they were all in force even though some will never be.[104] My work is narrower, but no less ambitious. I focus on aspects of civil liability that are unique to transboundary pollution: jurisdiction and choice of law. I suggest that private international law can fulfill some of the promises of international liability regimes and address the gaps and overlaps associated with the regulation of transboundary pollution.

I focus on private international law for substantive and procedural reasons. Substantively, private international law can level the playing field by allocating regulatory authority to either weaken or strengthen regulatory oversight on polluters and impact the likelihood of compensation for victims.[105] As we will see, it is inextricably bound to the regulation of transboundary pollution itself. Procedurally, issues of private international law are likely to arise first in any dispute brought to impose liability on a transboundary polluter. Courts must have jurisdiction to hear the dispute. And even before a lawsuit is filed, victims have to assess which law applies in order to determine the existence of a cause of action

[103] On the distinction between implementation, compliance, enforcement and effectiveness, see for instance the seminal piece of Edith Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1999) 32:5 U Rich L Rev 1555 at 1562–66, reprinted in Peter H Sand, ed, *International Environmental Agreements* (Cheltenham: Edward Elgar, 2019).
[104] See Sachs, *supra* note 39 ("[s]urprisingly, international law scholars have largely overlooked the lack of ratifications of civil liability treaties and have instead engaged in micro-level analysis of individual treaties, examining design issues such as the choice between strict liability and fault-based liability, the types of environmental harm that should trigger liability, channeling of liability to certain operators, and the implications of governmental permits for private liability. But expertly designed treaties have little relevance if they do not attract adherents, and only a handful of scholars have mentioned the lack of entry into force as a significant problem in this field of law" at 840).
[105] See Ebbesson, *supra* note 48 at 282.

and the remedies available in that forum.[106] Resolving these issues is crucial to the viability of environmental actions.

I do not suggest that victims invariably get—or should get—relief once they pass jurisdictional and choice of law hurdles. Nor do I suggest that we cast aside other fundamental debates such as the practicality of fault-based liability or the difficulties in establishing causation. Liability for transboundary pollution continues to be a complex and elusive topic and more work ought to be done than what a single thesis can achieve. Victims' prospects of success will also vary according to the complexity of the environmental phenomenon at stake: from an easily identifiable source of pollution to a global ecological problem with no obvious causation—climate change being the pinnacle litigation challenge.[107] But issues of private international law will arise in all cases. If we

---

[106] See Carmen Otero García-Castrillón, "International Litigation Trends in Environmental Liability: A European Union-United States Comparative Perspective" (2011) 7:3 J Priv Intl L 551 at 565 [García-Castrillón].

[107] In Canada, see Dustin W Klaudt, "Can Canada's "Living Tree" Constitution and Lessons from Foreign Climate Change Litigation Seed Justice and Remedy Climate Change?" (2018) 31:3 J Envtl L & Prac 185; James Rendell, "*Urgenda Foundation v The State of the Netherlands*: Precedents and Pitfalls of an Innovative Approach to State Liability for Climate Change" in Stanley D Berger, ed, *Key Developments in Environmental Law 2017* (Toronto: Thomson Reuters, 2017) 139; Martin Olszynski, Sharon Mascher & Meinhard Doelle, "From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability" (2017) 30:1 Geo Envtl L Rev 1 [Olszynski, Mascher & Doelle]; Michael Slattery, "Pathways from Paris: Does *Urgenda* Lead to Canada?" (2017) 30:3 J Envtl L & Prac 241; Andrew Gage & Margaretha Wewerinke, "Taking Climate Justice into Our Own Hands: A Model Climate Compensation Act" (1 December 2015), online (pdf): *West Coast Environmental Law* <www.wcel.org> [perma.cc/WQ6A-8J6T] [Gage & Wewerinke]; Cameron Jefferies, "Filling the Gaps in Canada's Climate Change Strategy: "All Litigation, All the Time...?"" (2015) 38:5 Fordham Intl LJ 1371; McLeod & Kilmurray, *supra* note 1, ch 12; Sue Vern Tan, "Private International Law: A Backdoor to Coherence in Climate Change Litigation?" (7 November 2015), online: *Centre for International Governance Innovation* <www.cigionline.org> [perma.cc/E96F-2RRD]; Andrew Gage & Michael Byers, "Payback Time? What the Internationalization of Climate Litigation Could Mean for Canadian Oil and Gas Companies" (1 October 2014), online (pdf): *West Coast Environmental Law* <www.wcel.org> [perma.cc/C4JX-XUHP] [Gage & Byers]; Karine Péloffy, "*Kivalina v Exxonmobil*: A Comparative Case Comment" (2013) 9:1 JSDLP 121 [Péloffy]; Craig Brown & Sara Seck, "Insurance Law Principles in an International Context: Compensating Losses Caused by Climate Change" (2013) 50:3 Alta L Rev 541; Hugh S Wilkins, "The Justiciability of Climate Change: A Comparison of US and Canadian Approaches" (2011) 34:2 Dal LJ 529; Meinhard Doelle, Dennis Mahony & Alex Smith, "Canada" in Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2011) 525 [Doelle, Mahony & Smith]; John Terry, "Litigation" in Dennis Mahony, ed, *The Law of Climate Change in Canada* (Aurora: Canada Law Book, 2010) (loose-leaf updated 2019, release 23), ch 16; Julia Schatz, "Climate Change Litigation in Canada and the USA" (2009) 18:2 RECIEL 129; Ava Murphy & Shi-Ling Hsu, "Climate Change Litigation: Inuit v The U.S. Electricity Generation Industry", Educational Case Study (Faculty of Law, University of British Columbia, 2008), online (pdf): *University of British Columbia Faculty of Law* <www.allard.ubc.ca> [perma.cc/7ZF6-N2M5]; Shi-Ling Hsu, "A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit" (2008) 79:3 U Colo L Rev 701 [Hsu]; Deborah Curran, "Climate Change Backgrounder" in Doelle & Tollefson, *supra* note 1, 747.

are to take the alternatives to international liability regimes seriously, including for more difficult problems such as climate change, then we ought to design workable mass claim procedures and pay more attention to preliminary steps on the way to a trial on the merits.[108]

This is especially true given the many purposes of litigation beyond compensation: to prevent damage, to mobilize public interest, to highlight legislative deficiencies and to provide a forum where citizens can be heard should their political representatives not be listening.[109] The harmful impacts of otherwise desirable economic activities primarily bear upon distributive justice, which depends in turn on sound procedural frameworks.[110] Crucial to this thesis is the argument that substantive environmental policy can (and should) inform these procedural frameworks.

Finally, a word about the main components of Canadian private international law and their relevance here. Choice of law is fundamental in the articulation of substantive liability standards for transboundary pollution. Yet scholars have devoted far more attention to jurisdictional issues such as the possibility for victims harmed in one state to get access to the courts of another (typically, the state in which the polluting activity takes place) or vice versa. Ubiquitous references to the *Trail Smelter* arbitration (in which victims could not sue in Canada for jurisdictional reasons) and the proliferation of international conventions on access to justice and public participation have also contributed to this distortion.

---

[108] See Philippe Sands & Jacqueline Peel with Adriana Fabra & Ruth MacKenzie, *Principles of International Environmental Law*, 4th ed (Cambridge: Cambridge University Press, 2018) at 804 [Sands & Peel].

[109] See Wai, "Transnational Private Law and Private Ordering", *supra* note 60 at 481–82; Paul R Muldoon, David A Scriven & James M Olson, *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto: Carswell, 1986) at 10–11 [Muldoon, Scriven & Olson].

[110] See Ellis, "Book Review", *supra* note 80 at 688. See also Christian Huglo, "International Law and Environmental Stakes: The Influence of International Law on the Development of Personal Liability of Private Individuals in the Case of Environmental Damage" in Yann Kerbrat & Sandrine Maljean-Dubois, eds, *The Transformation of International Environmental Law* (Paris: Pedone, 2011) 269 at 271; Ebbesson, *supra* note 48 at 275–77. *Cf* Cinnamon Carlarne & JD Colavecchio, "Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law" (2019) 27:2 NYU Envtl LJ 107 [Carlarne & Colavecchio] ("[c]limate action and scholarship, in particular, has tended to focus on distributive issues […], to the neglect of other principles at the heart of the environmental justice movement including concerns about corrective, procedural, and social justice" at 122).

Focusing on jurisdiction is not misguided. First, jurisdiction intersects with several important principles of international environmental law, chiefly access to justice and public participation. Second, the law does not always clearly locate where transboundary pollution occurs for jurisdictional purposes. Victims face real challenges if they sue outside their home jurisdiction—unfamiliarity with the foreign legal system and the costs of bringing a lawsuit abroad, to name a few—even when the foreign court does have jurisdiction.[111] Finally, connecting factors in jurisdictional rules sometimes overlap with the ones used to designate the applicable law, reminding us that the various components of private international law do not exist in complete isolation from one another.[112]

On the other hand, many things have changed since the *Trail Smelter* arbitration. The recent history of Canada-United States environmental litigation shows a greater willingness from both sides to assert jurisdiction, regardless of the uncertainty surrounding the localization of torts. Jurisdictional obstacles are no longer strong enough to prevent litigation, and it is doubtful that courts would endorse them unreservedly.[113] As early as 1986, a research project on cross-border environmental litigation led by the Canadian Environmental Law Research Foundation similarly concluded that "residents of the Great Lake Basin [were] in a reasonably better position to involve themselves in

---

[111] See Edward A Purcell Jr, "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992) 40:2 UCLA L Rev 423 at 446–49.

[112] See *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 16, [2012] 1 SCR 572 [*Van Breda*]. But see *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] SCJ No 4 (QL) [*Uashaunnuat*] (recalling that "the parallels between the rules governing conflicts of law and conflicts of jurisdiction are imperfect and conflicts of law rules should not be directly transposed onto the rules governing jurisdiction" at para 19); *Chevron Corp v Yaiguaje*, 2015 SCC 42 at paras 38–41, [2015] 3 SCR 69 [*Chevron* SCC 2015] (limiting the scope of *Van Breda* to the assumption of direct jurisdiction in tort disputes, and refusing to extend it to the recognition and enforcement of foreign judgments).

[113] See Rémy Kinna, "Non-Discrimination and Liability for Transboundary Acid Mine Drainage Pollution of South Africa's Rivers: Could the UN Watercourses Convention Open Pandora's Mine?" (2016) 41:3 Water Intl 371 at 378 [Kinna], citing Alan Boyle, "Human Rights and the Environment: Where Next?" (2012) 23:3 Eur J Intl L 613 at 638 [Boyle, "Where Next"]; Noah Hall et al, "Great Lakes Emerging Legal Issues Regarding the International Boundary Waters Treaty and the Great Lakes Water Quality Agreement" (2010) 34:2 Can-US LJ 193 at 224 (comments by Noah Hall) [Hall et al]; Hsu, *supra* note 107 at 760; Hsu & Parrish, *supra* note 7 at 33–39; Austen L Parrish, "Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canada-U.S. Transboundary Water Pollution Disputes" (2005) 85:2 BUL Rev 363 at 387–92 [Parrish]; Friedrich K Juenger, "Environmental Damage" in Campbell McLachlan & Peter Nygh, eds, *Transnational Tort Litigation: Jurisdictional Principles* (Oxford: Clarendon Press, 1996) 201 at 202–203.

cross-border legal proceedings than expected."[114] I reach an even more positive conclusion in the second chapter, after careful examination of the modern jurisdictional framework for torts in Canada.

The bottom lime is this: we must address the jurisdictional implications of transboundary pollution without overstating the obstacles faced by victims today. We must also pay greater attention to the conceptual challenges posed by choice of law and extraterritoriality, two points extensively discussed here.

4. Transboundary pollution entails that an act occurred in one place and had consequences in another. What exactly do I mean by transboundary pollution? Is dumping toxic waste into a lake the same as diverting a watercourse or emitting greenhouse gas into the atmosphere? What about stocking hazardous substances or carrying them across borders? Treaties and other legal instruments usually entail a precise definition of some form of transboundary pollution: medium of transmission, human or natural cause, accidental or routine event, threshold of harm, type of damages recoverable, etc. This thesis takes a different path by addressing transboundary pollution through a different discipline with its own reasoning, that of private international law. This requires a general idea of what transboundary pollution entails only for characterization purposes, that is, to determine whether it falls under tort law, property law or another category of conflict rules.[115]

Every legislative piece or scholarly work comes with its own definition of transboundary pollution. Merrill describes it as "[…] a physical externality or spillover that crosses state lines. More precisely, transboundary pollution occurs when a potentially harmful environmental agent is released in one political jurisdiction (the source state) and physically migrates through a natural medium such as air, water, or soil to another political jurisdiction (the affected state)."[116] Transboundary pollution has four defining

[114] Muldoon, Scriven & Olson, *supra* note 109 at 349.
[115] See Pilar Dominguez Lozano, Book Review of *La responsabilidad civil derivada de la contaminación transfronteriza ante la jurisdicción estatal* by Ana Crespo Hernandez, (2002) 91:2 Rev crit dr int privé 395 at 397; Pierre Bourel, "Un nouveau champ d'exploration pour le droit international privé conventionnel: les dommages causés à l'environnement" in *L'internationalisation du droit: mélanges en l'honneur de Yvon Loussouarn* (Paris: Dalloz, 1994) 93 at 98–100 [Bourel].
[116] Merrill, *supra* note 8 at 968.

features in international law: "(1) [a] physical relationship between the activity concerned and the damage caused; (2) human causation; (3) a certain threshold of severity that calls for legal action; and (4) transboundary movement of the harmful effects."[117]

Notorious examples of transboundary pollution where private individuals were (or could have been) involved include the *Trail Smelter* saga,[118] the *Mines de Potasse d'Alsace* dispute over the discharge of waste salts in the Rhine[119] and the Baia Mare cyanide spill in Romania.[120] Transboundary pollution can involve individuals in two neighbouring countries, a region, a continent or the whole planet depending on how diffuse the problem is. For our own purposes, transboundary pollution simply entails that the harmful act or activity occurs in one place and that the damage occurs either partly in that place and partly in another, or completely in another. The first scenario is the most common because transboundary pollution typically involves continuous damage beginning in one place and eventually crossing a border. The second scenario recalls the classic example of a gun fired across a border by a person in state *x*, causing an injury to a person in state *y*.[121] Here, the act and the injury are completely disassociated. Both scenarios, however, involve a foreign element—a legally relevant point of contact with a foreign state—which triggers the rules of private international law.[122]

---

[117] Hanqin Xue, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003) at 4 [Xue].
[118] See *Trail Smelter*, *supra* note 11; *Pakootas* 9th Cir 2006, *supra* note 14.
[119] See *Handelskwekeriz GJ Bier BV v Mines de Potasse d'Alsace SA*, C-21/76, [1976] ECR I-1735, [1977] 1 CMLR 284 [*Mines de Potasse d'Alsace*].
[120] See United Nations Environment Programme & Office for the Coordination of Humanitarian Affairs, "Cyanide Spill at Baia Mare Romania: UNEP/OCHA Assessment Mission" (March 2000), online (pdf): *ReliefWeb* <www.reliefweb.int> [perma.cc/2Q76-RS3X]; International Task Force for Assessing the Baia Mare Accident, "Report of the International Task Force for Assessing the Baia Mare Accident" (December 2000), online (pdf): *European Union* <www.europa.eu> [perma.cc/RL8U-3GKU]. See also Springer, *supra* note 79, ch 4; Alexander Szakats, "Cross-Border Pollution—Private International Law Problems in Claiming Compensation" (2001) 32:3 VUWLR 609; Stephen Stec et al, "Transboundary Environmental Governance and the Baia Mare Cyanide Spill" (2001) 27:4 Rev Cent & E Eur L 639; Cédric Lucas, "The Baia Mare and Baia Borsa Accidents: Cases of Severe Transboundary Water Pollution" (2001) 31:2 Envtl Pol'y & L 106.
[121] This is a classic example, but not a trivial one. The Supreme Court of the United States recently issued a judgment in a case involving a United States States border patrol agent who fired his weapon on American soil across the United States-Mexico border, killing a Mexican teenager on Mexican soil. See *Hernández v Mesa*, 140 S Ct 735, 206 L Ed (2d) 29 (2020).
[122] On the definition of foreign element, see *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 25–37, [2007] 2 SCR 801 [*Dell Computer*].

The specific notion of environmental damage is as hard to grasp as the general notion of transboundary pollution. Civil liability treaties typically compensate injuries to human health or property, economic losses such as deprivation of profits, as well as the cost of preventive and restoration measures.[123] Environmental or ecological damage (damage to the environment) is sometimes distinguished from so-called traditional damage (damage to persons or property).[124]

I refer to all of the above as environmental *damage* resulting from pollution, and sometimes use the words *harm* or *injury* as synonyms.[125] I do not claim that this simple nomenclature is a one size-fits-all. The notion of environmental damage poses great conceptual difficulties.[126] A study of private international law, such as this thesis, simply presupposes that the applicable law will determine the threshold, categories and scope of recoverable damage and the remedies available, including monetary awards and injunctions.

This thesis focuses on ensuring prompt and adequate compensation to direct victims of environmental damage. Damage to the global commons, however, raises special considerations, chiefly the existence of an interest to sue without having personally suffered damage. As Anderson observes, "[e]xisting civil liability regimes are reasonably good at awarding compensation for personal injury and damage to property, are somewhat sclerotic and inflexible in making awards for pure economic loss, but are downright clumsy and inflexible in making awards for environmental goods and processes outside the market."[127]

Damage to the global commons realistically go beyond the scope of this thesis. It is indeed difficult to see how conflict rules could efficiently deal with the problem in the

[123] See Sachs, *supra* note 39 at 851.
[124] See United Nations Environment Programme, Division of Environmental Policy Implementation, *Liability and Compensation Regimes Related to Environmental Damage: A Review* (Nairobi: UNEP, 2003) at 12 [UNEP].
[125] See Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 16.
[126] See generally Michael Bowman & Alan E Boyle, eds, *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford: Oxford University Press, 2002).
[127] See Anderson, *supra* note 5 at 410.

absence of an actual conflict between two or more legal orders.[128] This said, excluding the global commons does not diminish the relevance of private international law. Problems such as climate change can be approached not only as a global regulatory challenge, but also as distinct occurrences of transboundary damage calling for private remedies in certain circumstances.[129]

I also exclude from my analysis another category of transboundary environmental damage, that is, local pollution caused by a private actor with some degree of connection to a foreign entity. Infamous cases such as *Bhopal*,[130] *Cambior*[131] and *Chevron*,[132] for instance, involved transnational corporations that caused environmental damage abroad through the actions of their subsidiaries, agents or other related entities.[133] In this scenario, the laws of both states may vary dramatically with respect to environmental protection and the enforcement of environmental law by public authorities. The damage, however, remains local. We often use the terms "human rights litigation" when referring to lawsuits initiated against corporations in such circumstances.

I see two reasons to focus on transboundary pollution *per se* (a subset of torts which I describe in this thesis as complex, transboundary or involving pure transboundary

---

[128] See Marc Fallon, Bénédicte Fauvarque-Cosson & Stéphanie Francq, "Le régime du risque transfrontière de la responsabilité environnementale: en marche vers un droit spécial des conflits de lois?" in Geneviève Viney & Bernard Dubuisson, eds, *Les responsabilités environnementales dans l'espace européen: point de vue franco-belge* (Brussels: Bruylant, 2006) 547 at 602 [Fallon, Fauvarque-Cosson & Francq].
[129] See Sachs, *supra* note 39 at 901. See generally Cinnamon Carlarne, "Delinking International Environmental Law and Climate Change" (2014) 4:1 Mich J Envtl & Adm L 1; Hari M Osofsky, "Is Climate Change "International"? Litigation's Diagonal Regulatory Role" (2009) 49:3 Va J Intl L 585.
[130] See *Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984*, 809 F (2d) 195, 1987 US App Lexis 1186 (2nd Cir 1987), certiorari denied, 484 US 871, 108 S Ct 199 (1987) [*Bhopal*] (gas leak at a pesticide plant in India resulting in thousands of deaths).
[131] See *Recherches internationales Québec c Cambior Inc*, 1998 CanLII 9780, [1998] QJ No 2554 (QL) (Sup Ct) [*Cambior*] (cyanide spill in a Guyana facility partly owned by a Canadian mining company).
[132] See *Yaiguaje v Chevron Corporation*, 2018 ONCA 472, 141 OR (3d) 1, leave to appeal to SCC refused, 38183 (4 April 2019) [*Chevron* CA 2018]; *Chevron* SCC 2015, *supra* note 112 (pollution caused by oil exploitation in Ecuador).
[133] See also *Garcia v Tahoe Resources Inc*, 2017 BCCA 39, 407 DLR (4th) 651, leave to appeal to SCC refused, [2017] 1 SCR xviii [*Tahoe Resources*]; *Nevsun Resources Ltd v Araya*, 2020 SCC 5, [2020] SCJ No 5 (QL) [*Nevsun Resources* SCC]; *Das v George Weston Ltd*, 2018 ONCA 1053, 43 ETR (4th) 173, leave to appeal to SCC refused, 38529 (8 August 2019) [*George Weston* CA]; *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414, 116 OR (3d) 674 [*Hudbay Minerals*]; *Anvil Mining Ltd c Association canadienne contre l'impunité*, 2012 QCCA 117, [2012] RJQ 153, leave to appeal to SCC refused, [2012] 3 SCR v [*Anvil Mining*]; *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, 332 DLR (4th) 118; *Yassin v Green Park International Inc*, 2010 QCCA 1455, 322 DLR (4th) 232, leave to appeal to SCC refused, [2011] 1 SCR vi.

damage, insofar as the act and the injury occur in different places). First, international liability regimes typically limit their own scope to pure transboundary damage. For example, the *ILC Principles on the Allocation of Loss* apply to hazardous activities conducted in one state and having an impact in another.[134] The *Kiev Liability Protocol* similarly limits its scope to damage suffered in a state other than where an industrial accident occurred.[135] This wording excludes any damage occurring within the limits of a single state, regardless of the person who caused it, where that person might be formally domiciled and whether it has any connections to a foreign state or corporation. International liability regimes reflect the direction in which states have gone to address the problem over the years. I think it is sensible to locate my research within these parameters, particularly since I do not question the legitimacy of an international response.

Second, human rights litigation raises other considerations that are rarely found in liability instruments. They can involve the direct liability of a parent company for the wrongdoing of its subsidiary as a matter of corporate law, or its compliance with standards of corporate social responsibility.[136] Claims also often combine environmental

---

[134] See International Law Commission, "Report of the Commission to the General Assembly on the work of its fifty-eight session" (UNGAOR, 61st Sess, Supp No 10, UN Doc A/61/10 (2006)) in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, 2013) 1 at 63, para 10 (UN Doc A/CN.4/SER.A/2006/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its fifty-eighth session*, GA Res 61/34, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/34 (2006) [*Commentary to the ILC Principles on the Allocation of Loss*].

[135] See *Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters*, 21 May 2003, Joint Dec 1 in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the Convention on the Transboundary Effects of Industrial Accidents, *Report of the 2nd joint special session held at Kiev (Ukraine) on 21 May 2003*, UN Doc ECE/MP.WAT/12 & ECE/CP.TEIA/10 (2003) Annex (not yet in force) [*Kiev Liability Protocol*]. The *Kiev Liability Protocol* was adopted under the *Convention on the Transboundary Effects of Industrial Accidents*, 17 March 1992, 2105 UNTS 457, UKTS 2003 No 5, 31:6 ILM 1333 (entered into force 19 April 2000) [*Industrial Accidents Convention*] and the *Convention on the Protection and Use of Transboundary and International Lakes*, 17 March 1992, 1936 UNTS 269, UKTS (Misc) 1995 No 5, 31:6 ILM 1313 (entered into force 6 October 1996) [*Helsinki Convention*].

[136] See in particular *Hudbay Minerals*, *supra* note 133. In that case, Ontario courts dismissed a motion to strike an action alleging the direct liability of a Canadian mining company for the actions of its subsidiary in Guatemala. The case was one of the few that survived pre-trial obstacles in Canada, and the first to suggest a potential duty of care for Canadian parent corporations in relation to the wrongdoing of their subsidiaries. The law on this issue is also evolving in the United Kingdom. See *Vedanta Resources plc v Lungowe*, [2019] UKSC 20 at paras 42–62, [2019] 3 All ER 1013 [*Vedanta Resources*]; *AAA v Unilever plc*, [2018] EWCA Civ 1532 at paras 35–41, [2018] All ER (D) 87; *Okpabi v Royal Dutch Shell plc*, [2018] EWCA Civ 191 at paras 84–131, [2018] Bus LR 1022; *Thomson v Renwick Group plc*, [2014] EWCA Civ

considerations with other basic human rights, which makes it perilous to address one in isolation. Finally, private international law problems unfold differently in that context. The jurisdiction of the court typically flows from the domicile of the corporate wrongdoer rather than the territorial connections with the polluting activity or the damage suffered by the victim.[137] The doctrine of *forum non conveniens* (the ability of a court to decline to exercise its jurisdiction in favour of a more appropriate forum, a doctrine to which I come back in the second chapter) may also raise a bigger obstacle to the plaintiffs' case if the defendant's corporate domicile is the only connection to the forum.

Third, human rights litigation is already well documented in Canada. Scholars have addressed the topic at length, in relation to various human rights violations such as torture, forced labour and violent repression of protests, to name only a few.[138] Many

635 at paras 24–40, [2014] 2 BCLC 97; *Chandler v Cape plc*, [2012] EWCA Civ 525 at paras 62–81, [2012] 3 All ER 640. See also *George Weston* CA, *supra* note 133 at paras 127–200 (where the Ontario Court of Appeal reviewed English precedents to determine whether, under Bangladeshi law, the defendants owed a duty of care to the victims of the Rana Plaza building collapse).

[137] For an analysis of American and European law in this regard, see eg Geert van Calster, "Environmental Law and Private International Law" in Lees & Viñuales, *supra* note 81, 1139 [Van Calster].

[138] See generally Joost Blom, "Canada" in Catherine Kessedjian & Humberto Cantú Rivera, eds, *Private International Law Aspects of Corporate Social Responsibility* (Cham: Springer, 2020) 183 [Blom, "Canada"]; Yousuf Aftab & Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (Toronto: LexisNexis, 2019) at 20–40; Amissi Melchiade Manirabona, "Toward Barrier Removal for Transnational Human Rights Litigation in Canadian Courts" in Amissi Melchiade Manirabona & Yenny Vega Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis, 2019) 39 [Manirabona, "Barrier Removal"]; Geneviève Saumier, "L'ouverture récente des tribunaux canadiens aux poursuites dirigées contre les sociétés mères pour les préjudices causés par leurs filiales à l'étranger" (2018) 107:4 Rev crit dr int privé 775; Jolane T Lauzon, "*Araya v Nevsun Resources*: Remedies for Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad" (2018) 31:1 RQDI 143; E Samuel Farkas, "*Araya v Nevsun* and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law" (2018) 76:1 UT Fac L Rev 130; Galit A Sarfaty, "Managing the Governance Gap", Book Review of Book Review of *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* by Penelope Simons & Audrey Macklin, (2017) 67:4 UTLJ 655; Chilenye Nwapi, "Accountability of Canadian Mining Corporations for Their Overseas Conduct: Can Extraterritorial Corporate Criminal Prosecution Come to the Rescue?" (2016) 54 Can YB Intl L 227; Penelope Simons, "Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses" (2015) 56:2 Can Bus LJ 167; Madeleine Conway, "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40:2 Queen's LJ 741; Jason MacLean, "*Chevron Corp v Yaiguaje*: Canadian Law and the New Global Economic and Environmental Realities" (2015) 57:3 Can Bus LJ 367; Jeffrey Bone, Book Review of *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* by Penelope Simons & Audrey Macklin, (2014) 11:2 JSDLP 357; Chilenye Nwapi, "Resource Extraction in the Courtroom: The Significance of *Choc v Hudbay Minerals Inc* for the Future of Transnational Justice in Canada" (2014) 14 Asper Rev Intl Bus & Trade L 121; Susana C Mijares Peña, "Human Rights Violations by Canadian Companies Abroad: *Choc v Hudbay Minerals Inc*" (2014) 5:1 UWO J Leg Stud 3; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries,*

have advocated for tougher home-state regulation of corporate actors.[139] The media has reported on the issue.[140] The Canadian justice system itself has become accustomed to dealing with high-profile cases, particularly those involving the mining industry. Canada remains a leading capital market for the mining industry and the home of the majority of

Human Rights and the Home State Advantage (London: Routledge, 2014); Sean ED Fairhurst & Zoë Thoms, "Post-*Kiobel v Royal Dutch Petroleum Co*: Is Canada Poised to Become an Alternative Jurisdiction for Extraterritorial Human Rights Litigation?" (2014) 52:2 Alta L Rev 389 [Fairhurst & Thoms]; Sara L Seck, "Transnational Judicial and Non-Judicial Remedies for Corporate Human Rights Harms: Challenges of and for Law" (2013) 31:1 Windsor YB Access Just 177; Chilenye Nwapi, *Litigating Extraterritorial Corporate Crimes in Canadian Courts* (D.Phil Thesis, University of British Columbia Faculty of Law, 2012) [unpublished] [Nwapi]; Geneviève Saumier, "Commentaire sur Anvil Mining" (2013) 9:1 JSDLP 145; Geneviève Saumier, "PILAGG in Practice: Two Examples of Concrete Steps" (September 2013), online (pdf): *Private International Law as Global Governance eSeries* <blogs.sciences-po.fr/pilagg> [perma.cc/ZDA6-8QCD] [Saumier, "PILAGG"]; François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010) [Larocque]; James Yap, "Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from *Bil'in (Village Council) v Green Park International Ltd*" (2010) 8:2 J Intl Crim Justice 631; Jonathan Horlick et al, "American and Canadian Civil Actions Alleging Human Rights Violations Abroad by Oil and Gas Companies" (2008) 45:3 Alta L Rev 653; François Larocque, "Recent Developments in Transnational Human Rights Litigation: A Postscript to *Torture as Tort*" (2008) 46:3 Osgoode Hall LJ 605; Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70:4 Mod L Rev 598; Caroline Davidson, "Tort au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law" (2005) 38:5 Vand J Transnatl L 1403; Trevor CW Farrow, "Globalization, International Human Rights and Civil Procedure" (2003) 41:3 Alta L Rev 671 [Farrow]; Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) [Scott]; Craig Forcese, "Deterring "Militarized Commerce": The Prospect of Liability for Privatized Human Rights Abuses" (2000) 31:2 Ottawa L Rev 171 [Forcese].

[139] Sara Seck has been a notable advocate of this approach in Canada. See Sara L Seck, "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance" (2012) 13:12 German LJ 1363 [Seck, "Home State Regulation"]; Sara L Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rts & Dev LJ 177 [Seck, "Local Communities"]; Sara L Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46:3 Osgoode Hall LJ 565; Sara L Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can YB Intl L 139 [Seck, "Environmental Harm"]. As she explains, however, "continued reference to extraterritoriality in relation to home state jurisdiction may serve only to disguise the existence of real territorial links that provide a solid if preliminary justification for the reasonable exercise of home state jurisdiction." Seck, "Local Communities", *ibid* at 186–87. On this point, see also Sara L Seck, "Moving Beyond the E-Word in the Anthropocene" in Daniel S Margolies et al, eds, *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon: Routledge, 2019) 49.

[140] See eg Bill Curry, "New Watchdog Can Probe Conduct of Firms Operating Abroad", *The Globe and Mail* (18 January 2018) A8, also online: <www.theglobeandmail.com> [perma.cc/2PWN-UBQ2]; Melinda Maldonado, "Mining for the Truth", *Maclean's* 127:27 (14 July 2014) 42, also online: <www.macleans.ca> [perma.cc/6PWS-7KB2].

the world's mining companies.[141] Since the groundbreaking *Cambior* case,[142] human rights cases involving mining companies have proliferated in the country.[143] Meanwhile, recent decisions of the Supreme Court of the United States shut the doors of the country's courthouses to many foreign litigants under the *Alien Tort Statute*.[144] This may herald a new era of litigation in friendlier countries such as Canada.[145]

Courthouses are the primary battleground for now,[146] but elected officials can facilitate litigation through legislative reform. Canada's *Justice for Victims of Terrorism Act*, for instance, allows victims of terrorism to bring an action in damages in Canada against a foreign state whose immunity was lifted, a listed entity or another person, no matter where the act was committed.[147] The *Act* follows the spirit of the *ATS* but limits its scope to terrorism. Taking a broader approach, federal member of Parliament Peter Julian (New Democratic Party) tabled a private bill mirrored after the *ATS* to allow tort claims based

---

[141] See Government of Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2014) at 2, online (pdf): *Global Affairs Canada* <www.international.gc.ca> [perma.cc/548W-4JL6].

[142] See *Cambior*, *supra* note 131. That case was the first lawsuit brought by foreign plaintiffs against a Canadian mining corporation for human rights-related wrongdoing: *Recherches internationales Québec v Cambior Inc*, 1999 CanLII 12022 at para 20, [1999] JQ no 1581 (QL) (Sup Ct).

[143] See the sources cited *supra* 133.

[144] See *Alien Tort Statute*, 28 USC § 1350 (2017) [*ATS*]; *Jesner v Arab Bank plc*, 138 S Ct 1386, 200 L Ed (2d) 612 (2018); *Kiobel v Royal Dutch Petroleum Co*, 569 US 108, 133 S Ct 1659 (2013) [*Kiobel*]; *Sosa v Álvarez-Machaín*, 542 US 692, 124 S Ct 2739 (2004). Much has already been said about this jurisprudence. As Muir Watt points out, it participates in a form of "defensive territorialism" which is more political than theoretical. See Horatia Muir Watt, "Discours sur les méthodes du droit international privé (des formes juridiques de l'inter-altérité)" (2018) 389 Rec des Cours 9 at 125–33, reprinted in vol 35 of the *Procket Books of the Hague Academy of International Law* (Leiden: Koninklijke Brill, 2019); Horatia Muir Watt, "Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference" (2017) 70:1 Current Leg Probs 111 at 129–30.

[145] See Pamela K Bookman, "Litigation Isolationism" (2015) 67:5 Stan L Rev 1081 at 1116–19; Pamela K Bookman, "Once and Future U.S. Litigation" in Paul B Stephan, ed, *Foreign Court Judgments and the United States Legal System* (Leiden: Brill Nijhoff, 2014) 35 at 41–42. On the decline of international litigation in the United States, see the empirical findings of Marcus S Quintanilla & Christopher A Whytock, "The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law" (2011) 18:1 Sw J Intl L 31 at 32–35; Christopher A Whytock, "The Evolving Forum Shopping System" (2011) 96:3 Cornell L Rev 481.

[146] See *Nevsun Resources* SCC, *supra* note 133 at paras 60–132 (where the Supreme Court of Canada concluded that it was not "plain and obvious" that the common law could not recognize a domestic remedy for corporate violations of customary international law).

[147] See *Justice for Victims of Terrorism Act*, SC 2012, c 1, s 2, s 4; *Tracy v Iran (Information and Security)*, 2017 ONCA 549, 415 DLR (4th) 314, leave to appeal to SCC refused, [2018] 1 SCR vii. See *Order Establishing a List of Foreign State Supporters of Terrorism*, SOR/2012-170 (lifting Iran's and Syria's immunity for the purposes of terrorism proceedings in domestic courts, under the *State Immunity Act*, RSC 1985, c S-18, s 6.1(2)).

on violations of international law.[148] The bill features a cause of action for transboundary pollution alongside causes of action for torture, slavery and other egregious human rights violations.[149] The bill has made little progress in Parliament thus far,[150] but recurring reports of foreign misconduct should keep corporate accountability on the political agenda for the foreseeable future.

These developments are part of an already vigorous academic and social discussion. My contribution lies elsewhere. This said, the debate over liability for transboundary pollution shares some of the underlying themes and features of human rights litigation. Retired Supreme Court of Canada Justice Ian Binnie called judges to "rethink some of the doctrines that stand in the way of granting relief" in human rights litigation.[151] The same line of reasoning is often seen with respect to transboundary pollution. It is not a coincidence that the ILC referred to the Bhopal tragedy (a case involving local damage caused by the subsidiary of a foreign corporation) to explain the notion of prompt and adequate compensation in cases of pure transboundary damage.[152] Fundamentally, both topics challenge private international law and question whether it sufficiently protects the interests of the individual as opposed to comity and other state-centric interests.[153]

---

[148] See Bill C-331, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2st sess, 42nd Parl, 2015 (first reading 14 December 2016) [Bill C-331]; Bill C-323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 1st Sess, 41st Parl, 2011 (first reading 5 October 2011), reinstated 2nd Sess, 41st Parl, 2013 (16 October 2013); Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 40th Parl, 2009 (first reading 1 April 2009), reinstated 3rd Sess, 40th Parl, 2010 (3 March 2010); Bill C-492, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 39th Parl, 2007 (first reading 10 December 2007).
[149] See Bill C-331, *supra* note 148, cl 1(2)(o).
[150] A general federal election was held on 21 October 2019 and the bill will need to be retabled during the first session of the forty-third Parliament.
[151] The Honourable Ian Binnie, "Judging the Judges: "May They Boldly Go Where Ivan Rand Went Before"" (4th Coxford Lecture delivered at the Faculty of Law, University of Western Ontario, London (Ont), Canada, 16 February 2012), (2013) 26:1 Can JL & Jur 5 at 18. For other interventions on the same topic, see The Honourable Ian Binnie, "Foreword" in Simons & Macklin, *supra* note 138, xi; The Honourable Ian Binnie, "An Interview with the Honourable Justice Ian Binnie" (2012) 44:3 Ottawa L Rev 571 at 587–91; Justice Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report" (2009) 38:4 Brief 44.
[152] See Seck, "Home State Regulation", *supra* note 139 (noting that the *ILC Principles on the Allocation of Loss* "do refer to the Bhopal gas disaster, a primary example of the problem of transnational environmental harm, in four different contexts, suggesting a certain ambiguity as to their scope" at 1370, n 36).
[153] On the state-centric perspective of private international law, see Roxana Banu, "A Relational Feminist Approach to Conflict of Laws" (2017) 24:1 Mich J Gender & L 1 at 10–15; Roxana Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the

5. Canada offers an ideal setting to study transboundary pollution. The first chapter of this thesis engages with international environmental law in a way that cuts across all jurisdictions. The remainder of the thesis focuses on Canadian private international law, a primarily domestic body of law.[154] Canada is a federation in which each province and territory is considered a distinct state for the purposes of private international law.[155] Unlike the United States, Canada does not have a general body of so-called federal common law, except for specific matters such as Aboriginal title.[156] Canadian private international law is essentially provincial.[157] Quebec comprehensively codified its rules of private international law in the *Civil Code of Quebec.* Other provinces resort to the common law and particular statutes.

Canadian Private International Law Tort Rules" (2013) 31:1 Windsor YB Access Just 197 at 200. See also Upendra Baxi, "Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law" (2016) 23:1 Ind J Global Leg Stud 15 at 23 [Baxi, "Newly Emergent Geographies of Injustice"].

[154] On the connections between public and private international law, see in particular the work of Alex Mills, "Connecting Public and Private International Law" in Duncan French, Kasey McCall-Smith & Verónica Ruiz Abou-Nigm, eds, *Linkages and Boundaries in Private and Public International Law* (Oxford: Hart, 2018) 13; Alex Mills, "Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law" in Muir Watt & Fernández Arroyo, *supra* note 52, 34; Alex Mills, "Rediscovering the Public Dimension of Private International Law" (2011) 24 Hague YB Intl L 11; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge: Cambridge University Press, 2009); Alex Mills, "The Private History of International Law" (2006) 55:1 ICLQ 1. *Cf* Roxana Banu, *Nineteenth Century Perspectives in Private International Law* (Oxford: Oxford University Press, 2018) (whose work suggests that "[u]nderstanding the limitations of this association [with public international law] in the history of [private international law] would prevent us from romanticizing just any kind of appeal to connecting the two fields" at 291–92).

[155] See *Civil Code of Quebec*, CQLR c CCQ-1991, art 3077, para 1 [CCQ]; *Van Breda*, *supra* note 112 at para 21; *Samson v Holden*, [1963] SCR 373 at 378, 1963 CanLII 65 [*Samson*].

[156] See *PS Knight Co Ltd v Canadian Standards Association*, 2018 FCA 222 at para 120, 161 CPR (4th) 243, leave to appeal to SCC refused, 38506 (23 May 2019); *Caisse populaire Desjardins de l'Est de Drummond v Canada*, 2009 SCC 29 at para 81, [2009] 2 SCR 94, Deschamps J, dissenting; *Roberts v Canada*, [1989] 1 SCR 322 at 339–40, 1989 CanLII 122 [*Roberts*]; H Patrick Glenn, "Divided Justice? Judicial Structures in Federal and Confederal States" (1995) 46:5 SCL Rev 819 at 830–31.

[157] See Claude Emanuelli, *Étude comparative sur le droit international privé au Canada* (Montreal: Wilson & Lafleur, 2019) at para 1 [Emanuelli, *Étude comparative*]; H Patrick Glenn, "Justice Louis LeBel and the Private International Law of a Diverse Federation" (2015) 70 SCLR (2d) 47 at 47, reprinted in Dwight Newman & Malcolm Thorburn, eds, *The Dignity of Law: The Legacy of Justice Louis LeBel* (Markham: LexisNexis, 2015) 47; Geneviève Saumier, *Book Review of Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* by Vaughan Black, Stephen GA Pitel & Michael Sobkin, (2013) 9:2 J Priv Intl L 349 at 349–50. The words "Canadian private international law" should therefore be understood as the rules private of international law in force in the relevant province or territory. The same goes for the words "Canadian law". I also use the word "province" as shorthand for Canadian provinces *and* territories.

I have several reasons to focus on Canadian law. First, Canada's federal nature means that transboundary pollution can occur even within its borders. Provinces have legislative competence to regulate certain environmental matters.[158] Interprovincial pollution can in fact create serious conflicts. The diverging views of Alberta and British Columbia on the Trans Mountain interprovincial pipeline, for instance, show that tensions can occur even among close neighbours in a single country.[159] The controversy surrounding Quebec construction companies surreptitiously transferring contaminated soil to Ontario to avoid compliance with the more stringent laws of Quebec also highlights the problems with environmental enforcement across provincial borders.[160] Interprovincial pollution can in fact be even *more* complex than international pollution due to the constitutional constraints limiting the provinces' extraterritorial legislative reach.[161] Equally challenging problems occurred in the early twentieth century in the United States, when states began to invoke the Supreme Court's original jurisdiction over interstate disputes to litigate pollution or water diversion claims against other states.[162]

Second, Canada shares with the United States the longest international border on the planet and the world's largest surface freshwater system on which millions of Canadians

---

[158] See generally *R v Hydro-Québec*, [1997] 3 SCR 213, 1997 CanLII 318 [*Hydro-Québec*]; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110.

[159] See *Reference Re Environmental Management Act (British Columbia)*, 2019 BCCA 181, 434 DLR (4th) 213, appeal filed to the SCC as of right, 38682 (14 June 2019) (where the British Columbia Court of Appeal invalidated a provincial statute imposing environmental requirements which impacted the expansion of the Trans Mountain pipeline—a federal undertaking—from Alberta to British Columbia); *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, 21 CELR (4th) 1 (where British Columbia intervened in support of First Nations' request that federal approval of the project be set aside, while Alberta intervened in support of Trans Mountain and federal authorities).

[160] See *Englobe Corp c 9299-2742 Québec inc (Gestion OFA Environnement)*, 2017 QCCS 598, [2017] JQ no 1253 (QL), aff'd 2019 QCCA 533, [2019] JQ no 2298 (QL), leave to appeal to SCC refused, 38612 (29 August 2019) [*Englobe*].

[161] See *Interprovincial Co-operatives v R* (1975), [1976] 1 SCR 477, 1975 CanLII 212 [*Interprovincial Co-operatives* SCC]. For further discussion on the provincial power to regulate transboundary pollution, see subsection 3.2.3.2.2.2 below.

[162] See US Const art III, § 2, cl 3; *City of Milwaukee v Illinois*, 451 US 304, 101 S Ct 1784 (1981); *Wisconsin v Illinois*, 449 US 48, 101 S Ct 557 (1980); *Illinois v City of Milwaukee*, 406 US 91, 92 S Ct 1385 (1972); *Ohio v Wyandotte Chemicals Corp*, 401 US 493, 91 S Ct 1005 (1971) [*Wyandotte Chemicals*]; *Wisconsin v Illinois*, 388 US 426, 87 S Ct 1774 (1967); *Wisconsin v Illinois*, 289 US 395, 53 S Ct 671 (1933); *Wisconsin v Illinois*, 281 US 696, 50 S Ct 331 (1930); *Wisconsin v Illinois*, 281 US 179, 50 S Ct 266 (1930); *Wisconsin v Illinois*, 278 US 367, 49 S Ct 163 (1929); *Georgia v Tennessee Copper Co*, 227 US 678, 35 S Ct 752 (1915); *Georgia v Tennessee Copper Co*, 237 US 474, 35 S Ct 631 (1915); *Georgia v Tennessee Copper Co*, 206 US 230, 27 S Ct 618 (1907); *Missouri v Illinois*, 200 US 496, 26 S Ct 268 (1906); *Missouri v Illinois*, 180 US 208, 21 S Ct 331 (1901).

and Americans rely.[163] This is an ideal setting to study transboundary pollution. Contaminants move in both directions and the two sides deal with transboundary issues through a wide variety of legal and political means.[164] While the two governments—as well as Mexico—generally cooperate in a peaceful setting, incidents do happen and can lead to litigation.

This history of Canada-United States environmental litigation goes much beyond the *Trail Smelter* arbitration. Some incidents did end in arbitration, such as the Gut Dam case involving a Canadian structure that affected the water flows of Lake Ontario and the St. Lawrence River and caused damage to American property.[165] Others ended with amicable interstate settlements, such as the Cherry Point incident involving a Liberian tanker discharging 12,000 gallons of crude oil while unloading at a refinery in the state of Washington, severely polluting the Canadian coast.[166] But there is also an extensive

[163] See Noah D Hall, "Transboundary Pollution: Harmonizing International and Domestic Law" (2007) 40:4 Mich JL Reform 681 at 682–683 [Hall, "Transboundary Pollution"]. Hall has worked extensively on Canada-United States environmental issues. See eg Noah D Hall, "Drilling in the Great Lakes", *supra* note 28; Hall et al, *supra* note 113 at 219–25; Noah D Hall, "Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy" (2008) 32:1 Harv Envtl L Rev 49 [Hall, "Political Externalities"]; Noah D Hall, "Introduction: Canada-United States Transboundary Environmental Protection" (2009) 26 Windsor Rev Legal Soc Issues 1; Noah D Hall, "The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance" (2007) 24:1 Pace Envtl L Rev 131 [Hall, "Citizens"]; Noah Hall, "Bilateral Breakdown: U.S.-Canada Pollution Disputes" (2006) 21:1 Nat Resources & Envt 18 [Hall, "Bilateral Breakdown"].

[164] For a study of environmental governance in North America generally, see Robert G Healy, Debora L VanNijnatten & Marcela López-Vallejo, *Environmental Policy in North America: Approaches, Capacity and the Management of Transboundary Issues* (Toronto: University of Toronto Press, 2014). For a study focused on environmental disputes specifically, see Catherine A Cooper, "The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms" (1986) 24 Can YB Intl L 247 [Cooper].

[165] See *Agreement on the Settlement of Claims Relating to Gut Dam*, Canada and United States, 18 November 1968, 19:6 USTA 7863, TIAS No 6624 (entered into force 18 November 1968); *Canada-United States Settlement of Gut Dam Claims: Report of the Agent of the United States Before the Lake Ontario Claims Tribunal*, 27 September 1968, 8:1 ILM 118; *Agreement Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam*, Canada and United States, 25 March 1965, 607 UNTS 141, Can TS 1966 No 22, 4:3 ILM 468 (entered into force 11 October 1966). Relevant documents are reprinted in Cairo AR Robb, ed, *International Environmental Law Reports*, vol 1: Early Decisions (Cambridge: Cambridge University Press, 1999) at 386.

[166] See "Statement on Cherry Point Oil Spill and Representations to United States Government Arising Therefrom", *House of Commons Debates*, 28-4, vol 4 (8 June 1972) at 2955 (Mitchell Sharp), reprinted in ALC de Mestral, "Practice in International Law During 1972 as Reflected in Resolutions of the House of Commons and in Government Statements in the House of Commons" (1973) 11 Can YB Intl L 314 at 333–34 [Statement on Cherry Point Oil Spill].

history of civil litigation between the two countries, which, practitioners say, has turned into a noticeable trend in recent years.[167]

Some disputes involve victims of pollution in one state suing a private polluter in the other through class actions or individual proceedings. This is the scenario I am the most interested in. I already mentioned the *Pakootas* case as an example.[168] Several others exist. For instance, a Canadian Mohawk band sued in the United States two corporations that operated aluminum plants in the state of New York, alleging that the plants emitted airborne pollutants which settled on the Canadian side of the border where they lived.[169] An Ontario resident brought a private prosecution against a Detroit electricity provider that operated two coal-fired power plants in Eastern Michigan which contaminated the St-Clair River with mercury.[170] Another group of Ontario residents settled a lawsuit against the company's ancestor for transboundary air pollution.[171] Yet another group of Ontario residents sued three American steel manufacturers that operated seven plants across the Detroit River from Canada, claiming that the noxious air pollutants emitted from their facilities represented a nuisance for Canadians.[172]

Public authorities have also had their share of court time. Ontario intervened in proceedings brought in the United States by public authorities against a chemical company for pollution of Lake Ontario due to a landfill located next to a drinking-water treatment plant.[173] Ontario sued the City of Detroit, a municipal and a private corporation to stop the construction of a municipal trash incinerator that would have affected air

---

[167] See Marc McAree & Joanna Vince, "When Complying with the Law in Your Own Backyard Is Not Enough: Cross-Border United States and Canada Environmental Litigation" (2013) 42:2 Brief 57 [McAree & Vince]; Jeffrey Gracer, Dennis Mahony & Tyson Dyck, "Cross-Border Litigation Gains Traction in U.S. and Canadian Courts" (2008) 20:2 Envtl Cl J 181 [Gracer, Mahony & Dyck]; Dennis E Mahony & Tyson Dyck, "Cross-Border Environmental Litigation", *Lexpert* 9:7 (May 2008) 91, also online (pdf): *Lexology* <www.lexology.com> [perma.cc/GJF4-T7A7].
[168] See *Pakootas* 9th Cir 2006, *supra* note 14.
[169] See *Canadian St Regis Band of Mohawk Indians v Reynolds Metals*, [1981] 3 CNLR 33, [1981] 8 ILR 3037 (ND NY) [*St Regis*].
[170] See *Edwards v DTE Energy Co*, [2008] OJ No 4433 (QL) (Sup Ct) [*Edwards*].
[171] See "Edison Pays 300 Claims for Fallout", *Windsor Star* (7 September 1973) A3.
[172] See *Michie v Great Lakes Steel Division, National Steel Corp*, 495 F (2d) 213, 1974 US App Lexis 9324 (6th Cir 1974), certiorari denied, 419 US 997, 95 S Ct 310 (1974) [*Michie*].
[173] See *United States of America v Hooker Chemicals & Plastics Corporation*, 101 FRD 451, 1984 US Dist Lexis 18720 (WD NY 1984).

quality in the region.[174] The same province also intervened in a lawsuit initiated by American plaintiffs against the Environmental Protection Agency (EPA) regarding acid rain,[175] and later sued the EPA for its inaction in the prevention of air pollution originating in the United States.[176] The same year, American authorities sued Canadian shareholders and officers of an American corporation for the costs incurred in cleaning up a contaminated site in Michigan.[177] The Quebec and federal governments joined a coalition of industry advocates to challenge the EPA's ban on the use and manufacture of asbestos products in the United States.[178] Manitoba sued American federal authorities over several water diversion projects in North Dakota.[179] Public authorities and individuals in North Dakota also sued the Government of Manitoba and municipal authorities over a dike created by embankments on a road allowance in Southern Manitoba, near the United States border.[180]

The Canada-United States border thus offers a unique setting to study the jurisdictional aspects of transboundary environmental litigation. As mentioned earlier, the confluence of Canadian and American environmental policy should not be taken for granted. In the eyes of businesses operating across the border, broad similarities in environmental policy are immaterial as even the smallest differences create major practical difficulties.[181] The

---

[174] See *Her Majesty the Queen in Right of the Province of Ontario v City of Detroit*, 874 F (2d) 332, 1989 US App Lexis 5877 (6th Cir 1989), rev'g 696 F Supp 249, 1988 US Dist Lexis 12270 (ED Mich 1988).
[175] See *Thomas v New York*, 802 F (2d) 1443, 1986 US App Lexis 31067 (DC Cir 1986), certiorari denied, 482 US 918, 107 S Ct 3196.
[176] See *Her Majesty the Queen in Right of the Province of Ontario v United States Environmental Protection Agency*, 912 F (2d) 1525, 1990 US App Lexis 15262 (DC Cir 1990) [*EPA*]. Today, "[o]ver fifty percent of air pollution in the Province of Ontario–more than ninety percent in some municipalities–originates in the United States." Maria L Banda, "Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm" (2019) 103:4 Minn L Rev 1879 at 1880.
[177] See *United States of America v Ivey*, 747 F Supp 1235, 1990 US Dist Lexis 14871 (ED Mich 1990); *United States of America v Ivey*, 747 F Supp 1235, 1990 US Dist Lexis 14565 (ED Mich 1990).
[178] See *Corrosion Proof Fittings v Environmental Protection Agency*, 947 F (2d) 1201, 1991 US App Lexis 24922 (5th Cir 1991).
[179] See *People to Save the Sheyenne River Inc v North Dakota Department of Health*, 744 NW (2d) 748, 2008 ND Lexis 19 (ND Sup Ct 2008); *Manitoba v Norton*, 398 F Supp (2d) 41, 2005 US Dist Lexis 5142 (DDC 2005), aff'd 2006 US App Lexis 10193 (DC Cir 2006). In the latter case, US courts granted in part Manitoba's request for an injunction to better assess the environmental impacts of North Dakota's project. That injunction was only recently lifted. *Manitoba v Zinke*, 273 F Supp (3d) 145, 2017 US Dist Lexis 127212 (DDC 2017); *Manitoba v Zinke*, 849 F (3d) 1111, 2017 US App Lexis 3829 (DC Cir 2017); *Manitoba v Salazar*, 691 F Supp (2d) 37, 2010 US Dist Lexis 19982 (DDC 2010) [*Manitoba*].
[180] See *Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92, 409 DLR (4th) 719, leave to appeal to SCC refused, [2017] 2 SCR ix [*Pembina County Water Resource District*].
[181] See Gracer, Mahony & Dyck, *supra* note 167 at 189–90.

likelihood of a clash between the two countries will remain high in the current political setting. The *Pakootas* litigation caused unusual turmoil,[182] but it may not be the last time it happens, as long as freshwater resources remain at the forefront of global geopolitical tensions.

Despite my interest in Canada-United States issues, my focus remains on Canadian law. I am not legally trained in the United States, nor do I claim particular expertise in American law. I discuss American cases to demonstrate certain factual trends, without necessarily assessing their validity as a matter of American law. I also rely on a variety of sources and instruments from European countries. In Europe, major incidents such as the Sandoz chemical spill in Switzerland[183] resulted in a greater impetus to discuss the application of private international law to transboundary pollution. The close proximity of continental states further exacerbates the need for practical solutions to deal with issues such as the installation of a wind turbine at the border,[184] or the building of a nuclear power plant in a neighbouring state.[185] Today, the *Rome II Regulation* (the binding legal instrument on choice of law for torts in all EU countries except Denmark) contains a much-celebrated choice of law rule for environmental damage openly driven by environmental policy.[186] This initiative and the heated discussions that occurred prior to its adoption break the conceptual isolation of private international law.[187] It provides important insights for my own study.

---

[182] See Jacquie McNish, "Long Arm of U.S. Law Reaches Across the Border", *The Globe and Mail* (9 January 2008) B8, also online: <www.theglobeandmail.com> [perma.cc/Y9AL-H7QP].
[183] See Hans Ulrich Jesserun D'Oliveira, "The Sandoz Blaze: The Damage and the Public and Private Liabilities" in Francesco Francioni & Tullio Scovazzi, eds, *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991) 429; Alexandre Kiss, "Tchernobâle ou la pollution accidentelle du Rhin par des produits chimiques" (1987) 33 AFDI 719.
[184] See France, *JO*, Sénat, Débats parlementaires, Compte rendu intégral, Session of 27 April 2017 at 1537 (Jean-Yves Le Drian), reprinted in (2017) 106:3 Rev crit dr int privé 499.
[185] See Milda Seputyte, "This Lithuanian City Played Host to Filming for HBO' "Chernobyl." It's Now Preparing for Its Own Nuclear Radiation Leak", *Time* (4 September 2019), online: <www.time.com> [perma.cc/448N-K7VB].
[186] See EC, *Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40 at 45, art 7 [*Rome II Regulation*]. The draft regulations designed to transpose European private international law into domestic law in post-Brexit United Kingdom leave article 7 of the *Rome II Regulation* unaltered for now. See *The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2018* (UK), s 11 (not yet in force).
[187] See Joel R Paul, "The Isolation of Private International Law" (1988) 7:1 Wis Intl LJ 149 [Paul].

6. My focus is on private parties, not public authorities. Finally, I want to make clear that my focus is on the civil liability of polluters towards private victims. I do not discuss the liability of public authorities for environmental damage. Litigation against public authorities raises various immunities and privileges which far exceed the scope of this thesis.[188] Peculiarities exist not only at the substantive level but also in private international law. Provincial governments, for instance, can typically be sued only in their own courts.[189] I similarly exclude lawsuits by public authorities under criminal or regulatory statutes except when they can be assimilated to a private claim for compensation.[190]

Contribution to legal knowledge

My work fills two gaps in contemporary legal knowledge. The first is a gap between fields of study. In the field of international environmental law, scholars propose to solve the liability conundrum through private international law, but their analysis rarely goes beyond introducing basic concepts and their potential relevance.[191] In the field of private international law, scholars approach transboundary pollution by speculating, for example, on the applicable law and the effect of foreign licences in domestic proceedings.[192] These are important questions but we rarely pay attention to their international backdrop, including the states' international duty to ensure that victims obtain prompt and adequate compensation. We do not yet understand how states implement international

---

[188] See generally Karen Horsman & Gareth Morley, eds, *Government Liability: Law and Practice* (Aurora: Canada Law Book, 2007) (loose-leaf updated 2019, release 32); Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011).

[189] See *Province du Nouveau-Brunswick c Les produits métalliques AT Inc*, 2017 QCCA 453 at para 9, [2017] JQ no 2850 (QL); *Manson v Canetic Resources Ltd*, 2014 ONSC 261 at paras 25–28, [2014] OJ No 288 (QL); *Constructions Beauce-Atlas Inc c Pomerleau Inc*, 2013 QCCS 4077 at para 16, [2013] JQ no 10368 (QL); *Medvid v Alberta (Health and Wellness)*, 2012 SKCA 49 at paras 16–20, 349 DLR (4th) 72; *Sauve v Quebec (Attorney General)*, 2011 ONCA 369 at para 3, [2011] OJ No 2106 (QL); *Liability Solutions Inc v New Brunswick* (2007), 88 OR (3d) 101 at 104–105, 2007 CanLII 49488 (Sup Ct); *Athabasca Chipewyan First Nation v British Columbia*, 2001 ABCA 112 at paras 12–28, 199 DLR (4th) 452.

[190] See the definition of private law proposed by Howarth, *supra* note 81.

[191] See eg Birnie, Boyle & Redgewell, *supra* note 46 at 311–15; Boyle, "Environmental Liability, *supra* note 46 at 9–16.

[192] See eg Christian von Bar, "Environmental Damage in Private International Law" (1997) 268 Rec des Cours 291 [Von Bar, "Environmental Damage"].

environmental policy through domestic rules on jurisdiction and choice of law, and how this process relates to the articulation of liability standards for transboundary pollution.

The upshot is that contemporary private international law almost invariably fails to ponder the efforts at crafting an international liability regime that would attract consensus.[193] Yet the two bodies of law interact in obvious ways.[194] International environmental law frequently and explicitly points to private international law as part of the solution, most recently in the *ILC Principles on the Allocation of Loss*.[195] Taking these signals seriously strikes me as an important endeavour given the shifting emphasis towards civil liability and the contrasting failure of most liability treaties to achieve consensus.

No scholar has thoroughly and successfully undertaken this task. Some identified elements of coherence or complementarity between international environmental law and private international law.[196] Uglješa Grušić went further and explored how private international law contributes to environmental regulation.[197] His work, however, turned on the particulars of European private international law. He concluded that the environment-specific rule contained in the *Rome II Regulation* does not entirely advance European environmental policy. In this thesis, I take up Grušić's fundamental assumptions about the regulatory function of private international law. I test them in a

[193] I am aware that this argument goes both ways. Alex Mills, for instance, argues that the public international law of jurisdiction does not sufficiently account for private actors and their interests. See Alex Mills, "Private Interests and Private Law Regulation in Public International Law Jurisdiction" in Stephen Allen et al, eds, *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press, 2019) 330.
[194] See Claudio Chiarolla, "The Role of Private International Law Under the Nagoya Protocol" in Elisa Morgera, Matthias Buck & Elsa Tsioumanihe, eds, *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation* (Leiden: Martinus Nijhoff, 2012) 423 at 424. See also Elisa Morgera & Lorna Gillies, "Realizing the Objectives of Public International Environmental Law Through Private Contracts: The Need for a Dialogue with Private International Law Scholars" in French, McCall-Smith & Ruiz Abou-Nigm, *supra* note 154, 175 [Morgera & Gillies].
[195] See *ILC Principles on the Allocation of Loss*, *supra* note 37.
[196] See Carina Costa De Oliveira, *La réparation des dommages environnementaux en droit international: contribution à l'étude de la complémentarité entre le droit international public et le droit international privé* (Saarbrüken: Éditions universitaires européennes, 2012); Rüdiger Wolfrum, Christine Langenfeld & Petra Minnerop, *Environmental Liability in International Law: Towards a Coherent Conception* (Berlin: Erich Schmidt, 2005) [Wolfrum, Langenfeld & Minnerop].
[197] See Grušić, *supra* note 10. For further discussion on this point, see subsection 1.3.2.2 below.

Canadian setting where no rule equivalent to the environment-specific rule of the *Rome II Regulation* exists.

Bridging the scholarly gap is only a first step. This is why my work features an extensive bibliography of primary materials—old and new, domestic and international. It provides researchers with adequate resources to produce more research in this area, and eventually discover and develop new connections between private international law and international environmental law.

The second gap which my work fills is a historical gap. Active discussions took place in the 1970s over transboundary pollution in the midst of the 1977 *OECD Recommendation*[198] and the adoption of the 1974 *Nordic Convention* by Scandinavian countries.[199] Both instruments require that foreign victims of pollution have the same access to courts and remedies as local victims of pollution in the source state.

Early proposals relied heavily on private international law. They occurred precisely while environmental protection was finding a place of its own on the international agenda, and transboundary issues such as acid rain, ozone depletion and nuclear incidents were being discussed. Yet many of these proposals were never fully studied nor implemented. Private international law (and indeed private law generally) faded in the background as international treaty-making hit full speed. Follow-up projects under the auspices of the HCCH[200] and the ILA[201] in the 1990s and 2000s sought to keep private international law

---

[198] See OECD, *Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*, OECD Doc C(77)28/FINAL (1977), 16:4 ILM 977, reprinted in OECD, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 29 & OECD*, L'OCDE et l'environnement* (Paris: OECD, 1986) 171 [*OECD Recommendation*]. See also OECD, *Recommendation of the Council for Strengthening International Co-operation on Environmental Protection in Frontier Regions*, OECD Doc C(78)77/FINAL (1978), 17:6 ILM 1530, reprinted in OECD, *L'OCDE et l'environnement* (Paris: OECD, 1986) 175.

[199] See *Convention on the Protection of the Environment (With Protocol)*, Denmark, Finland, Norway and Sweden, 19 February 1974, 1092 UNTS 279, 13:3 ILM 591 (entered into force 5 October 1976) [*Nordic Convention*].

[200] See Christophe Bernasconi, "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?" (1999) 12 Hague YB Intl L 35, reprinted in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session: 6 to 22 June 2001*, vol 1: Miscellaneous Matters (Leiden: Koninklijke Brill, 2008) 320 [HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage"].

[201] See International Law Association, "Transnational Enforcement of Environmental Law: Final Report" (2006) 72 Intl L Assn Rep Conf 655 [ILA, "Final Report on Transnational Enforcement of Environmental

on the agenda.[202] The HCCH is a prominent intergovernmental organization concerned with the progressive unification of private international law,[203] while the ILA is an esteemed NGO devoted to the clarification and development of international law generally.[204] Both projects, however, failed to build momentum. The HCCH ceased its work on the topic and the ILA's final product did not give trigger significant legal reform. Meanwhile, increasing attention towards human rights litigation led commentators to triumphantly conclude that private international law was "beginning to yield to human rights and access to justice concerns in novel and important ways that have implications for future environmental litigation."[205]

The growing concern for the safeguard of human rights in private international law is cause for celebration.[206] Interestingly, however, documents such as the *OECD Recommendation* and the *Nordic Convention* continue to appear in today's scholarship, more than forty years after their adoption. One author recently suggested an approach based on non-discrimination in the aftermath of the *Pakootas* litigation and the allegedly extraterritorial application of American law to Teck Cominco in Canada.[207] Another

---

Law"], as considered and adopted by International Law Association, "Resolution No 6/2006: Transnational Enforcement of Environmental Law" (2006) 72 Intl L Assn Rep Conf 48 [*ILA Toronto Rules on Transnational Enforcement of Environmental Law*].

[202] For further discussion on the work of the HCCH and the ILA, see subsection 1.3.1 below.

[203] *Statute of the Hague Conference on Private International Law*, 9 & 31 October 1951, 220 UNTS 121, art 1, UKTS 1955 No 65, 60:2 AJIL 461 (entered into force 15 July 1955), reprinted in HCCH, *Collection of Conventions*, *supra* note 94, 2.

[204] International Law Association, "Constitution of the Association adopted at the 77th Conference, 2016" (2016) 77 Intl L Assn Rep Conf 70, art 3.1.

[205] Birnie, Boyle & Redgewell, *supra* note 46 at 334; Alan Boyle, "Human Rights or Environmental Rights? A Reassessment" (2007) 18:3 Fordham Envtl LJ 471 at 503–504 [Boyle, "Reassessment"].

[206] But see the work of Austen Parrish, who suggests that extraterritoriality and unilateralism (including human rights litigation in the United States) impedes on multilateral efforts to advance human rights. See eg Austen L Parrish, "Fading Extraterritoriality and Isolationism? Developments in the United States" (12th Earl A Snyder Lecture delivered at the Lauterpacht Centre for International Law, University of Cambridge, United Kingdom, 13 May 2016), (2017) 24:1 Ind J Global Leg Stud 207; Austen L Parrish, "*Kiobel*, Unilateralism, and the Retreat from Extraterritoriality" (2013) 28 Md J Intl L 208; Austen L Parrish, "State Court International Human Rights Litigation: A Concerning Trend" (2013) 3:1 UC Irvine L Rev 25. For other skeptical views of human rights litigation, see Cortelyou C Kenney, "Measuring Transnational Human Rights" (2015) 84:3 Fordham L Rev 1053; Eric A Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal" (2007) 155:6 U Pa L Rev 1925; Curtis A Bradley, "The Costs of International Human Rights Litigation" (2001) 2:2 Chicago J Intl L 457; Jack L Goldsmith & Curtis A Bradley, "The Current Illegitimacy of International Human Rights Litigation" (1997) 66:2 Fordham L Rev 319.

[207] See Toby Kruger, "Trail Smelter II: A Prudent Approach? From Extraterritoriality to Non-Discrimination" (2010) 43:1 UBC L Rev 109 [Kruger].

explored a similar approach to deal with transboundary haze pollution in Southeast Asia.[208] Leading texts still evoke non-discrimination as an important benchmark.[209] The ILC relied on this concept to craft the *Principles on the Allocation of Loss*, particularly the sixth principle on international and domestic remedies.[210] On the domestic front, we continue to discuss and criticize the rules that barred private action in *Trail Smelter* some eighty years ago as if they were immutable.[211]

On the one hand, this discussion feels anachronistic. In Canada, most of the jurisdictional obstacles criticized in the past decades no longer pose a serious threat to judicial relief, despite their lingering presence in law reports and their continuous mention in the literature. Canada, for example, does not, discriminate between foreign and local plaintiffs in the way the Organisation for Economic Co-operation and Development (OECD) understood the term in the 1970s, aside from a few isolated exceptions.[212]

On the other hand, several aspects of this discussion still have particular relevance today. Two examples suffice to show that early private approaches to transboundary pollution have not lost all relevance to the transboundary issues that we face today. First, recent negotiations between Canada, the United States and Mexico over a renewed free-trade agreement brought the theme of non-discrimination back in the legal and political discourse.[213] The possibility that this rhetoric eventually extends to judicial reasoning in other matters is not far-fetched. Non-discrimination may then have an important role to play in international environmental law.[214]

---

[208] See Prischa Listiningrum, "Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle" (2019) 8:1 Transnatl Envtl L 119 [Listiningrum].
[209] See Sands & Peel, *supra* note 108 at 164–65; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, 5th ed (St Paul: Foundation Press, 2015) at 1484–85 [Hunter, Salzman & Zaelke]; Birnie, Boyle & Redgewell, *supra* note 46 at 152, 304–11.
[210] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6.
[211] For further discussion on the local action rule, see subsection 2.2.1.1.2 below.
[212] For further discussion on those exceptions, see subsections 2.1.2 and 3.2.3.2.2.1 below.
[213] See *United States–Mexico–Canada Agreement*, 30 November 2018, online: *Government of Canada* <www.international.gc.ca> (not yet in force) [*USMCA*]. The *USMCA* is scheduled to take effect in the summer of 2020.
[214] I thank my supervisor Professor Geneviève Saumier for this insight.

Second, so-called climate change litigation has emerged as a regulatory mechanism to prevent, mitigate and compensate environmental damage. Climate change litigation loosely refers to the thousands of lawsuits brought against governments and polluters under a wide variety of legal frameworks and in all forums (domestic and international), in an effort to stop or reduce the production of greenhouse gas causing global warming. Canada has not escaped this trend,[215] which has obvious parallels with the legal fight against the tobacco industry (at least insofar as polluters themselves are involved).[216]

[215] See *Voters Taking Action on Climate Change v British Columbia (Energy and Mines)*, 2015 BCSC 471, 94 CELR (3d) 35; *Turp v Canada (Minister of Justice)*, 2012 FC 893, [2014] 1 FCR 439; *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 FCR 201, aff'd 2009 FCA 297, 313 DLR (4th) 767, leave to appeal to SCC refused, [2010] 1 SCR ix; *Imperial Oil Resources Ventures Limited v Canada (Fisheries and Oceans)*, 2008 FC 598, 36 CELR (3d) 153; *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, 35 CELR (3d) 254. Several cases are pending in Canadian courts. A non-profit organization is seeking authorization to bring a class action against the Government of Canada on behalf of millions of Quebeckers at or below the age of 35, alleging that the failure to adequately combat climate change infringes their environmental rights. The Quebec Superior Court denied authorization in first instance, but the plaintiff filed an appeal. See *Environnement Jeunesse c Procureur général du Canada*, 2019 QCCS 2885, [2019] JQ no 5940 (QL), notice of appeal to Qc CA filed, 500-09-028523-199 (19 September 2019); Ingrid Peritz, "Quebec Group Sues Ottawa over Climate Change: Lawsuit Launched on Behalf of 3.5 Million Young Quebeckers Argues They Will Face Most Dire Consequences of Global Warming", *The Globe and Mail* (27 November 2018) A7, also online: <www.theglobeandmail.com> [perma.cc/Z63Q-D3Y3]. Meanwhile, fifteen young Canadians filed a lawsuit against the Government of Canada for similar reasons. See *La Rose v Her Majesty the Queen* (25 October 2019), Vancouver T-1750-19 (FC) (Statement of Claim to the Defendants); Andrea Woo, "Youths to File Climate Lawsuit, Saying Charter Rights Have Been Violated", *The Globe and Mail* (25 October 2019) A7, also online: <www.theglobeandmail.com> [perma.cc/4QTW-DAQF]. See also *Mathur v Her Majesty the Queen in Right of Ontario* (25 November 2019), Toronto CV-19-00631627 (Ont Sup Ct) (Notice of Application) (similar lawsuit against the Government of Ontario). Other lawsuits failed or did not lead to a judgment on the merits. Greenpeace, for instance, sued the Government of Ontario over the repeal of the province's carbon cap and trade scheme. It was unsuccessful, but a majority of the Ontario Divisional Court nonetheless found that Ontario had failed to engage in proper consultation prior to the repeal. See *Greenpeace Canada (2471256 Canada Inc) v Minister of the Environment*, 2019 ONSC 5629, [2019] OJ No 5174 (QL); Jesse Firempong, News Release, "Statement: Court Majority Agrees That Premier Ford's Actions Scrapping Cap-and-Trade Were Unlawful" (11 October 2019), online: *Greenpeace* <www.greenpeace.org> [perma.cc/KLZ4-GDWF]. Finally, Ontario property owners sued the Ministry of Natural Resources of Ontario for flood damages caused by the recent rise of water levels in Muskoka. See *Burgess v Ontario (Minister of Natural Resources and Forestry)* (14 September 2016), Barrie 16-1325CP (Ont Sup Ct) (Statement of Claim) (notice of discontinuance, 7 August 2018); Tu Tanh Ha, "Muskoka Residents Seek $900-Million from Ontario in Water Damages", *The Globe and Mail* (16 September 2016) A15, also online: <www.theglobeandmail.com> [perma.cc/3X54-39PW].

[216] See Eric Dwyer, "Insurance Coverage in a Climate Changed Canada: How Can Canada Pay for Loss and Damage from Anthropogenic Climate Change" (2019) 28 Dal J Leg Stud 61 at 79–83; Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38:4 Oxford J Leg Stud 841 at 856–58 [Ganguly, Setzer & Heyvaert]; Olszynski, Mascher & Doelle, *supra* note 107.

Many lawsuits seek to hold governments accountable for regulatory inaction through public or administrative law, but the United States have also seen tort claims against greenhouse gas emitters themselves.[217] This phenomenon echoes long-forgotten efforts to tackle transboundary issues such as acid rain as private disputes.[218] Recently, several American cities commenced actions against giants of the fossil fuel industry to recover damages caused by climate change, so far with little success. A California district court summarily dismissed the case brought by San Francisco and Oakland against BP, Chevron, Conocophillips, Exxon Mobil and Royal Dutch Shell for failure to state a claim, concluding that "[t]he problem deserve[d] a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case."[219] Less than a month later, the United States District Court for the Southern District of New York dismissed another case brought by the City of New York against the same industry giants.[220] Both cases are now before appellate courts, and other actions of this kind are still pending in the United

[217] See *Kivalina v ExxonMobil Corp*, 696 F (3d) 849, 2012 US App Lexis 19870 (9th Cir 2012), certiorari denied, 569 US 1000, 133 S Ct 2390; *Comer v Murphy Oil USA Inc*, 839 F Supp (2d) 849, 2012 US Dist Lexis 39580 (SD Miss 2012), aff'd 718 F (3d) 460, 2013 US App Lexis 9705 (5th Cir 2013); *Comer v Murphy Oil USA Inc*, 2007 WL 6942285 (WL Int) (SD Miss 2007), rev'd 585 F (3d) 855, 2009 US App Lexis 22774 (5th Cir 2009), vacated and rehearing en banc granted, 598 F (3d) 208, 2010 US App Lexis 4253 (5th Cir 2010), aff'd 607 F (3d) 1049, 2010 US App Lexis 11019 (5th Cir 2010), mandamus denied, 562 US 1133, 131 S Ct 902; *American Electric Power Co v Connecticut*, 564 US 410, 131 S Ct 2527 (2012); *People of the State of California v General Motors Corporation*, 2007 US Dist Lexis 68547, 2007 WL 2726871 (WL Int) (ND Cal 2007).

[218] See the sources cited *infra* note 733.

[219] *City of Oakland v BP plc*, 325 F Supp (3d) 1017 at 1029, 2018 US Dist Lexis 106895 (ND Cal 2018), appeal to 9th Cir pending, 18-16663 [*City of Oakland* (1)]. See also *City of Oakland v BP plc*, 2018 US Dist Lexis 126258, 2018 WL 3609055 (WL Int) (ND Cal 2018), appeal to 9th Cir pending, 18-16663 [*City of Oakland* (2)] (granting motions to dismiss for lack of personal jurisdiction).

[220] See *City of New York v BP plc*, 325 F Supp (3d) 466, 2018 US Dist Lexis 120934 (SD NY 2018), appeal to 2nd Cir pending, 18-2188 [*City of New York*] (granting motion to dismiss for failure to state a claim).

States.[221] They will continue to appear on the dockets for the foreseeable future,[222] including possibly in Canada.[223] Jurisdiction and choice of law will have an important

[221] See eg *Mayor & City Council of Baltimore v BP plc*, 2019 US Dist Lexis 97438, 49 ELR 20102 (D Md 2019), appeal to 4th Cir pending, 19-1644 (case remanded to state courts); *Rhode Island v Chevron Corp*, 2019 US Dist Lexis 121349, 49 ELR 20126 (D RI 2019), appeal to 1st Cir pending, 19-1818 (case remanded to state courts); *King County v BP plc*, 2018 US Dist Lexis 178873, 2018 WL 9440497 (WL Int) (WD Wash 2019) [*King County*] (case stayed until the decision in *City of Oakland*); *Board of County Commissioners of Boulder County v Suncor Energy (USA) Inc*, 2019 US Dist Lexis 151578, 2019 WL 4200398 (WL Int) (D Colo 2019) (case remanded to state courts); *County of San Mateo v Chevron Corp*, 294 F Supp (3d) 934, 2018 US Dist Lexis 49197 (ND Cal 2018), appeal to 9th Cir pending, 18-15499, 18-15502 & 18-15503 (case remanded to state courts). For a complete survey, including briefs and other proceedings in the above-mentioned pending cases, see Columbia Law School Sabin Center for Climate Change Law, "Climate Change Litigation Database", online: *Climate Change Litigation Database* <www.climatecasechart.com> [perma.cc/5G3B-QR6W].

[222] See Ganguly, Setzer & Heyvaert, *supra* note 216 ("[…] the second wave of strategic private climate litigation shows no sign of cresting, as news alerts regarding new or planned litigation continue to be filed on a regular basis" at 850).

[223] For instance, the Victoria City Council endorsed a resolution to be presented to the Union of British Columbia Municipalities and the Association of Vancouver Island Coastal Communities, asking the Union to "explore the initiation of a class action lawsuit on behalf of member local governments to recover costs arising from climate change from major fossil fuels corporations." City of Victoria, "Minutes of Victoria Municipal Council" (17 January 2019) at 22–23, online (pdf): *City of Victoria* <www.victoria.ca> [perma.cc/4HUW-ZN8R] [City of Victoria]. Importantly, legislatures themselves could support plaintiffs through specific liability statutes. In 2018, Ontario MP Peter Tabuns (Ontario New Democratic Party) tabled a private bill imposing strict civil liability for climate change on greenhouse gas emitters, similar to the statutes governing tort litigation against the tobacco industry. See Bill 21, *An Act respecting civil liability for climate-related harms*, 3rd Sess, 41st Leg, Ontario, 2018 (referred to Standing Committee on Regulations and Private Bills 12 April 2018). The bill progressed in the legislative assembly while the Ontario Liberal Party formed the majority government. In June 2018, however, the Progressive Conservative Party of Ontario won the provincial general election and formed a new majority government. Its MPs described the bill as ideological and radical. It was ultimately defeated on second reading by a score of 53-18. See Bill 37, *An Act respecting civil liability for climate-related harms*, 1st Sess, 42nd Leg, Ontario, 2018 (defeated on second reading 25 October 2018); "Bill 37, An Act respecting civil liability for climate-related harms", 2nd reading, Ontario, Legislative Assembly, *Official Reports of Debates*, 42-1, No 41 (25 October 2018) at 1898–1903, 1915–16 (Jessica Bell, Bhutila Karpoche, Jeremy Roberts, Donna Skelly, Dave Smith & Peter Tabuns). Other provinces could nonetheless pick up on the initiative. The Victoria City Council, in particular, called the province of British Columbia to "consider legislation to support local governments in recovering costs arising from climate change from major fossil fuel corporations." City of Victoria, *supra* note 223 at 23. See also Andrew Gage, "Fossil-Fuel Firms Must Be Held Accountable; B.C. Needs Law to Help Recover Costs of Climate Change", Letter to the Editor, *Vancouver Sun* (26 July 2018) A13, online: <www.vancouversun.com> [perma.cc/8YQU-D378]; Clare Hennig, "B.C. Should Copy Ontario's New Climate Change Liability Bill, Says Environmental Lawyer", *CBC* (27 March 2018), online: <www.cbc.ca> [perma.cc/43DS-9LLS].

role to play in this context given the global implications of climate change.[224] The academic discussion on this point has already begun.[225]

Going back to the historical gap I mentioned earlier, my point is this: we should not forget the efforts we put into applying private law (including private international law) to other transboundary issues that were on the agenda not so long ago, and the lessons they can teach us in dealing with contemporary issues. This thesis fills the historical gap by reassessing the relevance of early debates on transboundary pollution against the rise of the human rights discourse, the judicial fight against climate change and the attempts at elaborating international liability regimes for some of the greatest environmental challenges of our time.

Outline of chapters

Chapter 1 argues that states have a duty to ensure prompt and adequate compensation for victims of transboundary pollution. I begin with a demonstration of the road taken from the first international liability regimes to present day. I introduce the issue of liability in international environmental law, including notions of state responsibility, state liability and treaty-based state/civil liability. I then demonstrate states' preference for regimes that

[224] Although not necessarily the primary battleground, jurisdiction over the defendants is at stake in several of the cases brought by American cities against the fossil fuel industry. See *City of New York*, *supra* note 220 at 470, n 1 (motions to dismiss for lack of personal jurisdiction deferred until ruling on the defendants' motion to dismiss for failure to state a claim); *City of Oakland* (2), *supra* note 219 at 9–16 (dismissing the claim for lack of personal jurisdiction over BP, Conocophillips, Exxon Mobil and Royal Dutch Shell on the basis that the defendents' activities were not adequately linked to plaintiffs' harm in California); *King County*, *supra* note 221 (challenge to the jurisdiction of the Washington courts on the basis of *City of Oakland*).

[225] On the private international law aspects of climate change litigation, see Meinhard Doelle & Sara Seck, "Loss & Damage from Climate Change: From Concept to Remedy?" (2020) Climate Pol'y at 5 [forthcoming, available online]; Olivera Boskovic, "Le contexte transnational en matière de responsabilité climatique" in Mathilde Hautereau-Boutonnet & Stéphanie Porchy-Simon, eds, *Le changement climatique, quel rôle pour le droit privé?* (Paris: Dalloz, 2019) 193 [Boskovic, "Responsabilité climatique"]; Matthias Lehmann & Florian Eichel, "Globaler Klimawandel und Internationales Privatrecht—Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden [Climate Change and Private International Law—Jurisdiction and Applicable Law in Transnational Litigation Concerning Individual Losses Caused by Global Warming]" (2019) 83:1 Rabel J Comp & Intl Priv L 77 [Lehmann & Eichel]; Fanny Giansetto, "Le droit international privé à l'épreuve des nouveaux contentieux en matière de responsabilité climatique" (2018) 145:2 JDI 507 [Giansetto]; Michael Byers, Kelsey Franks & Andrew Gage, "The Internationalization of Climate Damages Litigation" (2017) 7:2 Wash J Envtl L & Pol'y 264 at 285–302 [Byers, Franks & Gage]; Jutta Brunnée et al, "Overview of Legal Issues Relevant to Climate Change" in Lord et al, *supra* note 107, 23 at 44; Jonathan Zasloff, "The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change" (2008) 55:6 UCLA L Rev 1827 at 1875–81.

rely on domestic laws to implement the polluter-pays principle. I contrast this preference with the failure of many treaty-based civil liability regimes to achieve consensus. Taking a step back, I return to the primary objective of international liability regimes and argue that states now have a duty ensure prompt and adequate compensation of environmental damage. This statement finds support in scholarship and in the *ILC Principles on the Allocation of Loss.*[226] It also leads to the central proposition of my thesis, namely that private international law has a role in fulfilling this duty.

This is where my theoretical framework comes into play. The regulatory function of private international law has recently come under academic scrutiny in the literature on private international law and global governance, despite being somewhat intuitive to those accustomed to its methods and rules. The goal here is to move from a procedural perspective to a substantive one, demonstrating that the attempts we have seen in international environmental law to improve civil liability through domestic law are not misguided. They are, however, based on a certain conception of private international law which we must better understand—a conception that accounts for its regulatory function, the erosion of the public/private distinction and domestic courts' involvement in global governance.

The following two chapters build on the *ILC Principles on the Allocation of Loss* and assess how Canadian private international law regulates transboundary pollution and helps ensure (or inhibit) prompt and adequate compensation. I address in turn the jurisdiction of Canadian courts to hear a claim brought by local or foreign victims of transboundary pollution, and the implementation of environmental policy through choice of law rules and extraterritorial environmental statutes. The two chapters reexamine how Canadian private international law plays out in the context of transboundary pollution.

This is a much-needed update: the few comprehensive studies of this kind that are available in Canada date back several decades[227] and must be updated to account for the

[226] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 3(1).
[227] See Secretariat of the Commission for Environmental Cooperation, "Access to Courts and Administrative Agencies in Transboundary Pollution Matters" in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 4 (Cowansville: Yvon Blais, 2000) 205 [Secretariat of the CEC or CEC Report]; Muldoon, Scriven & Olson, *supra* note 109; Philip McNamara,

significant reforms of private international law that have occurred since then.[228] But my objective is not to conduct a detailed review of all the possible connecting factors, and their advantages and inconveniences for plaintiffs and defendants. Instead, and more importantly, I want to spell out the connections between the rules of private international law and the current state of international environmental law. It is from this novel perspective that I review the current legal landscape—not for its own sake, but to better understand its relationship with international environmental law.

Chapter 2 examines jurisdictional obstacles that have stood in the way of civil litigation since the *Trail Smelter* arbitration, and the solutions proposed over the years. I argue that courts are now increasingly willing to assert jurisdiction over transboundary pollution, which helps ensure prompt and adequate compensation. Targeted reforms have had little impact, but the general law of jurisdiction has evolved so as to render obsolete most of the obstacles faced by private actors in previous decades. To support this finding, I examine the jurisdictional requirements associated with the duty to ensure prompt and adequate compensation and the solutions proposed in the *ILC Principles on the Allocation of Loss*. Against this backdrop, I turn to the reforms undertaken in North America and the general law of jurisdiction in Canada. I examine the possibility of suing at the place of acting or the place of injury, the location (or *situs*) of transboundary pollution for jurisdictional purposes and peripheral issues such as the doctrine of *forum non conveniens* and the enforcement of foreign judgments. I conclude with the argument that Canadian jurisdictional rules are satisfactory in light of the duty to ensure prompt and compensation.

The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution (Frankfurt: Alfred Metzner, 1981) [McNamara]; Stephen McCaffrey, "Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Survey" (1981) 19:1 UWO L Rev 35 [McCaffrey, "Comparative Survey"]; Stephen C McCaffrey, *Private Remedies for Transfrontier Environmental Disturbances* (Morges: International Union for Conservation of Nature and Natural Resources, 1975) [McCaffrey, *Transfrontier Environmental Disturbances*]; Stephen C McCaffrey, "Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States" (1973) 3:2 Cal W Intl LJ 191 [McCaffrey, "Jurisdictional Considerations"].

[228] See generally Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001) 39 Can YB Intl L 117 [Wai, "Transformation"]; Robert Wai, "Justice Gérard La Forest and the Internationalist Turn in Canadian Jurisprudence" in Rebecca Johnson and John P McEvoy, eds, *Gérard V La Forest at the Supreme Court of Canada: 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 421.

Chapter 3 addresses the implementation of environmental policy in choice of law rules and extraterritorial environmental statutes. I argue that accounting for environmental policy in choice of law rules, including the polluter-pays principle, helps ensure prompt and adequate compensation. Again, I begin by examining the choice of law requirements associated with the duty to ensure prompt and adequate compensation, the solutions proposed in the *ILC Principles on the Allocation of Loss* and the growing international consensus surrounding one particular approach, namely the ubiquity principle. Through this discussion, I highlight the regulatory implications of choice of law with respect to transboundary pollution. Against this backdrop, I turn to Canadian law. I examine the rules which designate or displace the applicable law as well as the extraterritorial application of environmental statutes that contain civil causes of action. I conclude with the argument that Canadian choice of law rules fail to live up to the requirements of the duty to ensure prompt and adequate compensation.

The second and third chapters are not just similar in their structure: they are intertwined in their contents. Jurisdiction has substantive implications because it enables victims to access the courts of a state and have their claim heard on the merits (or prevents them from doing so) under local procedural rules. Courts' willingness to apply a law favourable to compensation may vary in each state. Jurisdiction is therefore crucial for victims seeking compensation. But even open access to the courts of all states would not suffice if the substantive law applied by those courts led to systematic denial of compensation. As the prospects of liability vary in each state, choice of law becomes crucial to ensure prompt and adequate compensation. Certain rules identified in this thesis fare better than others. I do not claim that they have a particular status in international law (customary or otherwise).[229] I do claim, however, that they can help ensure prompt and adequate compensation.

[229] As Zerk notes, however, "private international law at domestic level also has the potential to shape the development of customary rules. […] judicial decisions, including those on private jurisdictional and choice of law issues, form part of 'state practice' used to determine whether a new principle has passed into customary international law." Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 116 [Zerk].

The conclusion harks back to the duty to ensure prompt and adequate compensation and the *ILC Principles on the Allocation of Loss*. I summarize my research findings and I assess the ability of private international law to deal with transboundary pollution and to help fulfill the duty to ensure prompt and adequate compensation. This assessment provides valuable lessons on the legitimacy and viability of a liability regime that relies primarily on domestic law (including private international law) to hold polluters accountable. It helps determine whether it is misguided to further proceed in this direction.

1. Liability for transboundary pollution in international environmental law

I argue in this first chapter that states have under international law a duty to ensure prompt and adequate compensation for victims of transboundary pollution. They can discharge their duty either by assuming liability themselves or ensuring the availability of civil remedies to victims. In the latter, more plausible scenario, states can fulfill a part of their duty by adopting rules of private international law which help victims bring claims against transboundary polluters. Private international law addresses the gaps and overlaps associated with transboundary pollution and smoothens the regulatory coordination of domestic laws. My approach moves away from treaty-based civil liability regimes (which have become extremely difficult to put in place because states have conflicting interests and are reluctant to change their own domestic laws) while maintaining their rationale and objective. This central proposition runs through all chapters of this thesis and allows us to explore private international law from a new perspective.

I introduce the concepts of responsibility and liability in international environmental law, which paved the way for the proliferation of civil liability regimes and the development of the duty to ensure prompt and adequate compensation (1.1). I review the duty itself (1.2) and I identify the role of private international law in this context (1.3). I conclude with final observations (1.4).

This chapter does not deal exhaustively with either state responsibility, state liability or civil liability, nor does it provide a comprehensive account of their checkered history or status in customary international law. Jurists have produced staggering amounts of research on those topics and the ILC struggled with them for decades.[230] Grey areas

[230] In international environmental law, see Banda, *supra* note 176; Sandrine Maljean-Dubois, "International Litigation and State Liability for Environmental Damages: Recent Evolutions and Perspectives" in Jiunn-Rong Yeh, ed, *Climate Change Liability and Beyond* (Taipei: National Taiwan University Press, 2017) 27; Peel, *supra* note 40; Robert V Percival, "International Responsibility and Liability for Environmental Harm" in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (London: Routledge, 2013) 681 [Percival, "International Responsibility and Liability"]; Julio Barboza, *The Environment, Risk and Liability in International Law* (Leiden: Martinus Nijhoff, 2011) [Barboza]; Céline Nègre, "Responsibility and International Environmental Law" in James Crawford, Alain Pellet & Simon Olleson with the assistance of Kate Parlett, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 803; Phoebe Okowa, "Responsibility for Environmental Damage" in Malgosia Fitzmaurice, David M Ong & Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010) 303; Louise Angélique de La Fayette, "International Liability for

subsist but the true purpose of this thesis lies elsewhere: to study precisely how private international law and its regulatory function fit in the current landscape of international environmental law.

1.1. State responsibility, state liability and civil liability

This section introduces the notions of state responsibility, state liability and civil liability in international environmental law. I deal with fundamental distinctions (1.1.1) then turn to state responsibility (1.1.2), state liability (1.1.3) and civil liability (1.1.4). This section helps us achieve a better understanding of what is at stake in international liability regimes. It also contextualizes the ILC's choice to focus on prompt and adequate compensation as the guiding principle of international liability regimes.

1.1.1. Introduction to the distinction between responsibility and liability

Liability is accurately described as the "Yeti of international environmental law—pursued for years, sometimes spotted in rough outlines, but remarkably elusive in

---

Damage to the Environment" in *ibid*, 320; Malgosia Fitzmaurice, "International Responsibility and Liability" in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 1011; Sachs, *supra* note 39; Günther Handl, "International Accountability for Transboundary Environmental Harm Revisited: What Role for State Liability?" (2007) 37:2/3 Envtl Pol'y & L 116 [Handl]; Wolfrum, Langenfeld & Minnerop, *supra* note 196; "Boyle, "Environmental Liability", *supra* note 46; Kevin R Gray, "Transboundary Environmental Disputes Along the Canada-US Frontier: Revisiting the Efficacy of Applying the Rules of State Responsibility" (2005) 43 Can YB Intl L 333; Brunnée, "State Responsibility", *supra* note 46; Brunnée, "Sense and Sensibility", *supra* note 39; Xue, *supra* note 117; Mansour Jabbari-Gharabagh, "Type of State Responsibility for Environmental Damage" (2001) 33:1 RJT 59; Anne Daniel, "Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?" (2003) 12:3 RECIEL 225; Tullio Scovazzi, "State Responsibility for Environmental Harm" (2002) 12 YB Intl Envtl L 43; Robin R Churchill, "Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects" (2001) 12:1 YB Intl Envtl L 3; Phoebe Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: Oxford University Press, 2000) [Okowa]; Lefeber, *Transboundary Environmental Interference*, *supra* note 50; Peter Wetterstein, "Current Trends in International Civil Liability for Environmental Damage" (1994) 1:1 Ann Surv Intl & Comp L 181; Thomas Gehring & Markus Jachtenfuchs, "Liability for Transboundary Environmental Damage: Towards a General Liability Regime?" (1993) 4:1 Eur J Intl L 92 [Gehring & Jachtenfuchs]; Jutta Brunnée, "The Responsibility of States for Environmental Harm in a Multinational Context: Problems and Trends" (1993) 34:3 C de D 827; Peter Wetterstein, "Recent Trends in the Development of International Civil Liability" (1991) 60:1 Nordic J Intl L 49; Allan Rosas, "Issues of State Liability for Transboundary Environmental Damage" (1991) 60:1 Nordic J Intl L 29; Günther Doeker & Thomas Gehring, "Private or International Liability for Transnational Environmental Damage: The Precedent of Conventional Liability Regimes" (1990) 2:1 J Envtl L 1.

practice."[231] As an enforcement mechanism, its place in the arsenal of responses to noncompliance in international law leaves no doubt. As a result, "few multilateral environmental agreements […] can be negotiated today without running across the liability issue in one way or another."[232] Yet the idea that polluters should be held liable for the harm that they cause (which generally carries an obligation to compensate victims of the harm) is fraught with difficulties in all its basic components: the identity of the polluter and the role of the state, the standard of care, the nature and threshold of the harm and the very assumption that the prospect of liability will lead to deterrence.

International lawyers approached the problem first by distinguishing state liability from state responsibility. The distinction became ubiquitous under the impulse of the ILC, which separated the two topics early on.[233] This approach led to much controversy,[234] not the least because the distinction is unintelligible in some languages, including French, which uses *responsabilité* to describe both notions.[235]

State responsibility entails the violation of an obligation under international law—primary norms typically found in treaties, customary international law or general principles of international law.[236] State liability entails the compensation of damage in the absence of a wrongful act.[237] The latter is concerned with the transboundary risk

---

[231] Sachs, *supra* note 39 at 839. See also Todd, "Environmental Justice", *supra* note 97 at 122; Percival, "International Responsibility and Liability", *supra* note 230 at 692; Robert V Percival, "Liability for Environmental Harm and Emerging Global Environmental Law" (2010) 25:1 Md J Intl L 37 at 38 [Percival, "Liability for Environmental Harm"].

[232] Brunnée, "Sense and Sensibility", *supra* note 39 at 351. See also Brunnée, "State Responsibility", *supra* note 46 at 28, n 147.

[233] See International Law Commission, "Report of the Commission to the General Assembly on the work of its twenty-fifth session" (UNGAOR, 28th Sess, Supp No 10, UN Doc A/9010/Rev.1 (1973)) in *Yearbook of the International Law Commission 1973*, vol 2, part 2 (New York: UN, 1975) 161 at 169, para 38 (UN Doc A/CN.4/SER.A/1973/Add.l), as noted by the UNGA in *Report of the International Law Commission*, GA Res 3071(XXVIII), UNGAOR, 28th Sess, Supp No 30, UN Doc A/9334 (1973).

[234] See NLJT Horbach, "The Confusion About State Responsibility and International Liability" (1991) 4:1 Leiden J Intl L 47; Alan E Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?" (1990) 39:1 ICLQ 1.

[235] See Gerhard Hafner & Isabelle Buffart, "The Work of the International Law Commission: From Liability to Damage Prevention" in Kerbrat & Maljean-Dubois, *supra* note 110, 233 at 234–35 [Hafner & Buffart].

[236] See Alain Pellet, "The Definition of Responsibility in International Law" in Crawford, Pellet & Olleson, *supra* note 230, 3.

[237] See Michel Montjoie, "The Concept of Liability in the Absence of an Internationally Wrongful Act" in Crawford, Pellet & Olleson, *supra* note 230, 503 [Montjoie].

associated with legitimate activities occurring in a state's territory (including activities carried out by private actors).[238] Transboundary pollution is a prime example because it occurs as a result of activities which may not be unlawful or inherently reprehensible (energy production, for instance).

State responsibility/liability has no direct equivalent in domestic liability law, but the two can easily capture the same kind of conduct. The so-called regulatory liability of the state in tort, for instance, targets the failure of public authorities to ensure compliance with environmental law. Trial and appellate courts have grappled with claims brought by victims against polluters and the public authorities who had been negligent in overseeing or investigating the operations.[239] The Supreme Court of Canada even hinted at the Crown's potential liability for inactivity in the face of environmental threats.[240] This innovative but unsettled subset of tort law[241] echoes the notion of due diligence in international law, which requires that states take measures to prevent transboundary harm before it occurs. The line between domestic and international liability blurs even more when states themselves carry out projects with environmental impacts. While this chapter focuses on international law, the parallels with state liability in domestic law reveal a common struggle: assigning liability to public authorities who regularly make complex

[238] See Barboza, *supra* note 230 at 3.
[239] See *Ernst v EnCana Corp*, 2014 ABQB 672 at paras 31–71, [2015] 1 WWR 719; *Girard c 2944-7828 Québec Inc*, [2003] RJQ 2237 at 2253–74, 2003 CanLII 1067 (Sup Ct), rev'd (2004) [2005] RRA 13, 2004 CanLII 47874 (Qc CA); *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 at 289–93, [2002] OTC 515 (Sup Ct), aff'd (2004), 44 CPC (5th) 276, 2004 CanLII 34446 (Div Ct), rev'd (2006), 78 OR (3d) 641, 2006 CanLII 913 (Ont CA), leave to appeal to SCC refused, [2006] 2 SCR viii; *Pearson v Inco Ltd* (2001), 16 CPC (5th) 151, [2001] OTC 919 (Sup Ct). See also *Pembina County Water Resource District v Manitoba*, 2008 FC 1390 at paras 31–45, 63 CCLT (3d) 28; *Tottrup v Lund*, 2000 ABCA 121 at paras 18–38, 45–64, 186 DLR (4th) 226. For cases in which public authorities were involved as perpetrators rather than regulators, see *Spieser c Canada (Procureur général)*, 2020 QCCA 42, [2020] JQ no 142 (QL); *Dow Chemical Company v Ring*, 2010 NLCA 20, 297 Nfld & PEIR 86, leave to appeal to SCC refused, [2010] 2 SCR viii; *Bryson v Canada (Attorney General)*, 2009 NBQB 204, 353 NBR (2d) 1, leave to appeal to NBCA adjourned *sine die*, 2009 CanLII 50509, [2009] NBJ No 309 (QL) (CA); *R v Brooks*, 2009 SKQB 509, [2010] 6 WWR 81, leave to appeal to Sask CA refused, 2010 SKCA 55, [2010] 6 WWR 149; *Ward v Canada (Attorney General)*, 2007 MBCA 123, 286 DLR (4th) 684.
[240] See *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 81, [2004] 2 SCR 74 [*Canadian Forest Products*] [emphasis in the original].
[241] This applies to the liability of public authorities as a whole. See *Paradis Honey Ltd v Canada*, 2015 FCA 89, [2016] 1 FCR 446, leave to appeal to SCC refused, [2015] 3 SCR vi (deploring that "[…] the doctrine governing the liability of public authorities remains chaotic and uncertain, with no end in sight" at para 126); Freya Kristjanson & Stephen Moreau, "Regulatory Negligence and Administrative Law" (2012) 25:2 Can J Admin L & Prac 104 (pointing to "the lamentable state of confusion evident in this area of the law" at 118).

policy choices to solve problems that have no single, ready-made or scientifically foolproof answer.

1.1.2. State responsibility

Under the regime of state responsibility codified by the ILC, parts of which are now thought to be part of customary international law[242] but which is still unincorporated into a treaty,[243] states can be held responsible for an internationally wrongful act, that is, the breach of an international obligation attributable to the state.[244] Environmental treaties may also contain specific rules to that effect—for instance, the 1982 *UNCLOS*[245] and the 2005 *Antarctic Liability Annex* (not yet in force).[246]

Identifying an internationally wrongful act is relatively easy when it relates to the breach of a treaty obligation. Obligations arising from customary international environmental law are, however, notoriously difficult to pinpoint and insufficiently developed. Their open-ended nature makes it difficult to identify exactly what states can and cannot do, let

[242] See Peel, *supra* note 40 at 51; Boyle, "Environmental Liability", *supra* note 46 at 3–4.
[243] See Federica I Paddeu, "To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments" (2018) 21 Max Planck YB UN L 83.
[244] See *Responsibility of States for internationally wrongful acts*, GA Res 56/83, UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) Annex, reprinted in UN, vol 2, *supra* note 37 at 399–412, arts 1–2. See also *Responsibility of States for internationally wrongful acts*, GA Res 74/180, UNGAOR, 74th Sess, Supp No 49, UN Doc A/RES/74/180 (2019); *Responsibility of States for internationally wrongful acts*, GA Res 71/133, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/133 (2016); *Responsibility of States for internationally wrongful acts*, GA Res 68/104, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/104 (2013); *Responsibility of States for internationally wrongful acts*, GA Res 65/19, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/19 (2010); *Responsibility of States for internationally wrongful acts*, GA Res 62/61, UNGAOR, 62nd Sess, Supp No 49, UN Doc A/RES/62/61 (2007); *Responsibility of States for internationally wrongful acts*, GA Res 59/35, UNGAOR, 59th Sess, Supp No 49, UN Doc A/RES/59/35 (2004).
[245] See *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, UKTS 1999 No 81, 21:6 ILM 1261 (entered into force 16 November 1994), arts 139(2), 235(1), 304 [*UNCLOS*].
[246] See *Liability Arising from Environmental Emergencies*, 14 June 2005, [2011] ATNIF 7, art 10, 45:1 ILM 5 (not yet in force), reprinted in Antarctic Treaty Consultative Meeting, *Final Report of the Twenty-Eighth Antarctic Treaty Consultative Meeting: Stockholm, Sweden, 6–17 June 2005* (Buenos Aires: Antarctic Treaty Secretariat, 2005) at 63–72, Annex VI to the *Protocol on Environmental Protection to the Antarctic Treaty*, 4 October 1991, ATCM Doc XI ATSCM/2/3/2, UKTS 1999 No 6, 30:6 ILM 1461 (entered into force 14 January 1998) [*Antarctic Liability Annex*]. The Protocol itself was adopted under the *Antarctic Treaty*, 1 December 1959, 402 UNTS 71, Can TS 1988 No 34, 19:4 ILM 860 (entered into force 23 June 1961). Materials pertaining to Antarctica are reprinted in Ben Saul & Tim Stephens, eds, *Antarctica in International Law* (Oxford: Hart, 2015).

alone address complex environmental phenomena with the same precision as detailed regulation.[247]

At a minimum, states have a duty to prevent and abate transboundary pollution. The International Court of Justice (ICJ) held on several occasions that states must "use all the means at [their] disposal in order to avoid activities which take place in [their] territory, or in any area under [their] jurisdiction, causing significant damage to the environment of another [s]tate."[248] This is the prevention principle.[249] This obligation of due diligence is the core component of customary international environmental law, but it is so open-ended that it is difficult to determine what it requires, and whether it has been breached. Its implementation depends on more concrete procedural norms such as the obligation to conduct an environmental impact assessment and to consult and notify potentially affected states when a project poses a risk of transboundary damage.[250] Procedural norms

[247] On lack of specificity, see Brunnée, "State Responsibility", *supra* note 46 at 9, 26; Brunnée, "Sense and Sensibility", *supra* note 39 at 353–54; Daniel Bodansky, "Customary (And Not So) Customary International Environmental Law" (1995) 3:1 Ind J Global Leg Stud 105 at 118 [Bodansky, "Customary International Environmental Law"], reprinted in Paula M Pevato, ed, *International Environmental Law*, vol 1 (London: Routledge, 2018) 105. For Bodansky's more recent take on customary international environmental law, see Bodansky, *Art and Craft*, *supra* note 70, ch 9. Anderson hints at the same problem in the context of human rights litigation. He suggests that human rights law can serve to hold transnational corporations accountable for environmental damage in the absence of effective cross-border regulation but adds that "it is unlikely that the language of human rights will be able to provide the detailed environmental regulation that the international community will increasingly need in the twenty-first century." Anderson, *supra* note 5 at 424–25. *Cf* Birnie, Boyle & Redgewell, *supra* note 46 (questioning whether "maintaining normative coherence and strict adherence to law are more important than finding mechanisms that settle disputes and secure compliance with agreed commitments" and concluding that "[o]n this question the international legal system has always been pragmatic rather than principled" at 213); Gehring & Jachtenfuchs, *supra* note 230 (noting that "[a]s long as international conflicts on liability issues can be solved *in a satisfactory manner* by using simplified conventional procedures, states will not insist on basing their claims on the comparatively vague rules of state responsibility" at 104 [emphasis in the original]).

[248] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, [2015] ICJ Rep 665 at paras 104, 118, 168 [*Nicaragua Border Area*]; *Case concerning Pulp Mills on the River Uruguay (Uruguay v Argentina)*, [2010] ICJ Rep 14 at para 101 [*Pulp Mills*]. See also *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 92 at para 53 [*Gabčíkovo-Nagymaros*]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 29 [*Nuclear Weapons*].

[249] See generally Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge: Cambridge University Press, 2018); Leonardo Estrela Borges, *Les obligations de prévention dans le droit international de l'environnement et ses conséquences dans la responsabilité internationale des États* (Paris: L'Harmattan, 2016).

[250] See *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 1989 UNTS 309, Can TS 1998 No 11, 30:3 ILM 800 (entered into force 27 June 1997) [*Espoo Convention*]; *Nicaragua Border Area*, *supra* note 248 at paras 104, 153, 161, 168; *Pulp Mills*, *supra* note 248 at paras 204–205; *Consideration of prevention of transboundary harm from hazardous activities and*

branch out of the substantive duty to prevent harm and participate in its maturation.[251] They are important, but they remain basic in scope and in substance even when they seem well-established.

We tend to assume that customary international environmental law—when it exists—is easily enforced through the judicial process, while in fact the opposite is true.[252] Environmental disputes rarely result in litigation, and even less so in an interstate setting. An incident as dramatic as Chernobyl did not trigger claims from victim states against the Soviet Union.[253] Neither did Fukushima (although in this case, the catastrophe did not have severe transboundary impacts due to Japan's geographic location).[254] A critical mass of cases would not only reinforce the law of state responsibility itself, but also help transform broad obligations such as the prevention principle into something more tangible.[255] This is not the case yet.

Examples of state responsibility for environmental damage do exist, but they are peculiar and their precedential value (in the general sense of a persuasive and replicable approach) is debatable. *Resolution 687* of the UN Security Council (UNSC) is often invoked as an unequivocal precedent of state responsibility for environmental damage.[256] The UNSC held Iraq "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injuries to foreign

---

allocation of loss in the case of such harm, GA Res 62/68, UNGAOR, 62nd Sess, Supp No 49, UN Doc A/RES/62/68 (2007) Annex, reprinted in UN, vol 2, *supra* note 37 at 412–18 [*ILC Articles on Prevention*].

[251] See Owen McIntyre, "The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources" (2006) 46:1 Nat Resources J 157 at 170.

[252] See Bodansky, "Customary International Environmental Law", *supra* note 247 at 117. See also Sandrine Maljean-Dubois, "La quête d'effectivité du droit international de l'environnement" in Delphine Misonne, *À quoi sert le droit de l'environnement? Réalité et spécificité de son apport au droit et à la société* (Brussels: Bruylant, 2019) 251 at 265 [Maljean-Dubois].

[253] See Okowa, *supra* note 230 at 121–30.

[254] See Jeremy Suttenberg, "Who Pays? The Consequences of State Versus Operator Liability Within the Context of Transboundary Environmental Nuclear Damage" (2016) 24:2 NYU Envtl LJ 201 at 222–23; Günther Handl, "Preventing Transboundary Nuclear Pollution: A Post-Fukushima Legal Perspective" in Jayakumar et al, *supra* note 3, 190 at 191–92, n 5.

[255] As Springer explains, "[i]nternational environmental law is best developed when states recognize the value of creating rules and procedures that address environmental problems before they become sources of international dispute. Yet the record of state behaviour suggests that too often such proactive collaboration simply does not take place. The good news is that law is applied, its limitations uncovered, and better law developed even in times of conflict." Springer, *supra* note 79 at 234. On normative development in international environmental law, see Bodansky, *Art and Craft*, *supra* note 70, ch 9.

[256] See Birnie, Boyle & Redgewell, *supra* note 46 at 212.

[g]overnments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."[257] It established the United Nations Compensation Commission (UNCC), a subsidiary organ charged with administering compensation and assessing the value of damage suffered in Kuwait.[258] The panel of commissioners responsible for the adjudication of environmental claims noted that environmental protection and conservation were a common concern, and that states had obligations not only towards other states but also towards future generations and the international community.[259]

The implications of *Resolution 687* for international environmental law are unclear.[260] On the one hand, the practice of the UNCC provides a precedent that may facilitate the invocation of state responsibility or help design specific compensation schemes in other

[257] *Resolution 687*, UNSCOR, 46th Year, 2981st Mtg, UN Doc S/RES/687 (1991) 11 at para 16, 30:3 ILM 947. See also *Resolution 686*, UNSCOR, 46th Year, 2978th Mtg, UN Doc S/RES/686 (1991) 8 at para 2(b), 30:2 ILM 568; *Resolution 674*, UNSCOR, 45th Year, 2951st Mtg, UN Doc S/RES/674 (1990) 25 at para 8, 29:6 ILM 1561.

[258] See *Resolution 692*, UNSCOR, 46th Year, 2987th Mtg, UN Doc S/RES/692 (1991) 18 at para 3, 30:3 ILM 864.

[259] See United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Installment of "F4" Claims*, UN Doc S/AC.26/2005/10 (2005) at para 40; United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Fourth Installment of "F4" Claims*, UN Doc S/AC.26/2004/17 (2004) at para 38; United Nations Compensation Commission, *Report and Recommendations Made by the Panal of Commissioners Concerning Part One of the Fourth Installment of "F4" Claims*, UN Doc S/AC.26/2004/16 (2004) at para 43; United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the Third Installment of "F4" Claims*, UN Doc S/AC.26/2003/31 (2003) at para 42, 43:3 ILM 704. See also Cymie R Payne, "Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990–1991 Gulf War" in Carl Bruch, Carroll Muffett & Sandra S Nichols, eds, *Governance, Natural Resources and Post-Conflict Peacebuilding* (Abingdon: Routledge, 2016) 719 at 750; Peter H Sand, "Catastrophic Environmental Damage and the Gulf War Reparation Awards: The Experience of the UN Compensation Commission" (2011) 105 Am Soc'y Intl L Proc 430 at 431; Peter H Sand, "Environmental Principles Applied" in Cymie Payne & Peter H Sand, eds, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford: Oxford University Press, 2011) 170 at 173–74.

[260] Interestingly, the scope of *Resolution 687* itself was debated at the time. Had the UNSC fully disposed of Iraq's liability (in which case the UNCC would simply administer claims), or had it assumed that the UNCC would decide liability on a case-by-case basis? See Andrea Gattini, "The UN Compensation Commission: Old Rules, New Procedures on War Reparations" (2002) 13:1 Eur J Intl L 161 at 167–68. *Cf Provisional Rules for Claims Procedure*, UNCCGC Dec 10, 6th Sess, UN Doc S/AC/26/1992/10 (1992) Annex, art 31, 31:5 ILM 1053 ("[i]n considering the claims, Commissioners will apply Security Council Resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commisioners shall apply other relevant rules of international law"). In the end, Iraq accepted liability and the UNCC treated it as being established in principle. See on this point José R Allen, "Points of Law" in Payne & Sand, *supra* note 259, 141 at 143; United Nations Security Council, "Identical Letters Dated 6 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council" (6 April 1991), UN Doc S/22456 (1991) at 7.

cases.[261] On the other hand, judges cannot, unlike the UNSC, craft brand-new compensation mechanisms or create institutions such as the UNCC to implement their decisions.[262] The practice of the UNCC is notable, but not the harbinger of a radical evolution in international environmental law.[263]

Cases brought before international courts and tribunals are sparse and only occasionally result in a judgment on the merits that satisfactorily clarifies substantive obligations of customary international environmental law.[264] In the *Gabčíkovo-Nagymaros* dispute over the construction of a dam on the Danube, for instance, the ICJ focused on the bilateral treaty obligations of the parties.[265] It did not address Hungary's claim that Slovakia had breached its obligations to prevent environmental damage and to cooperate with affected states.[266]

More recently, the ICJ held Nicaragua responsible for environmental damage caused by excavations and military activities in a disputed territory which it found belonged to Costa Rica.[267] But the ICJ did so only on the basis that Nicaragua had violated Costa Rica's sovereignty. It rejected the argument that Nicaragua had breached a procedural obligation to carry out an environmental impact assessment and to notify and consult Costa Rica, as well as a substantive obligation not to cause harm.[268] In another case between the same parties and decided in the same judgment, the ICJ found that Costa Rica ought to have carried out an environmental impact assessment when it built a road

[261] See Sands & Peel, *supra* note 108 at 743, 755, 803.
[262] See Birnie, Boyle & Redgewell, *supra* note 46 at 232.
[263] See Jean-Christophe Martin, "The United Nations Compensation Commission Practice with Regards to Environmental Claims" in Kerbrat & Maljean-Dubois, *supra* note 110, 251 at 267.
[264] See generally José Juste-Ruiz, "The International Court of Justice and International Environmental Law" in Nerina Boschiero et al, eds, *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: TMC Asser, 2013) 383; Tim Stephens, *International Courts and Environmental Protection* (Cambridge: Cambridge University Press, 2009); Jorge E Viñuales, "The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment" (2008) 32:1 Fordham Intl LJ 232.
[265] See *Gabčíkovo-Nagymaros*, *supra* note 248.
[266] See *ibid* (Memorial of the Republic of Hungary at paras 6.56–82).
[267] See *Nicaragua Border Area*, *supra* note 248 at para 92. The ICJ recently issued its judgment on the amount of compensation owed by Nicaragua to Costa Rica, including for environmental damage. This is an unprecedented ruling for the ICJ. See *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, [2018] ICJ Rep 15 at paras 39–87.
[268] See *ibid* at paras 112, 120.

alongside the San Juan river,[269] but that the construction of the road itself had not caused significant transboundary harm.[270]

Other cases never reach the trial stage. Consider the *Aerial Spraying* case brought to the ICJ in 2008. The dispute involved Colombia's spraying of herbicides over coca plantations to eradicate drug production. The herbicides drifted into Ecuador and caused severe harm to the residents' health and their environment. This textbook example of transboundary pollution boosted observers' hopes of an authoritative and comprehensive ruling in an area of the law that has few of them. Unfortunately for them, parties settled their dispute on the eve of oral submissions on the merits.[271]

The settlement in *Aerial Spraying* proves that the prospect of interstate litigation can persuade the parties to find more durable arrangements and perhaps even put an end to transboundary pollution.[272] It also reminds us that the scarcity of reported cases may not accurately reflect the practice of invoking state responsibility for transboundary pollution.[273] As Peel suggests, "[e]ven if rarely used in practice, a robust and effective regime of state responsibility for transboundary pollution can stimulate more concerted efforts to prevent environmental harm or to better mitigate damage through improved systems of risk management, risk transfer, rehabilitation and compensation mechanisms."[274] But settlements do not clarify the law for future purposes, and the international community is still longing for clear answers to several key aspects of international environmental law, including the nature of the measures required to discharge the duty to prevent harm. Better defined norms would guide states in their conduct and thus have practical and symbolic value outside the courtroom.[275]

---

[269] See *ibid* at paras 162, 168, 173.
[270] See *ibid* at para 217.
[271] See *Case concerning Aerial Herbicide Spraying (Ecuador v Colombia)*, Order of 13 September 2013, [2013] ICJ Rep 278.
[272] See Alan Boyle, "Transboundary Air Pollution: A Tale of Two Paradigms" in Jayakumar et al, *supra* note 3, 233 at 255 [Boyle, "Two Paradigms"].
[273] See Peel, *supra* note 40 at 75, n 105.
[274] *Ibid* at 78.
[275] As Maljean-Dubois argues, "[l]*e contentieux demeure rare dans la vie internationale et là n'est donc pas l'essentiel qui est probablement plutôt à chercher dans les fonctions symboliques et pédagogique et dans celle d'orientation stratégique. Pourtant, même ces fonctions-là se trouvent limitées par l'insuffisante qualité des normes.*" Maljean-Dubois, *supra* note 252 at 266.

Simply put, the law of state responsibility is stuck in a vicious circle in which uncertain customary obligations impede the articulation of a claim while states maintain uncertainty to shield themselves from legal consequences.[276] The most optimistic scholars concede that it has evolved slowly in environmental matters,[277] while others describe shared responsibility in this area as a simple "buck-passing" process from state to operator, from operator to insurer and so on, tolerated by states only—and precisely—because they are not part of it.[278] All signs point to a lack of political interest in the consequences of misconduct. States obviously have less difficulty agreeing on an obligation to conduct an environmental assessment than on the actual consequences of a failure to do so.[279] Their inaction is made easier by the fact that they are rarely the direct cause of pollution.[280]

State responsibility will remain an incomplete means of dealing with transboundary pollution unless customary international environmental law becomes more sophisticated and the regime is applied more often.[281] There are signs of hope. Climate change, for instance, is sparking new doctrinal interest in the definition of primary obligations and the application of the law of state responsibility.[282] States threatened with the catastrophic

---

[276] See Brunnée, "Sense and Sensibility", *supra* note 39 at 354; Craik, "Second *Trail Smelter* Dispute", *supra* note 66 at 112; Craik, "*Trail Smelter* Redux", *supra* note 12 at 149.

[277] See Alexandre Kiss & Dinah Shelton, "Strict Liability in International Environmental Law" in Tafsir Malick Ndiaye & Rüdiger Wolfrum, eds, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Leiden: Martinus Nijhoff, 2007) 1131 at 1131 [Kiss & Shelton].

[278] See Ilias Plakokefalos, "Liability for Transboundary Harm" in André Nollkaemper & Ilias Plakokefalos, eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017) 1051 at 1064 [Plakokefalos].

[279] See Springer, *supra* note 79 at 92.

[280] See for instance the Canada-Philippines dispute over the shipment of waste containers by a Canadian company, *supra* note 45.

[281] In a technical report issued in 2018, the UN Secretary-General expressed precisely the same view, writing somewhat mildly that "[r]he rules of [s]tate responsibility may need to be further developed if they are to play any significant role as a tool for redressing transboundary environmental harm." Secretary-General of the United Nations, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, UN Doc A/73/419 (2018) at 40, para 96 [UN Secretary-General].

[282] See Global Justice Program at Yale University, "Oslo Principles on Global Climate Change Obligations" (1 March 2015), online (pdf): *Global Justice Program* <http://globaljustice.yale.edu> [perma.cc/UY9B-9EDZ]; International Law Association, "Legal Principles Relating to Climate Change" (2014) 76 Intl L Assn Rep Conf 330, as considered and adopted by International Law Association, "Resolution No 2/2014: Declaration of Legal Principles Relating to Climate Change" (2014) 76 Intl L Assn Rep Conf 21. In legal scholarship, see eg Benoit Mayer, "Climate Assessment as an Emerging Obligation Under Customary International Law" (2019) 68:2 ICLQ 271; Benoit Mayer, *The International Law of Climate Change* (Cambridge: Cambridge University Press, 2018) at 78–82, 267–71 [Mayer, *International*

consequences of global warming are pushing for a change. In 2002, Tuvalu threatened to sue Australia and the United States in the ICJ over greenhouse gas emissions.[283] In 2012, the Republic of Palau sought to secure the support of the UN General Assembly (UNGA) to request an advisory opinion from the ICJ. Palau proposed to ask the ICJ to identify "the obligations under international law of a [s]tate for ensuring that activities under its jurisdiction or control that emit greenhouse gas do not cause, or substantially contribute to, serious damage to another [s]tate or [s]tates."[284] The International Union for Conservation of Nature (IUCN) later picked up on the same idea.[285] Neither initiative came to fruition, but scholars continue to discuss the possibility of an advisory opinion from the ICJ.[286] While we should undoubtedly have this discussion, it is difficult to see how a problem as complex and politically sensitive as climate change can push states to

Law of Climate Change]; Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017) at 44–51 [Bodansky, Brunnée & Rajamani]; Benoit Mayer, "Climate Change Reparations and the Law and Practice of State Responsibility" (2017) 7:1 Asian J Intl L 185 [Mayer, "State Responsibility"]; Benoit Mayer, "State Responsibility and Climate Change Governance: A Light Through the Storm" (2014) 13:3 Chinese J Intl L 539; Christina Voigt, "State Responsibility for Climate Change Damages" (2008) 77:1/2 Nordic J Intl L 1; Michael G Faure & André Nollkaemper, "International Liability as an Instrument to Prevent and Compensate for Climate Change" (2007) 43:A Stan J Intl L 123.

[283] See Kalinga Seneviratne, "Tuvalu Steps up Threat to Australia, U.S.", *Tuvalu News* (8 September 2002), online: <www.tuvaluislands.com> [perma.cc/NB72-5X75].

[284] United Nations, Press Conference, "Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change" (3 February 2012), online: *United Nations Meetings Coverage and Press Releases* <www.un.org/press/en> [perma.cc/RF8R-49GC].

[285] See International Union for Conservation of Nature, "Request for an Advisory Opinion of the International Court of Justice on the Principle of Sustainable Development in View of the Needs of Future Generations", IUCN Res WCC-2016-Res-079-EN (2016), online (pdf): *International Union for Conservation of Nature* <www.iucn.org> [perma.cc/QLT6-QPP8].

[286] See Mayer, *International Law of Climate Change*, *supra* note 282 at 87, 241–42; Seokwoo Lee & Lowell Bautista, "Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate against Climate Change: Making out a Claim, Causation, and Related Issues" (2018) 45:1 Ecology LQ 129 at 152; Myanna Dellinger, "See You in Court: Around the World in Eight Climate Change Lawsuits" (2018) 42:2 Wm & Mary Envtl L & Pol'y Rev 525 at 548–49; Daniel Bodansky, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections" (2017) 49:2 Ariz St LJ 689; Philippe Sands, "Climate Change and the Rule of Law: Adjudicating the Future in International Law" (2016) 28:1 J Envtl L 19; Roda Verheyen & Cathrin Zengerling, "International Dispute Settlement" in Cinnamon P Carlarne, Kevin R Gray & Richard Tarasofsky, eds, *The Oxford Handbook of International Climate Change Law* (Oxford: Oxford University Press, 2016) 417 at 427–28. See also Yale Center for Environmental Law and Policy, "Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court" (2013), online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943> (report produced by Yale graduate students in a class taught at Yale Law School by Palau's ambassador at the UN, Palau's legal adviser and a Yale professor of law, outlining the justifications for an intervention by the ICJ).

finally accept the idea of state responsibility for environmental damage when they did so little in the past.

1.1.3. State liability

Liability for environmental damage (without an internationally wrongful act) has developed much more rapidly than state responsibility, albeit again with mixed results. International liability regimes target either the state (state liability) or a private party, typically the operator of a facility (civil liability). They provide compensation, often by imposing strict liability on the defendant (in other words without requiring the proof of some wrongdoing) while capping the amount payable as a tradeoff for a more stringent liability standard. They can also require the industry to set up compensation funds and obtain insurance coverage to ensure that victims get paid after an incident.[287]

The first comprehensive international liability regime appeared in 1960 to deal with the potentially disastrous consequences of the peaceful use of nuclear energy. The real urgency to develop international liability regimes came in the aftermath of the grounding and breakup of the *Torrey Canyon* supertanker in the North Sea in 1967.[288] The incident reminded the world that catastrophic damages could result from lawful but hazardous activities. It paved the way for the 1969 *Convention on Civil Liability for Oil Pollution Damage*[289] and the 1971 *Convention on the Establishment of an International Fund for*

[287] See Michael G Faure, "In the Aftermath of Disaster: Liability and Compensation Mechanisms as Tools to Reduce Disaster Risks" (2016) 52:1 Stan J Intl L 95 at 123; Micheal G Faure, "Liability and Compensation as Instruments of Disaster Risk Reduction?" in Jacqueline Peel & David Fischer, eds, *The Role of International Environmental Law in Disaster Risk Reduction* (Leiden: Brill Nijhoff, 2016) 266 at 291–92 (identifying four features of civil liability regimes, namely strict liability, compulsory financial guarantees, compensation caps and the channelling of liability).

[288] See Jacqueline Peel, "International Environmental Law and Climate Disasters" in Rosemary Lyster & Robert RM Verchick, eds, *Research Handbook on Climate Disaster Law: Barriers and Opportunities* (Cheltenham: Edward Elgar, 2018) 77 ("[t]he evolution of treaty regimes governing oil pollution and radioactive contamination from nuclear facilities has closely tracked the occurrence of high-profile disasters, including the Chernobyl nuclear reactor meltdown and major oil spill incidents such as the *Torrey Canyon* in 1967, the *Amoco Cadiz* in 1978, the *Exxon Valdez* in 1989, and the *Prestige* in 2002" at 84–85). See also Jacqueline Peel & David Fischer, "International Law at the Intersection of Environmental Protection and Disaster Risk Reduction" in Peel & Fischer, *supra* note 287, 1 at 7.

[289] See *International Convention on Civil Liability for Oil Pollution Damage*, 27 November 1992, 1956 UNTS 255, UKTS 1996 No 86 (entered into force 30 May 1996) as amended by IMO Res LEG.1(82), 18 October 2000, IMO Doc Res LEG.1(82) (entered into force 1 November 2003), superseding *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 3, Can TS 1989 No 46, 9:1 ILM 45 (entered into force 19 June 1975) [*CLC*].

Compensation for Oil Pollution Damage.[290] The regime, still in place today, seeks to compensate victims of oil pollution using funds from the cargo industry.

Three years after the adoption of the *CLC*, the international community committed in Stockholm to develop international liability law.[291] Much insistence was initially placed on the liability of the state, as opposed to that of private parties. The ILC explored the idea that states could be held liable for transboundary pollution without having breached international law, but it became clear that they would not readily sacrifice economically beneficial activities in the name of compensation. After years of protracted work on the topic, the ILC special rapporteur described state liability as a case of "misplaced emphasis".[292] He admitted that "[s]tate liability and strict liability are not widely supported at the international level, nor is liability for any type of activity located within the territory of a [s]tate in the performance of which no [s]tate officials or agents are involved."[293]

Little has changed today. State responsibility now has a strong hold in customary international law even though its application in environmental disputes is not yet settled. State liability, on the other hand, is a project that is effectively relinquished. Commenting on the efforts of the ILC, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) opined that "such efforts have not yet resulted in provisions entailing [s]tate liability for lawful acts."[294] States tend to compensate environmental

---

[290] See *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 27 November 1992, 1953 UNTS 373, UKTS 1996 No 87 (entered into force 30 May 1996) as amended by IMO Res LEG.2(82), 18 October 2000, IMO Doc Res LEG.2(82) (entered into force 1 November 2003) and the Protocol of 16 May 2003, Can TS 2010 No 4, UKTS 2012 No 48 (entered into force 3 March 2005), superseding *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 1110 UNTS 57, Can TS 1989 No 47, 11:2 ILM 284 (entered into force 16 October 1978) [*Fund Convention*].

[291] See *Stockholm Declaration*, *supra* note 34, Principle 22.

[292] International Law Commission, "First Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur" (UN Doc A/CN.4/531) in *Yearbook of the International Law Commission 2003*, vol 2, part 1 (New York: UN, 2010) 71 at 79 (UN Doc A/CN.4/SER.A/2003/Add.1) [ILC, "First Report on Allocation of Loss"].

[293] *Ibid* at 76, para 3.

[294] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, [2011] ITLOS Rep 10 at para 209, 50:4 ILM 458 [*Advisory Opinion on Responsibilities and Obligations of States*]. On ITLOS advisory opinion, see generally Donald K Anton, The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the

damage through lump-sum settlements and voluntary payments,[295] but the pattern is not consistent enough to establish the liability of the source state as a matter of customary international law.[296]

In treaty law, the only clear example of state liability comes from the 1972 *Space Liability Convention*. It provides that "[a] launching [s]tate shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."[297] The *Space Liability Convention* led to a well-known compensation claim following the crash of a Soviet nuclear satellite in Canada.[298] Cosmos 954 crashed in January 1978, spreading radioactive fuel over 124,000 km^2 in the Northwest Territories, Alberta and Saskatchewan. Authorities spent 14 million CAD in a two-phase cleanup process that lasted several months. They managed to recover only a small fraction of the satellite's radioactive power source. Canada then claimed 6 million CAD to the Soviet Union under the *Space Liability Convention* and general principles of international law.[299] The Soviet Union replied that it would consider the issue of damage

Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No 17)" (2012) 7:2 JSDLP 241.

[295] For a survey of state practice, see Barboza, *supra* note 230 at 45–72; Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 159–87.

[296] See Plakokefalos, *supra* note 278 at 1059; Orlando, "Public and Private", *supra* note 95 at 415–15; Montjoie, *supra* note 237 at 507; Alan Boyle, "Liability for Injurious Consequences of Acts Not Prohibited by International Law" in Crawford, Pellet & Olleson, *supra* note 230, 95 at 104 [Boyle, "Liability for Injurious Consequences"]; Birnie, Boyle & Redgewell, *supra* note 46 at 217–19; Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 181. But see Kiss & Shelton, *supra* note 277 at 1138–40; Barboza, *supra* note 230 at 153–54; Handl, *supra* note 230 at 117–20 (all defending the continuing importance of state liability).

[297] *Convention on International Liability for Damage Caused by Space Objects*, 29 March 1972, 961 UNTS 187, Can TS 1975 No 7, 10:5 ILM 965, art II (entered into force 1 September 1972) [*Space Liability Convention*].

[298] See *Claim Against the USSR for Damage Caused by Soviet Cosmos 954*, 23 January 1979, 18:4 ILM 899 [*Cosmos 954 Claim*].

[299] See Andrew Brearley, "Reflections upon the Notion of Liability: The Instances of *Kosmos 954* and Space Debris" (2008) 34:2 J Space L 291 at 297–300, 310. See generally Edward G Lee & DW Sproule, "Liability for Damage Caused by Space Debris: The Cosmos 954 Claim" (1988) 26 Can YB Intl L 273 [Lee & Sproule]; Alexander F Cohen, "Cosmos 954 and the International Law of Satellite Accidents" (1984) 10:1 Yale J Intl L 78; Joseph A Burke, "Convention on International Liability for Damage Caused by Space Objects: Definition and Determination of Damages After the Cosmos 954 Incident" (1984) 8:2 Fordham Intl LJ 255; Bryan Schwartz & Mark L Berlin, "After the Fall: An Analysis of Canadian Legal Claims for Damage Caused by Cosmos 954" (1982) 27:4 McGill LJ 676; Carl Q Christol, "International Liability for Damage Caused by Space Objects" (1980) 74:2 AJIL 346; André Farand, "L'apport du Canada en matière de responsabilité internationale pour les dommages d'origine spatiale: *l'affaire du satellite Cosmos 954*" (1980) 11:3 Études int 467; Eilene Galloway, "Nuclear Power Satellites: The U.S.S.R. Cosmos 954 and the Canadian Claim" (1979) 12:3 Akron L Rev 401; Peter PC Haanappel, "Some

"in strict accordance with the provisions [of the *Space Liability Convention*]."[300] The dispute ended in a 3 million CAD lump sum settlement with no admission of liability and consequently no reference to the *Space Liability Convention* or to international law.[301] It is said to have been motivated by past settlements, the desire to avoid prolonged negotiations and other political considerations.[302]

References to the Cosmos 954 incident are strangely ubiquitous in environmental literature, even today. Some suggest that the payment looks more like an admission of responsibility than a voluntary and non-prejudicial gesture.[303] Even if it were purely voluntary, they say, it would still imply that the source state has an "inner conviction" about its liability.[304] But just as the *Trail Smelter* arbitration is a dubious foundation for the entire field of international environmental law, the *Space Liability Convention* is a dubious model of state liability for transboundary pollution. First, it was negotiated at a time when global environmental protection was only beginning to attract the world's attention. Today, the *Space Liability Convention* faces strong criticism for its failure to properly deal with contemporary problems such as space debris.[305] Second, it concerns a very specific form of transboundary pollution, and a particularly hazardous one at that.[306] Third, space was primarily a military affair at the time. The parties to the *Space Liability*

Observations on the Crash of Cosmos 954" (1978) 6:2 J Space L 147; Stephen Gorove, "Cosmos 954: Issues of Law and Policy" (1978) 6:2 J Space L 137; Paul G Dembling, "Cosmos 954 and the Space Treaties" (1978) 6:2 J Space L 129.

[300] *Cosmos 954 Claim*, *supra* note 298 at 923 (unofficial translation of the note of 21 March 1978 from the Embassy of the Union of Soviet Socialist Republics at Ottawa to the Canadian Department of External Affairs).

[301] See *Protocol on Settlement of Canada's Claim for Damages Caused by "Cosmos 954"*, Canada and Union of Soviet Socialist Republics, 2 April 1981, Can TS 1981 No 8, 20:3 ILM 689 (entered into force 2 April 1981).

[302] See Lee & Sproule, *supra* note 298 at 274, n 4.

[303] See Barboza, *supra* note 230 at 63.

[304] *Ibid*. See also Handl, *supra* note 230 ("[h]owever, it would be disingenuous not to acknowledge that legal significance inevitably attaches to "*ex gratia*" payments of compensation, notwithstanding the label" at 124, n 80).

[305] See Bruce W Mann, "The Liability Convention: Scrap It? Fix It? Or Work Around It?" in Ram Jahku, Kuan-Wei Chan & Yaw Nyampong, eds, *Global Space Governance* (Montreal: McGill Centre for Research in Air and Space Law, 2015) 633; Timothy G Nelson, "Regulating the Void: In-Orbit Collisions and Space Debris" (2015/2016) 40:1/2 J Space L 105 at 114–25; Barry Kellman, "Space: The Foulded Frontier. Adjudicating Space Debris as an International Environmental Nuisance" (2014) 39:2 J Space L 227 at 255–58. See generally Peter Stubbe, *State Accountability for Space Debris: A Legal Study of Responsibility for Polluting the Space Environment and Liability for Damage Caused by Space Debris* (Leiden: Brill Nijhoff, 2017).

[306] See Ballarino, *supra* note 308 at 337.

Convention did not contemplate that private parties would engage in outer space activities alongside governments as extensively as they do today.[307] The choice of state liability over other models must be understood in this context.

Meanwhile, civil liability regimes proliferated at a faster pace. Cynics will not be surprised. The same lack of political will that hampered the development of state-centric doctrines led the states to divert attention from themselves and target private operators instead.[308] Civil liability regimes are also less of an exotic concept for most lawyers. They closely mirror domestic law and provide an easy way out of the conceptual entanglements associated with state responsibility and liability. As we will see, there are more principled reasons to focus on civil liability besides mere opportunism. Paradoxically, however, civil liability regimes have resulted in little hard law. Most existing regimes remain a dead letter.

1.1.4. Civil liability

Treaty-based civil liability regimes target private parties within the source state.[309] They have three main functions. First, they ensure non-discrimination and equal access to foreign victims in the source state. Second, they address issues of jurisdiction, choice of law and enforcement of foreign judgments (their most relevant function for our

[307] See Ricky J Lee, "The Liability Convention and Private Space Launch Services: Domestic Regulatory Responses" (2006) 31 Ann Air & Sp L 351 at 352–53. For early research on private activities in outer space, see Laurence Jay Eisenstein, "Choice of Law Regarding Private Activities in Outer Space: A Suggested Approach" (1986) 16:2 Cal W Intl LJ 282; Stephen B James & Kate Mary Kell, "Private Enterprise in Outer Space: A Selected Bibliography" (1979) 2:1 Hous J Intl L 159; Lawrence P Wilkins, "Substantive Bases for Recovery for Injuries Sustained by Private Individuals as a Result of Fallen Space Objects" (1978) 6:2 J Space L 161. See generally Dan St John, "The Trouble with Westphalia in Space: The State-Centric Liability Regime" (2012) 40:4 Denv J Intl L & Pol'y 686.

[308] See Eckard Rehbinder, "Extra-Territoriality of Pollution Control Laws from a European Perspective" in Günther Handl, Joachim Zekoll & Peer Zumbansen, eds, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Martinus Nijhoff, 2012) 127 at 145 [Rehbinder]. But see Tito Ballarino, "Questions de droit international privé et dommages catastrophiques" (1990) 220 Rec des Cours 289 [Ballarino] ("[o]*n ne saurait trouver ni une contestation, ni même un assouplissement de la règle, traditionnelle dans les dommages transfrontières, selon laquelle l'État est responsable de l'utilisation dommageable de son territoire national, qui est faite soit par ses agents, soit par les particuliers (même étrangers) placés sous sa juridiction*" at 352–53).

[309] See Barboza, *supra* note 230 at 31.

purposes). Third, they harmonize substantive liability law on issues such as the standard of fault, damages, insurance and defences.[310]

Because of their concern with harmonization, civil liability treaties are not typically described as international environmental law. They are uniform tort law in disguise, "amphibious" international instruments operating through domestic laws and institutions.[311] They may nonetheless impose direct obligations on states with respect to the operations of private actors under their jurisdiction.[312] First, they may require states to offer private remedies in order to ensure the availability of prompt and adequate compensation for victims of transboundary pollution. Second, they may provide for the state's alternative, subsidiary or supplementary liability, for example when compensation exceeds the financial capacity of the liable party.[313] Polluters do not always have deep pockets: state liability becomes useful when a small private operator causes catastrophic damage while drilling off the coast or running a nuclear facility.[314] Finally, states may themselves act as operators, in which case civil liability treaties can apply to them.[315]

In the next subsections, I introduce existing treaties (1.1.4.1), explain their fundamental assumptions (1.1.4.2) and their ultimate failure (1.1.4.3). I emphasize the need for a new vehicle going forward, one that derives from the duty to ensure prompt and adequate

---

[310] See Sachs, *supra* note 39 at 849–50.
[311] Pierre-Marie Dupuy & Jorge E Viñuales, *International Environmental Law*, 2nd ed (Cambridge: Cambridge University Press, 2018) at 322.
[312] This is consistent with the characterization of international environmental law as a body that "directs its rights and duties at the state and relies on the way in which the state in its national law controls corporations." André Nollkaemper, "Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives" in Gerd Winter, ed, *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge: Cambridge University Press, 2006) 179 at 187. See also Markos Karavias, *Corporate Obligations Under International Law* (Oxford: Oxford University Press, 2013) ("[…] civil liability instruments […] bind [s]tates and require that they regulate the conduct of corporations under domestic law" at 14);Alan E Boyle, "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs" in Francioni & Scovazzi, *supra* note 183, 363 (describing the role of the state under international environmental law as a "guarantor of private conduct" at 364). But see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016) at 153–161 (reading civil liability treaties as targeting private parties directly under international law).
[313] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 4(5).
[314] See Alan Boyle et al, "International Law and the Liability for Catastrophic Environmental Damage" (2011) 105 Am Soc'y Intl L Proc 423 at 429 (comments by Günther Handl).
[315] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 72, para 33.

compensation but avoids mistakes of the past. This new vehicle, I argue, has one rather old and reliable component: private international law.

1.1.4.1. Civil liability regimes in international enviromental law

The number of civil liability treaties increased from the 1980s to the 2000s through new standalone documents and declarations of interest for developing a liability counterpart to existing regimes.[316] More than a dozen treaties currently exist.[317] They are typically confined to a sector or activity although some have a broader scope.[318]

Four treaties address civil liability for marine oil pollution. The 1977 *Seabed Mineral Resources Convention* deals with oil pollution resulting from the exploration and exploitation of certain seabed mineral resources.[319] The 1992 *CLC* and the 1992 *Fund Convention* deal with pollution resulting from oil tankers.[320] The 2001 *Bunker Convention* deals with pollution resulting from oil used to fuel ships.[321] An intricate web of rules deals with civil liability for nuclear damage: the 1960 *Paris Convention*, the 1963 *Brussels Supplementary Convention*, the 1963 *Vienna Convention*, the 1988 *Vienna Joint Protocol* and the 1997 *CSC*.[322] In addition, the 1962 *Nuclear Ships Convention* deals with

[316] See Brunnée, "Sense and Sensibility", *supra* note 39 at 359.
[317] For a survey of existing instruments, see Hannes Descamps, Robin Slabbinck & Hubert Bocken, *International Documents on Environmental Liability* (London: Springer, 2008) [Descamps, Slabbinck & Bocken]; Wolfrum, Langenfeld & Minnerop, *supra* note 196, ch 2; International Law Commission, "Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Prepared by the Secretariat" (UN Doc A/CN.4/543) in *Yearbook of the International Law Commission 2004*, vol 2, part 1 (New York: UN, 2010) 85 (UN Doc A/CN.4/SER.A/2004/Add.1); UNEP, *supra* note 124.
[318] See *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*, 26 June 1993, Eur TS 1993 No 150, 32:5 ILM 1228 (not yet in force) [*Lugano Convention*]; *Nordic Convention*, *supra* note 199;
[319] See *Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources*, 1 May 1977, UKTS (Misc) 1977 No 8, 16:6 ILM 1450 (not yet in force) [*Seabed Mineral Resources Convention*].
[320] See *CLC*, *supra* note 289; *Fund Convention*, *supra* note 289.
[321] See *Convention on Civil Liability for Bunker Oil Pollution Damage*, 23 March 2001, Can TS 2010 No 3, 40:6 ILM 1493 (entered into force 21 November 2008) [*Bunker Convention*].
[322] See *Convention on Supplementary Compensation for Nuclear Damage*, 12 September 1997, Can TS 2017 No 30, 36:6 ILM 1454 (entered into force 15 April 2015) [*CSC*]; *Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention*, 21 September 1988, 1672 UNTS 293, UKTS (Misc) 1989 No 12 (entered into force 27 April 1992); *Convention on Civil Liability for Nuclear Damage*, 21 May 1963, 1063 UNTS 265, UKTS (Misc) 1964 No 9, 2:4 ILM 727 (entered into force 12 November 1977) as amended by the Protocol of 12 September 1997, 2241 UNTS 270, 36:6 ILM 1454 (entered into force 4 October 2003) [*Vienna Convention*]; *Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*, 31 January 1963, 1041 UNTS 358,

the liability of (nonexistent) civil nuclear ships operators[323] and the 1971 *Nuclear Material Convention* deals with damage caused by a nuclear incident occurring in the course of the maritime carriage of nuclear material.[324]

Civil liability treaties also cover other forms of transboundary pollution. The 1989 *CRTD Convention* deals with damage caused during the carriage of dangerous goods by road, rail and inland navigation vessels[325] while the 1996 *HNS Convention* deals with damage resulting from the carriage of hazardous and noxious substances by sea.[326] The 1999 *Basel Liability Protocol* deals with damage resulting from the transboundary movement and disposal of hazardous wastes.[327] The 2003 *Kiev Liability Protocol* deals with damage caused by the transboundary effects of industrial accidents on transboundary waters.[328] The 2005 *Antarctic Liability Annex* deals with environmental emergencies in the Antarctic.[329] Finally, the 2010 *Nagoya—Kuala Lumpur Supplementary Protocol* deals

---

UKTS 1975 No 44, 2:4 ILM 685 (entered into force 4 December 1974) as amended by the Additional Protocol of 28 January 1964, 956 UNTS 251, UKTS 1975 No 44 (entered into force 4 December 1974), the Protocol of 16 November 1982, 1650 UNTS 446, UKTS 1992 No 17 (entered into force 1 August 1991) and the Protocol of 12 February 2004, UKTS (Misc) 2015 No 7 (not yet in force) [*Brussels Supplementary Convention*]; *Convention on Third Party Liability in the Field of Nuclear Energy*, 29 July 1960, 956 UNTS 251, UKTS 1968 No 69, 55:4 AJIL 1082 (entered into force 1 April 1968) as amended by the Additional Protocol of 28 January 1964, 956 UNTS 251, UKTS 1968 No 69 (entered into force 1 April 1968), the Protocol of 16 November 1982, 1519 UNTS 319, UKTS 1989 No 6 (entered into force 7 October 1988) and the Protocol of 12 February 2004, UKTS (Misc) 2015 No 6 (not yet in force) [*Paris Convention*].

[323] See *Convention on the Liability of the Operators of Nuclear Ships*, 25 May 1962, 57:1 AJIL 268 (not yet in force) [*Nuclear Ships Convention*].

[324] See *Convention Related to Civil Liability in the Field of Maritime Carriage of Nuclear Material*, 17 December 1971, 974 UNTS 255, UKTS (Misc) 1972 No 39, 11:2 ILM 277 (entered into force 15 July 1975) [*Nuclear Material Convention*].

[325] See *Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels*, 10 October 1989, UN Doc ECE/TRANS/79 (not yet in force) [*CRTD Convention*].

[326] See *International Convention on Liability and Compensation for the Carriage of Hazardous and Noxious Substances by Sea*, 3 May 1996, UKTS (Misc) 1997 No 5, 35:6 ILM 1406 (not yet in force) as amended by the Protocol of 30 April 2010, IMO Doc LEG/CONF.17/10, UKTS (Misc) 1997 No 5 (not yet in force) [*HNS Convention*].

[327] See *Protocol on Civil Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste*, 10 December 1999, COP5 Dec V/29 in Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, UN Doc UNEP/CHW.5/29 (1999) Annex III (not yet in force) [*Basel Liability Protocol*]. The *Basel Liability Protocol* was adopted under the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, 1673 UNTS 57, Can TS 1992 No 19, 28:3 ILM 657 (entered into force 5 May 1992)

[328] See *Kiev Liability Protocol*, *supra* note 135. See also *Industrial Accidents Convention*, *supra* note 135.

[329] See *Antarctic Liability Annex*, *supra* note 246.

with liability for damage resulting from the transboundary movement of living modified organisms.[330]

Regardless of their practical impact (or lack thereof), the very existence of civil liability treaties is notable. Through them, states acknowledge that liability is essential to the enforcement of international environmental law, and that victims of transboundary pollution deserve some kind of compensation even though it may not come from states themselves. The language used in many treaties also signals some agreement over the standard of compensation for environmental damage—prompt and adequate.[331] Civil liability treaties are therefore worth studying both as evidence of the path taken in international environmental law, and as an illustration of the function of civil liability in the resolution of transboundary environmental disputes.

1.1.4.2. Assumptions of civil liability regimes

Civil liability treaties rest on two fundamental assumptions: liability may be imposed on private parties rather than the states, and *ex post* liability is not entirely superfluous when compared to *ex ante* regulation of transboundary pollution. If these two assumptions are correct—and I believe they are—we can then debate whether existing treaties succeed in conveying the benefits of an approach based on civil liability, or whether—as I propose—we need a new vehicle going forward.

Civil liability regimes for domestic or transboundary pollution are typically justified by four rationales. There may be others, but these are the most common. The first three are persuasive but should be carefully nuanced. The fourth one is plausible, but more often asserted than truly demonstrated.

---

[330] See *Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*, 15 October 2010, 50:1 ILM 108 (entered into force 5 March 2018) [*Nagoya–Kuala Lumpur Supplementary Protocol*]. The *Nagoya–Kuala Lumpur Supplementary Protocol* was adopted under the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 UNTS 208, UKTS 2004 No 17, 39:5 ILM 1027 (entered into force 11 September 2003), itself adopted under the *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, Can TS 1993 No 24, 31:4 ILM 818 (entered into force 29 December 1993).

[331] For further discussion on prompt and adequate compensation in civil liability treaties, see subsection 1.2.1.1 below.

First, civil liability directly assists victims of pollution whether or not public authorities choose to act against polluters.[332] This rationale does not exclude the state as plaintiff but assumes that it will not always act as such.[333] This is particularly true for transboundary pollution. Slaughter and Burke-White are right when they point out that "[a]rresting criminals or terrorists, securing nuclear materials, and preventing pollution are within the traditional province of domestic law. The result is that the external security of many states depends on the ability of national governments to maintain internal security sufficient to establish and enforce national law."[334] Paradoxically, however, those same national governments may not act as vigorously when foreign interests are at stake. As Wai explains, "[…] there are often severe practical impediments to effective extraterritorial regulation by national regulators. Local regulators may not pursue the case because of industry capture, inefficiency, shortage of resources, or restrictive ideological conditions."[335] Similarly, Banda points out that "[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."[336] In the end, few governments will be willing to aggressively and unilaterally defend the environment (or its population's) beyond borders.

Citizen suits under environmental statutes reflect the idea that civil liability can bypass government inaction. Those provisions allow individuals to enforce environmental laws in the public interest.[337] When the EPA did not enforce its administrative orders against a

---

[332] See Sachs, *supra* note 39 at 845. Financial compensation is the most compelling rationale for civil liability: "[o]ther remedies—such as declaratory relief and injunctions—may also be available, but it is the promise of monetary compensation that offers the strongest attraction from an economist's point of view." Anderson, *supra* note 5 at 408.

[333] See Jaye Ellis, "Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns" (2012) 25:2 Leiden J Intl L 397 [Ellis, "Extraterritorial Jurisdiction"] ("[…] I cannot agree […] that there is no room for cross-border litigation in transboundary pollution cases, even where a federal agency is involved in addition to or instead of private parties" at 414).

[334] Slaughter & Burke-White, *supra* note 49 at 330–31.

[335] Wai, "Transnational Private Law and Private Ordering", *supra* note 60 at 479.

[336] Banda, *supra* note 176 at 1881. Banda refers here to national governments but suggests that local governments may not act either.

[337] See generally Karl S Coplan, "Citizen Enforcement" in LeRoy C Paddock, Robert L Glicksman & Nicholas S Bryner, eds, *Elgar Encyclopedia of Environmental* Law, vol 2: Decision Making in Environmental Law (Cheltenham: Edward Elgar, 2016) 416; Paule Halley, "L'accès à la justice en matière d'environnement en droit québécois et canadien" in Julien Bétaille, ed, *Le droit d'accès à la justice en*

Canadian company in the *Pakootas* case, members of the Confederated Tribes of the Colville Reservation in the state of Washington filed a citizen suit and asked for injunctive relief, penalties and recovery under *CERCLA*.[338] They effectively did what they considered the EPA should have done. This is an important function of civil liability, even though the informal coordination of private actors through litigation may appear less plausible or desirable than the action of politically accountable public authorities with a consistent agenda (that is, assuming public authorities do have a consistent agenda and are willing to take the legal, financial and political steps to implement it).

Second, civil liability reduces the complexity of environmental disputes. They de-escalate them to the neighbourhood level and avoid issues of state responsibility or liability. As mentioned in the introduction, the dynamics of transboundary pollution suggest a conflict between private parties. The Canadian government did not initially view the *Trail Smelter* dispute as having an interstate character. A closer look at its history shows "that the actors most directly affected were not sovereign states but farmers, employees, businesspeople—in other words, members of the populations within the transboundary regions affected."[339] If it were to happen today, *Trail Smelter* could well unfold in civil courts rather than through interstate arbitration, as it indeed did in *Pakootas* (albeit in the form of a citizen suit under a public regulatory statute rather than a "pure" private law claim).[340]

Many would agree that civil litigation is a quicker, cheaper and more and efficient way of settling environmental disputes than lengthy and politically charged interstate dispute

---

matière d'environnement (Toulouse: Presses de l'Université de Toulouse 1 Capitole, 2016) 341. For further discussion on citizen suit provisions in Canada, see subsection 3.2.3.2 below.

[338] See *CERCLA*, *supra* note 13; *Pakootas* 9th Cir 2006, *supra* note 14.

[339] Jaye Ellis, "Has International Law Outgrown *Trail Smelter*?" in Bratspies & Miller, *supra* note 66, 56 at 63. See also Jutta Brunnée, Book Review of *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* edited by Rebecca M Bratspies & Russell A Miller, (2008) 102:2 AJIL 395 at 396.

[340] See Martijn van de Kerkhof, "The Trail Smelter Case Re-Examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute" (2011) 27:73 Utrecht J Intl & Eur L 68 at 82 [Van de Kerkhof]; Birnie, Boyle & Redgewell, *supra* note 46 at 217. But see Jutta Brunnée, "The United States and International Environmental Law: Living with an Elephant" (2004) 15:4 Eur J Intl L 617. Discussing the early stages of *Pakootas*, Brunnée notes that civil litigation would depart from "common practice surrounding transboundary pollution, both as between Canada and the United States and internationally. That practice has consistently involved resolution of the concern through diplomatic processes or resort to inter-state dispute settlement." *Ibid* at 633.

resolution mechanisms.[341] But this proposition should not be overstated. Leaving states out of the equation streamlines the process when it involves a simple transboundary nuisance that affects the legally protected interests of private actors in one neighbouring state. The argument weakens, however, as the issue becomes more complex or involves actors in more than two states. Civil litigation may then become as lengthy as interstate proceedings, with protracted proceedings, complex jurisdictional and evidentiary issues and, ultimately, enforcement difficulties abroad. The Amoco Cadiz oil spill off the French coast in 1978, for instance, led to fourteen years of civil litigation.[342] The length of this saga matches the thirteen years of litigation in *Trail Smelter* and exceeds the seven years of proceedings before the parties settled in *Aerial Spraying*.

Third, civil liability strengthens the polluter-pays principle by targeting the person responsible for the damage. The polluter-pays principle is a basic tenet of Canadian environmental law.[343] It is also a familiar concept in international environmental law. Circumstances may require that an insurer or an industry fund compensate the victims instead of the polluters themselves. Nonetheless, civil liability regimes internalize at least partly the costs of pollution and distribute the risk associated with activities susceptible of causing environmental damage.[344]

---

[341] See John H Knox, "The Flawed *Trail Smelter* Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law" in Bratspies & Miller, *supra* note 66, 66 at 70–71 [Knox, "Flawed"]; Michael J Robinson-Dorn, "The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trial for CERCLA" (2006) 14:2 NYU Envtl LJ 233 at 317–18 [Robinson-Dorn]. The logic typically goes like this: "[d]omestic remedies generally bring relief more expeditiously and cost-effectively than interstate dispute settlement processes, and prevent an intersate dispute from becoming unnecessarily politicized". Owen McIntyre & Mara Tignino, "Reconciling the UN Watercourses Convention with Recent Developments in Customary International Law" in Flavia Rocha Loures & Alistair Rieu-Clarke, eds, *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Abingdon: Routledge, 2013) 286 at 295.

[342] See *Re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F (2d) 1279, 1992 US App Lexis 833 (7th Cir 1992), rehearing denied, 1992 US App Lexis 2217 (7th Cir 1992).

[343] See *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 29, 430 DLR (4th) 1; *St Lawrence Cement Inc v Barrette*, 2008 SCC 64 at para 80, [2008] 3 SCR 392 [*St Lawrence Cement*]; *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at paras 23–24, [2003] 2 SCR 624 [*Imperial Oil*].

[344] But see Bergkamp, *supra* note 5 (who expresses strong sckepticism towards civil liability regimes on the basis that they make the polluter pay twice—once through public regulation and once through civil liability). Bergkamp's criticism of environmental liability is bold and his book is controversial. See Robert G Lee, Book Review of *Liability and Environment: Private and Public Law Aspects of Liability for Environmental Harm in an International Context* by Lukas Bergkamp, (2003) 15:3 J Envtl L 427 ("[…] ultimately this is the mystery of *Liability and Environment*. It is a book well versed in law and economics

Fourth, civil liability has a systemic effect on environmental protection akin to regulation itself.[345] While I readily subscribe to the first three rationales for civil liability (with the nuances I mentioned), the fourth one is more controversial. Little empirical evidence on the systemic implications of civil liability exists to either support or debunk the argument. This leaves us with intellectual postures rooted in so many assumptions regarding the behaviour of polluters and the role of the market that they become almost impossible to disentangle from their broader theoretical framework. One would celebrate the prospect of regulation through tort law or suggest that the threat of litigation provides an incentive for polluters to adjust their behaviour. Another would reply that this behaviour is always dictated by financial considerations, such that only the credible threat of crippling liability will alter the equation. Because financial considerations include reputation, image and the like, economic actors may align their conduct with socially beneficial ideals such as environmental protection, but that is purely coincidental. They will refrain from polluting only because they deem it financially beneficial to obey the rules rather than to disregard them, not because of the inherent deterrent effect of previous condemnations and the threat of future liability. Yet another would point to the lack of uniformity in the adjudication of private environmental disputes and the potential for discord among neighbouring states to denounce civil liability as a mechanism to protect the environment.

---

literature, but so often seems to diverge from a path clearly laid down by much of the classical works on which it draws. On each and every occasion that it does so it seems to have a single objective—to assert the interests of the corporation and to decry measures that would be unfair on the company" at 431); Maria Lee, Book Review of *Liability and Environment: Private and Public Law Aspects of Liability for Environmental Harm in an International Context* by Lukas Bergkamp (2003) 12:3 Eur Envtl L Rev 92 ("[e]verybody will find something with which to disagree in this book, and many will have good arguments in support. For example, environmentalists will be concerned with the dismissal of a potentially powerful regulatory tool, and both industry and environmentalists may question the high expectations of government regulation. […] However, I doubt very much that Professor Bergkamp will be unduly concerned by such disagreement: this is a deliberately and decisively provocative book" at 94); Michael Anderson, Book Review of *Liability and Environment: Private and Public Law Aspects of Liability for Environmental Harm in an International Context* by Lukas Bergkamp, (2002) 11:2 RECIEL 251 ("[o]verall, this reader found only part of the argument compelling. His analysis of the various ways in which [s]tates and governments avoid liability was insightful and impressive. The argument for reducing private liability was less persuasive, and often seemed to be running the risk of special pleading. His over-arching concern to free up social space for business initiatives, while laying the blame for environmental damage at the door of the [s]tate, appears to be openly partisan and may have much to do with a philosophical affinity with Hayek—who receives extensive mention in the footnotes" at 251).

[345] See Anderson, *supra* note 5 at 408–409.

I cannot suggest that deterrence and better environmental protection inevitably flow from imposing liability on polluters. It is true that we often feel the "behavioural effects of tort law" on corporate actors who consciously assess their litigation exposure around the world.[346] But as Boyle explains, "[l]iability, and liability treaties, are not a panacea […], and sceptics rightly question whether they have had much impact on industry or contribute to improving standards. […] [I]n any event the principal purpose of liability is to secure redress for victims, not necessarily to influence the behaviour of defendants."[347]

From this limited but important perspective, the effectiveness of civil liability varies depending on the circumstances. Legal concepts such as standing, harm and causation do not fare well in relation to complex ecological problems involving diffuse sources of pollution, unidentifiable victims and long-term consequences. Biosafety, climate change and toxic chemicals come to mind here. The EU legislature was surprisingly candid about this in its *Environmental Liability Directive*, noting in the preamble that "[l]iability is […] not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors."[348] The sheer complexity of litigating such issues may create a perception of injustice in the eyes of the victims, as a result of what Weaver and Kysar describe as judicial nihilism in the face of catastrophic harm—the fundamental mistake of "refus[ing] responsibility over the extraordinary and the indeterminate" using procedural and jurisdictional grounds.[349]

---

[346] Wai, "Private v Private", *supra* note 60 at 48. See also Zerk, *supra* note 229 at 236–37. For an innovative and insightful attempt at "rediscovering" the regulatory potential of tort law by revealing how some overlooked features of the tort regime (equitable powers, procedure and community) address complex risks, see Kysar & Reynolds, *supra* note 90.

[347] See Boyle, "Environmental Liability", *supra* note 46 at 9.

[348] EC, *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage*, [2004] OJ, L 143/56, Preamble, para 13 [*Environmental Liability Directive*].

[349] R Henry Weaver & Douglas A Kyser, "Courting Disaster: Climate Change and the Adjudication of Catastrophe" (2017) 93:1 Notre Dame L Rev 295 at 354, drawing from the work of Linda Ross Meyer, "Catastrophe: Plowing Up the Ground of Reason" in Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds, *Law and Catastrophe* (Stanford: Stanford University Press, 2007) 19. See also R Henry Weaver & Douglas A Kyser, "Tort Law and Normative Rupture" in Rosemary Lyster & Robert RM Verchick, eds, *Research Handbook on Climate Disaster Law: Barriers and Opportunities* (Cheltenham: Edward Elgar, 2018) 315. Kuh recently demonstrated that "judicial climate avoidance is often grounded in uneasiness about the legitimacy of judicial engagement." Katrina Fischer Kuh, "The Legitimacy of Judicial

At the opposite end of the spectrum, simple forms of pollution such as the *Trail Smelter* dispute, or isolated catastrophes such as the Deepwater Horizon blowout, are more amenable to civil liability claims. Their consequences extend to large, but identifiable environments and groups of people. They can be traced back to a complex, but again identifiable chain of events. To be sure, procedural hurdles and financial constraints may delay the judicial process immensely. But claims of this kind do not question the relevance of civil liability as a fundamental legal institution. They strain the system, but they do not break it.

Civil liability teaches significant lessons for environmental law despite its inherent limitations. Catastrophes monopolize public attention for a time. They cause national governments to pay attention to the transboundary consequences of the activities that they allow on their territory. Through civil liability, private actors can exert additional pressure to set legal reforms in motion. Courthouses become a beacon for them to assert their rights, maintain an issue on the political agenda, promote good governance and work towards environmental justice.[350] Liability does not replace other forms of regulation but it acts as an important fail-safe and a forum for the disempowered to be heard, provided they have the means to go to court (which, of course, is not always a given). For instance, a number of victims brought private claims after the nuclear

Climate Engagement" (2019) 46:3 Ecology LQ 731 at 734. On this point, see generally Laura Burgers, "Should Judges Make Climate Change Law?" (2020) 9:1 Transnatl Envtl L 55.

[350] See the sources cited *supra* note 109.

catastrophes in Chernobyl[351] and Fukushima[352] even though no state made a claim against the Soviet Union or Japan.

The systemic implications of tort law are a vast field of study,[353] but the picture is sufficiently clear for our purposes. Liability regimes for transboundary pollution can legitimately focus on private parties, and *ex post* liability is not entirely superfluous when compared to *ex ante* regulation of transboundary pollution. Convincing justifications and copious lawmaking aside, however, civil liability treaties rarely achieve their purpose because many of them are simply not in force.

1.1.4.3. Treaty failure

Noah Sachs' research points to a "yawning gap" in the coverage of civil liability treaties.[354] At the time of the publication of Sachs' extensive survey of civil liability treaties in 2008, six of the fourteen major treaties had entered into force.[355] Three treaties concern maritime oil pollution: the *CLC*, the *Fund Convention* and the *Bunker*

[351] See Bundesgericht [Federal Supreme Court], 21 June 1990, Bundesgerichtsentscheid (BGE) 116 II 480 (Switzerland), summarized in English in (1990) 46 Nuclear L Bull 42; Oberster Gerichtshof [Supreme Court], 14 April 1988, (1989) 39:4 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (ZÖR) [Austrian Journal of Public and International Law] 364 (Austria); Oberster Gerichtshof [Supreme Court], 13 January 1988, (1988) 110:5 Juristische Blätter (JBL) [Legal Journal] 323 (Austria); Amtsgericht Bonn [Local Court], 29 September 1987, (1988) 8:6 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 351 (Germany), aff'd Landgericht Bonn [Regional Court], 14 December 1987, (1988) 8:6 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 354 (Germany); Landgericht Bonn [Regional Court], 11 February 1987, (1987) 7:4 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 231 (Germany), aff'd Oberlandesgericht Köln [Regional Court of Appeal], 23 March 1987, (1987) 7:4 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 233 (Germany); Alfred Rest, "International Environmental Law in German Courts" (1997) 27:5 Envtl Pol'y & L 409 at 415–16 [Rest, "German Courts"]; Tito Ballarino, "Le droit international privé de l'environnement: questions de procédure civile et de loi applicable dans les États de l'Europe occidentale" in Christian von Bar, ed, *Internationales umwelthaftungsrecht* [International Environmental Liability Law], vol 1 (Köln: Heymann, 1995) 111 at 120–21; Alfred Rest, "Need for an International Court for the Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation" (1994) 24:4 Envtl Pol'y & L 173 at 175–79; Ballarino, *supra* note 308 at 369–71.

[352] See eg *Cooper v Tokyo Electric Power Company*, 860 F (3d) 1193, 2017 US App Lexis 11075 (9th Cir 2017). See generally Eric A Feldman, "Compensating the Victims of Japan's 3-11 Fukushima Disaster" (2015) 16:2 Asian Pac L & Pol'y J 127; Eric A Feldman, "Fukushima: Catastrophe, Compensation and Justice in Japan" (2013) 62:2 DePaul L Rev 335.

[353] On environmental regulation and tort law, see eg the sources cited *supra* note 88.

[354] See Sachs, *supra* note 39 at 853.

[355] See Sachs, *supra* note 39 at 839.

Convention.[356] The three others concern nuclear damage: the *Paris Convention*, the *Brussels Supplementary Convention* and the *Vienna Convention*.[357] Since Sachs' paper, the *CSC* (nuclear damage) and the *Nagoya–Kuala Lumpur Supplementary Protocol* (biosafety) entered into force, respectively in 2015 and 2018.[358]

Even if a 50-50 rate were considered a success, the numbers are deceptive. The treaties in force cover only two areas (marine oil pollution and nuclear damage) and even then, the membership of the nuclear liability regime remains patchy. For example, no major nuclear state ratified the 1997 Protocol amending the *Vienna Convention* to strengthen the nuclear liability regime after Chernobyl. Parties either have minimal nuclear power production or none, qualifying them primarily (or only) as victim states.[359] The *Vienna Convention* itself entered into force without the major nuclear states.[360] The *CSC* fares better with recent ratifications by Canada and the United States.[361]

The nuclear liability regime purports to regulate an activity that comes with exceptional hazards but a correspondingly low number of occurrences. Few treaties cover activities with a less remarkable impact on the environment (with the exception of maritime transport). The *Antarctic Liability Annex*, the *Kiev Liability Protocol*, the *Basel Liability Protocol*, the *HNS Convention* and the *CRTD Convention* have yet to come into force,[362]

[356] See *Bunker Convention*, *supra* note 321; *CLC*, *supra* note 289; *Fund Convention*, *supra* note 290.
[357] See *Vienna Convention*, *supra* note 322; *Brussels Supplementary Convention*, *supra* note 322; *Paris Convention*, *supra* note 322.
[358] See *Nagoya–Kuala Lumpur Supplementary Protocol*, *supra* note 330; *CSC*, *supra* note 322.
[359] See Julia A Schwartz, "International Nuclear Third Party Liability Law: The Response to Chernobyl" in International Atomic Energy Agency & OECD Nuclear Energy Agency, *International Nuclear Law in the Post-Chernobyl Period* (Paris: OECD, 2006) 37 at 48–49.
[360] See *Vienna Convention*, *supra* note 322; International Atomic Energy Agency, "Vienna Convention on Civil Liability for Nuclear Damage: Latest Status", online (pdf): *IAEA* <www.iaea.org> [perma.cc/9ZPM-FVB4].
[361] See *CSC*, *supra* note 322; International Atomic Energy Agency, "Convention on Supplementary Compensation for Nuclear Damage: Latest Status", online (pdf): *IAEA* <www.iaea.org> [perma.cc/R2FX-435C]. Canada ratified the *CSC* and adopted the *Nuclear Liability and Compensation Act*, SC 2015, c 4, s 120 [*Nuclear Liability and Compensation Act*] to improve the amounts and prospects of recovery in case of a nuclear accident.
[362] See *Antarctic Liability Annex*, *supra* note 246; *Kiev Liability Protocol*, *supra* note 135; *Basel Liability Protocol*, *supra* note 327; *HNS Convention*, *supra* note 326; *CRTD Convention*, *supra* note 325.

sometimes decades after their adoption, "cast[ing] serious doubt on their acceptability or relevance, and on the wisdom of negotiating any more of them."[363]

States show no enthusiasm for developing new civil liability treaties. The ILA was already skeptical when it developed the 1996 *Helsinki Articles on Private Law Remedies for Transboundary Damage in International Watercourses*, noting that "there was not yet a sufficiently widespread international consensus" on the use of a strict liability standard and the harmonization of liability rules.[364] A look at two recent environmental instruments, the 2010 *Nagoya—Kuala Lumpur Supplementary Protocol* on biosafety and the 2016 *Paris Agreement* on climate change, reveals continuing reluctance to enter into any meaningful and binding commitment on liability.

The *Nagoya—Kuala Lumpur Supplementary Protocol* purports to establish a liability regime for damage resulting from the transboundary movement of living modified organisms. States must provide for response measures in case of damage to biodiversity. They must also "aim to provide" compensation for material or personal damage associated with damage to biodiversity (a more relaxed formulation). To accomplish this, they can either apply their existing domestic law, apply/develop specific civil liability rules or apply/develop a combination of both.[365] This is a convoluted way of saying that states have full discretion in this regard.

---

[363] Birnie, Boyle & Redgewell, *supra* note 46 at 318. See also Sachs, *supra* note 39 at 857, citing Boyle, "Environmental Liability", *supra* note 46 at 16; Brunnée, "Sense and Sensibility", *supra* note 39 at 365. But see Knox, "Flawed", *supra* note 341 at 78 (describing the "relative popularity" of civil liability regimes). In a recent technical report, the Secretary-General of the United Nations recognizes that civil liability treaties have several defects, including the fact that many of them are simply not in force. See UN Secretary-General, *supra* note 281 at 42, para 99.

[364] International Law Association, "Water Resources Committee: Interim Report" (1996) 67 Intl L Assn Rep Conf 401 at 407 [*ILA Helsinki Articles on Private Law Remedies*], as considered and adopted by International Law Association, "Resolution No 12: Water Resources Law" (1996) 67 Intl L Assn Rep Conf 24.

[365] See *Nagoya–Kuala Lumpur Supplementary Protocol*, *supra* note 330, art 12. See also the recommendations of the biotechnology industry in CropLife International/Global Industry Coalition, "Implementation Guide to the Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety" (April 2013), online (pdf): *CropLife* <www.croplife.org> [perma.cc/9RH2-5H2K].

The *Nagoya—Kuala Lumpur Supplementary Protocol* could have been more ambitious on this point. Developing countries pushed for a detailed provision on liability,[366] and negotiators discussed several detailed proposals.[367] The final text, however, is an exceedingly vague provision imposing little more than *status quo* in a regime precisely designed to deal with liability. As a Malaysian negotiator puts it, the *Nagoya—Kuala Lumpur Supplementary Protocol* is "spectacularly deficient in providing for an effective civil liability regime."[368] Others are more nuanced, but nonetheless skeptical of the vague compromise reached in the end.[369]

Liability also interfered with the negotiations leading up to the *Paris Agreement*. Parties recognized in the *Paris Agreement* the importance of "averting, minimizing and addressing loss and damage" resulting from climate change,[370] but made sure to specify in their final decision that the provision "[did] not involve or provide a basis for any liability or compensation."[371] Developed countries, particularly the United States,

---

[366] See Elmo Thomas & Mahlet Teshome Kebede, "One Legally Binding Provision on Civil Liability: Why It Was So Important from the African Negotiators' Perspective" in Shibata, *supra* note 46, 125.
[367] See Lefeber, "Supplementary Protocol", *supra* note 46 at 83.
[368] Gurdial Singh Nijar, "Civil Liability in the Supplementary Protocol" in Shibata, *supra* note 46, 111 at 113; Gurdial Singh Nijar, "The Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety: An Analysis and Implementation Challenges" (2013) 13:3 Intl Envtl Agreements: Pol, L & Econ 271 at 277. But see Lefeber, "Supplementary Protocol", *supra* note 46 (noting that "[a]lthough [article 12(2) of the *Nagoya–Kuala Lumpur Supplementary Protocol*] falls short of imposing an obligation on Parties to ensure prompt, adequate and effective compensation for damage caused by transboundary movements of [living modified organisms], it requires a [s]tate to pay serious attention to the regulatory framework for such compensation when it considers becoming a Party to the Supplementary Protocol" at 83).
[369] See Sands & Peel, *supra* note 108 at 797; Emanuela Orlando, "From Domestic to Global? Recent Trends in Environmental Liability from a Multi-Level Perspective and Comparative Law Perspective" (2015) 24:3 RECIEL 290 at 300 [Orlando, "Domestic to Global"]. See also Orlando, "Public and Private", *supra* note 95.
[370] *Paris Agreement*, 12 December 2015, Can TS 2016 No 9, art 8(1), 55:4 ILM 743 (entered into force 4 November 2016). This provision derives from the *Warsaw international mechanism for loss and damage associated with climate change impacts*, COP19 Dec 2/CP.19 in Conference of the Parties to the United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, Addendum, Part two: Action taken by the Conference of the Parties at its nineteenth session*, UN Doc FCCC/CP/2013/10/Add.1 (2013) 6, as noted by the UNGA in *Protection of global climate for present and future generations of humankind*, GA Res 69/220, UNGAOR, 69th Sess, Supp No 49, UN Doc A/RES/69/220 (2014). The *Paris Agreement* itself was adopted under the *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, Can TS 1994 No 7, 31:4 ILM 851 (entered into force 21 March 1994).
[371] *Adoption of the Paris Agreement*, COP21 Dec 1/CP.21 in Conference of the Parties to the United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum, Part two: Action taken by the Conference of the Parties at its twenty-first session*, UN Doc FCCC/CP/2015/10/Add.1 (2016) 2 at para

appeared unwilling to incorporate any concept of state responsibility/state liability or civil liability into the agreement.[372] On the other hand, the Cook Islands, Nauru, Niue, Micronesia, the Philippines, Tuvalu, the Solomon Islands and Vanuatu—immensely vulnerable to the effects of climate change on water levels—ratified the *Paris Agreement* but declared that it could not affect the existing regime of state responsibility for climate change nor impede its future development.[373]

The divergent views on liability surrounding the *Paris Agreement* are nothing new. They are consistent with the history of all previous climate negotiations, "where concepts of wrongdoing, injustice and liability complicate, if not completely bring to a standstill, efforts to engage the biggest emitters in ongoing processes of international cooperation."[374] This is why drafters show extreme caution before using words that are

---

51, as noted by the UNGA in *Protection of global climate for present and future generations of humankind*, GA Res 71/228, UNGAOR, 71st Sess, Supp No 49, UN Doc A/Res/71/228 (2016). On paragraph 51 the COP's decision, see Veera Pekkarinen, Patrick Toussaint & Harrovan Asselt Mayer, "Loss and Damage after Paris: Moving Beyond Rhetoric" (2019) 13:1 Carbon & Climate Rev 31 at 34–35; Mayer, *International Law of Climate Change*, *supra* note 282 at 191; Benoit Mayer, "Construing International Climate Change Law as a Compliance Regime" (2018) 7:1 Transnatl Envtl L 115 at 126–27; Sam Adelman, "Human Rights in the Paris Agreement: Too Little, Too Late?" (2018) 7:1 Transnatl Envtl L 17 at 29–30; Linda Siegele, "Loss & Damage (Article 8)" in Daniel Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: Oxford University Press, 2017) 224 at 230, 232–33; Bodansky, Brunnée & Rajamani, *supra* note 282 at 238–39; Daniel Bodansky, "The Paris Climate Change Agreement: A New Hope?" (2016) 110:2 AJIL 288 at 309; Margaretha Wewerinke-Singh & Curtis Doebbler, "The Paris Agreement: Some Critical Reflections on Process and Substance" (2016) 39:4 UNSWLJ 1486 at 1505–1506; Marie-Claire Cordonier Segger, "Advancing the Paris Agreement on Climate Change for Sustainable Development" (2016) 5:2 Cambridge J Intl & Comp L 202 at 212–13; MJ Mace & Roda Verheyen, "Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement" (2016) 25:2 RECIEL 197 at 204–207; Wil Burns, "Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change" (2015) 22:2 ILSA J Intl & Comp L 415 at 424–25; Géraud de Lassus St-Geniès, "L'*Accord de Paris* sur le climat: quelques éléments de décryptage" (2015) 28:2 RQDI 27 at 34, n 36. See also Lennart Wegener, "Can the Paris Agreement Help Climate Change Litigation and Vice Versa?" (2020) 9:1 Transnatl Envtl L 17 at 35 (suggesting that domestic climate change litigation can complement the absence of a basis for liability in the *Paris Agreement*); Monika Hinteregger, "Civil Liability and the Challenges of Climate Change: A Functional Analysis" (2017) 8:2 J Eur Tort L 238 (suggesting that tort law covers climate change loss and damage to a large extent).

[372] See Elisa Calliari, Swenja Surminski & Jaroslav Mysiak, "The Politics of (and Behind) the UNFCCC's Loss and Damage Mechanism" in Reinhard Mechler et al, eds, *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Cham: Springer, 2019) 155 at 162 (citing former United States Secretary of State John Kerry who had described the inclusion of legal remedies for loss and damage as a dealbreaker). See also Noah M Sachs, "The Paris Agreement in the 2020s: Breakdown or Breakup?" (2019) 46:3 Ecology LQ 865 at 890.

[373] United Nations, "Status of the Paris Agreement" at 4–6, online (pdf): *United Nations Treaty Collection* <www.treaties.un.org> [perma.cc/BE7E-BZRN].

[374] Carlarne & Colavecchio, *supra* note 110 at 124.

even remotely connected to responsibility or liability. The 1979 *Convention on Long-Range Transboundary Air Pollution*, for instance, contains a provision in which states undertake to exchange scientific data on the effects of pollution and "the extent of the damage which these data indicate can be attributed to long-range transboundary air pollution."[375] The word "damage" caused so much concern that the drafters added a footnote to let the reader know that the text "[did] not contain a rule on [s]tate liability as to damage".[376] Ironically, the footnote itself created more confusion among scholars because it left unaddressed the possibility of a claim based on customary international law.[377]

Sachs identifies three causes for the failure of international liability regimes.[378] First, the conflicting interests of developed and developing countries push negotiating parties to adopt substantive provisions first and to postpone indefinitely their discussions on liability. By contrast, marine oil pollution and nuclear liability regimes succeeded because of the nature of the underlying activities, which developed states perceived as beneficial. They were also (in the case of marine shipping) already subject to international rules and their risks threatened states indiscriminately—source states could become victim states and vice versa. Second, negotiating and implementing liability agreements has low benefits (uncertain future events) and high transaction costs (high number of parties). Finally, current treaties impose overly high liability ceilings and

---

[375] *Convention on Long-Range Transboundary Air Pollution*, 13 November 1979, 1302 UNTS 217, art 8(f), Can TS 1983 No 34, 18:6 ILM 1442 (entered into force 16 March 1983) [*Convention on Long-Range Transboundary Air Pollution*].
[376] *Ibid*, art 8(f), n 1.
[377] See Peter H Sand, "Transboundary Air Pollution" in Nollkaemper & Plakokefalos, *supra* note 278, 962 at 977–78; Peter H Sand & Jonathan B Wiener, "Towards a New International Law of the Atmosphere?" (2016) 7:2 Goettingen J Intl L 195 at 212–13; Okowa, *supra* note 230 at 32–33; Marc Pallemaerts, "Judicial Recourse Against Foreign Air Polluters: A Case Study of Acid Rain in Europe" (1985) 9:1 Harv Envtl L Rev 143 at 158–60 [Pallemaerts]; Marc Pallemaerts, "International Legal Aspects of Long-Range Transboundary Air Pollution" (1988) 1 Hague YB Intl L 189 at 214–17; Frederick C Eisenstein, "Economic Implications of European Transfrontier Pollution: National Prerogative and Attribution of Responsibility" (1981) 11:3 Ga J Intl & Comp L 519 at 555; A-Ch Kiss, "La convention sur la pollution atmosphérique transfrontière à longue distance" [1981] 1 RJE 30 at 32–33. See also International Law Commission, "Report of the Commission to the General Assembly on the work of its thirty-fourth session" (UNGAOR, 37th Sess, Supp No 10, UN Doc A/37/10 (1982)) in *Yearbook of the International Law Commission 1982*, vol 2, part 2 (New York: UN, 1983) 1 at 87, para 119 (UN Doc A/CN.4/SER.A/1982/Add.1), as noted by the UNGA in *Report of the International Law Commission*, GA Res 37/111, UNGAOR, 37th Sess, Supp No 51, UN Doc A/RES/37/700 (1982).
[378] See Sachs, *supra* note 39 at 867–90.

require substantial changes in domestic law. Their content, Sachs says, is simply too demanding for states to agree. The conclusion of his study is alarming: "[t]he lack of viable legal remedies for victims of transboundary pollution is a glaring and longstanding hole in international environmental law, and private law solutions, which can address transboundary problems without resort to dispute resolution among governments, are urgently needed."[379]

Sachs assumes—and indeed argues—that existing treaties fail when they are not widely ratified. This is a sound assumption. Ratification is obviously not the only measure of success in international environmental law. Recent scholarship has gone beyond state-based conceptions of treaty performance to demonstrate that private parties can channel environmental treaties as a source of private standards even if those treaties do not directly bind them, thereby attenuating the constraints of public international law and participating in a form of private governance.[380] Likewise, private actors could voluntarily comply with the spirit of unratified civil liability treaties by settling claims and providing prompt and adequate compensation for the damage that they cause. But there is no evidence of a large scale channelling effect of unratified civil liability treaties by private actors. Ratification remains, for now, the most reliable indication of their success. And from this perspective, most civil liability treaties fail.

Whether treaty failure results from "genuine disagreement" or bad faith "free riding" by polluting states,[381] the reality is implacable: air and water-related industrial activities, handling and disposal of hazardous waste, transboundary movement of living modified organisms, deep-water drilling and other risky endeavours fail to be captured by any international liability regime. Repeated miscarriages have caused yet another vicious circle in which the failure of existing civil liability treaties makes it increasingly difficult to negotiate new ones.[382]

---

[379] *Ibid* at 890.
[380] See the work of Natasha Affolder, cited *supra* note 87. See also Morgera & Gillies, *supra* note 194.
[381] Grušić, *supra* note 10 at 188.
[382] See Lefeber, "Supplementary Protocol", *supra* note 46 at 83.

The prospect of a broader international liability regime for transboundary pollution (customary or treaty-based) is remote. States show little interest in going beyond their aspirational statements. Yet we continue to discuss liability, "because [it] cut[s] to the core question of whether international environmental law should involve only governmental obligations to monitor and to prevent ecological damage, or whether it should broaden to provide a viable remedy to citizens when ecological damage does occur."[383] If the latter is correct, and in the absence of successful treaties, domestic law can offer an alternative mechanism to implement liability standards in relation to transboundary pollution.[384] But first, we must identify what international environmental law expects from states in this area. The answer, in my view, lies in the duty to ensure prompt and adequate compensation.

1.2. The duty to ensure prompt and adequate compensation

Civil liability treaties pursue a common objective: to compensate environmental damage. In this section, I argue that states must ensure the availability of prompt and adequate compensation for victims of transboundary pollution. States do not have an obligation to pay compensation themselves (which is what state liability would entail) but if they do not voluntarily do so, they must at least enact procedural standards to ensure that victims can bring claims before domestic courts. This includes appropriate rules on jurisdiction, choice of law and the enforcement of foreign judgments. Lefeber expresses the theory as follows:

> [T]his obligation confers on the source state the *right* to choose between the assumption of liability *sine delicto* and the provision of effective civil law remedies to victims […] In order to be effective, civil law remedies will have to meet certain procedural and substantive minimum standards. As for the procedural minimum standards, it has been found that effective civil law remedies must be made available to victims in the source state on a non-discriminatory basis.[385]

[383] See Sachs, *supra* note 39 at 904.
[384] See Percival, "International Responsibility and Liability", *supra* note 230 at 689.
[385] Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 320.

Framed this way, the duty to ensure prompt and adequate compensation reveals the role of private international law in strengthening civil liability regimes outside the treaty process.[386] In the next subsections, I elaborate on the duty itself, its origins and implications (1.2.1). I then comment on its future development (1.2.2).

1.2.1. Prompt and adequate compensation in international law

Many civil liability treaties mention in their preamble or provisions the need to ensure prompt, adequate or effective compensation for victims of transboundary pollution. These words are neither new, nor environment-specific. They echo the famous Hull formula in international investment law, a benchmark used to assess compensation for the lawful expropriation of foreign property by a state. In this subsection, I summarize the most notable environmental treaties alluding to prompt, adequate or effective compensation (1.2.1.1). I delve into the meaning of those words, by exploring their origins in international investment law (1.2.1.2) and their current status in international environmental law (1.2.1.3).

A few terminological notes before I move on. I refer in this thesis to the "duty to ensure prompt and adequate compensation" (equivalent for stylistic purposes to the "duty to ensure the availability of prompt and adequate compensation"). This is because I focus on the states' obligation to adopt certain procedural rules designed to facilitate civil lawsuits—in other words to *ensure* rather than to *provide* compensation. My formulation also excludes the requirement of effective compensation. As we will see, effectiveness refers to the currency of the payment, which is not a problem in the vast majority of cases. The *ILC Principles on the Allocation of Loss* themselves mention effectiveness sporadically: one principle refers to prompt, adequate and effective remedies and two

[386] See Sachs, *supra* note 39 at 896–903. I should note that Sachs himself expresses some optimism towards better cooperation in the negotiation of civil liability treaties. This is why he proposes solutions both *inside* and *outside* the treaty process: "[t]hese two approaches are not mutually exclusive. Successful conclusion of future civil liability treaties can help to strengthen informal norms governing transboundary damage, and at the same time the emergence of norms through a variety of domestic and international interactions can provide an impetus for states to negotiate and implement treaties." Sachs, *supra* note 39 at 890. As I hope I have made clear at this point, my research builds on some of the solutions he identifies *outside* the treaty process. Undeniably, treaty solutions are also desirable if they are attainable. *Cf ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 7 (emphasizing the importance of developing specific liability regimes whenever possible).

other principles refer to prompt and adequate compensation.[387] Effectiveness also has a different meaning when used to describe the measures required to minimize environmental damage after it occurs, which obviously has nothing to do with currency.[388] My formulation should not be interpreted, however, as suggesting that effectiveness has a lesser status than promptness and adequacy in defining the standard of compensation required under international environmental law.

1.2.1.1. Prompt and adequate compensation in environmental treaties

The need to ensure prompt and adequate compensation has become a standard provision in civil liability treaties. Language varies but the premise is remarkably consistent. The list of relevant instruments is extensive and comprises most of the civil liability treaties introduced earlier. The *Paris Convention* seeks to "ensure adequate and equitable compensation" for victims of nuclear damage.[389] The *Seabed Mineral Resources Convention*, the *CLC* and the *Fund Convention* each seek to provide "adequate compensation" for victims of damage caused by certain forms of oil pollution.[390] The more recent *Bunker Convention* speaks of "ensur[ing] the payment of adequate, prompt and effective compensation" for victims of bunker oil pollution.[391] The *HNS Convention* recognizes "the need to ensure that adequate, prompt and effective compensation is available" for victims of pollution associated with the carriage of hazardous and noxious substances by sea.[392] The *CRTD Convention* seeks to ensure "adequate and speedy compensation" for victims of damage caused during the carriage of dangerous goods by road, rail and inland navigation vessels.[393] The *Basel Liability Protocol* and the *Kiev Liability Protocol* both recognize "the need to provide for third party liability and environmental liability in order to ensure that adequate and prompt compensation is available" in relation respectively to the transboundary movement and disposal of

[387] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principles 3(a), 4(1), 6(1)–6(2).
[388] See *Antarctic Liability Annex*, *supra* note 246, arts 5–6.
[389] *Paris Convention*, *supra* note 322, Preamble, para 3.
[390] *CLC*, *supra* note 289, Preamble, para 3; *Fund Convention*, *supra* note 290, Preamble, para 4; *Seabed Mineral Resources Convention*, *supra* note 319, Preamble, para 3.
[391] *Bunker Convention*, *supra* note 321, Preamble, para 4.
[392] *HNS Convention*, *supra* note 326, Preamble, para 2.
[393] *CRTD Convention*, *supra* note 325, Preamble, para 3.

hazardous waste and industrial accidents on transboundary waters. [394] The *Antarctic Liability Annex* seeks to "provide for prompt and effective response action to environmental emergencies" in the Antarctic.[395] Finally, the *Nagoya—Kuala Lumpur Supplementary Protocol* recognizes "the need to provide for appropriate response measures" in case of damage or likelihood of damage caused by the transboundary movement of living modified organisms.[396]

Prompt and adequate compensation also resonates beyond civil liability treaties. The 1981 *Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region*,[397] the 1990 *Protocol for the Protection of the Marine Environment*,[398] the 1992 *Convention on the Protection of the Black Sea Against Pollution*[399] and the 1994 *Protocol for the Protection of the Mediterranean Sea*[400] all use those words. The 2007 *Nairobi International Convention on the Removal of Wrecks* is premised on "the need to adopt uniform international rules and

---

[394] *Kiev Liability Protocol*, *supra* note 135, Preamble, para 5; *Basel Liability Protocol*, *supra* note 327, Preamble, para 5.
[395] *Antarctic Liability Annex*, *supra* note 246, Preamble, para 3, referring to the *Protocol on Environmental Protection to the Antarctic Treaty*, *supra* note 246, art 15.
[396] *Nagoya–Kuala Lumpur Supplementary Protocol*, *supra* note 330, Preamble, para 4.
[397] See *Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region*, 23 March 1981, UN Doc UNEP/16.22/7, art 15, 20:3 ILM 746 (entered into force 5 August 1984).
[398] See *Protocol for the Protection of the Marine Environment Against Pollution from Land-Based Sources*, 21 February 1990, 2399 UNTS 3, art XIII(1) (entered into force 1 February 1993). The Protocol was adopted under the *Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution*, 24 April 1978, 140 UNTS 133, 17:3 ILM 511 (entered into force 1 July 1979).
[399] See *Convention on the Protection of the Black Sea Against Pollution*, 21 April 1992, 1764 UNTS 3, art XVI(3), 32:4 ILM 1110 (entered into force 15 January 1994).
[400] See *Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*, 14 October 1994, UN Doc UNEP(OCA)/MED IG.4/4, art 27(2)(a), [2013] OJ, L 4/15 (entered into force 24 March 2011) [*Protocol for the Protection of the Mediterranean Sea*]. The *Protocol for the Protection of the Mediterranean Sea* was adopted under the *Convention for the Protection of the Mediterranean Sea Against Pollution*, 16 February 1976, 1102 UNTS 27, 15:2 ILM 290 (entered into force 12 February 1978). *Cf Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area*, COP15 Dec IG 17/4 in United Nations Environment Programme, *Report of the 15th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols*, UN Doc UNEP(DEPI)/MED IG.17/10 (2008) Annex V at 133, paras 31–32 (requiring that actions for compensation be widely available). On the latter instrument, see generally Tullio Scovazzi, "The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage That Can Be Compensated" (2009) 13 Max Planck YB UN L 183 [Scovazzi].

procedures to ensure the prompt and effective removal of wrecks and payment of compensation for the costs therein involved."[401] The 1982 *UNCLOS* provides that states must "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction."[402] The *Bunker Convention* refers to this provision in its own preamble.[403] The ITLOS took it as a "direct obligation […] to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts […]."[404] According to the ITLOS, to ensure means "to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result."[405]

Other references to prompt and adequate compensation abound. The 1998 *Aarhus Convention* requires states to ensure access to justice in environmental matters, including through procedures that "provide adequate and effective remedies, including injunctive relief as appropriate, and [are] fair, equitable, timely and not prohibitively expensive."[406] The Compliance Committee of the *Aarhus Convention* held that private nuisance proceedings in English law are judicial procedures within the meaning of the convention,[407] such that they must offer prompt, adequate and effective remedies when

[401] *Nairobi International Convention on the Removal of Wrecks*, 18 May 2007, UKTS 2016 No 30, Preamble, para 2, 46:4 ILM 697 (entered into force 14 April 2005).
[402] *UNCLOS*, *supra* note 245, art 235(2).
[403] See *Bunker Convention*, *supra* note 321, Preamble, para 2.
[404] *Advisory Opinion on Responsibilities and Obligations of States*, *supra* note 294 at para 140.
[405] *Ibid* at para 110 (referring to article 139(1) of the *UNCLOS* and the obligations of sponsoring states in relation to the seabed and ocean floor).
[406] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447, art 9(4), UKTS 2005 No 24, 38:3 ILM 517 (entered into force 30 October 2001) [*Aarhus Convention*].
[407] See United Nations Economic Commission for Europe, Compliance Committee, *Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, 55th Mtg, UN Doc ECE/MP.PP/C.1/2016/10 (2016) at paras 68–73, as endorsed by UNECE Dec VI/8k in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the sixth session of the Meeting of the Parties—Addendum: Decisions adopted by the Meeting of the Parties*, UN Doc ECE/MP.PP/2017/2/Add.1 (2017) 54; Economic Commission for Europe, Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2008/23 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, 29th Mtg, UN Doc ECE/MP.PP/C.1/2010/6/Add.1 (2010) at paras 43–47, as endorsed by UNECE Dec IV/9i in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the*

the nuisance complained of affects the environment.[408] The ILA relied on prompt, adequate and effective compensation in the *Helsinki Articles on Private Law Remedies*[409] and the commentary to the 2004 *Berlin Rules on Water Resources*,[410] suggesting it was consistent with the aspirations of the international community expressed in the tenth principle of the *Rio Declaration*.[411] Similar wording appears in soft law instruments such as the 2006 *ILA Toronto Rules on Transnational Enforcement of Environmental Law*,[412] the 2010 *UNEP Guidelines on Access to Justice*[413] and the 2015 *IUCN Draft International Covenant on Environment and Development* (the latter emphasizing that the duty to ensure prompt and adequate compensation amounts to a due diligence obligation).[414] The 2017 *Global Pact for the Environment* drafted by legal experts and presented by French President Emmanuel Macron to the UN captures the same spirit.[415] It

---

fourth session of the Meeting of the Parties—Addendum: Chisinau Declaration and decisions adopted by the Meeting of the Parties, UN Doc ECE/MP.PP/2011/2/Add.1 (2011) 58. See also *Austin v Miller Argent (South Wales) Ltd*, [2014] EWCA Civ 1012 at paras 12–24, [2015] 2 All ER 524; *Morgan v Hinton Organics (Wessex) Ltd*, [2009] EWCA Civ 107 at paras 41–46, [2009] Env LR 30.

[408] See *Aarhus Convention*, *supra* note 406, art 9(4).

[409] See *ILA Helsinki Articles on Private Law Remedies*, *supra* note 364 at 405 (art 2(1)), 408 (art 3(1)(d)).

[410] See International Law Association, "Water Resources Law: Fourth Report" (2004) 71 Intl L Assn Rep Conf 334 at 371–72 [*ILA Berlin Rules on Water Resources*], as considered and adopted by International Law Association, "Resolution No 2/2004: Water Resources" (2004) 71 Intl L Assn Rep Conf 15.

[411] See *Rio Declaration*, *supra* note 35, Principle 10.

[412] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rule 3(3); ILA, "Final Report on Transnational Enforcement of Environmental Law", *supra* note 201 at 665–66.

[413] See *Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters*, UNEPGC Dec SS.XI/5 A in United Nations Environment Programme Governing Council, *Report of the Governing Council/Global Ministerial Environment Forum on the work of its eleventh special session (Bali, Indonesia, 24–26 February 2010)*, UNGAOR, 65th Sess, Supp No 25, UN Doc A/65/25 (2010) Annex I at 12, Annex, Guideline 21, as noted by the UNGA in *Report of the Governing Council of the United Nations Environment Programme on its eleventh special session*, GA Res 65/162, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/162 (2010) [*UNEP Guidelines on Access to Justice*]. See also *Protection of the marine environment against pollution from land-based sources*, UNEPGC Dec 13/18/II in United Nations Environment Programme Governing Council, *Report of the Governing Council on the work of its thirteenth session: 14–24 May 1985*, UNGAOR, 40th Sess, Supp No 25, UN Doc A/40/25 (1985) 53, Guideline 17(1), as noted by the UNGA in *International Co-operation in the field of the environment*, GA Res 40/200, UNGAOR, 40th Sess, Supp No 53, UN Doc A/Res/40/200 (1985), reprinted in (1985) 14:2/3 Envtl Pol'y & Law 77; United Nations Environment Programme, Working Group on Scientific and Technical Cooperation for MED POL, *Principles, methodology and guidelines for the protection of the marine environment against pollution from land-based sources*, UN Doc UNEP/WG.118/INF.23 (1985) at 7, Guideline 17(1).

[414] See International Union for Conservation of Nature, *Draft International Covenant on Environment and Development: Implementing Sustainability*, 5th ed (Gland: IUCN, 2015) at 21–22 (arts 59, 61–62), 154–163 [*IUCN Draft International Covenant on Environment and Development*].

[415] See Global Pact for the Environment, "Draft Global Pact for the Environment" (2017), arts 7, 11, online (pdf): *Global Pact for the Environment* <https://globalpactenvironment.org> [perma.cc/35H7-9PSE]. After the presentation of the *Global Pact* at the UN, the UNGA established a working group to discuss, among other things, options for a new international instrument. See *Towards a Global Pact for the Environment*,

requires effective and affordable access to justice and the adequate remediation of environmental damage.[416]

The UNGA itself has requested on fourteen occasions since 2006 that Israel "assume responsibility for prompt and adequate compensation" for environmental damage after Israeli Air Force bombed storage tanks in Lebanon, causing massive oil spills on the Lebanese and Syrian coastlines.[417] One hundred and sixty-two states voted in favour of

GA Res 72/277, UNGAOR, 72th Sess, Supp No 49, UN Doc A/RES/72/277 (2018). The working group issued its recommendations in June 2019. These recommendations make no reference to the *Global Pact* itself and focus primarily on strengthening existing international environmental law. See *Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, UN Doc A/AC.289/6/Rev.2 (2019) at paras 53–60, as endorsed by the UNGA in *Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, GA Res 73/333, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/333 (2019). For a summary of the negotiations, see International Institute for Sustainable Development Reporting Services, "Summary of the Third Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 20-22 May 2019", *Earth Negotiations Bulletin* 35:3 (25 May 2019), online (pdf): *International Institute for Sustainable Development* <https://enb.iisd.org> [perma.cc/LV66-5KTG].

[416] The *Global Pact* does not innovate in this regard. Almost forty years ago, the 1982 *World Charter for Nature* already required access to means of redress in case of environmental damage. See *World Charter for Nature*, GA Res 37/7, UNGAOR, 37th Sess, Supp No 51, UN Doc A/RES/37/7 (1982) Annex at para 23, 22:2 ILM 45. As Kotzé deplores, articles 5–8 of the *Global Pact*, including article 7 on the remediation of damage "seem simply to have been "copied and pasted" while no apparent thought was given to reframing them in terms of emerging case law, realities or progressive moves forward. They are neither innovative nor sufficiently radical to represent anything markedly different from that already offered by [international environmental law]." Louis Kotzé, "A Global Environmental Constitution for the Anthropocene?" (2019) 8:1 Transnatl Envtl L 11 at 26–27. See also Louis J Kotzé & Duncan French, "A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for *Lex Anthropocenae*?" (2018) 18:6 Intl Envtl Agreements: Pol, L & Econ 811 at 827. For other, sometimes more optimistic assessments of the potential of the *Global Pact*, see Teresa Parejo Navajas & Nathan Lobel, "Framing the Global Pact for the Environment: Why It's Needed, What It Does, and How It Does It" (2019) 30:1 Fordham Envtl LJ 32 and the special issue on the *Global Pact* published in (2019) 28:1 RECIEL 3–56.

[417] See *Oil slick on Lebanese shores*, GA Res 74/208, UNGAOR, 74rd Sess, Supp No 49, UN Doc A/RES/74/208 (2019) at para 5; *Oil slick on Lebanese shores*, GA Res 73/224, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/224 (2018) at para 5; *Oil slick on Lebanese shores*, GA Res 72/209, UNGAOR, 72nd Sess, Supp No 49, UN Doc A/RES/72/209 (2017) at para 5; *Oil slick on Lebanese shores*, GA Res 71/218, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/218 (2016) at para 5; *Oil slick on Lebanese shores*, GA Res 70/194, UNGAOR, 70th Sess, Supp No 49, UN Doc A/RES/70/194 (2015) at para 5; *Oil slick on Lebanese shores*, GA Res 69/212, UNGAOR, 69th Sess, Supp No 49, UN Doc A/RES/69/212 (2014) at para 5; *Oil slick on Lebanese shores*, GA Res 68/206, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/206 (2013) at para 4; *Oil slick on Lebanese shores*, GA Res 67/201, UNGAOR, 67th Sess, Supp No 49, UN Doc A/RES/67/201 (2012) at para 4; *Oil slick on Lebanese shores*, GA Res 66/192, UNGAOR, 66th Sess, Supp No 49, UN Doc A/RES/66/192 (2011) at para 4; *Oil slick on Lebanese shores*, GA Res 65/147, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/67/147 (2010) at para 4; *Oil slick on Lebanese shores*, GA Res 64/195, UNGAOR, 64th Sess, Supp No 49, UN Doc A/RES/64/295 (2009) at para 4; *Oil slick on Lebanese shores*, GA Res 63/211, UNGAOR, 63rd Sess, Supp No 49, UN Doc A/RES/63/211 (2008) at para 4; *Oil slick on Lebanese shores*, GA Res 62/188, UNGAOR, 62nd Sess, Supp No 49, UN Doc A/RES/62/188 (2007) at para 4; *Oil slick on Lebanese shores*, GA Res 61/194, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/194 (2006) at para 3.

the most recent version of the resolution. Seven voted against (Australia, Canada, Israel, Marshall Islands, Micronesia, Nauru and the United States) and seven abstained.[418] Resolutions from the UNGA have no binding effect but the vote indicates a wide consensus on the standard of compensation for environmental damage.[419]

Finally, the notion of prompt and adequate compensation echoes human rights law, particularly the requirement of an effective judicial remedy developed under UN's auspices in the 2018 *Framework Principles on Human Rights and the Environment* and the 2011 *Guiding Principles on Business and Human Rights*.[420] Ongoing negotiations to adopt a binding treaty on business and human rights also hinge on a possible state obligation to provide for "adequate, effective and prompt remedies" for human rights abuses committed in the course of business activities.[421] I will not assess here the full scope of the obligation to ensure access judicial remedies in each and every area of international law. Bear in mind, however, that the duty to ensure prompt and adequate compensation of environmental damage resembles—at least conceptually—those other obligations.

---

[418] See UNGA, 74th Sess, 52nd Plenary Mtg, Agenda Item No 19, UN Doc A/74/PV.52 (2019) at 9/58–9/59.

[419] See *Nuclear Weapons*, *supra* note 248 at para 70; *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14 at para 188.

[420] See United Nations Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/59 (2018), Framework Principle 10, as noted by the United Nations Human Rights Council in *Human rights and the environment*, HRC Res 37/8, 37th Sess, UN Doc A/HRC/RES/37/8 (2018); United Nations Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox. Mapping Report*, UN Doc A/HRC/25/53 (2013) at paras 41–43, as noted by the United Nations Human Rights Council in *Human rights and the environment*, HRC Res 25/21, 25th Sess, UN Doc A/HRC/RES/25/21 (2014); United Nations Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31 (2011) Annex, Principles 25–26, as endorsed by the United Nations Human Rights Council in *Human rights and transnational corporations and other business enterprises*, HRC Res 17/4, 17th Sess, UN Doc A/HRC/RES/17/4 (2011).

[421] See United Nations Human Rights Council, Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, "Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises" (16 July 2019), art 4(5), online (pdf): *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org> [perma.cc/83TR-SF8B].

1.2.1.2. Prompt and adequate compensation in international investment law

The origins of the duty to ensure prompt and adequate compensation in international environmental law are unclear. The ILC traces it back to the *Trail Smelter* and *Corfu Channel* cases,[422] but they have more to say on the prevention principle than on any given standard of compensation. In fact, the duty to ensure prompt and adequate compensation comes from international investment law. It echoes a standard of compensation known as the Hull formula—prompt, adequate and effective compensation for lawful expropriation of foreign property by a state.[423] Debates over the standard of compensation for lawful expropriation in international law have a long and checkered history which goes beyond the scope of this thesis, but a brief introduction helps us understand how the same language became so pervasive in international environmental law.[424]

The Hull formula came in response to the nationalization of American-owned properties by the Mexican state in the 1920s. The nationalization was part of a major land reform in the wake of the Mexican Revolution and the promulgation of the 1917 Constitution.[425] Years of discussions followed in order to determine the amount of compensation owed by Mexico to American nationals. Secretary of State Cordell Hull eventually exchanged letters with Mexican officials to resolve the matter. In 1938, Hull wrote in a letter to the Mexican ambassador in Washington that "no government is entitled to expropriate private property, for whatever purpose, without provision for *prompt, adequate, and effective* payment therefor."[426] This became known as the Hull Formula.

---

[422] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 72, para 3, citing *Trail Smelter*, *supra* note 11 at 1965; *Corfu Channel Case (United Kingdom v Albania)*, [1949] ICJ Rep 4 at 22. See also Kinna, *supra* note 113 at 378.

[423] Compensation for unlawful expropriation, by contrast, engages the rules on state responsibility. See *ADC Affiliate Ltd v Republic of Hungary* (2006), 15 ICSID Rep 534 at 617–18 (International Center for Settlement of Investment Disputes); *Case concerning the Factory at Chorzów* (1928), PCIJ (Ser A) No 17 at 27–29, 47.

[424] Special thanks to Lukas Vanhonnaeker (doctoral candidate at McGill University Faculty of Law at the time of writing) for his guidance regarding this section. All errors are my own.

[425] See Tali Levy, "NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard" (1995) 31:2 Stan J Intl L 423 at 424–29 [Levy]; Frank G Dawson & Burns H Weston, ""Prompt Adequate and Effective": A Universal Standard of Compensation?" (1962) 30:4 Fordham L Rev 727 at 740–41 [Dawson & Weston].

[426] United States Department of State, *Compensation for American-owned Lands Expropriated in Mexico: Full Text of Official Notes, July 21, 1938 to November 12, 1938* (Washington, DC: United States Government Printing Office, 1939) at 18 [emphasis added]. Selected excerpts are reprinted in Marjorie M

The United States has long championed the Hull Formula and its treaty practice is a useful starting point for our purposes. The most recent *United States Model Bilateral Investment Treaty* equates prompt, adequate and effective compensation with the payment without delay (promptness) of the fair market value of the expropriated investment (adequacy) in realizable and transferable currency (effectiveness).[427] Canada's standard *Foreign Investment Protection Agreement* also incorporates the Hull Formula.[428]

Dawson and Weston explained the meaning of the formula as follows. First, the expropriating state must make the payment as soon as possible (or in a reasonable time), with no need to make immediate or prior payment if it pays the interest accrued from the day of the expropriation. Second, the expropriating state must provide payment of the market value of the property before the taking occurred, but no more and without including speculation. Finally, the expropriating state must pay in a currency that is valuable to the foreign investor: ideally its own, but minimally one that is useful and free from restrictions on exports or reinvestment.[429]

Whiteman, *Digest of International Law*, vol 8 (Washington, DC: United States Government Printing Office, 1967) at 1101–1104, 1020, Green Haywood Hackworth, *Digest of International Law*, vol 3 (Washington, DC: United States Department of State, 1942) at 655–65 and "Mexico–United-States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens" (1938) 32:4 AJIL Supp 181.

[427] See United States Trade Representative & United States Department of State, "2012 U.S. Model Bilateral Investment Treaty" (April 2012), arts 6(1)(c), 6(2)(a), (b), (d), online (pdf): *Office of the United States Trade Representative* <www.ustr.gov> [perma.cc/D5Q7-ZCL5], reprinted in Lee M Caplan & Jeremy K Sharpe, "United States" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 755 at 763–850. *Cf Restatement of Foreign Relations Law*, vol 2, *supra* note 12, § 712(1)(c) (holding states responsible for expropriation if not accompanied by the provision of just compensation).

[428] See Government of Canada, *Foreign Investment Protection Agreement* (May 2004), art 13(1), online (pdf): *Italaw* <www.italaw.com> [perma.cc/A8NP-3P62], reprinted in Céline Lévesque & Andrew Newcombe, "Canada" in Brown, *supra* note 427, 53 at 62–128.

[429] See Dawson & Weston, *supra* note 425 at 736–40. For a breakdown of the three components of the Hull Formula, see also Gillian White, *Nationalisation of Foreign Property* (London: Steven & Sons, 1961) at 235–43; International Law Commission, "International Responsibility. Fourth Report by FV García Amador, Special Rapporteur. Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens—Measures Affecting Acquired Rights" (UN Doc A/CN.4/119) in *Yearbook of the International Law Commission 1959*, vol 2, part 1 (New York: UN, 1960) 1 at 19–21, paras 74–81 (UN Doc A/CN.4/SER.A/1959/Add.1).

The Hull Formula became the default American position in the postwar period.[430] In the 1960s and 1970s, however, some states began to question the necessity of protecting foreign investors. Opposition came from two fronts. Communist states attacked investment protection standards on ideological grounds, claiming that they prevented the nationalization of private property. Meanwhile, emancipated colonies denied the legitimacy of existing international law, claiming that it derived from a system which had condoned their servitude and granted undue privileges to colonial powers.[431]

Opponents brought the debate to the UN, where states agreed in 1962 on the payment of "appropriate compensation" in accordance with the law of the nationalizing state.[432] The vague notion of appropriate compensation gave capital-importing states more leeway than the Hull formula, which advantaged capital-exporting states and implied full compensation (although this last point remains debatable[433]). American representatives maintained that the notion of appropriate compensation referred in fact to the Hull formula,[434] but the 1974 *Charter of Economic Rights and Duties of States*—adopted without the support of some major capital exporting states—indicated that the domestic law of the nationalizing state would govern disputes over compensation,[435] effectively

[430] See Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016) at 68–69 [Dumberry].
[431] See *ibid* at 70–71; Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38:4 Va J Intl L 639 at 646–47.
[432] *Permanent sovereignty over natural resources*, GA Res 1803 (XVII), UNGAOR, 17th Sess, Supp No 17, UN Doc A/5217 (1962) 15 at para 4, 2:1 ILM 223.
[433] Compare Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2019) [Cox] ("[the Hull Formula] is generally understood as the requirement to pay 'full compensation' for expropriation, whereby 'adequate' compensation is understood to mean that 'the investor is paid the full value of the property taken'" at para 12.02); Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd ed (Oxford: Oxford University Press, 2017) [Marboe] ("[t]he Hull formula has sometimes been referred to as the standard of 'full compensation'. However, the wording of the diplomatic note of Cordell Hull does not contain the word 'full' nor does more recent state practice use it. Yet, even 'full compensation' would not be identical to the principle of 'full reparation' as a closer analysis of state practice shows" at para 2.47).
[434] See Dumberry, *supra* note 430 at 73; Stephen M Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources" (1963) 49:5 ABA J 463 at 465, reprinted in Stephen M Schwebel, *Justice in International Law: Selected Writings of Judge Stephen M Schwebel* (Cambridge: Cambridge University Press, 2008) 401.
[435] See *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UNGAOR, 29th Sess, Supp No 31, UN Doc A/9631 (1974) 50, art 2(c), 14:1 ILM 251; *Permanent sovereignty over natural resources*, GA Res 3171 (XXVIII), UNGAOR, 28th Sess, Supp No 30, UN Doc A/9030 (1973) 52 at para 3, 13:1 ILM 238.

rejecting the Hull Formula.[436] In the years that followed, arbitrators had fluctuating views over which standard of compensation prevailed.[437]

Despite its demise at the UN and its rejection by developing states, the Hull Formula has made its way into the "overwhelming majority" of recent bilateral investment treaties.[438] Multilateral treaties[439] and guidelines from the OECD[440] and the World Bank[441] have used similar words. The debate over its status in customary international law continues,[442] but the Hull Formula has undeniably become prevalent in investment treaties[443]. At a minimum, this consistency in treaty language indicates that "the members of the international community share the view that foreigners cannot be deprived of their property for domestic policy reasons without being effectively compensated for the current value of their investment."[444] But no matter how the standard of compensation is

[436] See Dumberry, *supra* note 430 at 73–74.
[437] See eg *CME Czech Republic BV v Czech Republic* (2006), 9 ICSID Rep 264 at 369–70, 416–19, 15:4 WTAM 83 (UNCITRAL) (full compensation, although Arbitrator Brownlie focused on just/appropriate compensation in his separate opinion); *Government of the State of Kuwait v American Independent Oil Company (AMINOIL)* (1982), 21:5 ILM 976 at 1032–34, 66 ILR 518 (ad hoc) (appropriate compensation in light of all circumstances); *Libyan American Oil Company (LIAMCO) v Government of the Lybian Arab Republic* (1981), 20:1 ILM 1 at 72–73, 76–77, 62 ILR 140 (ad hoc) (equitable compensation); *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic* (1977), 17:1 ILM 1 at 30–31, 53 ILR 389 (ad hoc) (appropriate compensation under UNGA Resolution 1803 (XVII)). See also *Banco Nacional de Cuba v Chase Manhattan Bank*, 658 F (2d) 875 at 888–93, 1981 US App Lexis 10793 (2nd Cir 1981) (full compensation is appropriate compensation in the circumstances of the case).
[438] Dumberry, *supra* note 430 at 113–14; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration* (Oxford: Oxford University Press, 2011) at 93. See also Cox, *supra* note 433 at para 12.15.
[439] See *Energy Charter Treaty*, 21 November 1990, 2080 UNTS 95, art 12(2), UKTS 2000 No 78, 34:2 ILM 381 (entered into force 16 April 1998); *ASEAN Comprehensive Investment Agreement*, 26 February 2009), art 14(1)(c), online (pdf): *ASEAN* <www.asean.org> [perma.cc/3Q5C-ACT7] (entered into force 29 March 2012). See also *Comprehensive Economic and Trade Agreement*, Canada and European Union, 30 October 2016, [2017] OJ, L 11/23, art 8.12(1)(d) (not yet in force, provisionally applied in part 21 September 2017); European Union, "European Union's Proposal for Investment Protection and Resolution of Investment Disputes. Transatlantic Trade and Investment Partnership. Trade in Services, Investment and e-Commerce" (12 November 2015), art 5(1)(d), online (pdf): *European Commission* <www.ec.europa.eu> [perma.cc/7KUM-SNNZ].
[440] See OECD, *Multilateral Agreement on Investment: Draft Consolidated Text*, OECD Doc DAFFE/MAI(98)7/REV1 (1998), art 3.2.
[441] World Bank, "Guidelines on the Treatment of Foreign Direct Investment" in World Bank, *Legal Framework for the Treatment of Foreign Direct Investment*, vol 2 (Washington, DC: World Bank, 1992) 33, Guideline IV(2), reprinted in (1992) 31:6 ILM 1379 & (1992) 7:2 ICSID Rev 297.
[442] See Dumberry, *supra* note 430 ("[…] the question as to whether or not the Hull Formula […] has transformed into a customary rule remains open" at 205).
[443] See the sources cited *supra* note 438.
[444] Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1997) 269 Rec des Cours 251 at 397.

defined (Hull Formula or otherwise), it is only the first step of the analysis. Courts and arbitrators then have to choose and apply a calculation method. This is another crucial question in international investment law.[445]

Compensation for lawful expropriation remains a controversial area of international law, shaped by stark disagreement between capital-importing and capital-exporting states. It is perhaps no coincidence that the Hull formula has crossed into international environmental law, which features equally strong tension between developed and developing states. Just how and when it did, however, is unclear. Transplantation is likely to have occurred incrementally through various political statements, negotiating positions and anecdotal occurrences. For instance, after the Cherry Point oil spill in the United States caused damage to Canadian coasts in 1972, Canadian Secretary of State for External Affairs Mitchell Sharp declared in Parliament that "the Canadian government expect[ed] full and prompt compensation of all damages suffered in Canada, as well as full [cleanup] costs, to be paid by those responsible."[446]

There are parallels between expropriation and transboundary pollution. Just like expropriation, transboundary pollution involves an interference with property and the deprivation of its economic benefits, an "obvious analogy" according to Boyle.[447] This analogy makes sense conceptually and historically. The debate over expropriation at the UN was anchored in the principle of national sovereignty over natural resources. The same principle was critical in the development of modern international environmental law.[448] Even as a new environmental consciousness arose, states consistently reasserted their sovereign right to exploit natural resources under their own terms as long as they did not cause damage to other states.[449] Broadly framed, every rule of international

[445] See Marboe, *supra* note 433, ch 4–6; Cox, *supra* note 433, ch 13.
[446] Statement on Cherry Point Oil Spill, *supra* note 166 at 2555.
[447] See Boyle, "Liability for Injurious Consequences", *supra* note 296 at 102; Birnie, Boyle & Redgewell, *supra* note 46 at 320; Boyle, "Environmental Liability", *supra* note 46 at 18. See also Mayer, "State Responsibility", *supra* note 282 at 200–201; Rutsel Silvestre J Martha, *The Financial Obligation in International Law* (Oxford: Oxford University Press, 2015) at 411–12.
[448] See generally Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).
[449] See *Rio+20 Declaration*, *supra* note 35 at paras 14–18; *Rio Declaration*, *supra* note 35, Principle 2; *Stockholm Declaration*, *supra* note 34, Principle 21.

environmental law is the product of a loose compromise and permanent tug-of-war between state sovereignty, environmental protection and the prevention principle.[450] The transplantation of the Hull formula into international environmental law may have been coincidental, but a shared conceptual and historical background facilitated it.

1.2.1.3. Status of the duty to ensure prompt and adequate compensation

In my view, the duty to ensure prompt and adequate compensation must be viewed as an emerging principle of international environmental law. As we will see in the next subsection, the ILC took it up as the foundation for the *Principles on the Allocation of Loss*. The ILC recommended that states ensure prompt and adequate compensation[451] and suggested that such a duty had the support of the international community.[452] The ILA was bolder, declaring in the commentary to the *Berlin Rules on Water Resources* that "there [was] a right under international law to prompt, adequate, and effective compensation or other appropriate remedies for injuries arising from activities in a [s]tate relating to an international drainage basin."[453] As early as 1977, the Canadian Delegation at the OECD took the position that states had "a duty to ensure the availability of adequate and practical legal remedies" for transboundary pollution in domestic law.[454] The formula varies (much like the thousands of bilateral investment treaties that are in place today) but the notion of prompt and adequate compensation is increasingly well-established in international environmental law.

---

[450] See Leslie-Anne Duvic-Paoli & Jorge E Viñuales, "Principle 2: Prevention" in Viñuales, *supra* note 35, 107 at 108–10. *Cf* Jutta Brunnée & Stephen J Toope, "The Sovereignty of International Law?" (2017) 67:4 UTLJ 496 ("[…] international law's early approach to environmental harm conceptualized such harm as violations of sovereign rights. Then, gradually, international law evolved to focus on environmental harm proper and to give expression to community interests in environmental protection" at 509). On this point, see also Banda, *supra* note 176 at 1896–97.

[451] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 4(1).

[452] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 72–73, paras 4–5; International Law Commission, "Third Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur" (UN Doc A/CN.4/566) in *Yearbook of the International Law Commission 2006*, vol 2, part 1 (New York: UN, 2013) 71 at 85, para 36 (UN Doc A/CN.4/SER.A/2006/Add.1).

[453] *ILA Berlin Rules on Water Resources*, *supra* note 410 at 371.

[454] Canadian Delegation (OECD), "Transfrontier Pollution (TFP): Liability and Compensation" in OECD, *Transfrontier Pollution*, *supra* note 198, 283 at 284. The delegation made sure to mention that it had submitted the report "as a contribution to the discussion of liability for transfrontier pollution" and not as a reflection of Canada's position. *Ibid* at 283, n 1.

Grey areas obviously remain. The duty to ensure prompt and adequate compensation is not part of customary international law yet and has not reached the level of fine-tuning seen in international investment jurisprudence and scholarship. The *ILC Principles on the Allocation of Loss* do not stick to any rigid interpretation of the Hull formula or any other standard. It may be that the standard of compensation is less stringent than the Hull formula or that it deviates from it in some respects. For now, the duty to ensure prompt and adequate compensation refers more broadly to the availability of compensation for environmental damage. It could morph into a more precise standard of compensation as time passes, and its precise meaning is judicially tested.[455]

Scholarship confirms that prompt and adequate compensation has an increasingly important place in international environmental law. Anderson, for instance, hints at a general obligation in international law to provide remedies for transboundary pollution but concludes that this obligation is more of a soft law principle than a binding norm, notably because treaty practice is insufficiently developed.[456] Barboza, who acted as Special Rapporteur in the ILC's project on liability, thinks it is conceivable to deduce a perceived obligation to ensure prompt and adequate compensation from the states' willingness to deal with transboundary damage in one way or another.[457]

Others are more assertive. For Boyle, primary materials reveal the existence of a principle of compensation that is more than just soft law, even though it is not easily definable.[458] Orlando underscores a growing international consensus surrounding the duty to ensure prompt and adequate compensation.[459] Foster notes that it is possible to argue

[455] Expropriation precedents could be relevant in this regard. See *In the Matter of the People of Enewetak* (2000), 39:5 ILM 1214 at 1215 (Marshall Islands Nuclear Claims Tribunal) (drawing from expropriation precedents to assess damage to property resulting from the displacement of local populations in Marshall Islands to carry out a United States nuclear testing program—damages included radiological cleanup costs and soil remediation). See also the sources cited *supra* note 447.
[456] See Anderson, *supra* note 5 at 414.
[457] See Barboza, *supra* note 230 at 157.
[458] See Boyle, "Environmental Liability", *supra* note 46 at 18–19. See also Boyle, "Liability for Injurious Consequences", *supra* note 296 at 101–102; Birnie, Boyle & Redgewell, *supra* note 46 at 319–20.
[459] See Orlando, "Domestic to Global", *supra* note 369 at 303.

that the duty to ensure prompt and adequate compensation already exists in international law.[460] Plakokefalos hints at the very least at a *de lege ferenda* obligation:

> […] it is safe to conclude that there is no liability rule that would oblige states to pay compensation in international law. What might be inferred, however, is that there is a *de lege ferenda obligation* of states to ensure that compensation is provided in cases of transboundary harm. The [*ILC Principles on the Allocation of Loss*] and the number of civil liability conventions, in combination with the general obligation to prevent transboundary harm, lead to this conclusion.
>
> The fact that there is no customary rule on state liability does not mean that states do not bear obligations, beyond those on prevention of transboundary harm, whenever damage to the environment occurs. According to the [*ILC Principles on the Allocation of Loss*], the state has the obligation to ensure that the victims of the harm are compensated. Similar obligations are to be found, explicitly or implicitly, in a number of civil liability conventions and protocols.[461]

The strongest doctrinal support for this proposition comes from René Lefeber. In his pioneering monograph, Lefeber points out that unlike state responsibility/liability, the obligation to ensure prompt and adequate compensation has wide support in international law. This support includes the state practice of settling claims with lump-sum agreements and voluntary payments (even though it does not persuasively establish a principle of state liability in customary international law), in treaties obliging states to provide civil remedies and in the above-mentioned civil liability treaties.[462]

Lefeber also defines the words prompt, adequate and effective, an exercise later endorsed by the ILC. Lefeber argues that victims obtain prompt compensation (the time component) when they do not face lengthy procedural obstacles to bring their claim.[463] At a minimum, they should have access to interim relief to make up for unavoidable delays in legal proceedings.[464] Victims obtain adequate compensation (the quantitative

---

[460] See Caroline Foster, "The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?" (2005) 14:3 RECIEL 265 at 280–81 [Foster].
[461] Plakokefalos, *supra* note 278 at 1059–60.
[462] See Lefeber, *Transboundary Environmental Interference*, *supra* note 50.
[463] See *ibid* at 323. *Cf Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 (referring to "the procedures that would govern access to justice, and that would influence the time and duration for the rendering of decisions on compensation payable in a given case" at 77, para 7).
[464] See *ibid.*

component) when the amount covers at least a portion of the claim.[465] Victims finally obtain effective compensation (the qualitative component) when the funds are provided in a convertible currency and without conditions.[466] Lefeber does not refer to the Hull formula nor its interpretation by courts and arbitrators, but his conclusion aligns with the state of the law as described in the previous subsection. Another author recently interpreted the components of the duty to ensure prompt and adequate compensation in similar fashion.[467]

For Lefeber, the duty to ensure prompt, adequate and effective compensation requires states to provide civil remedies that meet certain minimum procedural standards unless they choose to assume their own liability. These standards, he says, are found in the rules governing jurisdiction, choice of law and the recognition and enforcement of foreign judgments.[468] This is the first time a scholar explicitly hints at a connection between the duty to ensure prompt and adequate compensation and the rules of private international law.

Arguably, Lefeber's explanations do not add enough flesh to the bones of the duty to ensure prompt and adequate compensation. It seems obvious that prompt and adequate compensation entails a certain amount of money paid in a certain time and in a certain currency, but the details are harder to pin down. Nonetheless, Lefeber successfully demonstrates that private international law plays a key role in turning the duty to ensure prompt and adequate compensation into a meaningful concept. This is particularly obvious in the *ILC Principles on the Allocation of Loss*.

Before turning to those principles, I must comment on Lefeber's more recent work. His original thesis identified prompt and adequate compensation as the basis for the future development of international liability law—a proposition which I argue is well founded in light of the work of the ILC and the contemporaneous opinion of scholars. Eighteen

---

[465] See *ibid* at 323–24. *Cf Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 (seemingly lowering the threshold of adequacy to any compensation that is "not arbitrary or grossly disproportionate to the damage actually suffered, even if it is less than full" at 78, para 8).
[466] See *ibid* at 324.
[467] See Mehdi Piri Damagh, *Prevention and Compensation of Trans-Boundary Damage in Relation to Cross-Border Oil and Gas Pipelines* (Cambridge: Intersentia, 2015) at 343–44 [Piri Damagh].
[468] See *ibid*.

years later, however, Lefeber nuanced his statement in a piece on the *Nagoya—Kuala Lumpur Supplementary Protocol*.[469] He still acknowledges the shift from state responsibility/liability to civil liability in international environmental law but adds a third step to this evolution: a so-called duty to ensure prompt, adequate and effective response measures.[470]

Lefeber argues that the duty to ensure prompt and adequate compensation works well for traditional damage to private property, but not for damage to public goods such as the environment itself.[471] Evaluating the monetary value of environmental damage, he says, poses intrinsic difficulties. The process can never restore things to the way they were. Hence states have moved from civil to regulatory liability in the negotiation of new treaties. Lefeber defines regulatory liability (not to be confused with regulatory liability in domestic tort law, also known as regulatory negligence) as an obligation to implement response measures to prevent environmental damage, to avoid further damage or to restore the damage already caused.[472]

Regulatory liability entails the adoption of contingency plans backed by sufficient technical knowledge and the financial means to prevent environmental damage and to mitigate it once it has occurred. The recent *Antarctic Liability Annex* and *Nagoya—Kuala Lumpur Supplementary Protocol* have detailed provisions to that effect.[473] The *ILC Principles on the Allocation of Loss* also feature a set of response measures,[474] which the ILC distinguished from its *Articles on Prevention* on the basis that they deal with the action taken after an incident occurs, but ideally before it crosses the borders of the source state[475]—a rather arcane distinction.

---

[469] See *Nagoya–Kuala Lumpur Supplementary Protocol*, *supra* note 330.
[470] See Lefeber, "Supplementary Protocol", *supra* note 46 at 84–87.
[471] See *ibid* at 84.
[472] See *ibid* at 86.
[473] See *Nagoya–Kuala Lumpur Supplementary Protocol*, *supra* note 330, art 5; *Antarctic Liability Annex*, *supra* note 246, arts 3–6.
[474] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 5.
[475] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 84, para 5; *ILC Articles on Prevention*, *supra* note 250, arts 16–17.

Lefeber exaggerates the autonomous meaning of regulatory liability, in my view. Response measures are an ambiguous notion that could refer to the measures taken either before or after an accident occurs. In the latter case, response measures are not entirely distinct from compensation. They are a form of *ex post* prevention: they can restore a previous state of affairs or partially mitigate a loss which will later be financially compensated. Either way, Lefeber does not explain how they represent a standalone legal concept rather than a necessary implication of the liability reasoning.

Lefeber also overstates the novel character of regulatory liability. Several treaties already require the operator to take all necessary response measures after environmental damage occurs, in addition to providing financial compensation.[476] Others refer to environmental damage as including the cost of preventive measures, counter-intuitively defined as all measures taken *after* an accident has occurred to prevent or minimize damage.[477] Those provisions are often vague and do not delve into the nature and implementation of specific response measures. The *Antarctic Liability Annex* and the *Nagoya—Kuala Lumpur Supplementary Protocol*, by contrast, contain more sophisticated arrangements and a clearer role for states and private parties. This is a noteworthy contribution[478] but hardly a brand-new paradigm.

It is also too early to tell whether the increase in the sophistication of response obligations will have any real impact on international liability law. The *Nagoya—Kuala Lumpur Supplementary Protocol* entered into force in 2018, but the *Antarctic Liability Annex* is not yet in force. Lukewarm response may not suffice for these instruments to avoid the fate of so many civil liability treaties—once promising, now headed for textbook oblivion. Other scholars do not fully embrace Lefeber's optimism towards the concept of regulatory liability either. Foster, in particular, doubts that regulatory liability

[476] See *Kiev Liability Protocol*, *supra* note 135, art 6; *Basel Liability Protocol*, *supra* note 327, art 6.
[477] See *Bunker Convention*, *supra* note 321, arts 1(7), 1(9)(b); *CSC*, *supra* note 322, arts I(f)(vi), I(h); *HNS Convention*, *supra* note 326, arts 1(6)(d), 1(7); *CLC*, *supra* note 289, art I(6)(b), I(7); *Fund Convention*, *supra* note 289, art 1(2), 3(b); *CRTD Convention*, *supra* note 325, arts 1(10)(d), 1(11); *Seabed Mineral Resources Convention*, *supra* note 319, arts 1(6)–1(7).
[478] On the significance of the *Nagoya—Kuala Lumpur Supplementary Protocol*, see Sands & Peel, *supra* note 108 at 798; Anastasia Telesetsky, "Introductory Note to the Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress" (2011) 50:1 ILM 105 at 106.

truly equates with liability as understood in international law.[479] For these reasons, I continue to refer to the duty to ensure prompt and adequate compensation as developed in Lefeber's earlier work, leaving out the effectiveness component and mentioning the requirement of appropriate response measures when necessary.

We have seen so far that the notion of prompt and adequate compensation runs through international environmental law. The next subsection examines the *ILC Principles on the Allocation of Loss*—the latest synthesis of the law in this area, the clearest illustration of the role of private international law in ensuring prompt and adequate compensation, and an anchor for its future development.

1.2.2. Future development of the duty to ensure prompt and adequate compensation

The ILC blazed a trail for the future development of the duty to ensure prompt and adequate compensation when it adopted the *Principles on the Allocation of Loss*, which marked the end of its tremendously long and protracted journey into the depths of liability.[480] The ILC submitted eight principles to the UNGA, which in turn commended them to the attention of governments.[481] While the law is not entirely settled, the very existence of the *ILC Principles on the Allocation of Loss* and its consideration by the

[479] See Caroline E Foster, "Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era" (2014) 17:2 J Intl Econ L 355 ("Lefeber uses the term "regulatory liability approach" in describing [s]tates' obligation to ensure prompt, adequate, and effective response measures. [citation omitted]. However, it is hard [to] see that this amounts to any form of liability on the public international plane" at 369, n 78). *Cf* Emanuela Orlando, "Liability" in Ludwig Krämer & Emanuela Orlando, eds, *Elgar Enyclopedia of Environmental Law*, vol 6: Principles of Environmental Law (Cheltenham: Edward Elgar, 2018) 272 [Orlando, "Liability"] ("[…] the [*Nagoya—Kuala Lumpur Supplementary Protocol*] put[s] forward a 'novel' concept of liability which goes beyond monetary compensation to include the primary duty to take response action to mitigate and restore the damage" at 284); Orlando, "Domestic to Global", *supra* note 369 (citing Lefeber to suggest that the "regulatory approach to liability in the text of the [*Nagoya—Kuala Lumpur Supplementary Protocol*] has been referred to as signalling a paradigm shift in the evolution of international liability, at least in conventional international law" at 300); Dire Tladi, "Civil Liability in the Context of the Cartagena Protocol: To Be or Not to Be (Binding)?" (2010) 10:1 Intl Envtl Agreements: Pol, L & Econ 15 (describing the rise of regulatory liability as an alternative to civil liability in the negotiation of the *Nagoya—Kuala Lumpur Supplementary Protocol*).

[480] See *ILC Principles on the Allocation of Loss*, *supra* note 37. For a short summary of the history of the project, see UN, vol 1, *supra* note 37 at 219–29; Hafner & Buffart, *supra* note 235 at 237–39. For an insider look, see Barboza, *supra* note 230, ch 6–7.

[481] See the resolutions cited *supra* note 37.

UNGA strengthens the place of the duty to ensure prompt and adequate compensation in international law.

The *ILC Principles on the Allocation of Loss* provide a roadmap to allocate losses after transboundary environmental damage occurs. Their preamble reaffirms the commitment to develop international liability law and recalls existing civil liability treaties.[482] The ILC made it clear that it did not attempt to define the precise status of each principle in customary international law. It simply sought to contribute to the development of international law without prejudice to existing and future treaties, or other doctrines such as state responsibility.[483]

The *ILC Principles on the Allocation of Loss* have two purposes: to ensure prompt and adequate compensation for victims of transboundary damage[484] and to protect the environment.[485] To comply with the *ILC Principles on the Allocation of Loss*, states must adopt appropriate response measures in the event of transboundary damage and ensure that compensation is available for victims who choose to sue the person responsible in civil courts.[486] States do not have to pay compensation themselves[487] except if they are acting as the operator.[488] The document assumes that the source state acted with due diligence in preventing damage such that its responsibility/liability is not engaged in that regard.[489]

---

[482] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Preamble, paras 1, 8.
[483] See *ibid*, Principle 7; *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 60–61, para 13.
[484] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 3(a). *Cf* Foster, *supra* note 460 at 275–77 (arguing that prompt and adequate compensation in the *ILC Principles on the Allocation of Loss* has become secondary to the broader objective of cost internationalization in accordance with the polluter-pays principle). The ILC collapsed the two when it explained that prompt and adequate compensation "should be perceived from the perspective of achieving "cost internalization", which constituted the core, in its origins, of the "polluter pays" principle." *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 74, para 11.
[485] See *ibid*, Principle 3(b). The ILC presented environmental protection *per se* as a recent concern of mankind but remained vague on how it could achieve it. *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 73, para 6.
[486] See *ibid*, Principle 5.
[487] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 77, para 3.
[488] See *ibid* at 72, para 33.
[489] See *ibid* at 77, para 2.

The *ILC Principles on the Allocation of Loss* possess the basic features of civil liability treaties, including the notion of prompt and adequate compensation. As Boyle astutely observes, drawing from previous efforts rather than starting afresh can be a blessing and a curse. Covering known territory facilitates acceptance, but why would states agree to something that they explicitly rejected when expressed in a civil liability treaty?[490] The ILC's approach is a gamble, albeit one that has very low stakes considering the failure of all other solutions.

The *ILC Principles on the Allocation of Loss* contain two types of rules: ones that set out the substantive conditions of the operator's liability (standard of liability, financial limits, compensation funds, etc.) and ones that set out the procedural requirements needed to effectively impose liability on the operator. They define the operator as the person in control of the activity when damage occurs.[491]

The fourth principle entitled "prompt and adequate compensation" goes to the substantive conditions of the operator's liability. It requires each state to take necessary measures to ensure prompt and adequate compensation, including the imposition of no-fault liability on the operator, the requirement to establish and maintain insurance coverage and, in appropriate cases, industry funds and other financial resources.[492]

The sixth principle, by contrast, lists the procedural means to ensure prompt and adequate compensation. It is the most important for our purposes:

> **Principle 6: International and Domestic Remedies**
>
> **1.** States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of

[490] See Boyle, "Liability for Injurious Consequences", *supra* note 296 at 104; Birnie, Boyle & Redgewell, *supra* note 46 at 321–22; Boyle, "Environmental Liability", *supra* note 46 at 25–26. See also Gou Haibo, "ILC Proposal on the Role of Origin State in Transboundary Damage" in Michael G Faure & Song Ying, eds, *China and International Environmental Liability: Legal Remedies for Transboundary Pollution* (Cheltenham: Edward Elgar, 2008) 107 at 115 [Haibo]; Foster, *supra* note 460 at 272. But see Kiss & Shelton, *supra* note 277 at 1140 (criticizing the choice of the ILC to dismiss strict state liability entirely, even to progressively develop the law).
[491] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 2(g).
[492] See *ibid*, Principle 4.

transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.

3. Paragraphs 1 and 2 are without prejudice to the right of the victims to seek remedies other than those available in the State of origin.

4. States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

5. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.[493]

The ILC gave further substance to the words prompt and adequate in its *Commentary to the ILC Principles on the Allocation of Loss*. It is said that promptness refers to the time and duration of procedures, while adequacy refers to an amount of compensation that is not arbitrary or grossly disproportionate, even if it is not sufficient.[494] The ILC's take echoes the work of Lefeber.[495] It also finds support in international investment law.[496]

Interestingly, UNEP interpreted the same words quite differently in its implementation guide to the *UNEP Guidelines on Access to Justice*. UNEP defined adequacy as the full compensation of past damage, the prevention of future damage and the restoration of the *status quo ante.*[497] It referred to effectiveness in terms of how well states prevent or rectify environmental damage, and how efficiently remedies can be enforced.[498] Finally, it associated promptness with the provision of injunctive relief before environmental damage becomes irreversible.[499] The United Nations Economic Commission for Europe

[493] See *ibid*, *supra* note 37, Principle 6.
[494] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 77–78, paras 7–8.
[495] See *ibid* at 85, para 1, n 462, citing Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 234–36.
[496] For further discussion on international investment law, see subsection 1.2.1.2 above.
[497] See United Nations Environment Programme, *Putting Rio Principle 10 into Action: An Implementation Guide* (Nairobi: UNEP, 2015) at 119, commenting on *UNEP Guidelines on Access to Justice*, *supra* note 413, Guideline 21.
[498] See *ibid*.
[499] See *ibid* at 120.

(UNECE) used similar concepts in its implementation guide to the *Aarhus Convention*.[500] These definitions are all plausible, and should also help shape the duty to ensure prompt and adequate compensation.

The fourth and the sixth *ILC Principles on the Allocation of Loss* confirm that the duty to ensure prompt and adequate compensation is now the focal point of international liability law, both substantively and procedurally. As Boyle argues, "it is not new, and builds on existing law, but it is the first occasion on which such a core principle has been articulated in such general terms."[501] Such general statements admittedly have a precarious status in international environmental law, but the ILC's choice to frame its principles as a "semi-non-binding" declaration of a residual nature could paradoxically spare them from past failures. Expecting that total harmonization would prove impossible, the ILC had initially designed a pure soft law instrument, a decision met by heavy criticism.[502] The ILC then made certain provisions mandatory.[503] It identified prompt and adequate compensation as the overarching principle and gave states leeway to implement it as they saw fit.[504] Domestic laws could therefore keep distinctive features while still reflecting global priorities such as access to justice, public participation and compensation.[505] This is sensible, even though the combination of *shoulds* and *shalls* throughout the *ILC Principles on the Allocation of Loss* makes for mystifying reading.[506]

I am optimistic towards the potential impact of the *ILC Principles on the Allocation of Loss*—it is the point of this thesis. At the same time, I cannot overlook an apparent lack of interest in the ILC's work. Only a few states gave feedback to the ILC throughout the process.[507] Some welcomed the *ILC Principles on the Allocation of Loss* with strong (and

---

[500] See United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2nd ed (Geneva: UN, 2014) at 199–200 [UNECE], commenting on *Aarhus Convention*, *supra* note 406, art 9(4).
[501] See Boyle, "Environmental Liability", *supra* note 46 at 18.
[502] See *ibid* at 18–20, 26.
[503] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principles 5(a)–5(b), 5(d), 6(1), 8(2) (all using the word "shall" as opposed to "should").
[504] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 60, paras 11–12.
[505] See *Rio+20 Declaration*, *supra* note 35 at paras 14–18; *Rio Declaration*, *supra* note 35, Principles 10, 13.
[506] See Barboza, *supra* note 230 at 150–51. See also Piri Damagh, *supra* note 467 at 376.
[507] Prior to the adoption of the *ILC Principles on the Allocation of Loss*, see International Law Commission, "Comments and observations received from Governments" (UN Doc A/CN.4/562 and Add.1) in *Yearbook*

well-deserved) skepticism.[508] Others were more optimistic but understandably refrained from unbridled celebration.[509] The ILC itself chose not to reopen the Pandora's box of liability in its ongoing work on the protection of the atmosphere.[510] The UNGA, however, has continued to bring the *ILC Principles on the Allocation of Loss* to the attention of governments every three years since then.[511]

The *ILC Principles on the Allocation of Loss* "exist in the legal-political space of normative desiderata".[512] Realistically, they will not lead to a global liability regime,[513]

---

of the International Law Commission 2006, vol 2, part 1 (New York: UN, 2013) 89 (UN Doc A/CN.4/SER.A/2006/Add.1). More states, however, gave feedback after the adoption of the *ILC Principles on the Allocation of Loss* and their consideration at the UNGA. See Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/74/131 and Add.1 (2019); Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/71/136 and Add.1 (2016); Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/68/170 (2013); Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/65/184 and Add.1 (2010).

[508] See Jean-Maurice Arbour et al, *Droit international de l'environnement*, 3rd ed (Cowansville: Yvon Blais, 2016) at 1237; Hafner & Buffart, *supra* note 235 at 248–49; Haibo, *supra* note 490 at 125.

[509] See Orlando, "Liability", *supra* note 479 at 284; Wilde, *supra* note 90 at 204; Sands & Peel, *supra* note 108 at 770; Ellis, "Book Review", *supra* note 80 at 685; Barboza, *supra* note 230 at 159; André Nollkaemper, "Cluster-Litigation in Cases of Transboundary Environmental Harm" in Faure & Ying, *supra* note 490, 11 at 35; Wolfrum, Langenfeld & Minnerop, *supra* note 196 at 493–94; Foster, *supra* note 460 at 266, 281.

[510] See International Law Commission, "Report of the Commission to the General Assembly on the work of its sixty-fifth session" (UNGAOR, 68th Sess, Supp No 10, UN Doc A/68/10 (2013)) in *Yearbook of the International Law Commission 2013*, vol 2, part 2 (New York: UN, 2018) 1, as noted by the UNGA in *Report of the International Law Commission on the work of its sixty-fifth session*, GA Res 68/112, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/112 (2013) ("[t]he Commission included the topic in its programme on the understanding that: [t]he topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals […]" at 78, para 168(a)). *Cf* International Law Commission, "Report of the Commission to the General Assembly on the work of its sixty-third session" (UNGAOR, 66th Sess, Supp No 10, UN Doc A/66/10 (2011)) in *Yearbook of the International Law Commission 2011*, vol 2, part 2 (New York: UN, 2018) 1, Annex II at 194, para 24 (UN Doc A/CN.4/SER.A/2011/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its sixty-third session*, GA Res 66/98, UNGAOR, 66th Sess, Supp No 49, UN Doc A/RES/66/98 (2011). Work on draft guidelines is still underway. See International Law Commission, "Report of the Commission to the General Assembly on the work of its seventieth session" (UNGAOR, 73rd Sess, Supp No 10, UN Doc A/73/10 (2018)) at 157–200, paras 67–78, as noted by the UNGA in *Report of the International Law Commission on the work of its seventieth session*, GA Res 73/265, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/265 (2018).

[511] See the resolutions cited *supra* note 37.

[512] Duncan French & Louis J Kotzé, "'Towards a Global Pact for the Environment': International Environmental Law's Factual, Technical and (Unmentionable) Normative Gaps" (2019) 28:1 RECIEL 25 at 28 [French & Kotzé].

[513] But see Listiningrum, *supra* note 208 ("[…] [the *ILC Principles on the Allocation of Loss*] could potentially be used as evidence of *opinio juris* in finding customary international law when judges find that

but they could lead to meaningful procedural changes in domestic law. The adoption of prompt and adequate compensation as a governing principle of environmental liability will then turn out to be the most important legacy left by the ILC in this area, even in the absence of a single new civil liability treaty.[514] I explore in the next chapters whether this legacy can leave traces in Canada.

Summing up, we have seen so far that international environmental law now features civil liability as the dominant approach to deal with compensation for transboundary pollution. Prompt and adequate compensation has emerged as an important duty. This shift is conceptually sound but existing treaties fail to attract consensus and political will is lacking. This is a major problem. Now that the ILC's project is over, the message needs a new messenger. It also needs a new package.

The most promising option outside treaty negotiation is to strengthen domestic liability regimes in order to make them a viable threat. But domestic liability regimes can only play a role if appropriate rules of private international law are in place, ones that successfully bring transboundary polluters within the purview of domestic law. Non-treaty solutions therefore rest on the development of underlying norms governing access to justice and jurisdiction. As Sachs explains, these norms might be meagre when compared to a comprehensive treaty-based liability regime, but they "would have the advantages of flexibility and the ability to take root across diverse legal cultures 'transform[ing], mutat[ing], and percolat[ing] up and down, from the public to the private, from the domestic to the international level and back down again.'"[515] The *ILC Principles on the Allocation of Loss* (particularly the sixth principle) contain the seeds of these norms. This thesis defines them further.

---

the provisions are supported widely by state practice […]" at 132); Piri Damagh, *supra* note 467 ("[t]he [*ILC Principles on the Allocation of Loss*] are non-binding, but they largely contribute to develop international law with respect to the compensation of trans-boundary damage" at 179).

[514] See Boyle, "Liability for Injurious Consequences", *supra* note 296 at 102; Birnie, Boyle & Redgewell, *supra* note 46 at 319; Boyle, "Environmental Liability", *supra* note 46 at 18.

[515] Sachs, *supra* note 39 at 898, citing Harold Hongju Koh, "Transnational Legal Process" (1994 Roscoe Pound Lecture delivered at the University of Nebraska College of Law, Lincoln (Neb), United States, 28 October 1994), (1996) 75:1 Neb L Rev 181 at 184.

1.3. The role of private international law

The proposition that private international law can help ensure prompt and adequate compensation implies that it has a regulatory function. I first define what we should expect from private international law in environmental matters, based on the work of various international organizations (1.3.1). I then recast its role in light of my theoretical framework, by focusing on its regulatory function (1.3.2).

1.3.1. Expectations towards private international law

The duty to ensure prompt and adequate compensation implies *some* role for private international law. The sixth principle of the *ILC Principles on the Allocation of Loss* explicitly bears on jurisdiction and choice of law. In a previous report, the ILC stated that "the duty [to compensate] could equally well be discharged, if it is considered appropriate, […] by allowing forum shopping and letting the plaintiff sue in the most favourable jurisdiction […]."[516]

This statement suggests that minimum procedural standards exist within the duty to ensure prompt and adequate compensation.[517] This stands to reason. Clearly, the availability of prompt and adequate compensation rests on the ability of domestic bodies to assert jurisdiction over instances of transboundary pollution.[518] Similarly, enabling foreign victims to seek remedies in the source state under the same conditions as local victims requires jurisdictional rules to that effect. But promptness and adequacy involve something more than the mere non-discrimination of local and foreign victims—a subtler but equally important connection with private international law. How to reconcile, for example, promptness with lengthy proceedings to debate jurisdiction over foreign land or *forum non conveniens*? These doctrines can force victims to sue abroad, in an unknown

[516] See ILC, "First Report on Allocation of Loss", *supra* note 292 at 102.
[517] See Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 260–69.
[518] For a good encapsulation of this proposition, see Giansetto, *supra* note 225 ("[…] *le droit de la compétence internationale, via l'organisation du contentieux, peut assurer une certaine régulation des activités économiques dans un but de protection de l'environnement. En fonction des règles de conflit de juridictions adoptées, l'accès à la justice du demandeur sera plus ou moins aisé. Les actions en responsabilité civile seront alors plus ou moins susceptibles d'assurer la sanction des sociétés polluantes et l'indemnisation des victimes*" at 513).

legal system, or to embark on a long quest to enforce their judgment against foreign polluters. How to reconcile access to justice—a cornerstone of international environmental law—with a denial of jurisdiction? How to reconcile adequate compensation with choice of law rules that lead to a denial of compensation in substantive law? How should a court factor a state's international obligations into a decision on choice of law? Is choice of law inherently discriminatory towards foreign plaintiffs?

These are difficult questions. They are partially answered through the study of the relationship between private international law and human rights law (a lively field of study in Europe, notably[519]) but they remain hard to grasp in the context of international environmental law. They may even appear foreign to international lawyers, in part due to the prevailing conception of private international law as a separate field of study. They are not. Private international law can participate in a form of environmental justice aimed at reducing "unpredictability, complexity and costs [and] balancing the interests of plaintiffs in the widest choice of law and jurisdiction against the interests of defendants in ordering their affairs in an environmentally responsible manner […]."[520] Of course, the language of the two disciplines may be different. There are experts in each, with only a small portion of them working in between. This is precisely why I seek to provide a framework that is intelligible in both private international law *and* international environmental law.

The literature occasionally mentions the connections between private international law and international environmental law (notably the work of the ILC). Some, for instance,

[519] See eg *Naït-Liman v Switzerland* [GC], No 51357/07, [2018] ECHR 243 [*Naït-Liman*]; Patrick Kinsch, "Human Rights and Private International Law" in Basedow et al, vol 1, *supra* note 53, 880; James Fawcett, Máire Ní Shúilleabháin & Sangeeta Shah, *Human Rights and Private International Law* (Oxford: Oxford University Press, 2016) [Fawcett, Ní Shúilleabháin & Shah]; Louwrens R Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (The Hague: TMC Asser, 2014) [Kiestra]; Patrick Kinsch, "Droits de l'homme, droits fondamentaux et droit international privé" (2014) 318 Rec des Cours 9; JJ Fawcett, "The Impact of Article 6(1) of the ECHR on Private International Law" (2007) 56:1 ICLQ 1; Fabien Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 2007); Franz Matscher, "Le droit international privé face à la Convention européenne des droits de l'homme" in *Travaux du Comité français de droit international privé 1995–1998* (Paris: Pedone, 2000) 211.

[520] Birnie, Boyle & Redgewell, *supra* note 46 at 316.

analyzed whether the commitment made in Stockholm to develop international liability law included the promotion of private remedies.[521] But most connections are still largely unexplored in legal scholarship.

International organizations have issued a wide array of recommendations in this area. The ILC identified overarching principles and other organizations filled in the gaps, chiefly the HCCH, the ILA and the United Nations Environment Programme (UNEP). In their own way and within their own mandate, they all contributed to the development of international environmental law by identifying desirable rules of private international law that align with the ILC's final proposal. Their work has noticeable common threads, which is unsurprising. Each project occurred while civil liability treaties were being negotiated and the ILC was crafting the *ILC Principles on the Allocation of Loss*. Representatives from those organizations also met throughout the years. For instance, the ILA met with Special Rapporteur Rao (from the ILC), while Christophe Bernasconi (from the HCCH) acted as co-rapporteur for the ILA.[522]

The bulk of the substantive work comes from the HCCH, which began working on civil liability for transboundary pollution in the early 1990s.[523] The Permanent Bureau of the HCCH issued three background research papers to structure the negotiation of a potential Hague Convention on Environmental Liability that would have harmonized choice of law and jurisdiction for transboundary environmental damage and filled the gaps left by existing civil liability treaties.[524] Christophe Bernasconi (the Secretary of the Permanent

[521] See Peter H Sand, "The Role of Domestic Procedures in Transnational Environmental Disputes" in *Transfrontier Pollution*, *supra* note 198, 146 at 190, reprinted in Peter H Sand, ed, *Transnational Environmental Law: Lessons in Global Change* (The Hague: Kluwer Law International, 1999) 87 [Sand, "Domestic Procedures"].
[522] See ILA, "Final Report on Transnational Enforcement of Environmental Law", *supra* note 201 at 656. Many aspects of the HCCH's background research, authored by Bernasconi, made its way into the ILA's reports.
[523] On the origins and progress of the project, see HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 35–37; Paul R Beaumont, "Private International Law of the Environment" [1995] Jurid Rev 28 at 28–31 [Beaumont]; Christian von Bar, "Les dix points d'Osnabrück" (1994) 83:4 Rev cr drt intl privé 853, reprinted in Hague Conference on Private International Law, *Proceedings of the Eighteenth Session: 30 September to 19 October 1996*, vol 1: Miscellaneous Matters (The Hague: SDU, 1999) 82.
[524] Hague Conference on Private International Law, "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?", HCCH Prel Doc 8 (April 2000) in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session: 6 to 22 June 2001*, vol 1: Miscellaneous Matters (Leiden: Koninklijke Brill, 2008) 320, reprinted from Bernasconi, *supra* note 200;

Bureau at the time, now Secretary General) noted that "if environmental law ha[d] remained the exclusive preserve of *public* international law, it [was] because *private* international law did not offer a sufficiently relevant regime."[525]

The idea seemed controversial at the outset. Some experts who attended preliminary meetings doubted that the HCCH could ever produce a comprehensive and widely ratified instrument in this complex and politically sensitive area.[526] Skepticism won the day and the project was aborted in the early 2000s.[527] The HCCH left the topic on its agenda for some time without priority.[528] It officially removed it in 2010,[529] despite the Permanent Bureau's invitation to focus on a non-binding choice of law instrument as an alternative.[530] Nonetheless, the former Secretary General of the HCCH, Hans Van Loon,

---

Hague Conference on Private International Law, "Note on the Law Applicable to Civil Liability for Environmental Damage", HCCH Prel Doc 3 (April 1995) in HCCH, *Proceedings of the Eighteenth Session*, *supra* note 523, 72; Hague Conference on Private International Law, "Note on the Law Applicable to Civil Liability for Environmental Damage", HCCH Prel Doc 9 (May 1992) in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session: 10 to 29 May 1993*, vol 1: Miscellaneous Matters and Centenary (The Hague: SDU, 1995) 186, reprinted in Von Bar, *Internationales Umwelthaftungsrecht*, *supra* note 351, 225. I use the term HCCH to refer to the research conducted by the Permanent Bureau and the successive decisions of the Council on General Affairs and Policy to maintain the topic on its agenda. The reader should bear in mind that the Council never adopted a formal instrument in this area, nor did it formally approve the research findings of the Permanent Bureau.

[525] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 143 [emphasis in the original].

[526] See Beaumont, *supra* note 523 at 37–39.

[527] See Hague Conference on Private International Law, "Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference", HCCH Prel Doc 10 (June 2000), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/RAX9-Z2TF] ("[w]hilst recognising the importance of this area, the experts drew attention to the risk of overlap which might occur between various existing instruments. Attention was drawn to the work previously done by the Council of Europe and the [EU] in this domain, and work that might be undertaken by the Organization of American States. A number of experts pointed to the problems raised by issues of public international law and indicated that the time was not ripe for a Hague Convention on this subject. While further study was welcome, these experts were not in favour of a governmental experts meeting on this topic. Other experts, however, felt that the topic was important and promising and spoke in favour of giving priority to the topic. No delegation recommended that the issue should be deleted from the agenda and it was decided to maintain the topic on the agenda of the [HCCH], but without priority" at 13)

[528] See Hague Conference on Private International Law, "Final Act of the Nineteenth Session" in HCCH, *Proceedings of the Nineteenth Session*, *supra* note 524, 33 at 46.

[529] See Hague Conference on Private International Law, "Conclusions and Recommendations Adopted by the Council on General Affairs and Policy of the Conference" (7–9 April 2010) at 4, online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/3WKU-G993].

[530] See Hague Conference on Private International Law, "Should the Hague Conference Revisit the Scope and Nature of Possible Work in the Field of Civil Liability for Environmental Damage?", HCCH Prel Doc 12 (February 2010), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/B394-5JWC] [HCCH, "Should the Hague Conference Revisit Civil Liability for Environmental Damage?"].

sought to revitalize the project in a recent lecture, expressing optimism that rising concern about environmental protection and corporate social responsibility would encourage the harmonization of private international law in environmental matters.[531] The Permanent Bureau also insisted, in a recent information document, on the normative opportunities arising out of the UN's 2030 Sustainable Goals.[532]

Meanwhile, as the HCCH project faltered, the ILA established a committee to study the transnational enforcement of environmental law.[533] The Committee chaired by Alan Boyle produced three reports[534] which led to the adoption of the *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, a set of six rules (and one draft rule) dealing with issues such as access to justice, jurisdiction and choice of law.[535] The rules reflect the contents of civil liability treaties and other instruments such as the *Aarhus Convention* on access to justice.[536] They also overlap with the *ILC Principles on the Allocation of Loss*. The Boyle Committee did not claim that its work reflected customary international law in its entirety but sought to influence the future development of international law.[537] The ILA commended the final product to the attention of the ILC and other international organizations.[538]

Finally, UNEP (the UN's leading international environmental body) proposed a set of guidelines on liability.[539] The *UNEP Guidelines on Liability* focus on key issues which

---

[531] See Van Loon, "Global Horizon", *supra* note 83 at 105. See also Van Loon, "Global Legal Ordering", *supra* note 83 at 234; Van Loon, "Principles and Building Blocks", *supra* note 83 at 317–18.
[532] See Hague Conference on Private International Law, "The HCCH and the United Nations Sustainable Development Goals", HCCH Info Doc 3 (January 2020), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/V2UG-M9Z6].
[533] On the origins and progress of the project, see ILA, "Final Report of the Transnational Enforcement of Environmental Law", *supra* note 201 at 655–57.
[534] See *ibid*; International Law Association, "Transnational Enforcement of Environmental Law: Second Report" (2004) 71 Intl L Assn Rep Conf 896 at 898–900 [ILA, "Second Report on Transnational Enforcement of Environmental Law]; ILA, "First Report on Transnational Enforcement of Environmental Law", *supra* note 82.
[535] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201.
[536] See *Aarhus Convention*, *supra* note 406.
[537] See International Law Association, "Committee on Transnational Enforcement of Environmental Law: Working Session" (2006) 72 Intl L Assn Rep Conf 680 at 684–85 (comments by Jutta Brunnée and Christophe Bernasconi).
[538] See the resolution adopting the *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201.
[539] See *Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment*, UNEPGC Dec SS.XI/5 B in

states should pay attention to when designing domestic liability regimes for environmental damage.[540] They include a choice of law provision discussed in the third chapter.[541]

Efforts to harmonize private international law in environmental matters have attracted uneven attention and support.[542] The HCCH's work may have been influential, if only because of the organization's membership and stature, but the same cannot be said of the *ILA Toronto Rules on Transnational Enforcement of Environmental Law* or the *UNEP Guidelines on Liability*. The latter inspired the drafters of the *Nagoya—Kuala Lumpur Supplementary Protocol* but it is difficult to know for sure whether (and to what extent) states relied on them to reform domestic law.[543] The lack of echo is unfortunate, not only because the work is significant but also because it fills the gaps left by the *ILC Principles on the Allocation of Loss* and provides more precise guidelines than the ILC could ever have offered in the area of private international law.

I am aware that the ILC, the HCCH, the ILA, UNEP and other bodies whose work I rely upon have disparate roles, structures and degrees of influence. Not all of them are state-sanctioned—the ILA, for instance, is entirely private—and their work does not always turn into hard law. Yet each of these organizations has contributed to the progressive development of many areas of international law and it is entirely realistic that they will exert the same influence in international environmental law.[544] Taken as a whole, their

---

United Nations Environment Programme Governing Council, *Report of the Governing Council/Global Ministerial Environment Forum on the work of its eleventh special session (Bali, Indonesia, 24–26 February 2010)*, UNGAOR, 65th Sess, Supp No 25, UN Doc A/65/25 (2010) Annex I at 16, Annex, as noted by the UNGA in *Report of the Governing Council of the United Nations Environment Programme on its eleventh special session*, GA Res 65/162, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/162 (2010) [*UNEP Guidelines on Liability*].

[540] See *ibid*, Preamble.

[541] See *ibid*, Guideline 13.

[542] See *Juris-classeur environnement et développement durable* (online), "Droit international privé et environnement", fasc 2030 at para 1 by Olivera Boskovic [Boskovic, "Droit international privé et environnement"]; Boskovic, "Responsabilité climatique", *supra* note 225 at 194–95.

[543] See Frederic Perron-Welch & Olivier Rukundo, "Biosafety, Liability and Sustainable Development" in Marie-Claire Cordonier Segger, Frederic Perron-Welch & Christine Frison, eds, *Legal Aspects of Implementing the Cartagena Protocol on Biosafety* (Cambridge: Cambridge University Press, 2013) 188 at 200.

[544] For an overview of each organization, see the entries "International Law Commission", "International Law Association", "United Nations Environment Programme" and "Hague Conference on Private

policy work can alleviate the academic and doctrinal separation of public and private international law and ensure that private international law responds to the environmental challenges of our time. As Paul argues, "[o]ur rhetoric, our conceptual categories and scholarly framework, actually shape our perception of, and our response to, reality. Each era's rhetoric is more than a tool—it actually takes on a life of its own—exposing connections, moral problems and perhaps even solutions, that in other eras may seem peripheral."[545] On this view, the *ILC Principles on the Allocation of Loss* could spearhead a new era in the liability discourse. They provide a new opportunity to achieve a real connection between public and private international law in environmental matters.[546]

1.3.2. The regulatory function of private international law

The development of the duty to ensure prompt and adequate compensation rests on our ability to translate the *ILC Principles on the Allocation of Loss* into private international law. This would contribute to the domestic interpretation and enforcement of international environmental law in subtler ways than direct legislative implementation or judicial applications. This translation process is entirely realistic. Human rights litigation, for instance, may involve the translation of customary international law into domestic tort law, in order to better protect and enforce human rights.[547] Translation tends to be easier when the priorities are clear: international norms prohibiting torture or slavery, to name a few, have a long history that contrasts with the uneven legal treatment of transboundary pollution.[548] Translation from international environmental law will be difficult if the source material is controversial or in flux. Nonetheless, some carefully delineated principles—including equal access and remedy, discussed in the second and third chapters—attract wide support.

International Law" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*, online: *Oxford Public International Law* <opil.ouplaw.com>.

[545] Paul, *supra* note 187 at 172.

[546] *Cf* Scott & Wai, *supra* note 60 (describing a "sporadic and uneven hook-up between international human rights norms and the domestic law applicable to private law obligations and the rights of corporations" at 316).

[547] See *Nevsun Resources* SCC, *supra* note 133; Larocque, *supra* note 138 at 137. See also Gabrielle Holly, "Transnational Tort and Access to Remedy Under the *UN Guiding Principles on Business and Human Rights*: *Kamasaee v Commonwealth*" (2018) 19:1 Melbourne J Intl L 52 at 80.

[548] See Sachs, *supra* note 39 at 902.

The possibility of translating principles of international environmental law into private international law rests on a certain conception of the discipline, which transcends its dominant characterization as an obstacle to justice (1.3.2.1) and embraces instead its regulatory potential (1.3.2.2).

1.3.2.1. Private international law as obstacle?

Private international law has historically been treated as an obstacle to compensation in environmental disputes.[549] As Benidickson noted almost thirty years ago, "[f]or whatever reason, the impression appears to be widespread that courts in Canada have not to this point played a very significant role in resolving environmental disputes. Obstacles to litigation have received a good deal of discussion, and awareness of courts' limitations as decision-makers in the environmental context has no doubt discouraged their use."[550] This is true for all environmental litigation, particularly when it relates to transboundary pollution.

The depiction of private international law as a roadblock for victims of transboundary pollution dates back to the *Trail Smelter* saga itself and the plaintiffs' stillborn attempt to sue the polluter. Lawyers had advised them that Canadian courts would not accept jurisdiction over a dispute related to foreign land (the so-called local action rule) and Washington courts did not have long-arm jurisdiction over absent defendants.[551] Like so many other aspects of the dispute, this anecdote durably altered legal imagination. Ever since, the literature has consistently pointed to the existence of liability walls that add up to patchy civil liability treaties and form a "defensive bulwark" that favours risk externalization by polluters in source states.[552] Sachs, for example, warns that "[w]ithout specific treaties setting the ground rules for tort suits, individuals harmed by

[549] See Boskovic, "Droit international privé et environnement", *supra* note 542 at para 2.
[550] Jamie Benidickson, Book Review of *The Price of Pollution: Environmental Litigation in Canada* by Elizabeth Swanson & Elaine L Hughes, (1991) 23:2 Ottawa L Rev 475 at 475.
[551] See the sources cited *supra* note 12. For further discussion on the local action rule, see subsection 2.2.1.1.2 below.
[552] Sachs, *supra* note 39 at 865. See also Todd, "Environmental Justice", *supra* note 97 at 94.

transboundary pollution have few viable avenues for redress because of [liability walls]—procedural hurdles to bringing transnational tort suits."[553]

The obstacle theory presents jurisdiction and choice of law as procedural impediments to a meaningful trial on the merits. They exhaust plaintiffs' limited financial resources on lengthy preliminary issues. They offer escape devices to polluters who are then free to settle on their own terms.[554] Combined with other obstacles such as the cost of bringing proceedings and the practicalities of doing so in a foreign country, they deny access to justice and accountability.

This line of argument recalls the rhetoric of human rights litigation, in which jurisdictional rules are often presented as a tool for defendants to evade liability rather than a legitimate way of allocating regulatory authority or ensuring fairness. If we accept that civil procedure is about the power to assert substantive rights and to claim meaningful remedies,[555] summary dismissals on jurisdictional grounds symbolize the ability of powerful private actors to deny those rights to weaker parties and ultimately evade liability through regulatory arbitrage.[556] This is obvious in the famous reasons of Judge Doggett, concurring in the American case of *Alfaro*, in which he wrote that "[t]he doctrine of *forum non conveniens* is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the doctrine of *forum non conveniens* enables corporations to evade legal control merely because they are transnational."[557]

The obstacle theory relates to the idea that private international law is dreary, jargon-filled and unintelligible to all but a few technicians whose "tunnel-vision"[558] reflects a

[553] *Ibid* at 839.
[554] See McCaffrey, "Jurisdictional Considerations", *supra* note 227 at 192.
[555] See Fairhurst & Thoms, *supra* note 138 at 399–400, citing Farrow, *supra* note 138 at 673.
[556] On regulatory arbitrage, see generally William J Moon, "Regulating Offshore Finance" (2019) 72:1 Vand L Rev 1; Annelise Riles, "Managing Regulatory Arbitrage: A Conflict of Laws Approach" (2014) 47:1 Cornell Intl LJ 63 [Riles]; Victor Fleischer, "Regulatory Arbitrage" (2010) 89:2 Tex L Rev 227.
[557] *Dow Chemical Co v Alfaro*, 786 SW (2d) 674 at 689, 1990 Tex Lexis 44 (Tex Sup Ct 1990), Doggett J, concurring, certiorari denied, 498 US 1024, 111 S Ct 671.
[558] See Muir Watt, "Beyond the Schism", *supra* note 53 at 374.

lack of interest in broader regulatory challenges.[559] At best, it is indifferent to the "communities of misfortune" suffering at the hand of mass tortfeasors and lacks a valuable social agenda.[560] At worst, its pursuit of so-called adjudicative efficiency turns it into a vehicle for the promotion of free trade as the default value of the international order,[561] and actually *favours* a few privileged actors (generally corporations) over masses of disempowered individuals who do not purposively structure their transnational relationships in order to benefit from the free flow of resources.[562]

In fact, the obstacle theory is not so much a theory as it is a way to advocate reforms of private international law or to dismiss it altogether in favour of other approaches to deal with regulatory conflicts. With respect to liability for transboundary pollution, alternative approaches include universal civil jurisdiction,[563] substantive harmonization of domestic laws[564] or a general international instrument that would fill the gaps left by existing

---

[559] See the depiction in Friedrich K Juenger, "Mass Disasters and the Conflict of Laws" [1989] U Ill L Rev 105 at 106. Juenger, of course, thought it was "plain wrong" to assert that private international law lacked practical impact or that it was divorced from "the world's hustle and bustle". *Ibid*. More recently, Lehmann wrote that "[o]ne may criticise the discipline's focus as being too narrow- or petty-minded, but it is hard to deny its importance in facilitating cross-border relations." Lehmann, *supra* note 52 at 2.

[560] See Upendra Baxi, "Mass Torts, Multinational Enterprise Liability and Private International Law" (1999) 276 Rec des Cours 297 at 317 [Baxi, "Mass Torts"]. Baxi has vigorously defended this view over the years. See also Baxi, "Newly Emergent Geographies of Injustice", *supra* note 153; Upendra Baxi, "Geographies of Injustice: Human Rights at the Altar of Convenience" in Scott, *supra* note 138, 197 [Baxi, "Geographies of Injustice"].

[561] See Vaughan Black, Joost Blom & Janet Walker, "Current Jurisdictional and Recognitial Issues in the Conflict of Laws" (2011) 50 Can Bus LJ 499 at 505–506 [Black, Blom & Walker] (comments by Vaughan Black); Farrow, *supra* note 138 at 689, n 26; Vaughan Black, "Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention" (2000) 38:2 Osgoode Hall LJ 237 at 249–50, n 45. Robert Wai questions the prevailing "liberal internationalist" discourse focused on commerce, cooperation and cosmopolitanism, and suggested that private international law could pursue other legitimate policy objectives. This is at the heart of his theories on the regulatory function of private international law. See Wai, "Transnational Private Litigation", *supra* note 60 at 255; Scott & Wai, *supra* note 60 at 290–94; Wai, "Regulatory Function", *supra* note 6 at 224–32; Wai, "Transformation", *supra* note 60 at 155ff; Robert Wai, "Occupying the International: Liberal Internationalist Visions and Policy Argumentation in Private International Law" (2000) 13 Hague YB Intl L 65. For a similar criticism, see Nwapi, *supra* note 138 at 464–65.

[562] See Jennifer A Orange, "Torture, Tort Choice of Law, and *Tolofson*" in Scott, *supra* note 138, 291 at 306–307 [Orange].

[563] See Joel Colón-Ríos, "Constituent Power, the Rights of Nature, and Universal Jurisdiction" (2014) 60:1 McGill LJ 127 at 151–71; Larocque, *supra* note 138 at 177–88.

[564] See Francesco Munari & Lorenzo Schiano Di Pepe, "Liability for Environmental Torts in Europe: Choice of Law and the Case for Pursuing Effective Legal Uniformity" (2005) 41:3 Riv dir int priv pr 607 at 631–32, reprinted in Alberto Malatesta, ed, *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe: The Rome II Proposal* (Padua: CEDAM, 2006) 173; Sand, "Domestic Procedures", *supra* note 521 at 192.

treaties. In its most drastic iterations, the obstacle theory suggests that private international law plays no role in the regulation of transboundary pollution or the compensation of victims. Like the rest of private law, its shortcomings merely illustrate the need for an approach based on public or administrative law.[565]

The obstacle theory is not necessarily misconceived. In some cases, rules of private international law have indeed led to results which shake our instinctive sense of substantive justice, particularly in high-profile cases where innocent victims of egregious misconduct were denied access to courts on jurisdictional grounds.[566] But there is more to private international law than the obstacle theory and its narrative acknowledge, at least with respect to transboundary pollution. As long as regulatory conflicts persist and substantive harmonization of liability regimes remains unlikely, part of the solution comes from a bottom-up approach that relies precisely on private international law to coordinate domestic liability regimes and ensure prompt and adequate compensation. In other words, reform must come from within private international law. This is what OECD countries attempted to do in the 1970s when they started working on private remedies for transboundary pollution.[567] Today, the study of the regulatory function of private international law offers an appropriate theoretical framework to finally achieve this task.

1.3.2.2. Private international law as regulation?

The regulation theory embraces discrepancies in domestic laws and casts private international law as an important device to prevent regulatory arbitrage by powerful actors. As Riles explains in the context of financial regulation, "[u]nlike the harmonization paradigm, which pursues legal uniformity, the [conflict of laws] approach accepts that regulatory nationalism is a fact of life, and sets for itself the more modest goal of achieving coordination among different national regimes."[568] The regulation theory is especially relevant when states cannot effectively or fully enforce their

[565] See eg Said Mahmoudi, "Some Private International Law Aspects of Transboundary Environmental Disputes" (1990) 59:2 Nordic J Intl L 128 at 135–36 [Mahmoudi].
[566] See eg *Anvil Mining, supra* note 133 (where the Quebec Court of Appeal refused to rely on the forum of necessity doctrine to hear the claim of victims of human rights violations in the Democratic Republic of Congo).
[567] For further discussion on the work of the OECD, see subsection 2.1.2.2 below.
[568] Riles, *supra* note 556 at 66–67.

regulations, when harmonization of substantive laws is politically unlikely or when states engage in regulatory competition[569]—all too familiar challenges in environmental law.[570]

The extent of private international law's contribution to global governance hinges on the proper conceptualization of its regulatory function. Wai's theories on the existence of touchdown points are particularly useful here. He explains that the "major regulatory concern" of private law is to protect third parties from the negative externalities of private transactions.[571] Victims harness civil liability to get compensation *vis-à-vis* the tortfeasor, which potentially contributes (at least in theory) to deterrence and social stigma.[572] If the tortfeasor has "lifted-off" from national legal systems (because the actor or the problem transcends borders), private international law can correct the course by leading victims to touchdown points.[573]

The regulation theory assumes a major role for domestic courts as participants in the international legal order[574] or, as the Supreme Court of Canada described them, "institutions of public norm generation and legitimation".[575] It also suggests that seemingly procedural rules of private international law have substantive implications.[576]

---

[569] See Muir Watt, "European Integration", *supra* note 53 at 16–17; Wai, "Regulatory Function", *supra* note 6 at 250.

[570] See Karl Kreuzer, "Environmental Disturbance and Damage in the Context of Private International Law" (1992) 44:1 Rev esp der int 57 ("[t]he unification at international level of substantive rules of national law on environmental liability would only do away with co-ordination (and most choice-of-law) problems if all the relevant provisions of national law—substantive as well as procedural, those of public as well as private law—accorded with one another. As long experience of attempts at unification shows, however, such thorough-going integration would seem to be virtually impossible. […] Until there is a real prospect of the various national substantive rules on environmental liability being unified, we will have to make do with the rules of the conflict of laws as a means of regulating transnational disputes" at 72–73).

[571] Wai, "Regulatory Function", *supra* note 6 at 233.

[572] See *ibid* at 235–36.

[573] See *ibid* at 266.

[574] On domestic courts, private international law and global governance, see in particular the work of Christopher A Whytock, "Transnational Judicial Governance" (2012) 2:1 St John's J Intl & Comp L 55; Christopher A Whytock, "Domestic Courts and Global Governance" (2011) 101 Am Soc'y Intl L Proc 166; Christopher A Whytock, "Domestic Courts and Global Governance" (2009) 84:1 Tul L Rev 67. See generally Melissa A Waters, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" (2005) 93:2 Geo LJ 487; Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44:1 Harv Intl LJ 191; Anne-Marie Slaughter, "Judicial Globalization" (2000) 40:4 Va J Intl L 1103.

[575] *Douez v Facebook Inc*, 2017 SCC 33 at para 25, [2017] 1 SCR 751 [*Facebook*], citing Trevor CW Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014) at 41.

[576] See Farrow, *supra* note 138, citing Paul Schiff Berman, "The Globalization of Jurisdiction" (2002) 151:2 U Pa L Rev 311 at 544 ("[t]he question of whether a court is willing to grant or deny jurisdiction over a given cause of action or litigant becomes, in the end, a question of power. Because different justice

Asserting jurisdiction over a transnational actor allows its regulatory oversight in domestic courts through the proxy of domestic law. Declining to assert jurisdiction makes that oversight more difficult and therefore less likely.[577] The same goes for the application of a more or less stringent substantive law to govern a dispute in domestic courts by virtue of choice of law rules.[578] On this view, private international law impacts the level of regulation and the perpetuation/reduction of gaps and overlaps between domestic regimes because it determines "whether state-based regulation will occur."[579]

The regulation theory can be harnessed to promote a greater role for private international law in global governance, but the claims in this regard often begin with bold assessments of the failures of the discipline.[580] Such assessments tend to imply that private international law has consistently or systematically turned a blind eye to substantive justice and matters of public interest more generally. This is due to inherent defects in its neutral and process-based methodology which have obscured its regulatory function, prevented it from addressing injustices and ultimately made it irrelevant in the twenty-first century.

This idea that the regulatory function of private international law is somehow less discernable than the regulatory function of substantive private law, and that private international law has failed to fulfill that function so far, should not be overstated. Private international law is not completely neutral, blind or apolitical.[581] For one thing, most conflict rules come from domestic law. This means that "[e]ven though conflict rules can hardly be reduced to shadow projections of the forum country's substantive law, it is

---

will be dispensed in different jurisdictions, the decision to afford or deny jurisdiction is a threshold decision that ultimately may mean the difference between meaningful justice gained and meaningful justice denied. As Berman has argued, "[a]n assertion of jurisdiction, therefore, is never simply a legal judgment, but a socially embedded, meaning-producing act"" at 691).

[577] See Wai, "Regulatory Function", *supra* note 6 at 253.

[578] See *ibid*.

[579] See *ibid* at 253. See also Grušić, *supra* note 10 at 189–90; Zerk, *supra* note 229 at 114–15.

[580] See eg Muir Watt, "Beyond the Schism", *supra* note 53.

[581] This is particularly true of American choice-of-law theories such as the better-law approach, which involves a substantive assessment of each competing law. See eg the seminal work of Friedrich K Juenger, *Choice of Law and Multistate Justice* (Dordrecht: Martinus Nijhoff, 1993). As Alex Mills explains, "[t]he U.S. choice of law revolution was of critical importance in drawing attention to the fact that private international law rules are not mechanical or neutral, but themselves engage with a variety of policy considerations." Alex Mills, "The Identities of Private International Law: Lessons from the U.S. and EU Revolutions" (2013) 23:3 Duke J Comp & Intl L 445 at 466. See also Lehmann, *supra* note 52 at 11.

reasonable to expect that they take into account the basic substantive policies underlying the particular field of substantive *lex fori.*"[582] Furthermore, modern private international law has moved beyond process-based methodology and towards substantive justice in many areas and jurisdictions. Scholars refer to this shift as the materialization of private international law.[583] Substantive objectives appear not only in specific mechanisms designed to supplant conflict rules (a public policy exception overriding the designation of a particularly offensive foreign law, for instance), but in the fabric of conflict rules themselves. It does not make just any substance-oriented rule acceptable. We might question, for instance, the legitimacy of an outcome-oriented unilateral choice of law provision which unreservedly promotes the interests of the forum and offends basic comity between nations.[584] But the materialization of private international is incompatible

[582] Michael Bogdan, "On the So-Called Deficit of Social Values in Private International Law" in Ch Pampoukis, ed, *In Search for Justice: Essays in Honour of Professor Emeritus Spyridon Vrellis* (Athens: Nomiki, 2014) 31 at 32 [Bogdan, "Social Values"]. See also Symeonides, "Idealism, Pragmatism, Eclectism", *supra* note 583 at 128; Michael Bogdan, "Private International Law as Component of the Law of the Forum: General Course on Private International Law" (2011) 348 Rec des Cours 9 at 61, reprinted in vol 13 of the *Procket Books of the Hague Academy of International Law* (The Hague: Hague Academy of International Law, 2012); Andreas Bucher, "La dimension sociale du droit international privé" (2009) 330 Rec des Cours 9 at 170, reprinted in vol 9 of the *Procket Books of the Hague Academy of International Law* (The Hague: Hague Academy of International Law, 2011).

[583] See Yves Lequette, "Les mutations du droit international privé: vers un changement de paradigme? Cours général de droit international privé" (2017) 387 Rec des Cours 9 at 240–55 [Lequette]; Julio D González Campos, "Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé" (2000) 287 Rec des Cours 9 at 309–411 [González Campos]. Symeonides, in particular, studied extensively the distinction between "conflicts justice" (applying the law that is the most closely related to a situation no matter the substantive result) and "material justice" (achieving the right substantive outcome) and demonstrated that private international law regimes around the world regularly strive for the latter. See Symeon C Symeonides, "Private International Law: Idealism, Pragmatism, Eclecticism" (2017) 384 Rec des Cours 9 at 195–255 [Symeonides, "Idealism, Pragmatism, Eclectism"]; Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford: Oxford University Press, 2014), ch 6 [Symeonides, *Codifying Choice of Law*]; Symeon C Symeonides, "Result-Selectivism in Conflicts Laws" (2009) 46:1 Willamette L Rev 1; Symeon C Symeonides, "Result-Selectivism in Private International Law" (2008) 3:1 Roman J Priv Intl L & Comp Priv L 1; Symeon C Symeonides, "Material Justice and Conflicts Justice in Choice of Law" in Patrick J Borchers & Joachim Zekoll, eds, *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (Ardsley: Transnational Publishers, 2001) 125. *Cf* Roxana Banu, "Conflicting Justice in Conflict-of-Laws" (2020) Vand J Transnatl L [forthcoming, available online on SSRN] (arguing that conflicts justice and material justice are in fact complementary theories).

[584] In Quebec, articles 3129, 3151 and 3165(1°) CCQ are striking examples of a unilateral policy reflected in conflict rules. The regime was adopted in 1989 to ensure that all civil liability claims for injuries suffered anywhere in relation to raw materials originating in Quebec were litigated exclusively before Quebec courts and under Quebec law, and that no foreign judgment was recognized and enforced in the province. See *Loi modifiant le Code civil et le Code de procédure civile*, SQ 1989 c 62. The legislature most likely intended to shield the local asbestos industry from potentially costly litigation abroad, but the legislative history is not entirely clear on this. See on this point "Bill 158, *Loi modifiant le Code civil et le Code de procédure civile*", Quebec, National Assembly, *Journal des débats*, 33-2, vol 30, No 134 (21 June 1989) at

with a blanket claim that the discipline has isolated itself from the rest of the law (public and private) by being oblivious to policy considerations and completely neutral.[585]

The treatment of international consumer contracts offers a good example of private international law's alignment with legitimate and widely accepted substantive concerns—in this case, the curtailing of party autonomy to protect the weaker party in an era of globalized commerce. The protection of consumers is indeed a common concern in many private international law regimes.[586] In Quebec, article 3117 CCQ lists circumstances in which the mandatory rules of the consumer's place of residence override the choice of a less protective law by the parties.[587] Article 3149 CCQ also provides that local courts always have jurisdiction when the consumer has its domicile or residence in the province—merchants cannot oppose a forum selection clause designating a foreign court.[588] The latter provision exists precisely to protect consumers who, despite having signed a contract containing a forum selection clause, cannot be expected to spend thousands of dollars to vindicate their rights abroad, and would otherwise be left without a remedy, contrary to the forum's domestic policy.[589] Canadian common law similarly accounts for "public policy considerations relating to the gross inequality of bargaining

---

6970–73 (Gil Rémillard & Claude Filion); JG Castel, "Commentaire sur certaines dispositions du Code civil du Québec se rapportant au droit international privé" (1992) 119:3 JDI 625 at 654; HP Glenn, "La guerre de l'amiante" (1991) 80:1 Rev crit dr int privé 41. See also "Bill 125, Civil Code of Quebec", Quebec, National Assembly, Subcommittee on Institutions, *Journal des débats*, 34-1, vol 31, No 32 (9 December 1991) at 1310–11 (Louise Harel, Jean Pineau & Gil Rémillard) (where the Minister of Justice vaguely justified the regime with the "*intérêts supérieurs de notre système juridique*" and explained that the National Assembly had adopted it in "[u]*n contexte d'harmonie et de collaboration pour en arriver à un résultat certain*").

[585] For challenges to the ideal of substantive neutrality in European private international law, see Bogdan, "Social Values", *supra* note 582; Th M de Boer, "Forum Preferences in Contemporary European Conflicts Law: The Myth of a "Neutral Choice"" in Heinz-Peter Mansel, ed, *Festschrift für Erik Jayme*, vol 1 (Munich: Sellier, 2004) 39. See also Francesca Ragno, "Certainty Versus Flexibility in the EU Choice of Law System" in Ferrari & Fernández Arroyo, *supra* note 83, 27 at 56–68.

[586] See Giesela Rühl, "Consumer Protection in Choice of Law" (2011) 44:3 Cornell Intl LJ 571 ("[t]oday, consumer protection in choice of law is an integral part of legal systems around the world" at 570).

[587] See CCQ, art 3117, para 1.

[588] CCQ, art 3149. For a comparative perspective, see Michael Wilderspin, "Consumer Contracts" in Basedow et al, vol 1, *supra* note 53, 464.

[589] See *Facebook*, *supra* note 575 at para 103, Abella J, concurring; *Dell Computer*, *supra* note 122 at paras 64–65. See also *Rees c Convergia*, 2005 QCCA 353 at para 21, [2005] JQ No 3248 (QL), leave to appeal to SCC refused, [2005] 2 SCR vii [*Rees*]; *Dominion Bridge Corporation c Knai* (1997), [1998] RJQ 321 at 325, 1997 CanLII 10221 (CA) (both regarding employment contracts, also covered by article 3149 CCQ). See generally Geneviève Saumier, "La sphère d'application de l'article 3149 C.c.Q. et le consommateur québécois" (2007) 37:2 RGD 463.

power between the parties […]" in determining whether to enforce forum selection clauses in consumer contracts.[590] There are many other examples of sensitive areas in which conflict rules operate differently in order to protect the weaker party (employment,[591] insurance[592] and product liability,[593] for instance) or to favour a certain outcome (the establishment of filiation as opposed to its absence, for instance[594]).

My point here is not to discuss whether private international law pursues the right substantive objectives or achieves them in all cases. My point is simply to show that conflict rules come with substantive considerations which are more visible than the critics of its neutrality would suggest. Typically, substance-oriented rules will attempt to protect a vulnerable party or favour a certain outcome. Whether private international law performs a regulatory function in a broader, more systemic sense—for instance, by addressing regulatory gaps and raising overall standards instead of simply protecting the victim in any given case—remains open for debate.[595] In our context, this question harks back to the debate over the systemic impact of tort law on environmental protection. I argued above that a systemic impact is plausible but cannot be demonstrated in all cases.[596]

This brief incursion into substance-oriented conflict rules shows that the methodological intricacies of private international law are not the root of all injustices created by globalization. In its current form, private international law has frequently shown concern for substantive outcomes and will continue to do so, either by protecting individual rights

[590] *Facebook*, *supra* note 575 at para 38. See generally Marina Pavlović, "Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016) 62:2 McGill LJ 389; Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010) 60 UNBLJ 12 at 18–25.
[591] In Quebec, see CCQ, arts 3118, 3149. For a comparative perspective, see Matteo Fornasier, "Employment Contracts, Applicable Law" in Basedow et al, vol 1, *supra* note 53, 615; Matteo Fornasier "Employment Contracts, Jurisdiction" in Basedow et al, vol 1, *supra* note 53, 624.
[592] In Quebec, see CCQ, art 3119 (choice of law). For a comparative perspective, see Helmut Heiss, "Insurance Contracts" in Basedow et al, vol 2, *supra* note 53, 954.
[593] In Quebec, see CCQ, art 3128 (choice of law). For a comparative perspective, see Thomas Kadner Graziano, "Products Liability" in Basedow et al, vol 2, *supra* note 53, 1413. For further discussion on article 3128 CCQ, see the text accompanying notes 1412, 1421–1422.
[594] In Quebec, see CCQ, art 3091, para 1.
[595] This is the core of Muir Watt's account of the regulatory function of choice of law rules. See the sources cited *supra* note 53. For further discussion on the regulatory function of the ubiquity principle as a choice of law rule, see subsection 3.1.4.2.1 below.
[596] For further discussion on the assumptions of civil liability regimes, see subsection 1.1.4.2 above.

or seeking to achieve more systemic goals. What strikes me, however, is the lack of a similar reflection with respect to environmental damage specifically. Scholars have only begun to apply the regulation theory to improve environmental protection or to secure the rights of the victims of transboundary pollution through conflict rules.[597] Before the EU adopted the *Rome II Regulation* in 2007, few states had applied the technique of substance-oriented conflict rules to environmental damage.[598] Private international law is, of course, not a complete solution to the many challenges of globalization (the allocation of regulatory authority being one thing, the exercise of that authority by legislators and judges being another), but it has great untapped potential in environmental law. The regulation theory, particularly Wai's foundational work, reveals that potential.

Conceptualizing private international law as a form of regulation does not mean that it must systematically or aggressively match the substantive orientations of the forum. Wai persuasively argues that we should not associate the regulatory function of private international law with parochialism or unilateralism, as opposed to the more "internationalist" concerns of modern private international law such as the facilitation of free trade. We should instead expand our definition of what internationalism means in order to include other important objectives such as the effective regulation of transnational actors in a globalized world.[599] On this view, private international law is not

[597] See Van Loon, "Global Legal Ordering", *supra* note 83 at 232; Van Loon, "Principles and Building Blocks", *supra* note 83 at 300; Van Loon, "Global Horizon", *supra* note 83 at 85–87, 105–106; Grušić, *supra* note 10; Claire Staath & Benedict S Wray, "Corporations and Social Environmental Justice: The Role of Private International Law" in Antoine Duval & Marie-Angle Moreau, eds, *Towards Social Environmental Justice?* (Florence: European University Institute, 2012) 75 at 85–93; Ivana Kunda, "Policies Underlying Conflict of Law Choices in Environmental Law" in Vasilka Sancin, ed, *International Environmental Law: Contemporary Concerns and Challenges* (Ljubljana: Založba, 2012) 507 [Kunda]; Olivera Boskovic, "L'efficacité du droit international privé en matière environnementale" in Olivera Boskovic, ed, *L'efficacité du droit de l'environnement: mise en œuvre et sanctions* (Paris: Dalloz, 2010) 53 [Boskovic, "Efficacité"]; Olivera Boskovic, "The Law Applicable to Violations of the Environment—Regulatory Strategies" in Cafaggi & Muir Watt, *supra* note 88, 188 at 188–90 [Boskovic, "Regulatory Strategies"]; Ebbesson, *supra* note 48; Olivera Boskovic, "Les atteintes à l'environnement" in Mathias Audit, Horatia Muir Watt & Étienne Pataut, eds, *Conflits de lois et regulation économique: l'expérience du marché intérieur* (Paris: Librairie générale de droit et de jurisprudence, 2008) 195 at 203–204 [Boskovic, "Atteintes à l'environnement"]; Muir Watt, "Intérêts gouvernementaux", *supra* note 53. See also, for early hints at this reflection, Nicolas Blanchard, "The Role of Conflicts of Laws Regarding the Transboundary Pollution of Water" in Amos Shapira & Mala Tabory, eds, *New Political Entities in Public and Private International Law with Special Reference to the Palestinian Entity* (The Hague: Kluwer Law International, 1999) 387.

[598] For further discussion on the *Rome II Regulation*, see subsection 3.1.4.2.1 below.

[599] See Wai, "Regulatory Function", *supra* note 6 at 239, 268, 273.

limited to being the mouthpiece of some unilateral state policy (parochial) or the promoter of an unbridled liberalist discourse seeking to facilitate international commerce above all things (narrowly defined internationalism). It can, and should, address other legitimate concerns (broadly defined internationalism) which are no less valuable than the ones typically promoted in recent internationalist reforms.[600]

Our traditional deference to the regulatory policy of other states in private international law does not prevent the adoption of substance-oriented conflict rules[601] as long as the substance attracts some degree of consensus. I explained above how documents such as the *ILC Principles on the Allocation of Loss* were drafted with the aim of reaching consensus on a global concern—to hold transboundary polluters liable and to provide compensation to the victims. In my view, they avoid the parochial stigma associated with regulatory accounts of private international law. They are a better point of reference than any given domestic environmental policy, no matter how desirable it may be. They are prime candidates for translation into private international law and do not make it more parochial or unilateral as a result.

My theoretical stance is therefore a cautious one. I do not claim that private international law has failed to rise to the challenge of globalization in all areas, but I do think it has stayed on the sidelines with respect to transboundary pollution. More can be done. The regulation theory has the crucial advantage of maintaining private international law in the conversation instead of casting it aside as unhelpful. We can then determine whether it contributes to environmental protection or at least helps translate the duty to ensure prompt and adequate compensation into domestic law. This is what I aim to do in this thesis. It is more productive than trying to avoid private international law in an area where private actors are everywhere, international harmonization has proven so difficult, and domestic state-law retain so much importance—three features that engage rather than disengage private international law.

[600] See *ibid*.
[601] As argued by Van Loon, "Global Horizon", *supra* note 83 at 31–32.

1.4. Conclusion of Chapter 1

The authors of a leading textbook write that civil liability "is an area in which some serious thinking is overdue."[602] In this first chapter, I pointed the direction in which our thinking should go as far as victims' right to compensation is concerned. I isolated the notion of prompt and adequate compensation as an overarching and emerging principle of international environmental law. I argued that states have a duty to ensure its availability, not necessarily by assuming liability themselves but by laying out the necessary conditions for civil proceedings. I explained how private international law could, under certain conditions, help ensure prompt and adequate compensation in a way that we do not fully understand yet. I will now look at the details of this process.

This first chapter shows that the journey from early work on state responsibility to increased treaty making in the area of civil liability has not been entirely successful. But it has provided the ILC with enough precedents to settle on a promising way forward. Instruments such as the *ILC Principles on the Allocation of Loss* and the *UNEP Guidelines on Liability* have helped reach a point where "[t]he web of responsibility for environmental harm seems today less inextricable than it did before."[603] They offer an authoritative basis[604] for future work. It is on this basis that I approach jurisdiction and choice of law in the next two chapters. I refer primarily to the *ILC Principles on the Allocation of Loss* to explain what the duty to ensure prompt and adequate compensation entails in private international law, and how Canadian law responds to its requirements.

I want to make one last general comment before moving on. The footnotes in this first chapter highlight a critical disconnect between how vigorously we discuss liability for transboundary pollution, and how rarely the victims of transboundary pollution sue polluters and obtain a judgment on the merits. There is also a disconnect in how enthusiastically we promise deterrence in the wake of private litigation and how little empirical evidence exists to support such a broad claim. This does not bode well for legal

[602] Birnie, Boyle & Redgewell, *supra* note 46 at 318.
[603] Scovazzi, *supra* note 400 at 210.
[604] See Sands & Peel, *supra* note 108 at 770.

research in this area, which already tends to feed on itself rather than on actual cases.[605] We must pay close attention to those disconnects: to be mindful of the law's fundamental struggle to grasp complex ecological problems, to question how neutral or blind private international law really is, to identify the real obstacles to litigation, and not to take for granted that their removal will inevitably lead to a brave new world of enforcement by like-minded individuals who have converging views on how to protect the environment through domestic courts. The difficulties and controversies explored in this thesis have inhibited the full potential of private law to address transboundary pollution, but other socio-legal phenomena are also at play. They cannot be neglected.

[605] See Hans W Baade, "Codes of Conduct for Multinational Enterprises: An Introductory Survey" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer: Kluwer, 1980) 407 at 413, cited in Bodansky, "Customary International Environmental Law", *supra* note 247 at 117, n 65.

2. Jurisdiction over transboundary pollution

This second chapter focuses on the jurisdictional aspects of the duty to ensure prompt and adequate compensation. If the pollution originates in state *x* but damage is suffered in state *y*, the court seized by the plaintiff (in one of those states or elsewhere) first has to decide whether it can hear the dispute pursuant to jurisdictional rules. In this chapter, I argue that Canadian law meets the jurisdictional requirements associated with the duty to ensure prompt and adequate compensation. My argument debunks a common assumption in the literature, namely that victims face insurmountable jurisdictional obstacles if they wish to litigate.

Prospects for liability may seem bleak if we look at environment-specific rules or reform proposals. Attempts at implementing equal access to justice in environmental disputes through uniform legislation have either failed or become obsolete. Likewise, Canadian courts have not given definitive guidance on jurisdiction over transboundary pollution. It is tempting to suggest that the law does not respond to the concerns expressed in the *ILC Principles on the Allocation of Loss* and could lead to the same dead end faced by plaintiffs before the *Trail Smelter* dispute turned into an interstate arbitration. Authors are understandably pessimistic.

The portrait changes, however, if we look at the general law of jurisdiction that applies to all transboundary disputes, including environmental ones. Canadian courts can hear actions by foreign plaintiffs against local polluters at the place of acting, as well as actions by local plaintiffs against foreign polluters at the place of injury. Foreign plaintiffs have access to courts on no less disadvantageous terms than local plaintiffs. Both can seek relief insofar as the applicable substantive liability law provides for it—an issue which I discuss in the third chapter. Simply put, jurisdictional rules do not significantly hinder the availability of prompt and adequate compensation. They provide the necessary touchdown points to prevent the liftoff of transboundary polluters and contribute to their regulatory oversight through private litigation,[606] as long as there

[606] See Wai, "Regulatory Function", *supra* note 6 and the other sources cited *supra* note 60.

remains no evidence of a widespread resort to declinatory strategies such as *forum non conveniens*.

This chapter identifies the jurisdictional aspects of the duty to ensure prompt and adequate compensation, their origins in international environmental law and their limits. It provides a standard to assess whether and how the Canadian law of jurisdiction helps ensure prompt and adequate compensation (and where it can go from there). I begin by exploring the relationship between jurisdiction and prompt and adequate compensation through the fundamental concepts set out in the *ILC Principles on the Allocation of Loss*, chiefly non-discrimination and equal access (2.1). I then take a step back and review the current jurisdictional framework against the duty to ensure prompt and adequate compensation. I argue that the Canadian law of jurisdiction contributes to prompt and adequate compensation even though specific legislative reforms are nowhere in sight (2.2). I conclude with final remarks (2.3).

As will become apparent throughout this chapter, jurisdiction is not a significant obstacle to redress in transboundary environmental disputes. The fact that most authors have chosen to frame it this way since the *Trail Smelter* arbitration (through the obstacle theory I described earlier) makes it necessary to justify my divergent conclusion in a fully fledged chapter, but this is only the first building block. Thorny issues also arise after a court finds that it has jurisdiction, when it seeks to determine the law applicable to the dispute or to apply local environmental laws extraterritorially. I examine these issues in the third chapter.

2.1. International environmental law and the approach of the ILC

This section identifies what the duty to ensure prompt and adequate compensation entails in terms of jurisdiction. I begin with an overview of the ILC's position expressed in the sixth principle of the *ILC Principles on the Allocation of Loss* (2.1.1). I explore non-discrimination and equal access, transitioning from the *Nordic Convention* and the work of the OECD which many consider to be the first milestones in this area, to subsequent manifestations of the same logic (2.1.2). I explain how Canada has formally incorporated these notions into domestic law (2.1.3). We will see that equal access is a feature of

Canada-United States relations, but it remains patchy even in that setting. The general law of jurisdiction will apply in most cases. With this conclusion in mind, I return to the *ILC Principles on the Allocation of Loss* and I identify a preferable approach to jurisdiction beyond the minimal requirements of equal access (2.1.4). Note that equal *access* is related to but differs from equal *remedy*. As I explain below, the first has implications for jurisdiction and the second has implications for choice of law, hence their separate treatment in the second and third chapters.

2.1.1. Jurisdiction in the *ILC Principles on the Allocation of Loss*

The sixth principle of the *ILC Principles on the Allocation of Loss* puts forward three jurisdictional provisions designed to operationalize and implement the duty to ensure prompt and adequate compensation.[607] First, it requires states to "provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available" to deal with transboundary pollution originating in their territory.[608] Second, it recommends that "[v]ictims of transboundary damage […] have access to remedies in the [s]tate of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that [s]tate."[609] Third, it reiterates "the right of the victims to seek remedies other than those available in the [s]tate of origin."[610] There provisions are the core jurisdictional components of prompt and adequate compensation. The first is jurisdictional on its face, while the other two also touch on the substantive law applied by the competent body.

The sixth principle of the *ILC Principles on the Allocation of Loss* expands on equal or non-discriminatory access,[611] which the *ILC Articles on Prevention* also contained.[612] The

[607] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 85, para 1.
[608] *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6(1).
[609] *Ibid*, Principle 6(2).
[610] *Ibid*, Principle 6(3).
[611] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, para 2.
[612] See *ILC Articles on Prevention*, *supra* note 250, art 15; International Law Commission, "Report of the Commission to the General Assembly on the work of its fifty-third session" (UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001)) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2007) 1 at 167–68 (UN Doc A/CN.4/SER.A/2001/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its fifty-third session*, GA Res 56/82,

ILC presented non-discrimination as a way to avoid overburdening victims with excessive procedures and to make it easier for them to obtain prompt and adequate compensation.[613] It proceeded on the assumption that non-discrimination could replace a fully harmonized civil liability regime by ensuring that private parties could deal with transboundary pollution in a courthouse when governments did not act. This approach "reflect[s] a very different strategy for dealing with transboundary pollution—one that eschews a universal standard of conduct in favo[u]r of norms embedded in the practices of the affected parties, and designed to promote a spirit of reciprocity rather than an abstract environmental ideal."[614]

Other international organizations have taken the same path. The *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, for instance, guarantee the right of access to courts, extend the requirement of a prompt, adequate and effective remedy to all transboundary plaintiffs and secure the jurisdiction of the courts at the place of acting and at the place of injury.[615] The work of a commission of the Institute of International Law (IIL) led by Francisco Orrego Vicuña[616] and the background research conducted by the Permanent Bureau of the HCCH also put strong emphasis on non-discrimination (the

---

UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/82 (2001) [*Commentary to the ILC Articles on Prevention*].

[613] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 88, para 12.

[614] Merrill, *supra* note 8 at 954.

[615] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rules 1, 3–4; ILA, "Final Report on Transnational Enforcement of Environmental Law", *supra* note 201 at 657–59, 661–68; *ILA Berlin Rules on Water Resources*, *supra* note 410 at 409, art 71(1); ILA, "First Report on Transnational Enforcement of Environmental Law", *supra* note 82 at 838–41; International Law Association, "Resolution No 3/2002: Sustainable Development. New Dehli Declaration of Principles of International Law Relating to Sustainable Development" (2002) 70 Intl L Assn Rep Conf 22 at 28, para 5.3, reprinted in (2002) 2:2 Intl Envtl Agreements: Pol, L & Econ 211 and circulated at the Rio+20 Summit in *Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations*, 6 August 2002, UN Doc A/Conf.199/8 (2002) [*ILA New Dehli Declaration*].

[616] See Institute of International Law, "Resolution on Responsibility and Liability under International Law for Environmental Damage" in *Yearbook of the Institute of International Law. Session of Strasbourg, 1997*, vol 67, part II*:* Deliberations of the Institute (Paris: Pedone, 1998) 486 at 513, art 30, reprinted in (1998) 37:6 ILM 1474 & (1998) 10:2 Geo Intl Envtl L Rev 269 [*IIL Resolution on Responsibility and Liability*]; Institute of International Law, "Final Report" in *Yearbook of the Institute of International Law. Session of Strasbourg, 1997*, vol 67, part I: Travaux préparatoires (Paris: Pedone, 1998) 312 at 342, reprinted in (1998) 10:2 Geo Intl Envtl L Rev 279 at 304 [IIL, "Final Report"]; Teresa A Berwick, "Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes" (1998) 10:2 Geo Intl Envtl L Rev 257 at 266–67.

latter in the context of the participation of non-residents in administrative proceedings in the source state).[617]

2.1.2. Non-discrimination and equal access

Non-discrimination suggests that foreign victims of transboudary pollution (or the persons exposed to a risk thereof) should receive the same treatment as victims of pollution in the source state. They should equally be able to access information, participate in proceedings, claim remedies or avail themselves of any other right under foreign environmental laws and regulations.[618]

Non-discrimination has a long history in trade law and human rights law, as well as EU law. It crossed over to international environmental law in the 1970s[619] and gradually became prevalent in legal reasoning and state practice. Non-discrimination is now commonplace in areas with similar laws, intermingled economies and a strong interest in reciprocity such as North America or Western Europe.[620] Several commentators assert that it is now part of general international law[621] or at least widely accepted globally.[622] The *Industrial Accidents Convention* even recognizes non-discrimination as a "principl[e] of international law and custom".[623] The *ILC Principles on the Allocation of Loss* add another layer of authority to the principle of non-discrimination, even though its formal

---

[617] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 94–95.
[618] See generally Kruger, *supra* note 207 at 122–29; Birnie, Boyle & Redgewell, *supra* note 46 at 304–11; Henri Smets, "Le principe de non-discrimination en matière de protection de l'environnement" (2000) 4:1 REDE 3 [Smets]; Frédérique Ferrand-Desmars, *La non-discrimination dans le traitement des dommages causés aux personnes privées par les pollutions transfrontières* (Doctoral Thesis, Université Paris-II Panthéon-Assas Faculty of Law, 1998) [unpublished] [Ferrand Desmars]; Pierre-Marie Dupuy, "La contribution du principe de non-discrimination à l'élaboration du droit international de l'environnement" (1991) 7:2 RQDI 135 [Dupuy].
[619] See Pierre-Marie Dupuy, "Sur des tendances récentes dans le droit international de l'environnement" (1974) 20 AFDI 815.
[620] For further discussion on the use of non-discrimination in international instruments, see subsection 2.1.2.2 below.
[621] See Kinna, *supra* note 113 at 378–79; Boyle, "Two Paradigms", *supra* note 272 at 253–55; Boyle, "Where Next", *supra* note 113 at 635, 639; Birnie, Boyle & Redgewell, *supra* note 46 at 305–306; Boyle, "Environmental Liability", *supra* note 46 at 9.
[622] See Jonas Ebbesson, "Principle 10: Public Participation" in Viñuales, *supra* note 35, 287 at 292; Ebbesson, *supra* note 48 at 284–85; Jonas Ebbesson, "Public Participation" in Bodansky, Brunnée & Hey, *supra* note 230, 682 at 696–97; Smets, *supra* note 618 at 3, 33; Jonas Ebbesson, "The Notion of Public Participation in International Environmental Law" (1997) 8 YB Intl Entl L 51 at 82–83.
[623] *Industrial Accidents Convention*, *supra* note 135, Preamble, para 10.

status in international law remains controversial,[624] as evidenced by the debate surrounding its inclusion in the 1997 *UN Watercourses Convention*.[625]

Despite the ubiquitousness of non-discrimination in legal discourse, the words used to describe the notion often muddle its contents. The *Commentary to the ILC Principles on the Allocation of Loss* amalgamates "non-discrimination" and "equal access".[626] It seems clear, however, that non-discrimination operates on two different levels and only one of them encompasses equal access. Dupuy demonstrates this distinction in the clearest terms.[627] First, non-discrimination operates at the *state* level, when a state treats transboundary damage the same way it would treat local damage.[628] This is the substantive aspect of non-discrimination. Second, it operates at the *individual* level, when a state treats a foreign plaintiff the same way it would treat a local plaintiff in legal

[624] See Michael Mason, "Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law" (2006) 12:3 Global Gov 283 at 292; Xue, *supra* note 117 at 106–108; Okowa, *supra* note 230 at 225; Dupuy, *supra* note 618 at 143–44; Roda Mushkat, "The Daya Bay Nuclear Plant Project in the Light of International Environmental Law" (1990) 7:1/2 UCLA Pac Basin LJ 87 at 100; James A Caputo, "Equal Right of Access in Matters of Transboundary Pollution: Its Prospects in Industrial and Developing Countries" (1984) 14:1 Cal W Intl LJ 192 at 219–20; JG Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (The Hague: Martinus Nijhoff, 1984) at 569–70.

[625] See Stephen C McCaffrey, *The Law of International Watercourses*, 3rd ed (Oxford: Oxford University Press, 2019) at 573–574; Roberta Greco, "Access to Procedures and the Principle of Non-Discrimination (Article 32)" in Laurence Boisson de Chazournes et al, eds, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary* (Oxford: Oxford University Press, 2018) 325 at 338–40 [Greco]; Owen McIntyre, *Environmental Protection of International Watercourses Under International Law* (Farnham: Ashgate, 2007) at 325–32, 353–54; Stephen C McCaffrey & Mpazi Sinjela, "Current Developments: The 1997 United Nations Convention on International Watercourses" (1998) 92:1 AJIL 97 at 104; Sergei V Vinogradov, "Observations on the International Law Commission's Draft Rules on the Non-Navigational Uses of International Watercourses: Management and Domestic Remedies" (1992) 3:1 Colo J Intl Envtl L & Pol'y 235 at 254–55. The *UN Watercourses Convention* provides that "[u]nless the watercourse states concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse state shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory." *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, UKTS 2015 No 5, art 32, 36:3 ILM 703 (entered into force 17 August 2014), as adopted by the UNGA in *Convention on the law of the non-navigational uses of international watercourses*, GA Res 51/229, UNGAOR, 51st Sess, Supp No 49, UN Doc A/RES/51/229 (1997) Annex [*UN Watercourses Convention*].

[626] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, para 2.

[627] See Dupuy, *supra* note 618. See also Ferrand-Desmars, *supra* note 618 at para 88.

[628] See *ibid* at 136–40.

proceedings.[629] This is the procedural aspect of non-discrimination, also called equal access.

The literature distinguishes between the substantive and procedural aspects of non-discrimination but shows little consistency in describing what falls in each category. The distinction can easily become artificial if applied too rigidly. For instance, the participation of foreigners in decision-making processes and administrative proceedings such as environmental impact assessments counts not only as procedural non-discrimination, but also as substantive non-discrimination. This is because the process involves consideration by the state of potential transboundary environmental damage originating in its territory—a decidedly substantive inquiry. In the end, describing non-discrimination as procedural or substantive is a terminological divergence with little consequence in principle.

For my part, I refer to equal access as the procedural arm of non-discrimination and one of the ways to achieve it.[630] The plaintiff-centric approach taken in the sixth principle of the *ILC Principles on the Allocation of Loss* makes it clear that the ILC understood non-discrimination primarily in this sense.[631] This terminology also aligns with the OECD's.[632]

I further distinguish equal *access* from equal *remedy*.[633] The first concept refers to access to courts by foreign plaintiffs. The obvious effect of equal access is to remove procedural obstacles specifically aimed at foreign plaintiffs. It also has an effect on jurisdictional

---

[629] See *ibid* at 140–43.
[630] For a similar understanding of equal acess, see Muldoon, Scriven & Olson, *supra* note 109 at 16; Paul Muldoon & Leslie Stalker, "Equal Access: Suing Polluters on their Own Turf" (1984) 12:1 Alt J 12 at 13; Henri Smets, "Local Actions to Combat Transfrontier Pollution" (1976) 5:4 Ambio 164 at 166.
[631] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 85–89, paras 1–16.
[632] See OECD Council, Environment Committee, "Report on Equal Right of Access" in OECD, *Transfrontier Pollution*, *supra* note 198, 23 at 24, 28 [OECD Council]; OECD Secretary General, "Report on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution" in OECD, *Transfrontier Pollution*, *supra* note 198, 37 at 42 [OECD Secretary General]; OECD Secretariat, "Equal Right of Access in Matters of Transfrontier Pollution in OECD Member Countries" in OECD, *Transfrontier Pollution*, *supra* note 198, 54 at 92, 120–22 [OECD Secretariat, "Equal Right of Access"]; OECD Secretariat, "Study of Some Principles for Solving Problems of Transfrontier Pollution" in OECD, *Transfrontier Pollution*, *supra* note 198, 226 at 241 [OECD Secretariat, "Principles"].
[633] See Ferrand-Desmars, *supra* note 618 at para 143.

rules, as we will see below. The second concept refers to the remedies available to foreign plaintiffs. Existing instruments do not clearly explain how equal remedy differs from equal access. In the third chapter, I argue that equal remedy is indeed a different concept that affects the substantive law designated by choice of law rules.[634] For now, I will focus on equal access. I exclude for our purposes access to *administrative* proceedings (environmental impact assessments, for instance) and I focus on access to *judicial* proceedings (civil litigation against polluters).

Because we are concerned with the rules of private international law, the most important question is whether equal access has any implications for jurisdiction. In a very strict sense, the answer is no. Equal access does not mandate any particular rule of jurisdiction. It simply requires states to treat plaintiffs equally as a matter of civil procedure, regardless of their nationality and *assuming* that the courts of that state have jurisdiction over the dispute.[635] Understood in this limited sense, only certain procedural measures qualify as barriers to equal access in transboundary environmental disputes litigated in Canada. Four provinces prohibit foreign plaintiffs from acting as class representatives.[636] Some environmental statutes also limit the availability of injunctions to local plaintiffs.[637] Finally, foreign plaintiffs may have to post security for the costs of proceedings.[638]

This last point warrants further discussion. Canadian courts have held that security for costs does not constitute unlawful discrimination[639] and the ILC declared that it was not

---

[634] For further discussion on this point, see subsection 3.1.2 below.
[635] In this sense, equal access connects with broader principles on the national treatment of foreigners under public international law. See Ferrand-Desmars, *supra* note 618 at para 179.
[636] See *Class Proceedings Act*, RSBC 1996, c 50, s 2(1) [*BC Class Proceedings Act*]; *The Class Actions Act*, SS 2001, c C-12.01, s 4(1) [*SK Class Actions Act*]; *Class Proceedings Act*, RSNB 2011, c 125, s 3(1) [*NB Class Proceedings Act*]; *Class Actions Act*, SNL 2001, c C-18.1, s 3(1) [*NL Class Actions Act*]; *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 at para 487, 408 DLR (4th) 383, aff'd 2017 BCCA 401, 419 DLR (4th) 631, aff'd 2020 SCC 5, [2020] SCJ No 5 (QL).
[637] *Environmental Bill of Rights, 1993*, SO 1993, c 28, s 84(1) [*ON Environmental Bill of Rights*]; *Environment Quality Act*, CQLR c Q-2, s 19.3, para 1 [*QC Environment Quality Act*]; *Environmental Rights Act*, SNWT 1988, c 83 (Supp), s 6(1), as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28 [*NWT Environmental Rights Act*]; *Environmental Rights Act*, RSNWT (Nu) 1988, c 83 (Supp), s 6(1) [*NU Environmental Rights Act*]; *Environment Act*, RSY 2002, c 76, s 8(1) [*YT Environment Act*]. For further discussion on residency requirements, see subsection 3.2.3.2.2.1 below.
[638] See eg *Code of Civil Procedure*, CQLR c C-25.01, art 492 [CCP]; *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, s 56.01(1)(a) [*Ontario Rules of Civil Procedure*].
[639] See *Gladstone c Dankoff*, [2003] RJQ 1534, 2003 CanLII 75184 (Sup Ct), leave to appeal to Qc CA refused, 2003 CanLII 71920, [2003] QJ No 6647 (QL) (CA), leave to appeal to SCC refused, [2003] 2 SCR

prohibited by the non-discrimination provisions contained in the *Articles on Prevention*[640] and in the draft articles that inspired the 1997 *UN Watercourses Convention.*[641] But it seems clear that security for costs affects foreign plaintiffs' ability to sue, even though it may not be discriminatory *per se*. The correlation is apparent in the HCCH's 1980 *Convention on International Access to Justice*, which prohibits the requirement of "security, bond or deposit of any kind" for the sole reason that a plaintiff is a foreign national or resides elsewhere.[642] The American Law Institute's and UNIDROIT's *Principles of Transnational Civil Procedure* similarly discourage the imposition of security for costs on the sole basis of nationality or residence.[643] Likewise, the OECD Secretary General advocated for the attenuation of the obligation to post security for costs

---

vii; *Lapierre c Barrette*, [1988] RJQ 2374 at 2381–82, (*sub nom Litigation Guardian c Barrette*) 1988 CanLII 985 (CA); *Conkle c Vital* (1987), [1988] RJQ 476 at 478–80, [1987] JQ no 2679 (QL) (Sup Ct); *Crothers v Simpson Sears Ltd*, 1988 ABCA 155 (CanLII) at paras 37–50, 51 DLR (4th) 529; *Benoît c Gestion Tex-Di inc*, [1987] RJQ 1401 at 1403–1407, (*sub nom Benoit v Gestion Ted-Di)* 1987 CanLII 5293 (Sup Ct); *Nissho Corp v Bank of British Columbia* (1987), 39 DLR (4th) 453 at 458–59, [1987] AJ No 1343 (QL) (QB); *Aukema v Bernier Kitchen Cabinets Inc* (1987), 38 DLR (4th) 146 at 149, 1987 CanLII 3416 (Alta QB). Contra *Kask v Shimizu* (1986), 28 DLR (4th) 64, 1986 CanLII 100 (Alta QB) (now explicitly rejected). In Europe, see *Nasser v United Bank of Kuwait*, [2001] EWCA Civ 556, [2002] 1 All ER 401; Cass civ 1re, 16 March 1999, *Pordea c Times Newspapers Ltd*, [1999] Bull civ I 61, No 92, [2000] ILPr 763; *Hayes v Kronenberger GmBH*, C-323/95, [1997] ECR I-1711, [1997] ILPr 361; *Delecta Aktiebolag v MSL Dynamics Ltd*, C-43/95, [1996] ECR I-4661, [1996] 3 CMLR 741; *Fitzgerald v Williams*, [1996] QB 657, [1996] 2 All ER 171 (CA); *Tolstoy Miloslavsky v United Kingdom* (1995), ECHR (Ser A) 51 (No 316-B), 20 EHRR 442.

[640] See *Commentary to the ILC Articles in Prevention*, *supra* note 612 at 167, para 2, commenting on article 15 of the *ILC Articles on Prevention*, *supra* note 250.

[641] See International Law Commission, "Report of the Commission to the General Assembly on the work of its forty-sixth Session" (UNGAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994)) in *Yearbook of the International Law Commission 1994*, vol 2, part 2 (New York: UN, 1997) 1 at 132, para 2 (UN Doc A/CN.4/SER.A/1994/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its 46th session*, GA Res 49/51, UNGAOR, 49th Sess, Supp No 49, UN Doc A/RES/49/51 (1994). The UN took up the work of the ILC by resolution. See *Draft articles on the law of the non-navigational uses of international watercourses*, GA Res 49/52, UNGAOR, 49th Sess, Supp No 49, UN Doc A/RES/49/52 (1994). It eventually became the *UN Watercourses Convention*, *supra* note 625, which entered into force in 2014, more than seventeen years after its adoption at the UN.

[642] *Convention on International Access to Justice*, 25 October 1980, 1510 UNTS 375, art 14, 19:6 ILM 1505 (entered into force 1 May 1988), reprinted in HCCH, *Collection of Conventions*, *supra* note 94, 300. The same correlation also transpires from the HCCH's 2019 *Convention on the Recognition and Enforcement of Foreign Judgments*, which discourages states from imposing security for costs in recognition and enforcement proceedings on the sole ground that the applicant is a foreign national or non-resident. See *Convention on the Recognition and Enforcement of Foreign Judgments*, *supra* note 94, art 14(1). As a corollary to the no-security rule, costs awards relating to recognition and enforcement proceedings are enforceable in any contracting state upon application by the judgment debtor. See *ibid*, art 14(2). Contracting states may declare that they will not apply the no-security rule. See *ibid*, art 14(3).

[643] See American Law Institute & UNIDROIT, "Principles of Transnational Civil Procedure" (2004) 9:4 Unif L Rev 758 at 764, reprinted in American Law Institute & UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006) at 16–50 [ALI/UNIDROIT].

in transboundary environmental disputes through reciprocal agreements.[644] There is at least one example of such agreement in Canada. In *Pembina County Water Resource District*, the Federal Court exempted North Dakota plaintiffs from posting security for costs in their lawsuit against Manitoba authorities.[645] The Court held that the equal access provision of the *International Boundary Waters Treaty Act*[646] prevailed over usual rules of procedure which would have permitted the imposition of security for costs on non-residents. The bottom line is that security for costs has significant implications for the notion of equal access, even when that notion is narrowly interpreted.

I do not accept, however, that equal access is concerned only with the procedural obstacles that are specifically and explicitly aimed at foreign plaintiffs, such as the three measures mentioned above. If it were, the bar set by the ILC would be extremely low. There is clearly no justification for a distinction based solely on nationality.[647] Equal access understood in this sense is already well implanted in many legal systems[648] and may even have acquired customary status in international law.[649] In Canada, the *Citizenship Act* provides than a non-citizen is triable as if that person were a citizen.[650] Likewise, anyone can sue in Canadian courts,[651] except in peculiar cases such as lawsuits

---

[644] See OECD Secretary General, *supra* note 632 at 46.
[645] See *Pembina County Water Resource District v Manitoba*, 2005 FC 1226 at para 17, [2005] FCJ No 1492 (QL).
[646] See *International Boundary Waters Treaty Act*, RSC 1985, c I-17, s 4(1) [*International Boundary Waters Treaty Act*]; *Treaty Relating to the Boundary Waters and Questions Arising Along the Border Between the United States and Canada*, United Kingdom and United States, 11 January 1909, UKTS 1910 No 23, art II, para 1, 36 US Stat 2448 (entered into force 5 May 1910) [*Boundary Waters Treaty*].
[647] See Fawcett, Ní Shúilleabháin & Shah, *supra* note 519 at para 9.115; ALI/UNIDROIT, *supra* note 643 at 764.
[648] This said, equal access to courts remains a challenge in some parts of the world. See eg Michael M Karayanni, "The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs" in Muir Watt & Fernández Arroyo, *supra* note 52, 211; Michael Karayanni, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (Oxford: Oxford University Press, 2014) at 227–41. See also Francesco Francioni, "Access to Justice, Denial of Justice and International Investment Law" (2009) 20:3 Eur J Intl L 729 ("[…] historically, access to justice has remained problematic for aliens" at 730).
[649] See Ferrand-Desmars, *supra* note 618 at para 177.
[650] See *Citizenship Act*, RSC 1985, c C-29, s 39.
[651] See CCP, art 489, para 2; *Montana v Les développements du Saguenay Ltée* (1975), [1977] 1 SCR 32 at 36, 1975 CanLII 178. Section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 prohibits discrimination based on national or ethnic origin. Foreign plaintiffs are often foreign nationals and have equality rights on that basis. Residency, however, is not normally an analogous ground for discrimination captured by the *Canadian Charter*. See *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 48, [2003] 1 SCR 6; *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1044–45, 1993 CanLII 58;

brought by enemy aliens[652] or unregistered foreign corporations carrying on business in certain provinces.[653] The procedural obstacles that do exist in Canada (the inability to act as class representative, the inability to sue under certain environmental statutes and the requirement to post security for costs) are a problem, as we will see in the third chapter,[654] but they do not prevent foreign victims from suing in Canada altogether. For instance, the fact that they cannot act as class representatives does not prevent them from being class members if the court authorizes the appointment of a non-member as class representative.[655] The fact that they cannot claim statutory injunctive relief does not prevent them from suing in Canadian courts and claiming a similar remedy under general civil or common law. And while security for costs may be a financial obstacle for foreign plaintiffs, courts have wide discretionary powers to set the appropriate amount depending on the circumstances.[656]

Interpreting equal access so narrowly that it only prohibits marginal obstacles and promotes an ideal already shared by many legal systems therefore misses the point. If equal access truly aims at removing the procedural obstacles faced by foreign victims of

---

R v Turpin, [1989] 1 SCR 1296 at 1332–33, 1989 CanLII 98. *Cf Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at 253–54, 1999 CanLII 687 (recognition of aboriginality-residence/off-reserve band member status as an analagous ground of discrimination). See also *Western Surety Co v Elk Valley Logging Ltd* (1985), 23 DLR (4th) 464 at 471–72, 1985 CanLII 780 (BCSC) (the fact that a defendant residing in British Columbia is subject to the jurisdiction of British Columbia courts but cannot join the province of Alberta as a third-party to the proceedings does not constitute unlawful discrimination because the defendant can always seek remedy against Alberta in Alberta courts).

[652] See *Amin v Brown*, [2005] EWHC (Ch) 1670 at paras 21–24, [2006] ILPr 67; *International Association of Science and Technology for Development v Hamza*, 1995 ABCA 9 (CanLII) at para 22, 122 DLR (4th) 92 [*International Association of Science and Technology for Development*]; *Sovfracht v Van Udens Scheepvaart En Agentuur Maatschappij* (1942), [1943] AC 203 at 209, [1943] 1 All ER 76 (HL); *Reventlow-Criminil v Streamstown (Municipality)* (1920), 52 DLR 266 at 269, 1920 CanLII 482 (Alta CA), aff'd (1921), 63 SCR 8, 1922 CanLII 32; *Johnstone v Pedlar*, [1921] 2 AC 262 at 283, [1921] All ER Rep 176 (HL); *Rodriguez v Speyer Brothers* (1918), [1919] AC 59 at 66, [1918–19] All ER Rep 884 (HL Eng)); *Porter v Freudenberg*, [1915] 1 KB 857 at 867–74, [1914–15] All ER Rep 918 (CA); *Princess Thurn and Taxis v Moffitt* (1914), [1915] 1 Ch 58 at 60–61, [1914–15] All ER Rep 301; Karen Knop, "Citizenship, Public and Private" (2008) 71:3 Law & Contemp Probs 309 at 321–28; JG Castel, "Exemption from the Jurisdiction of Canadian Courts" (1971) 9 Can YB Intl L 159 at 183–87.

[653] See *Success International Inc v Environmental Export International of Canada Inc* (1995), 23 OR (3d) 137 at 146, 1995 CanLII 7186 (Gen Div) (concerning the *Extra-Provincial Corporations Act*, RSO 1990, c E.27, ss 4(2), 21(1)); *International Association of Science and Technology*, *supra* note 652 at paras 23–29 (concerning the *Business Corporations Act*, RSA 2000, c B-9, s 295(1)).

[654] For further discussion on equal remedy in Canadian law, particularly in relation to residency requirements in environmental statutes, see subsection 3.2.3.2.2.1 below.

[655] See *BC Class Proceedings Act*, *supra* note 636, s 2(4); *SK Class Actions Act*, *supra* note 636, s 4(4); *NB Class Proceedings Act*, *supra* note 636, s 3(5); *NL Class Actions Act*, *supra* note 636, s 3(4).

[656] See *Iraq (Republic of) c Instrubel nv*, 2014 QCCA 1183 at para 3, [2014] JQ no 5630 (QL).

transboundary pollution in the source state, it must focus on more than the rules mentioned above. It must also focus on jurisdiction itself. Jurisdiction is a significant obstacle to justice if it bars access to the courts of the source state for foreigners. A court without jurisdiction obviously cannot hear the merits of a claim. Preliminary debates on jurisdiction may also impede access to justice if they unduly lengthen or complexify the proceedings.[657] Equal access, understood in a wider sense, has something to say about jurisdiction. This is evident in the ILA's commentary to the *Montreal Rules on Water Pollution*, in which the ILA praised the jurisdictional rule articulated in *Mines de potasse d'Alsace* as a sign that the law was evolving towards equal access.[658] This is also evident the ILA's commentary to the *Helsinki Articles on Private Law Remedies*, in which the ILA explains that equal access "requires elimination of jurisdictional or other procedural obstacles for transboundary claimants, including such requirements as security for costs from foreign plaintiffs, the denial of legal aid to such plaintiffs, *and the rule found in various forms in certain jurisdictions that deny jurisdiction over actions involving foreign land*."[659] It would therefore be incoherent to focus only on open discrimination, the prohibition of which is uncontroversial, and maintain jurisdictional obstacles that produce the same result.

Going back to non-discrimination in relation to *jurisdictional* rules, it seems clear that equal access requires at a minimum that courts in the source state have jurisdiction over transboundary pollution. Consider a polluting facility in state *x* that affects only the residents of state *x*. Being a local matter, courts of state *x* will undoubtedly have jurisdiction to hear the residents' claim. Now consider a polluting facility in state *x* that

---

[657] See the forceful statement of the Supreme Court of the United Kingdom in *Vedanta*, *supra* note 136 at paras 6–14. See also *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*, 2015 ONSC 519 at para 94, 66 CPC (7th) 316, rev'd 2016 ONCA 60, 129 OR (3d) 37; Gerard Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79 at 85–86, 111. The Supreme Court of Canada emphasized the fundamental importance of access to justice in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 38–40, [2014] 3 SCR 31; *Hryniak v Mauldin*, 2014 SCC 7 at paras 23–33, [2014] 1 SCR 87.

[658] See International Law Association, "International Water Resources Law: Report of the Committee" (1982) 60 Intl L Assn Rep Conf 531 at 545 [*ILA Montreal Rules on Water Pollution*], as considered and adopted by International Law Association, "Resolution No 12/1982: International Water Resources Law" (1982) 60 Intl L Assn Rep Conf 13.

[659] *ILA Helsinki Articles on Private Law Remedies*, *supra* note 364 at 408, cited in *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, para 5, n 468 [emphasis added].

affects both the residents of state *x* and *y* (or even only the residents of state *y*). To secure equal treatment for residents of state *y*, courts of state *x* must have jurisdiction to hear their claim, if only because residents of state *x* could have sued there in a local scenario. This will not be a problem in most situations because the place of acting often aligns with the domicile or place of business of the polluter, two common grounds of jurisdiction.

Of course, equal access has its limits. It does not alleviate non-jurisdictional obstacles faced by foreign victims who sue at the place of acting, notably their unfamiliarity with a foreign legal system and the costs of bringing a lawsuit abroad.[660] It does not help them sue at the place of injury either (even though it does not exclude it). Finally, it does not eliminate substantive obstacles to prompt and adequate compensation in the source state if those obstacles apply equally to local and foreign plaintiffs. Equal access only marks the beginning of the discussion on jurisdiction over transboundary pollution. It is not an end in itself—more can be done, as we will see later one.

Many states and international organizations have sought to implement equal access into domestic law. The *Nordic Convention* and the *OECD Recommendation* are among the best-known instruments. Those instruments inspired the ILC and helped shape early Canada-United States environmental relations. The literature often exaggerates their significance, but they remain important to understand the ILC's position on jurisdiction and identify any potential shortcoming in Canadian private international law.

I address each of them in turn, beginning with the *Nordic Convention* (2.1.2.1) and then turning to the *OECD Recommendation* (2.1.2.2). Note that the two instruments are intertwined. The OECD began its work the year the *Nordic Convention* was adopted, and the latter provided a basis for the final *OECD Recommendation* three years later.[661] In

[660] See Banda, *supra* note 176 ("[e]qual access is still illusory in many legal systems given the difficulties and expense of litigating claims in foreign courts" at 1883).
[661] See Thomas M Shoesmith, "Transfrontier Pollution—*OECD Council Recommendation on Implementing a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*" (1978) 19:1 Harv Intl LJ 407 at 408, n 8 [Shoesmith]; Robert E Stein, "The OECD Guiding Principles on Transfrontier Pollution" (1976) 6:1 Ga J Intl & Comp L 245 at 250–51 [Stein].

turn, the *OECD Recommendation* publicized the *Nordic Convention* to a broader audience. It is therefore advisable to read them together.

2.1.2.1. The 1974 *Nordic Convention*

Equal access truly appeared on the radar with the adoption of the *Nordic Convention* by Denmark, Finland, Norway and Sweden in 1974,[662] in the wake of the *Stockholm Declaration* and an earlier agreement on cooperation between Nordic countries.[663] Some form of non-discrimination had already been seen in environmental instruments prior to 1974, in peculiar contexts or under strict conditions. This included the *Boundary Waters Treaty* between Canada and the United States regarding water diversion,[664] American statutes such as the *Trans-Alaska Pipeline Authorization Act*,[665] the *Clean Air Act*[666] and the *National Environmental Policy Act*[667] (and later *CERCLA*[668]), a bilateral treaty

[662] See *Nordic Convention*, *supra* note 199; Bengt Broms, "The Nordic Convention on the Protection of the Environment" in Cees Flinterman, Barbara Kwiatkowska & Johan G Lammers, eds, *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: Martinus Nijhoff, 1986) 141; Charles Phillips, "Nordic Co-operation for the Protection of the Environment Against Air Pollution and the Possibility of Transboundary Private Litigation" in Cees Flinterman, Barbara Kwiatkowska & Johan G Lammers, eds, *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: Martinus Nijhoff, 1986) 153 [Phillips]; A Ch Kiss, "La Convention nordique sur l'environnement" (1974) 20 AFDI 808.

[663] See *Agreement Concerning Co-operation*, Finland, Denmark, Iceland, Norway and Sweden, 23 March 1962, 434 UNTS 145 (entered into force 1 July 1962).

[664] See *International Boundary Waters Treaty Act*, *supra* note 646, s 4; *Boundary Waters Treaty*, *supra* note 646, art II, para 1.

[665] See *Trans-Alaska Pipeline Authorization Act*, Pub L No 93-153, § 204(c)(1), 87 Stat 584 at 586 (1973) (codified as amended at 43 USC § 1651–56 (2017)), as repealed by *Trans-Alaska Pipeline System Reform Act of 1990*, Pub L No 101-380, §8102(a)(1), 104 Stat 564 at 565 (1990).

[666] See *Clean Air Act*, Pub L No 88-206, §115, 77 Stat 392 at 396–99 (1963) (codified as amended at 42 USC § 7415 (2017)); *EPA*, *supra* note 176.

[667] See *National Environmental Policy Act of 1969*, Pub L No 91-190, 83 Stat 852 (1970) (codified as amended at 42 USC § 4321–4370 (2017)); Council on Environmental Quality, "Memorandum to U.S. Agencies on Applying the Environmental Impact Statement Requirement to Environmental Impacts Abroad" (24 September 1976), 15:6 ILM 1426; *Executive Order 12114—Environmental Effects Abroad of Major Federal Actions*, 44 Fed Reg 1957 (1979) (codified at 3 CFR 356 (1980)). For cases in which courts have considered the environmental impact of a project outside the US, see *Manitoba*, *supra* note 179 at 51; *Association of Public Agency Customers Inc v Bonneville Power Administration*, 126 F (3d) 1158 at 1187, 1997 US App Lexis 26278 (9th Cir 1997); *Swinomish Tribal Community v Federal Energy Regulatory Commission*, 627 F (2d) 499 at 510–12, 1980 US App Lexis 16447 (DC Circ 1980); *People of Saipan, ex rel Guerrero v United States Department of the Interior*, 356 F Supp 645 at 649–50, 1973 US Dist Lexis 14420 (D Hawaii 1973), rev'd 502 F (2d) 90, 1974 US App Lexis 7637 (9th Cir 1974), certiorari denied, 420 US 1003, 95 S Ct 1445 (1975); *People of Enewetak v Laird*, 353 F Supp 811 at 818, 1973 US Dist Lexis 15300 (D Hawaii 1973); *Wilderness Society v Morton*, 463 F (2d) 1261 at 1262–63, 1972 US App Lexis 9636 (DC Cir 1972).

[668] See *CERCLA*, *supra* note 13, § 111(l).

between Austria and Germany regarding an Austrian airport at the border[669] and a resolution from the Council of Europe.[670] The *Nordic Convention*, however, broke new ground. It promoted equal access in wide terms, applied to all environmentally harmful activities and defined them very broadly.[671] This was an unusual approach at the time of its adoption, as global environmental problems were only beginning to attract legal and political attention.[672]

The *Nordic Convention* represents a strong stance in favour of environmental cooperation, both in terms of prevention and compensation.[673] It is procedural in nature. Its central provision requires that all persons affected by an environmentally harmful activity benefit from the same compensation standards and have equal access to courts and administrative bodies in the four countries.[674] It also institutes a regime of administrative approval to deal with the transboundary effects of activities in the area.[675]

The *Nordic Convention* seeks to consolidate the rights of victims and facilitate private litigation.[676] Curiously, however, it has had little discernible impact in practice.[677] The literature identifies only one instance in which plaintiffs benefited from equal access

---

[669] See *Agreement Concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport*, Federal Republic of Germany and Austria, 19 December 1967, 945 UNTS 87, Bundesgesetzblatt (BGBI) [Federal Law Gazette] II 13, art 4(3) (entered into force 17 May 1974); Ignaz Seidl-Hohenveldern, "À propos des nuisances dues aux aéroports limitrophes: le cas de Salzbourg et le traité austro-allemand du 19 décembre 1967" (1973) 19 AFDI 890.
[670] See Council of Europe, Committee of Ministers, *Resolution 71(5) on Air Pollution in Frontier Areas*, Doc 2934, Appendix VIII (1971), reprinted in OECD, *Transfrontier Pollution*, *supra* note 198, 251 & (1971) 19 Eur YB 262.
[671] See Sand, "Domestic Procedures", *supra* note 521 at 189, n 5 (pointing to a mistranslation of the original terms of the *Nordic Convention* which obscures the fact that they cover potentially harmful activities as well).
[672] See Henry McGee & Timothy W Woolsey, "Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano's *The Peaceful Settlement of International Disputes: A Pragmatic Approach*" (2002) 20:1 UCLA J Envtl L & Pol'y 109 (describing the *Nordic Convention* as "truly a bold endeavo[u]r" at 128); Philippe J Sands, "Environment, Community and International Law" (1989) 30:2 Harv Intl LJ 393 (describing the *Nordic Convention* as being "unique in establishing a comprehensive regime for the protection of the environment" at 413).
[673] *Cf* Rasmus Klocker Larsen, "Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v Boliden Mineral AB*" (2014) 83:4 Nordic J Intl L 404 at 413 (noting a decline in regional cooperation between Scandinavian countries in private law since the 1970s).
[674] See *Nordic Convention*, *supra* note 199, art 3.
[675] See *ibid*, arts 4–12.
[676] See Broms, *supra* note 662 at 149–50; Phillips, *supra* note 662 at 169–70.
[677] See Timo Koivurova, "The Future of the Nordic Environment Protection Convention" (1997) 66:4 Nordic J Intl L 505 at 505.

under the *Nordic Convention.* In the *Saugbruksforeningen and Borregard Industries* case, Norwegian courts gave standing to Norwegian and Swedish non-governmental organizations to sue Norwegian companies that operated near the Swedish border, even though the Swedish organization did not have standing under its own Swedish law.[678] The similarity of the four states' environmental laws and an already sufficiently broad jurisdictional basis may explain the paucity of cases that require resorting to the *Nordic Convention.*

Regardless of its use in practice, the *Nordic Convention* is still consistently hailed as one of the most innovative models for environmental protection. Scandinavian countries carried it into treaty negotiations.[679] It has left a durable mark on other efforts to achieve equal access and also inspired the *ILC Principles on the Allocation of Loss*.[680] Scholars routinely refer to it when discussing the possibility of litigating transboundary pollution in domestic courts, and few dare to admit that its practical significance has been somewhat exaggerated in the literature.[681] The *Nordic Convention* seems to have earned its place in the Pantheon of unlikely milestones of international environmental law.

2.1.2.2. The 1977 *OECD Recommendation*

The *OECD Recommendation* is a non-binding recommendation[682] that followed in the footsteps of the *Nordic Convention*. After issuing two preliminary recommendations,[683]

---

[678] See Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (The Hague: Kluwer Law International, 1999) at 341–42; Jonas Ebbesson, "Reflections on the 1974 Nordic Environment Protection Convention Two Decades after its Signing" in Tuula Tervashonka, ed, *The Legal Status of the Individual in Nordic Environmental Law* (Rovaniemi: Northern Institute for Environmental and Minority Law, University of Lapland 1994) 63 at 64, reprinted in Erkki J Hollo & Kari Marttinen, eds, *North European Environmental Law* (Helsinki: Finnish Society of Environmental Law, 1995) 39. This literature is dated, but recent work in French or English does not report any other case. See eg Birnie, Boyle & Redgewell, *supra* note 46 at 307, n 207.

[679] See Nina Glickman, "Keep Your Pollution to Yourself: Institutions for Regulating Transboundary Pollution and the United States-Mexico Approach" (1984) 25:3 Va J Intl L 693 at 714.

[680] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86.

[681] See Patricia W Birnie & Alan E Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992) at 198.

[682] See OECD, *Rules of Procedure of the Organisation*, OECD Doc C(2007)14/FINAL (2013), Rule 18(b); *OECD Recommendation*, *supra* note 198, Preamble, para 8.

[683] See OECD, *Recommendation of the Council on Equal Right of Access in Relation to Transfrontier Pollution*, OECD Doc C(76)55/FINAL, 15:5 ILM 1218 (1976), reprinted in OECD, *Legal Aspects*, *supra* note 198, 19 & OECD, *Environnement*, *supra* note 198, 169; OECD, *Recommendation of the Council on Principles Concerning Transfrontier Pollution*, OECD Doc C(74)224 (1974), 15:1 ILM 242, reprinted in

the OECD Council chose to promote equal access on similar terms as the *Nordic Convention*. It recommended that OECD countries adjust their domestic law and treat foreign victims of transboundary pollution in a manner equivalent to local victims in a purely domestic case, including by preserving the right of all persons to participate in administrative and judicial proceedings in the source state.[684]

The OECD did not insist on a jurisdictional rule—only on the absence of discrimination in procedural law.[685] But its prior statements went further on this point. They made it clear that the exclusive jurisdiction of the courts at the place of injury offends the principle of non-discrimination and should be avoided.[686] In other words, non-discrimination *requires* jurisdiction at the place of acting. It can also accommodate complementary jurisdiction at the place of injury. The proposal was criticized for being unclear on this point,[687] but the OECD could hardly have excluded the place of injury without doing so expressly, and equal access obviously does not prevent victims from suing elsewhere. The *ILC Principles on the Allocation of Loss* are clearer on this point in any event.[688]

The non-binding *OECD Recommendation* comes from a small group of states (twenty-four at the time) and would have needed further elaboration in order to have an impact in

---

OECD, *Legal Aspects*, *supra* note 198, 11 & OECD, *Environnement*, *supra* note 198, 163 [*1974 OECD Recommendation*]. The OECD also worked on the role of the states in preventing transboundary pollution. See generally Organisation for Economic Co-operation and Development, *Transfrontier Pollution and the Role of States* (Paris: OECD, 1981).

[684] See *OECD Recommendation*, *supra* note 198, s 4.

[685] See OECD Secretary General, *supra* note 632 at 46.

[686] See OECD Council, *supra* note 632 at 26; OECD Secretariat, "Equal Right of Access", *supra* note 632 at 126.

[687] See E Willheim, "Private Remedies for Transfrontier Environmental Damage: A Critique of OECD's Doctrine of Equal Right of Access" (1976) 7 Austl YB Intl L 174 at at 180, 198–99 [Willheim]; Ignaz Seidl-Hohenveldern, "Alternative Approaches to Transfrontier Environmental Injuries" (1976) 2:1 Envtl Pol'y & L 6 at 8 [Seidl-Hohenveldern]; Stephen C McCaffrey, "The OECD Principles Concerning Transfrontier Pollution: A Commentary" (1975) 1:1 Envtl Pol'y & L 2 at 7 [McCaffrey, "OECD Principles"].

[688] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6(3) ("[p]aragraphs 1 and 2 are without prejudice of the right of the victims to seek remedies other than those available in the [s]tate of origin"). This principle is ambiguously phrased. Arguably, it covers cases in which victims seek to bring a lawsuit outside the source state, but it also covers cases in which victims seek to invoke foreign law (for instance the hypothetically more favourable law of the place of injury) before the courts of the source state. On the latter point, see subsection 3.1.2 below.

domestic law.[689] But the OECD has often led the way on environmental issues and the document remains an important landmark that was well received by scholars at the time.[690] It helped turn non-discrimination into a workable and widely recognized principle of international environmental law. In the years that followed, provisions appeared in environmental treaties,[691] guidelines,[692] resolutions and reports from the ILA[693] and the IIL,[694] and model laws drafted by various organizations and research groups.[695] The experts who worked on the 1988 Brundtland Report also included non-discrimination and equal access as two of the twenty-two foundational principles of

[689] See Anderson, *supra* note 5 at 414.
[690] See Shoesmith, *supra* note 661; Stein, *supra* note 661; Seidl-Hohenveldern, *supra* note 687; McCaffrey, "OECD Principles", *supra* note 687. But see Willheim, *supra* note 687 (who is more skeptical of the document overall).
[691] See eg *Revised African Convention on the Conservation of Nature and Natural Resources*, 11 July 2003, art XVI(2) (not yet in force); *Revised Protocol on Shared Watercourses of the Southern African Development Community*, 7 August 2000, 40:2 ILM 321, art 3(10)(c) (entered into force 22 September 2003), adopted under the *Treaty of the Southern African Development Community*, 17 August 1992, 32:1 ILM 120, 5:2 Afr J Intl & Comp L 418 (entered into force 5 October 1993) [*Revised Protocol on Shared Watercourses*]; *Aarhus Convention*, *supra* note 406, art 3(9); *UN Watercourses Convention*, *supra* note 625, art 32; *Protocol for the Protection of the Mediterranean Sea*, *supra* note 399, art 26(4) (language restricted to administrative proceedings); *Industrial Accidents Convention*, *supra* note 135, Preamble, para 10, art 9; *Espoo Convention*, *supra* note 250, art 2(6).
[692] See eg *Draft principles of conduct in the field of the environment for the guidance of states in the conservation and harmonious utilisation of natural resources shared by two or more states*, 17:5 ILM 1097 (1978), Principle 14, as approved by UNEPGC in *Co-operation in the field of the environment concerning natural resources shared by two or more States*, UNEPGC Dec 6/14 in United Nations Environment Programme Governing Council, *Report of the Governing Council on the work of its sixth session: 9–25 May 1978*, UNGAOR, 33rd Sess, Supp No 25, UN Doc A/33/25 (1978) 154 [*Draft Principles of Conduct in the Field of the Environment*] and noted by the UNGA in *Co-operation in the field of the environment concerning natural resources shared by two or more States*, GA Res 34/186, UNGAOR, 34th Sess, Supp No 46, UN Doc A/RES/34/186 (1979).
[693] See eg *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rule 3(3); *ILA Berlin Rules on Water Resources*, *supra* note 410 at 409, art 71(1); *ILA New Dehli Declaration*, *supra* note 615 at 28, para 5.3; *ILA Helsinki Articles on Private Law Remedies*, *supra* note 364 at 408, art 3(1); *ILA Montreal Rules on Water Pollution*, *supra* note 658 at 544, art 8.
[694] See eg *IIL Resolution on Responsibility and Liability*, *supra* note 616 at 513, art 30; IIL, "Final Report", *supra* note 616 at 342.
[695] See eg *IUCN Draft International Covenant on Environment and Development*, *supra* note 414 at 22, art 62; Société française pour le droit de l'environnement & Gesellschaft für Umweltrecht [German Environmental Law Society], "Projet de convention entre la République française et la République fédérale d'Allemagne pour la limitation et la prévention des pollutions transfrontières" [1997] 1 RJE 99 at 103 (art 5), 108 (art 23) [SFDE & GfU]; Muldoon, Scriven & Olson, *supra* note 109 at 358, s 4. See also Alfred Rest, *Convention on Compensation for Transfrontier Environmental Injuries: Draft with Explanatory Notes* (Berlin: Erich Schmidt, 1976) at 22 (art 21(2)), 64 [Rest, *Convention on Compensation*]

environmental protection and sustainable development that strongly influenced the negotiation of the *Rio Declaration* a few years later.[696]

Several important multilateral instruments entrench non-discrimination and equal access. The *Aarhus Convention* expressly requires that the public have access to justice in environmental matters without discrimination based on citizenship, nationality or domicile.[697] The UNECE declared that under that provision, states must ensure that foreign members of the public have access to justice under the same conditions as locals.[698] The *UN Watercourses Convention* prohibits discrimination on the basis of nationality, residence or place of injury when a state grants access to justice or a right to claim compensation to victims.[699] The 1991 *Espoo Convention* (legally binding in Canada[700]) gives the public a right to participate in environmental impact assessments.[701] In the United States, the *Restatement (Third) of Foreign Relations* promotes equal access

[696] See *Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental* Law, arts 13, 20, Annex I to *Report of the World Commission on Environment and Development*, UN Doc A/42/427 (1987) Annex, as adopted by UNEPGC in *Report of the World Commission on Environment and Development*, UNEPGC Dec 14/14 in United Nations Environment Programme Governing Council, *Report of the Governing Council on the work of its fourteenth session: 8–19 June 1987*, UNGAOR, 42nd Sess, Supp No 25, UN Doc A/42/25 (1987) 60 and noted by the UNGA in *Report of the World Commission on Environment and Development*, GA Res 42/187, UNGAOR, 42nd Sess, Supp No 49, UN Doc A/RES/42/187 (1987), reprinted in Experts Group on Environmental Law, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London: Graham & Trotman, 1987).
[697] See *Aarhus Convention*, *supra* note 401, art 3(9).
[698] See UNECE, *supra* note 500 at 189. See also United Nations Economic Commission for Europe, Compliance Committee, *Findings and recommendations with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystre deep-water navigation canal construction (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine))*, 7th Mtg, UN Doc ECE/MP.PP/C.1/2005/2/Add.3 (2005) at para 26, as endorsed by UNECE Dec II/5b in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the Second Meeting of the Parties—Addendum*, UN Doc ECE/MP.PP/2005/2/Add.8 (2005).
[699] See *UN Watercourses Convention*, *supra* note 625, art 32.
[700] See *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52; Government of Canada, "Compendium of Canada's Engagement in International Environmental Agreements and Instruments: *UNECE Convention on Environmental Impact Assessment in Transboundary Context (Espoo Convention)*", online (pdf): *Government of Canada* <www.canada.ca> [perma.cc/YGR6-J6MW].
[701] See *Espoo Convention*, *supra* note 250, art 2(6); Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context, "Correspondence on Specific Compliance Issues as a Result of Information Provided to the Committee" (16 March 2010), UN Doc EIA/IC/INFO/4 (2010) at 2, item (c) and the sources cited *supra* note 250.

to foreign victims of transboundary pollution.[702] Recently, the Inter-American Court of Human Rights issued a voluminous advisory opinion in which it declared that American states must guarantee non-discriminatory access to justice to all victims of pollution originating in their territory, including foreign victims.[703] This growing corpus of domestic and international law reflects broader commitments to increase public participation and access to justice in environmental matters.[704]

2.1.3. Implementation of equal access in Canada

Four documents promote equal access specifically in relation to Canada. The 1909 *Boundary Waters Treaty* marked the introduction of the concept in Canada (2.1.3.1). The 1979 *Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution* (2.1.3.2) and the 1982 *Transboundary Pollution Reciprocal Access Act* (2.1.3.3) later expanded equal access to all transboundary environmental disputes. They were not entirely successful but led to special legislation that overrides the general law of jurisdiction in four provinces. Finally, North American states put equal access at the heart of their trade policy with the 1994 *North American Agreement on Environmental Cooperation* (2.1.3.4). Each of those four documents reflect the approach of the ILC in the *Principles on the Allocation of Loss*. They also share many of the features of earlier documents such as the *Nordic Convention* and the *OECD Recommendation*.

---

[702] See *Restatement (Third) of Foreign Relations Law*, vol 2, *supra* note 12, § 602(2). American courts held that the equal access provision of the *Restatement (Third) of Foreign Relations Law* did not reflect a "universally recognized principl[e] of international law" but only "iterate[d] the existing [US] view of the law of nations regarding global environmental protection." *Amlon Metals Inc v FMC Corp*, 775 F Supp 668 at 671, 1991 US Dist Lexis 14571 (SD NY 1991) [*Amlon Metals*]. The American Law Institute issued a new restatement in 2018, but only on selected topics of treaties, jurisdiction and sovereign immunity. See *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018), as commented by the American Law Institute, *Restatement of the Law, Fourth: Foreign Relations of the United States. Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* (St Paul: American Law Institute, 2018) [*Restatement (Fourth) of Foreign Relations Law*].

[703] See *Environment and Human Rights (Colombia)* (2017), Advisory Opinion OC-23/17, Inter-Am Ct HR (Ser A) No 23 at paras 238–40. According to two authors, the Inter-American Court of Human Rights "delivered one of the strongest judicial assertions of [s]tates' obligations in relation to the protection of the environmental and human rights to date." Ricardo Abello-Galvis & Walter Arevalo-Ramirez, "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection" (2019) 28:2 RECIEL 217 at 221. See also Banda, *supra* note 176 at 1915 (describing the advisory-opinion as a "seminal ruling").

[704] See *UNEP Guidelines on Access to Justice*, *supra* note 413; *Rio+20 Declaration*, *supra* note 35 at paras 14–18; *Rio Declaration*, *supra* note 35, Principle 10.

In addition, the *Nuclear Liability and Compensation Act* requires the Nuclear Claims Tribunal to treat claims equitably and without discrimination on the basis of nationality or residence.[705] This administrative tribunal is established by the Governor in Council if deemed necessary in order to process claims after a nuclear incident.[706] If such tribunal is not established, the *Act* gives jurisdiction to the courts of the province where the incident occurred (or the Federal Court when the incident spanned two provinces or Canada's exclusive economic zone).[707] The *Act*, however, provides that Canadian courts do not have jurisdiction over a claim for damage suffered abroad.[708] Foreign victims therefore do not have access to Canadian courts in this scenario.

2.1.3.1. The 1909 *Boundary Waters Treaty*

The *International Boundary Waters Treaty Act* was the first to introduce the concept of equal access in Canada.[709] The *Act* incorporates into domestic law the 1909 *Boundary Waters Treaty* between Canada and the United States.[710] The treaty itself is an important milestone for environmental cooperation in North America. It created the bilateral International Joint Commission (IJC) to prevent and manage disputes over the use of transboundary watercourses.[711] It also led to several other agreements on water quality in the Great Lakes area.[712] The details of the regime go beyond the scope of this thesis, but its equal access provision warrants attention.

---

[705] See *Nuclear Liability and Compensation Act*, *supra* note 361, s 41(3).
[706] See *ibid*, s 36(1).
[707] See *ibid*, ss 34(1)–34(2). *Cf Nuclear Liability Act*, RSC 1985, c N-28, s 14 (jurisdiction of courts at the place of injury, or where the facility is located if an injury was suffered in more than one place); *Energy Probe v Canada (Attorney General)* (1994), 17 OR (3d) 717, 1994 CanLII 7247 (Gen Div) (upholding the constitutional validity of the former *Nuclear Liability Act*—jurisdictional provisions not in dispute).
[708] See *ibid*, s 34(6).
[709] See *International Boundary Waters Treaty Act*, *supra* note 646.
[710] See *Boundary Waters Treaty*, *supra* note 646.
[711] See International Joint Commission, "Mission and Mandates", online: *International Joint Commission* <www.ijc.org> [perma.cc/2PQE-TMHV]. The IJC also assists Canada and the United States in the implementation of the *Agreement Between the Government of Canada and the Government of the United States of America on Air Quality*, 13 March 1991, 1852 UNTS 79, Can TS 1991 No 3, 30:3 ILM 678 (entered into force 13 March 1991) as amended by the Protocol of 7 December 2000, Can TS 2000 No 26 (entered into force 7 December 2000).
[712] See *Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978*, 22 November 1978, 1153 UNTS 187, Can TS 1978 No 20 (entered into force 22 November 1978) as amended by the Protocol of 16 October 1983, Can TS 1983 No 22, TIAS No 10798 (entered into force 16 October 1983), the Protocol of 18 November 1987, 2185 UNTS 504, Can TS 1987 No 32, TIAS No 11551

Section 4(1) of the *International Boundary Waters Treaty Act* reflects the first paragraph of Article II of the *Boundary Waters Treaty*. It grants both states exclusive jurisdiction over the use and diversion of a watercourse partially located on their territory and flowing into the other state's territory. It requires, however, that the foreign victims of a water diversion in one state have the same rights and remedies as those in the state where the water diversion occurred.[713] The *International Boundary Waters Treaty Act* also gives the Federal Court exclusive jurisdiction over any dispute arising from its provisions.[714]

The *International Boundary Waters Treaty Act* essentially creates a special right for victims in the United States to seek remedies in Canada.[715] Legislative debates reveal that parliamentarians disagreed over the existence and extent of such right prior to the adoption of the *Act.*[716] Today, it is clear that the interference with or the diversion of a watercourse flowing from Canada into the United States can give rise to a remedy in Federal Court if it causes damage (including environmental damage) to American victims.

This said, section 4(1) of the *International Boundary Waters Treaty Act* applies only to water diversion. It does not apply to other problems such as transboundary pollution.[717] Its wording, and that of Article II, paragraph 1 of the *Boundary Waters Treaty* which it

---

(entered into force 18 November 1987) and the Protocol of 7 September 2012, Can TS 2013 No 8, TIAS No 13212 (entered into force 12 February 2013), superseding *Agreement Between Canada and the United States of America on Great Lakes Water Quality*, 15 April 1972, 837 UNTS 213, Can TS 1972 No 12, 11:4 ILM 694 (entered into force 25 April 1972).

[713] See *International Boundary Waters Treaty Act*, *supra* note 646, s 4(1). On Article II of the *Boundary Waters Treaty*, see Tim A Kalavrouziotis, "U.S.-Canadian Relations Regarding Diversions from an International Basin: An Analysis of Article II of the Boundary Waters Treaty" (1989) 12:4 Fordham Intl LJ 658; McCaffrey, "Jurisdictional Considerations", *supra* note 227 at 203–217; Robert Day Scott, "The Canadian-American Boundary Waters Treaty: Why Article II?" (1958) 36:4 Can Bar Rev 511.

[714] See *International Boundary Waters Treaty Act*, *supra* note 646, s 5.

[715] See *Pembina County Water Resource District v Manitoba*, 2011 FC 1118 at para 18, 397 FTR 262.

[716] See "Bill 36, International Waterways Treaty", 2nd reading, *House of Commons Debates*, 11-3, vol 5 (16 May 1911) at 9095–9100, 9130–9132, 9213–9215 (Hons John Allister Currie, Angus Claude Macdonell, John Dowsley Reid, Henry Emmerson, Charles Joseph Doherty & William Pugsley); "Bill 36, Waterways Treaty", 1st reading, *House of Commons Debates*, 11-3, vol 1 (6 December 1910) at 885–87 (Hons Angus Claude Macdonell, William Pugsley, Oswald Smith Crocket & Martin Burrell).

[717] But see Bill C-444, *An Act to amend the International Boundary Waters Treaty Act (water quality)*, 1st sess, 42nd Parl, 2019 (first reading 1 May 2019) (proposing to amend the *International Boundary Waters Treaty Act* to require the Canadian Minister of Foreign Affairs to "undertake steps toward the possible amendment of the [*Boundary Waters Treaty*] in order that the quality of boundary waters is taken into account"). A federal general election was held on 21 October 2019 and the bill will need to be retabled during the first session of the forty-third Parliament.

incorporates, leave no doubt on this point ("any interference with or diversion from").[718] By contrast, Article IV, paragraph 2 of the *Boundary Waters Treaty* explicitly prohibits pollution on either side of the border,[719] but unlike Article II, it does not mention the legal remedies attached to the obligation nor the beneficiaries of those remedies. In *Pembina County Water Resources District*, the Federal Court of Appeal recalled that section 4(1) of the *International Boundary Waters Treaty Act* did not extend to the acts covered by Article IV of the *Boundary Waters Treaty*, only those covered by Article II.[720] It ultimately held that Article IV does not grant any private right of action or remedies to victims of transboundary pollution.[721]

---

[718] See *International Boundary Waters Treaty Act*, *supra* note 646, ss 4(1); *Boundary Waters Treaty*, *supra* note 646, art II, para 1.

[719] *Boundary Waters Treaty*, *supra* note 646, art IV, para 2 ("[i]t is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other").

[720] See *Pembina County Water Resource District*, *supra* note 180 at para 65–66, 69–73. In that case, the plaintiffs sought to rely on the first paragraph of Article IV, concerning works which raise the natural level of waters on the other side of the border. The reasoning of the Federal Court of Appeal equally applies to the second paragraph of Article IV concerning water pollution, as that paragraph is not mentioned in section 4 of the *International Boundary Waters Treaty Act* either.

[721] See *ibid*. The Secretariat of the Commission for Environmental Cooperation (CEC) established under the 1994 *North American Agreement on Environmental Cooperation* reached a similar conclusion. In 2019, the CEC dealt with a complaint by an association of Quebec residents against both Canada and the United States for failure to enforce their environmental laws in relation to the pollution of Lake Memphremagog, a transboundary watercourse. The plaintiff relied on several provisions of the *Boundary Waters Treaty*, including Article IV, paragraph 2. The admissibility of the complaint hinged on whether those provisions were part of the domestic environmental laws of either state. The CEC concluded that "[w]hile the [*International Boundary Waters Treaty Act*] clearly brings certain provisions of the [*Boundary Waters Treaty*] within Canadian domestic law, it does not do so with respect to the anti-pollution provision of Article IV […] As such, the above referenced Treaty articles cannot be considered part of Canadian domestic law." See *Lake Memphremagog SEM-01-003: Secretariat Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, CEC Doc A14/SEM/19-003/06/DETN14(1) (2019) at paras 23–24, online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/H3KM-6URK] [*Lake Memphremagog SEM-01-003*]. The CEC's determination goes somewhat further than a previous determination in which it concluded that the law was unclear on this point in Canada. See *Devils Lake SEM-06-002: Secretariat Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, CEC Doc A14/SEM/06-002/12/DETN (2006) at 5–7, online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/R7MP-U8ZH], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 23 (Cowansville: Yvon Blais, 2007) 381 [*Devils Lake SEM-06-002*]. In the United States, it seems clear that the *Boundary Waters Treaty* does not create a private cause of action. See *Haudenosaunee Six Nations of Iroquois (Confederacy) of North America v Canada*, 1998 US Dist Lexis 16265 at 6–7, 1998 WL 748351 (WL Int) (WD NY 1998); *DiLaura v Power Authority of the State of New York*, 786 F Supp 241 at 252, 1991 US App Lexis 20442 (WD NY 1991), aff'd 982 F (2d) 73, 1992 US App Lexis 33834 (2nd Cir 1992); *Miller v United States of America*, 583 F (2d) 857 at 859–61, 1978 US App Lexis 9282 (6th Cir 1978) [*Miller*]. See also *Lake Memphremagog SEM-01-003*, *ibid* at paras 21–22; *Devils Lake SEM-06-002*, *ibid* at 5, 7. *Cf* Arthur T Carter, "The Boundary Waters Treaty of 1909: Does It Provide an

Section 4(1) of the *International Boundary Waters Treaty Act* (which reflects Article II, paragraph 1 of the *Boundary Waters Treaty*) was invoked twice in Canada. The first case involved a Canadian victim of flooding who sued the IJC for its manipulation of water levels in the St. Lawrence River. The Federal Court ruled in 1976 that the equal access provision could not apply because the injury had not occurred in the United States but in Ontario.[722] The rest of the claim was struck down because the IJC did not have a legal personality and therefore could not be sued.[723]

The second case took longer to unfold. In 2004, North Dakota authorities and private landowners sued the Government of Manitoba and the rural municipality of Rhineland in nuisance and negligence. Manitoba and North Dakota have a long history when it comes to the diversion of water resources, including the recent Devils Lake drainage controversy.[724] This time, the dispute involved a road allowance in Manitoba, near the North Dakota border. Embankments on the road allowance blocked the natural dispersion of the Pembina River from North Dakota into Manitoba and caused floods in North Dakota. Plaintiffs sought injunctive relief and damages from the Federal Court under section 4(1) of the *International Boundary Waters Treaty Act*.

Thirteen years of preliminary procedures followed. In 2017, the Federal Court of Appeal concluded that it did not have jurisdiction to hear the claim and the Supreme Court of

---

Environmental Cause of Action?" (1975) 20:1 SDL Rev 147 [Carter] (arguing that the *Boundary Waters Treaty* creates a cause of action for Canadian victims of pollution originating in the United States). For further discussion on the CEC, see subsection 2.1.3.4 below.

[722] See *Burnell v International Joint Commission* (1976), [1977] 1 FC 269 at 273, 71 DLR (3d) 725.

[723] See *ibid* at 276–77. On the IJC's lack of legal personnality in Canada, see also *Trépanier v Canada (Deputy Attorney General)*, 2014 CanLII 8968 at paras 50–52, [2014] OJ No 1003 (QL) (Sup Ct (Sm Cl Div)) [*Trépanier*] (lawsuit brought by an employee of the IJC alleging that the terms and conditions of his employment had been altered—application of *Burnell* to strike the claim). Courts on both sides of the border also found that as the IJC, as an international organization, is immune from lawsuits. In Canada, see *Trépanier*, *ibid* at para 49 (applying section 3 of the *International Joint Commission Immunity Order*, CRC, c 1315 (2006)). In the United States, see *Miller*, *supra* note 721 at 868, n 42; *Edison Sault Electric Company v United States*, 552 F (2d) 326 at 336, 1977 US Ct Cl Lexis 27 (Ct Cl 1977); *Soucheray v Corps of Engineers of the United States Army*, 483 F Supp 352 at 355, 1979 US Dist Lexis 8708 (WD Wis 1979).

[724] See Andrea Signorelli, "Devils Lake Outlet and the Need for Canada and the United States to Pursue a New Bilateral Understanding in the Management of Transboundary Waters" (2011) 34:3 Man LJ 183; Bart Kempf, "Draining Devils Lake: The International Lawmaking Problems Created by the Devils Lake Outlet" (2006) 19:2 Geo Intl Envtl L Rev 239.

Canada refused to hear the case.[725] In the Federal Court of Appeal's view, Article II of the *Boundary Waters Treaty* referred only to Canada's diversion or interference in Canada with the flow of a river flowing *into* the United States and vice versa. The Pembina River, by contrast, flowed *from* the United States into Canada, where the alleged interference had occurred.[726] While this reasoning may appear overly formal, it is important to note that the Federal Court derives its powers from statute only.[727] It cannot exceed the statutory grant of jurisdiction contained in the *International Boundary Waters Treaty Act*. The wording of the *Act* is therefore determinative. The Federal Court of Appeal nonetheless left the door open to a lawsuit before provincial courts (the courts of general jurisdiction in Canada).[728]

Plaintiffs publicly expressed their intention to file a claim in the Manitoba Court of Queen's Bench after the Supreme Court of Canada refused to hear their appeal.[729] The limitations periods in force in the province, however, could limit the amounts recoverable.[730] The case illustrates once again the hardship faced by foreign plaintiffs in environmental litigation. Thirteen years after filing their claim, plaintiffs are still at the starting gates. But if the case ever gets to trial in Manitoba, it may provide important insights on cross-border environmental disputes in North America.

Summing up, the *Boundary Waters Treaty* remains a significant example of the implementation of equal access in Canada because there are parallels to be made between water diversion and pollution, but it has a very limited scope. We must look elsewhere for more comprehensive initiatives.

---

[725] See *Pembina County Water Resource District*, *supra* note 180. The ruling on costs indicates that the defendants only raised the jurisdictional challenge on the first day of the trial. The Federal Court held that while the defendants had failed to raise their argument in a timely manner, they should not have to pay for the plaintiffs' mistake to proceed in a court which did not have jurisdiction. Hence the parties each had to bear their own costs. See *Pembina County Water Resource District v Manitoba*, 2019 FC 82 at para 37, [2019] FCJ No 321 (QL).
[726] See *ibid* at para 62.
[727] See *Federal Courts Act*, RSC 1985, c F-7; *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 33, [2016] 2 SCR 617; *Roberts*, *supra* note 156 at 331.
[728] See *Pembina County Water Resource District*, *supra* note 180 at paras 76–77.
[729] See Dylan Robertson, "Court No Closer to Fording International Flood Dispute: U.S. Trying to Change Flow of Flooding Water", *Winnipeg Free Press* (31 January 2018) 4, also online: <www.winnipegfreepress.com> [perma.cc/4FYL-59KA].
[730] See *ibid*.

2.1.3.2. The 1979 *Draft Treaty on Equal Access and Remedy*

In 1979, the American Bar Association (ABA) and the Canadian Bar Association (CBA) endorsed and commended to the attention of their governments an instrument drafted by a joint working group and designed to implement equal access between Canada and the United States.[731] The 1979 *Draft Treaty on Equal Access and Remedy* sought to facilitate the private settlement of environmental disputes between the two countries. The co-chairman of the ABA/CBA Working Group described the document as an adjustment to existing domestic law in order to provide equal access to all procedures and remedies.[732] The project began in the midst of extensive academic debate on the viability of private remedies for acid rain damage, a pressing environmental preoccupation at the time.[733]

Interestingly, the ABA/CBA Working Group took the view that governmental intervention in transboundary environmental disputes was neither necessary nor

---

[731] See American Bar Association & Canadian Bar Association, "Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution" in American Bar Association & Canadian Bar Association, *Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association on 15 August 1979 and by the Canadian Bar Association on 30 August 1979, With Accompanying Reports and Recommendations* (Chicago: Section of International Law of the American Bar Association, 1979) xiii, reprinted in (2011) 35:1/2 Can-US LJ 9 at 16–20 & Muldoon, Scriven & Olson, *supra* note 109 at 365–67 [*Draft Treaty on Equal Access and Remedy*]. See generally Joel A Gallob, "Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy" (1991) 15:1 Harv Envtl L Rev 85 [Gallob].

[732] See T Bradbrooke Smith, "Report to the Executive and to the 1979 Annual Meeting of the Canadian Bar Association" in ABA & CBA, *supra* note 731, xxxiii at xxxv, reprinted in (2011) 35:1/2 Can-US LJ 9 at 30–35 [Smith].

[733] See Andrew Morriss, "Supporting Structures for Resolving Environmental Disputes Among Friendly Neighbors" in Jurgen Schmandt, Judith Clarkson & Hilliard Roderick, eds *Acid Rain and Friendly Neighbors: The Policy Dispute Between Canada and the United States*, revised ed (Durham: Duke University Press, 1988) 217 at 219–23 [Morriss]; Nancy Hughes Milestone, "A Common Law Solution to the Acid Rain Problem" (1986) 20:2 Val UL Rev 277; Pallemaerts, *supra* note 377; Chesley P Erwin Jr, "Resolving Transboundary Air Pollution Disputes in North America: The Case for a Quasi-Judicial Remedy" [1984] Wis Intl LJ 203; Karen A Mingst, "Evaluating Public and Private Approaches to International Solutions to Acid Rain Pollution" (1982) 22:1 Nat Resources J 5; John Pickering & Gina L Swets, "Who'll Stop the Rain: Resolution Mechanisms for U.S.-Canadian Transboundary Pollution Disputes" (1982) 12:1 Denv J Intl L & Pol'y 51; Peter Herzberg, "Remedies in American Courts" (1982) 5 Can-US LJ 91; Simon Chester, "Remedies in Canadian Courts" (1982) 5 Can-US LJ 85; James M Fischer, "The Availability of Private Remedies for Acid Rain Damage" (1981) 9:3 Ecology LQ 429; The Honourable Richard D Cudahy, "Clouds on the Horizon: Acid Rain in Domestic Courts" in Canadian Bar Association, Environmental Law Section & Canadian Bar Association, Standing Committee on Environmental Law, eds, *Common Boundary/Common Problems: The Environmental Consequences of Energy Production. Proceedings of a Conference Held at Banff, Alberta, Canada, March 19-21, 1981* (Washington, DC: Committee on Environmental Law, 1982) 82; Irene H van Lier, *Acid Rain and International Law* (Toronto: Bunsel Environmental Consultants, 1981) at 87–91.

desirable.[734] This is in stark contrast with the approach taken in the *Trail Smelter* arbitration, and the position that the British Columbia and Canadian governments would later take in *Pakootas* by denying any strong tradition of private enforcement in Canadian environmental law.[735]

The ABA/CBA Working Group's focus on individual action over governmental intervention led to heavy reliance on procedural equal access. The main provisions of the proposed treaty were in fact based on the *OECD Recommendation*.[736] The ABA/CBA Working Group also confined its proposal to transboundary pollution instead of covering all Canada-United States litigation. They hoped that the inherently bilateral nature of the pollution problem and a growing environmental consciousness would cause the populations of each country and their governments to support a targeted reform inspired by the experience of the Nordic countries, which, if successful, could lead to broader reforms in other bilateral matters.[737] The *Draft Treaty on Equal Access and Remedy* initially gathered some attention. Unfortunately, the two governments never formally endorsed it.

2.1.3.3. The 1982 *Reciprocal Access Act*

After the release of the *Draft Treaty on Equal Access and Remedy*, lawyers on both sides of the border were reportedly displeased with the unwillingness of their governments to secure equal access through a bilateral treaty.[738] The ABA/CBA Working Group decided to turn its attention to a more flexible instrument.[739] It established a liaison group with the Uniform Law Conference of Canada (ULCC), a century-old intergovernmental body that

[734] See Smith, *supra* note 732 at xxxvi–xxxvii.
[735] See Ellis, "Extraterritorial Jurisdiction", *supra* note 333 at 412–13.
[736] See *Draft Treaty on Equal Access and Remedy*, *supra* note 731, art 2.
[737] See American Bar Association & Canadian Bar Association Working Group, "Report and Recommendations of the American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes" in American Bar Association & Canadian Bar Association, *supra* note 731, li at 42–43, reprinted in (2011) 35:1/2 Can-US LJ 9 at 40–121 [ABA/CBA Working Group].
[738] See Constance D Hunt, "Implementation: Joint Institutional Management and Remedies in Domestic Tribunals (Articles 26–28 and 30–32)" (1992) 3:1 Colo J Intl Envtl L & Pol'y 281 at 290; Gallob, *supra* note 731 at 290; Gerald F Fitzgerald, "The Proposed Canada-United States Transboundary Air Pollution Agreement: The Legal Background" (1982) 20 Can YB Intl L 219 at 239.
[739] See J Neil Mulvaney, "Participation by Ontario in U.S. Administrative and Judicial Proceedings" (1983) 4:3 NYL Sch J Intl & Comp L 553 at 567.

promotes legislative harmonization between provinces and territories, and its counterpart the United States National Conference of Commissioners on Uniform State Laws. This process led to the 1982 *Transboundary Pollution Reciprocal Access Act*, a model law for states, provinces and territories to adopt.[740]

The *Reciprocal Access Act* resembles the *Draft Treaty on Equal Access and Remedy* but expands its scope to interprovincial and interstate pollution.[741] It implements equal access to courts at the place of acting for all persons (including corporations and public authorities) as well as equal right of relief.[742] The *Reciprocal Access Act* rests on reciprocity. For it to apply, the source state and the victim state must enact its provisions or provide substantially equivalent access to their courts.[743] Canadian provinces can also designate reciprocating jurisdictions by regulation.[744] This mechanism is less flexible than non-discrimination *per se*. Nothing would normally prevent a state from granting equal access to foreign plaintiffs even if its own residents do not have the same advantage abroad. The logic of the *Reciprocal Access Act*, however, is different. It is reciprocal in essence.[745]

The *Reciprocal Access Act* could have facilitated litigation over transboundary pollution if it had been widely adopted.[746] The problem lies in who enacted it: Ontario, Manitoba,

---

[740] See *Transboundary Pollution Reciprocal Access Act*, (1982) 64 Unif L Conf Proc 498, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/4AQG-RJMY], reprinted in Muldoon, Scriven & Olson, *supra* note 109 at 369–71 [*Reciprocal Access Act*].
[741] See *Reciprocal Access Act*, *supra* note 740, s 1(1); Uniform Law Conference of Canada, "Uniform Transboundary Pollution Reciprocal Access Act" (1982) 64 Unif L Conf Proc 498 at 504 [ULCC].
[742] See *Reciprocal Access Act*, *supra* note 740, ss 2–3.
[743] See *Ibid*, s 1(1).
[744] See *ibid*, s 7(b).
[745] See "Bill 5, Transboundary Pollution Act", 2nd reading, Nova Scotia, House of Assembly, *Debates and Proceedings*, 56-1, Vol 93, No 8 (21 September 1993) ("[t]his very clearly is reciprocal legislation. It will not put any Nova Scotian company or person in the danger of being put at risk without a reciprocal opportunity available to Nova Scotian companies or individuals" at 388 (John Leefe)).
[746] *Cf* Gregory Wetstone & Armin Rosencranz, "Transboundary Air Pollution Between Canada and the United States" (1982) 1:2 UCLA Pac Basin LJ 197 ("[e]ven if [the *Reciprocal Access Act*] led to the enactment of uniform state and provincial laws, a court would have to be bold indeed to entertain a suit involving acid rain damages" at 217). See also "Bill 3, An Act respecting Actions arising from Transboundary Pollution between Ontario and Reciprocating Jurisdictions", 2nd reading, Ontario, Legislative Assembly, *Official Reports of Debates*, 33-1, No 113 (10 February 1986) ("[f]rankly, I think the bill is something of a toothless wonder. It purports to offer to citizens of other jurisdictions the same rights that citizens of Ontario have here with respect to the environment. The problem is that we do not have any environmental rights in this province; therefore, what we are giving to the people from other jurisdictions is not very much" at 3964 (Ruth Anna Grier)).

Nova Scotia, Prince Edward Island, Michigan, New Jersey, Wisconsin, Colorado, Oregon, Connecticut and Montana.[747] Of these jurisdictions, only Ontario, Michigan and Wisconsin share a border.[748] The *Reciprocal Access Act* would therefore not capture pollution between British Columbia and Washington (the *Trail Smelter* case) or Manitoba and North Dakota (the *Pembina County Water Resource District* case) unless they mutually provided substantially equivalent access to their courts. This creates a highly inconsistent patchwork of private international law that excludes obvious instances of transboundary pollution (a shared watercourse, for instance) but includes some longer-range ones. Unsurprisingly, the *Reciprocal Access Act* has had little discernible impact on transboundary environmental litigation. No court has ever decided a case based on its provisions. One decision mentions it, but only in a list of United States pollution control measures that had no immediate bearing on the case.[749]

It would be difficult to raise the decades-old *Draft Treaty on Equal Access and Remedy* and *Reciprocal Access Act* from their state of latency. Scholars still advocate for their wider implementation,[750] but the indifference of governments and the lack of a single judicial precedent make it improbable. At the very least, the *Reciprocal Access Act* made its way into four provinces, which should not be neglected as a matter of positive law. More fundamentally, the *Reciprocal Access Act* shows how environmental policy—in

---

[747] In Canada, see *Transboundary Pollution Reciprocal Access Act*, RSO 1990, c T.18 [*ON Reciprocal Access Act*]; *The Transboundary Pollution Reciprocal Access Act*, SM 1985–86, c 11, CCSM c T145 [*MB Reciprocal Access Act*]; *Environment Act*, SNS 1994–95, c 1, ss 145–55 [*NS Environment Act*]; *Transboundary Pollution (Reciprocal Access) Act*, RSPEI 1988, c T-5 [*PEI Reciprocal Access Act*]. Nova Scotia first adopted the *Reciprocal Access Act* with the *Transboundary Pollution Act*, SNS 1993, c 15. The *Transboundary Pollution Act* was later repealed, and its contents carried over to the *NS Environment Act*, a more comprehensive environmental statute. In the United States, see Mich Comp Laws § 324.1801–324.1807 (2017); NJ Rev Stat § 2A:58A-1 to 2A:58A-8 (2017); Wis Stat § 299.33 (2017); Colo Rev Stat § 13-1.5-101–13.1.5-109 (2017); Or Rev Stat § 468.076–468.089 (2017); Conn Gen Stat § 51-351b (2016); Mont Code § 75-16-101 to 75-16-109 (2017). Minnesota, Maine and North Dakota introduced the *Reciprocal Access Act* but never enacted it. The ULCC took the view that New York and Minnesota did not need to enact the *Reciprocal Access Act* due to local developments that secured access for foreign victims. See ULCC, *supra* note 741 at 504.

[748] Ontario designated Minnesota as an additional reciprocating jurisdiction under section 7(b) of the *Reciprocal Access Act*, which corresponds to section 8 of the *ON Reciprocal Access Act*, *supra* note 747. See *Reciprocating Jurisdictions*, RRO 1990, Reg 1084, s 2.

[749] See *NL Industries Inc v Commercial Union Insurance Co*, 938 F Supp 248 at 251, n 1, 1996 US Dist Lexis 11940 (D NJ 1996), remanded 154 F (3d) 155, 1998 US App Lexis 21549 (3rd Cir 1998).

[750] See Kruger, *supra* note 207 at 139, n 102; Hall, "Political Externalities", *supra* note 163 at 89–90; Hall, "Transboundary Pollution", *supra* note 163 at 744–45; Hall, "Bilateral Breakdown", *supra* note 163 at 23.

this case equal access—percolates into private international law to help ensure prompt and adequate compensation. It emphasizes the regulatory function of private international law and the idea that substantive justice can affect the fabric of conflict rules, as demonstrated in the first chapter.[751] This is a worthwhile pursuit, again as a backup to regulatory oversight by public authorities.

2.1.3.4. The 1994 *North American Agreement on Environmental Cooperation*

The last initiative to implement equal access in Canada came with the adoption of the 1994 *North American Agreement on Environmental Cooperation* as an environmental companion to the *North American Free Trade Agreement* between Canada, the United States and Mexico.[752] The *NAAEC* created an independent Commission for Environmental Cooperation (CEC) to support environmental cooperation between *NAFTA* partners.[753] *NAFTA* is destined to be superseded by the 2018 *United States–Mexico–Canada Agreement*, which contains a full chapter on environmental matters.[754] The CEC has survived the transition but will operate in accordance with a new parallel agreement, the 2018 *Agreement on Environmental Cooperation*.[755]

The success of the *NAAEC* in ensuring prompt and adequate damage for victims of transboundary pollution is minimal at best. It has had little practical impact in transboundary environmental disputes so far. It also issued policy recommendations which could have been harnessed by lawmakers to promote broader reforms of civil procedure, environmental law and private international law, but were not.

From a practical perspective, the *NAAEC* has had little impact on the rights of transboundary plaintiffs in Canada-United States environmental disputes. The *NAAEC*

---

[751] For further discussion on my theoretical framework, see the introduction and section 1.3.2.2 above.
[752] See *North American Agreement on Environmental Cooperation*, Canada, United States and Mexico, 14 September 1993, Can TS 1994 No 3, 32:6 ILM 1480 (entered into force 1 January 1994) [*NAAEC*]; *North American Free Trade Agreement*, Canada, United States and Mexico, 17 December 1992, Can TS 1994 No 2, 32:2 ILM 289 (entered into force 1 January 1994) [*NAFTA*].
[753] See *NAAEC*, *supra* note 752, art 10.
[754] See *USMCA*, *supra* note 213, arts 24.1–24.32.
[755] See *USMCA*, *supra* note 213, art 24.25(3); *Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada*, 18 December 2018, online (pdf): *Government of Canada* <www.international.gc.ca> [perma.cc/FMP9-3N4S] (not yet in force) [*AEC*].

requires parties to ensure that all interested persons have access to private remedies for the enforcement of environmental laws.[756] Canada's bilateral environmental agreements also contain a similar provision.[757] The *NAAEC* also enables the Secretariat of the CEC to hear submissions from individuals and non-governmental organizations who complain that a state failed to enforce its environmental laws, and to prepare a factual record of the situation if needed.[758] The CEC received several complaints concerning private remedies or access to environmental justice in the past.[759]

The *NAAEC*, however, does not provide much help in a transboundary context. First, the words "interested persons" say nothing *per se* about the rights of transboundary plaintiffs. Domestic law will determine their standing.[760] Second, the *NAAEC* does not seem to cover situations in which a lawful activity in state *x* causes environmental damage in state

---

[756] See *NAAEC*, *supra* note 752, art 6(2). *Cf USMCA*, *supra* note 213, art 24.6(2).
[757] See *Free Trade Agreement Between Canada and the Republic of Korea*, 22 September 2014, Can TS 2015 No 3, art 17.7(2) (entered into force 1 January 2015); *Agreement on Environmental Cooperation Between Canada and the Republic of Honduras*, 5 November 2013, Can TS 2014 No 24, art 8(2) (entered into force 1 October 2014); *Agreement on the Environment Between Canada and the Republic of Panama*, 13 May 2010, Can TS 2013 No 10, art 8(2) (entered into force 1 April 2013); *Agreement on the Environment Between Canada and the Hashemite Kingdom of Jordan*, 28 June 2009, Can TS 2012 No 23, art 8(2) (entered into force 1 October 2012); *Agreement on the Environment Between Canada and the Republic of Colombia*, 21 November 2008, Can TS 2011 No 12, art 3(3) (entered into force 15 August 2011); *Agreement on the Environment Between Canada and the Republic of Peru*, 1 August 2009, Can TS 2009 No 16, art 3(3) (entered into force 1 August 2009); *Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Costa Rica*, 23 April 2001, Can TS 2002 No 18, art 5(2) (entered into force 1 November 2002); *Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Chile*, 6 February 1997, Can TS 1997 No 51, art 6, 36:5 ILM 1196 (entered into force 5 July 1997).
[758] See *NAAEC*, *supra* note 752, arts 14–15. *Cf USMCA*, *supra* note 213, arts 24.27–24.28.
[759] See *Tarahumara SEM-00-006: Determinación en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte*, CEC Doc A14/SEM00-006/09/14(1)(2) (2001), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/864B-6FZA], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 9 (Cowansville: Yvon Blais, 2002) 215 (submission declared admissible and factual record prepared, reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 20 (Cowansville: Yvon Blais, 2005)); *Dermet SEM-01-003: Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte*, CEC Doc A14/SEM/01-003/05/14(1) (2001), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/LQ2Y-HYLZ], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 9 (Cowansville: Yvon Blais, 2002) 267 (submission declared inadmissible); *Logging Rider SEM-95-002: Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, CEC Doc A14/SEM/95-002/03/14(1) (1995), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/G4PE-YR7A], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 1 (Cowansville: Yvon Blais, 1998) 77 (submission declared inadmissible).
[760] See *NAAEC*, *supra* note 752, art 6(2) ("[…] persons with a legally recognized interest under its law […]"). *Cf USMCA*, *supra* note 213, art 24.6(2) (similar wording).

y if it does not involve the violation of state *x*'s own environmental laws.[761] Finally, the CEC is not an administrative tribunal. It has no enforcement powers of its own. It only disseminates information about specific environmental issues. Its functions make it an unlikely avenue for transboundary plaintiffs who seek compensation, even assuming the *NAAEC* applies.[762]

The *NAAEC* had more potential from a policy perspective.[763] It notably required that the CEC consider and develop recommendations regarding equal access and remedies for victims of transboundary pollution.[764] This policy mission aligned with the recommendations of the *ILC Principles on the Allocation of Loss* and followed up on earlier efforts to implement equal access between Canada and the United States.[765] To fulfill its mission under the *NAAEC*, the Secretariat of the CEC issued a detailed report providing background information on the current state of equal access in North America. The CEC Report took the typical stance in favour of private litigation over governmental intervention to resolve transboundary environmental disputes[766] and recalled previous North American initiatives, including the *Draft Treaty on Equal Access and Remedy* and the *Reciprocal Access Act.*[767] It identified several barriers to equal access: the absence of jurisdiction over foreign land (the so-called local action rule addressed later in this chapter),[768] the residency requirements in environmental statutes and their territorial scope (addressed in the third chapter).[769]

Unfortunately, the CEC never acted in response to the report of its secretariat. Nor did the *NAAEC* push Canada and the United States to revisit the *Draft Treaty on Equal Access and Remedy* or the *Reciprocal Access Act* in order to "level the playing field" in

---

[761] See Robinson-Dorn, *supra* note 341 at 307.
[762] See *ibid*.
[763] I say "had" because it is unlikely that the *NAAEC* will continue to influence environmental policy now that the *USMCA* is in an almost definitive form.
[764] See *NAAEC*, *supra* note 752, art 10(9).
[765] *Cf* Joseph F DiMento & Pamela M Doughman, "Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented" (1998) 10:3 Geo Intl Envtl L Rev 651 at 737 (criticizing the *NAAEC* as being "overly cautious in addressing judicial remedies for transborder disputes" compared to the *Nordic Convention*'s "more substantive" provisions).
[766] See Secretariat of the CEC, *supra* note 227 at 215.
[767] See *ibid* at 299–309.
[768] For further discussion on the local action rule, see subsection 2.2.1.1.2 below.
[769] See Secretariat of the CEC, *supra* note 227 at 217.

environmental matters.[770] Knox explains the CEC's inaction by the inherent challenge of addressing bilateral issues between Canada and the United States (or the United States and Mexico) within a trilateral institution such as the CEC.[771] At the same time, the *Draft Treaty on Equal Access and Remedy* and the *Reciprocal Access Act* did not have much more success in a bilateral context. This casts doubt on whether the CEC would fare better in a smaller setting, particularly with its limited budget.

The *NAAEC* is a sharp reminder of North American states' commitment to equal access and the reforms they could have achieved in that area. Practical results, however, have been meagre and targeted efforts such as those seen in the 1970s and 1980s have run out of gas. The CEC Report quietly marked the end of more than two decades of discussion over equal access. No major initiative has appeared on the agenda since then. The new *USMCA* uses similar language as the *NAAEC* regarding private remedies, but the new work programme of the CEC may not include the promotion of equal access.[772] The future of a North American concept of equal access remains unclear in the meantime.

2.1.4. Going beyond the *ILC Principles on the Allocation of Loss*

We have seen that the *ILC Principles on the Allocation of Loss* require equal access, and that Canada lacks a comprehensive instrument in this sense. But this is not the end of the matter. The general law of jurisdiction may effectively ensure equal access even when no specific framework such as the *Reciprocal Access Act* is in place. Indeed, Knox suggests that the lack of political pressure to implement equal access may in fact result from a perception that private international law already provides a sufficient jurisdictional

[770] See Paul N Hanson, Paul E Hagen & Kathleen Rogers, "The Application of the United States Hazardous Waste Cleanup Laws in the Canada-U.S. Context" (1992) 18 Can-US LJ 137 (who speculated that "concern for "levelling the playing field" with regard to environmental standards among the United States, Canada and Mexico under [*NAFTA*] may prompt the governments of the United States and Canada to revisit the issue of reciprocal access legislation" at 170–71).
[771] See John H Knox, "The Neglected Lessons of the NAFTA Environmental Regime" (2010) 45:2 Wake Forest L Rev 391 at 408; John H Knox, "The CEC and Transboundary Pollution" in David L Merkell & John H Knox, eds, *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford: Stanford University Press, 2003) 80 at 89–93 [Knox, "CEC"]
[772] See *AEC*, *supra* note 755, art 10(2)(c) (listing as a potential element of the CEC's work programme the promotion of "public participation in environmental and natural resources observation, decision-making, protection, and enforcement of laws, including through public access to information").

basis.[773] In other words, we may not need legal reform if local and foreign victims of transboundary pollution both have access to Canadian courts under general jurisdictional rules. The question then becomes which jurisdictional rule aligns best with the *ILC Principles on the Allocation of Loss*. Given the logic of equal access, jurisdiction must, at a minimum, allow domestic courts in the source state to hear claims and grant remedies.[774] Jurisdiction at the place of injury is not excluded. Equal access also requires that the jurisdictional threshold be the same for all plaintiffs (no discrimination).

The ILC admitted that the lack of consensus on an appropriate jurisdictional rule could impair the availability of prompt and adequate compensation.[775] Interestingly, it mentioned only a single example of a possible jurisdictional rule, which it seemed to view favourably: the possibility for plaintiffs to sue at the place of acting or at the place of injury.[776] Several civil liability treaties adopt this dual solution as the default rule.[777] The IIL did not take a firm stance,[778] but the ILA[779] and the IUCN[780] endorsed the idea.

[773] See Knox, "CEC", *supra* note 771 at 89, n 40.
[774] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, para 4.
[775] See *ibid* at 87, para 7.
[776] See *ibid* at 87, para 8.
[777] See *Kiev Liability Protocol*, *supra* note 135, art 13(1); *Basel Liability Protocol*, *supra* note 327, art 17(1); *Lugano Convention*, *supra* note 318, art 19(1); *CRTD Convention*, *supra* note 325, art 19(1). See also *Seabed Mineral Resources Convention*, *supra* note 319, art 11(1); *Nuclear Ships Convention*, *supra* note 323, art X(1). For other jurisdictional bases, see *Antarctic Liability Annex*, *supra* note 246, art 7(1); *Bunker Convention*, *supra* note 321, art 9(1); *CSC*, *supra* note 322, arts XIII(1)–XIII(4); *HNS Convention*, *supra* note 326, arts 38(1)–38(2), 39(1)–39(2); *CLC*, *supra* note 289, art IX(1); *Fund Convention*, *supra* note 289, arts 7(1), (3); *Vienna Convention*, *supra* note 322, art XI; *Paris Convention*, *supra* note 322, arts 13(a)–13(c).
[778] See *IIL Resolution on Responsibility and Liability*, *supra* note 616 at 513, art 32; IIL, "Final Report", *supra* note 616 at 343–44. The *travaux préparatoires* indicate that several members of the commission did not find it necessary to address issues of private international law in depth or in an environment-specific instrument. See Institute of International Law, "Travaux de M Orrego Vicuña" in *Yearbook of the Institute of International Law. Session of Strasbourg, 1997*, *supra* note 616, 221 at 271, 279–80, 307 (comments by Shabtai Rosenne, Ibrahim Shihata and Jean Salmon respectively).
[779] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rule 4(1); ILA, "Final Report on Transnational Enforcement of Environmental Law", *supra* note 201 at 664–66; ILA, "Second Report on Transnational Enforcement of Environmental Law", *supra* note 534 at 898–900.
[780] See *IUCN Draft International Covenant on Environment and Development*, *supra* note 414 at 23 (art 66), 165–66. *Cf* Rest, *Convention on Compensation*, *supra* note 695 at 23 (art 25), 65–69 (adopting jurisdiction at the place of acting as the default solution, except when contracting states recognize plaintiffs' right to choose between the place of acting and the place of injury).

The Permanent Bureau of the HCCH also seemed in favour of this solution in its exploratory work on the subject.[781]

The EU has followed that approach for decades. The *Brussels I Recast Regulation*, its predecessors and related texts allow plaintiffs to sue a tortfeasor in the courts of the place where the harmful event occurred or may occur,[782] in addition to other places such as the domicile of the defendant or the location of its branches.[783] In the *Mines de potasse d'Alsace* case involving transboundary pollution of the Rhine, the European Court of Justice (ECJ) held that plaintiffs have "an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it."[784] The ruling became a landmark of private international law.[785] The ECJ has constantly reiterated this

[781] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 96–97, 141; Beaumont, *supra* note 523 at 36–37.
[782] See EC, *Regulation (EC) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L 351/1, art 7(2) [*Brussels I Recast Regulation*]; *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 30 October 2007, [2007] OJ, L 339/3, art 5(3) (entered into force 1 January 2010); EC, *Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] OJ, L 12/1, art 5(3); *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 16 September 1988, 1659 UNTS 13, art 5(3), OJ, L 319/9, 28:3 ILM 620 (entered into force 1 January 1991); *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, 1262 UNTS 153, art 5(3), [1972], OJ L 299/32, 8:2 ILM 229 (entered into force 1 February 1973) [*Brussels Convention on Jurisdiction and the Enforcement of Judgments*].
[783] See *Brussels I Recast Regulation*, *supra* note 782, arts 4(1), 7(5).
[784] *Mines de potasse d'Alsace*, *supra* note 119 at paras 19, 24–25.
[785] For an early application by French courts in a transboundary environmental dispute, see Trib gr inst Bastia, 8 December 1976, *La Prud'hommie des pêcheurs de Bastia c Société Montedison*, (1977) D Jur 427, aff'd Cass civ 2e, 3 April 1978, *Société Montedison c Préfet du département de la Haute Corse*, (1978) Bull civ II 86, No 106, (1978) D Jur 367 (note Bernard Audit), [1979] 1 RJE 20 (note Martine Remond-Gouilloud) (toxic spill on high sea—French courts have jurisdiction over proceedings brought by fishermen and public authorities against the polluter for damages suffered in France); Alexandre-Ch Kiss, "Un cas de pollution internationale: l'affaire des boues rouges" (1975) 102 JDI 207. For an early application by German courts, see Oberlandesgericht Karlsruhe [Regional Court of Appeal], 4 August 1977, (1977) 23:11 Recht der Internationalen Wirtschaft (RIW/AWD) [Law of International Business] 718 (Germany), aff'g Landgericht Freiburg [Regional Court], 10 June 1975, No 2076/74 (unreported) (Germany), summarized in French in [1976] 2 RJE 73 [*Lindan*].

interpretation to this day[786] and explained that it also covered preventive actions.[787] Damage, however, must always be direct.[788]

The ECJ's jurisprudence since *Mines de potasse d'Alsace* makes it clear that the rule is justified by proximity and the sound administration of justice rather than sheer generosity towards plaintiffs.[789] The place of acting and the place of injury are acceptable because they both have a sufficient connection with the dispute (particularly given the requirement of a direct injury), not because they maximize the plaintiff's ability to engage in forum shopping. The net result only happens to be beneficial for the victims of transboundary pollution. They can, depending on the circumstances, choose to sue in their own courts (as damage usually occurs where they reside) or on the polluter's turf.

The usual assumption that greater willingness from courts to assert jurisdiction is inherently desirable to advance victims' rights must be weighed against other considerations such as fairness to the defendant. Giving plaintiffs a choice causes some uncertainty for defendants who have to anticipate where damage might occur. Nonetheless, the rule has more upsides than downsides. Crucially, it recognizes the difficulties of isolating a single element of the tort for jurisdictional purposes, particularly when the behaviour in dispute is in fact an omission. It also recognizes that the place of acting and the place of injury each have strategic advantages and disadvantages in transboundary environmental litigation. Suing at the place of injury may lead to difficulties in obtaining evidence or enforcing a judgment against the assets of foreign

---

[786] See eg *AB FlyLAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS*, C-27/17, ECLI:EU:C:2018:533 at para 28, [2019] 1 WLR 669; *Bolagsupplysningen OÜ v Svensk Handel AB*, C-194/16, ECLI:EU:C:2017:766 at para 29, [2018] QB 963; *Universal Music International Holding BV v Schilling*, C-12/15, ECLI:EU:C:2016:449 at para 28, [2016] QB 967.

[787] See eg *Danmarks Rederiforening (on behalf of DFDS Torline A/S) v O Landsorganisationen i Sverige (on behalf of SEKO Sjöfolk Facket för Service och Kommunikation)*, C-18/02, [2004] ECR I-1417 at para 27, [2004] All ER (EC) 845; *Verein für Konsumenteninformation v Henkel*, C-167/00, [2002] ECR I-8111 at paras 46–50, [2003] 1 All ER (Comm) 606.

[788] See eg *Löber v Barclays Bank plc*, C-304/17, ECLI:EU:C:2018:701 at para 23, [2019] 4 WLR 5; *Marinari v Lloyds Bank plc*, C-364/93, [1995] ECR 1-2719 at paras 14–15, [1996] QB 217; *Dumez France SA v Hessiche Landesbank*, C-220/88, [1990] ECR I-49 at para 122, [1990] ILPr 299; *Mines de potasse d'Alsace*, *supra* note 119 at para 16. But see, in the United Kingdom, *Brownlie v Four Seasons Holdings Incorporated*, [2017] UKSC 80 at paras 33–55, [2018] 2 All ER 91 [*Brownlie*] (where Lady Hale refuses to mirror the EU solution in English common law).

[789] The ruling in *Mines de potasse d'Alsace* itself, albeit a case of transboundary pollution, does not attach any particular weight to environmental considerations. See Giansetto, *supra* note 225 at para 512.

polluters. Conversely, suing at the place of acting may be daunting for foreign residents with limited financial means. Each forum also has its own procedural and choice of law rules which impact the course of litigation. The European rule suggests that plaintiffs should weigh those factors and decide for themselves what works in their best interest. Furthermore, disqualifying indirect damage at the outset alleviates some of the uncertainty faced by defendants, as there may be a point where the effects of pollution are simply too remote to create a jurisdictional connection with the place of injury.[790]

Overall, the European rule accounts for the transboundary effects of pollution and broadens jurisdiction to include the claims of all direct victims.[791] It favours prompt and adequate compensation and fits neatly with the objectives of the *ILC Principles on the Allocation of Loss*—it goes in fact further than basic equal access because it also guarantees jurisdiction at the place of injury. More fundamentally, it favours the legal oversight of transboundary polluters through domestic law. This is a legitimate objective for private international law conceived as a regulatory device. As we will see below, Quebec civil law aligns with the European rule. Canadian common law takes a different path but reaches a similar result in most cases. This leads me to conclude that the jurisdictional aspects of the duty to ensure prompt and adequate compensation do not cause significant difficulties in Canada.

[790] Other aspects of the *Brussels I Recast Regulation* explain the approach taken by the ECJ. First, the *Brussels I Recast Regulation* also deals with the recognition and enforcement of judgments between EU states. In this regime, the enforcing court cannot review the jurisdiction of the court of origin. See *Brussels I Recast Regulation*, *supra* note 782, art 45(3). Second, the *Brussels I Recast Regulation* rejects the doctrine of *forum non conveniens* which would otherwise reduce the risk of improper forum shopping by plaintiffs. These basic features of EU private international law justify a restrictive approach to the notion of damage suffered in the jurisdiction. See *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 at para 61, [2002] 4 SCR 205 [*Spar Aerospace*]; Gérald Goldstein, "De la pertinence et de la localisation du préjudice économique ou continu aux fins de la compétence internationale des tribunaux québécois" (2010) 69 R du B 169 at 203–204.

[791] But see Eduardo Álvares Armas, "(Lack of) International Jurisdiction over Third-Country Polluters: A Trojan Horse to the EU's Environmental Policy?" in Jean-Sylvestre Bergé, Stéphanie Francq & Miguel Gardenez Santiago, eds, *Boundaries of European Private International Law* (Brussels: Bruylant, 2015) 283 (pointing out that the heads of jurisdiction in the Brussels I Regulation only apply when the defendant is domiciled in the EU).

2.2. Jurisdiction over transboundary pollution in Canadian private international law

In this section, I argue that Canadian law meets the jurisdictional requirements associated with the duty to ensure prompt and adequate compensation, even though equal access initiatives have not yielded significant results. This is because Canadian courts have the necessary jurisdiction to hear claims against transboundary polluters, even where specific legislation such as the *International Boundary Waters Treaty Act* or the *Reciprocal Access Act* is not applicable.

In the next subsections, I analyze jurisdiction over transboundary pollution originating in Canada or affecting its population (2.2.1). I comment on the possibility of declining jurisdiction once it has been established (2.2.2), and the possibility of enforcing foreign judgments against domestic polluters in the country (2.2.3). Recall that the words "Canadian courts" refer to the courts of a province in relation to those of another province or foreign state. Provinces are considered distinct states in private international law, which means that transboundary pollution can be interprovincial or international.[792]

2.2.1. Asserting jurisdiction over transboundary pollution

This subsection examines the treatment of two types of plaintiffs against the ILC's views on jurisdiction: foreign victims suing in Canada for pollution originating in Canada (2.2.1.1) and local victims suing in Canada for pollution originating abroad (2.2.1.2). The two scenarios cover the bulk of private lawsuits which victims of transboundary pollution could conceivably bring in Canada.

Plaintiffs in the first scenario will rely on the polluters' operations in the province or locate the tort at the place of acting in order to establish jurisdiction. The result may then depend on the nature of the claim (specifically whether it involves foreign land), but contrary to common belief, this is unlikely to be a determining factor. Conversely, plaintiffs in the second scenario will locate the tort at the place of injury in order to establish jurisdiction (assuming the defendant is not present in the province and does not

[792] See the text accompanying notes 155, 158–161. The same is true for the third chapter on choice of law.

consent to have the claim tried there). In both scenarios, courts have the necessary jurisdiction to hear tort claims against local or foreign polluters. This undermines the obstacle theory outlined in the first chapter and suggests that the difficulties are often exaggerated.

2.2.1.1. Foreign plaintiffs in Canada

I examine the relevant grounds of jurisdiction available to foreign plaintiffs (2.2.1.1.1) and I deconstruct the most contentious issue in this scenario—claims involving damage to foreign land (2.2.1.1.2). I exclude nuclear damage from this analysis. As mentioned above, courts have no jurisdiction to hear an action for this kind of damage when suffered abroad.[793] This effectively closes the door to foreign victims of nuclear damage.

2.2.1.1.1. Place of business or tort committed in the jurisdiction

Can foreign plaintiffs sue Canadian polluters for transboundary pollution originating in Canada? This question has important implications for climate change litigation against greenhouse gas emitters in their home state, for instance. In the narrow set of circumstances contemplated in the *Reciprocal Access Act*, the answer is yes because the *Act* explicitly guarantees jurisdiction at the place of acting.

In Quebec, the answer is also yes. Quebec courts have jurisdiction when the defendant has its domicile or residence in Quebec,[794] the defendant is a legal person not domiciled in Quebec but it has an establishment in the province and the dispute relates to the

[793] See *Nuclear Liability and Compensation Act*, *supra* note 361, s 34(6). For further discussion on this point, see subsection 2.1.3 above.

[794] See CCQ, arts 3134, 3148, para 1(1°). Residence-based jurisdiction is only relevant for natural persons, as legal persons and other business entities do not possess a residence separate from their domicile (i.e., their head office under article 307 CCQ). Indeed, the Court of Appeal held that a corporation was a "non-resident" (and therefore could be ordered to provide security for costs) because its head office was in Nova Scotia, even though the plaintiff alleged having a so-called "*de facto* head office" in Quebec. See *Groupe Pages jaunes Cie c Pitney Bowes du Canada Ltée*, 2010 QCCA 368 at para 8, [2010] JQ no 1457 (QL). Article 492, para 1 CCP now makes this clear. In the context of jurisdiction, certain cases describe the establishment of a legal person under article 3148, para 1(2°) CCQ as the equivalent of a physical person's residence under article 3148, para 1(1°) CCQ. See *Interinvest (Bermuda) Ltd c Herzog*, 2009 QCCA 1428 at para 24, [2009] JQ no 7463 (QL) [*Herzog*]; *Royal & Sun Alliance Insurance c Despec Supplies Inc*, 2003 CanLII 29717 at paras 61–63, [2003] JQ no 18779 (QL) (Sup Ct); *Spar Aerospace Ltd c American Mobile Satellite Corporation*, [1998] RJQ 2802 at 2806, 1998 CanLII 11929 (Sup Ct); *Dunn v Wightman*, [1995] RJQ 2210 at 2214, [1995] QJ No 2951 (QL) (Sup Ct).

defendant's activities in the province,[795] or a fault, injury or injurious act or omission occurred in the province.[796] In the latter case, any single element suffices.[797] This "broad basis for jurisdiction"[798] clearly covers pollution originating in the province.[799] Additionally, Quebec courts have exclusive jurisdiction over civil liability claims for injuries suffered anywhere in relation to raw materials originating in the province.[800]

Neighbourhood disturbance and civil liability claims (two potential causes of action in case of environmental damage[801]) have conceptual differences in domestic law but they fall under the same jurisdictional rule for private international law purposes. Civil liability claims are grounded in article 1457 CCQ whereby "[e]very person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another." This provision is found in Book Five of the CCQ on obligations. Neighbourhood disturbance claims, by contrast, are grounded in article 976 CCQ whereby neighbours must suffer only "the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage." This provision is found in Book Four of the CCQ on property.[802] It is often presented as a limitation to private property, but it

---

[795] See CCQ, art 3148, para 1(2°). While the defendant must have an establishment in Quebec and the dispute must relate to the defendant's activities in Quebec, courts do not require that the Quebec establishment itself undertake the defendant's activities in Quebec. The two conditions should therefore be read disjunctively. See *Herzog*, *supra* note 794 at para 41. See also *Transax Technologies Inc c Red Baron Corp Ltd*, 2017 QCCA 626 at para 32, [2017] JQ no 3880 (QL) [*Transax Technologies*]; *Syndicat canadien de la fonction publique c Syndicat canadien des communications, de l'énergie et du papier, section locale 2013 (SCEP)*, 2015 QCCA 1392 at paras 38–41, 22 CCPB (2d) 1; *Anvil Mining*, *supra* note 133 at para 89.
[796] See CCQ, art 3148, para 1(3°). The Quebec Minister of Justice replaced "damage" by "injury" in 2014 without changing the substance of the text. See *Act respecting the Compilation of Québec Laws and Regulations*, CQLR c R-2.2.0.0.2, s 3; *Poppy Industries Canada Inc v Diva Delights Ltd*, 2018 QCCA 163 at para 41, [2018] QJ No 622 (QL). The word "omission" was added to article 3148, para 1(3°) by *An Act to ensure better consistency between the French and English texts of the Civil Code*, SQ 2016, c 4, s 365.
[797] See *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 at para 45, [2013] 3 SCR 600 [*Infineon*]; *Spar Aerospace*, *supra* note 790 at para 56.
[798] See *Infineon*, *supra* note 797 at para 47, citing *Spar Aerospace*, *supra* note 790 at para 58..
[799] *Cf Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC Inc (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 97, [2017] 4 CNLR 89, aff'd 2017 QCCA 1791, [2018] 4 CNLR 167, aff'd 2020 SCC 4, [2020] SCJ No 4 (QL); *Cambior*, *supra* note 131 at paras 18–21 (both suggesting that even corporate decisions taken in Quebec which led to pollution elsewhere suffice to establish jurisdiction under article 3148, para 1(3°).
[800] See CCQ, art 3151; *Worthington Corp c Atlas Turner Inc*, [2004] RJQ 2376, 2004 CanLII 21370 (CA), leave to appeal to SCC refused, [2005] 1 SCR xvii [*Worthington*]. See also CCQ, arts 3129, 3165(1°).
[801] For further discussion on causes of action in the CCQ, see the sources cited *supra* note 1.
[802] Additionally, article 982 CCQ provides that "[u]nless it is contrary to the general interest, a person having a right to use a spring, lake, sheet of water, underground stream or any running water may, to

has strong conceptual connections with civil liability[803] because the right belongs to a person who exercises it against another person.[804] Importantly, neighbourhood disturbance can lead to injunctive relief *and* damages, and is often invoked alongside civil liability.[805]

The characterization of neighbourhood disturbance for jurisdictional purposes arose in *Uashaunnuat*. Innus sued two mining companies engaged in iron ore extraction in the Labrador Trough. Relying on Aboriginal rights over land, they claimed that the defendants' extraction projects had adversely impacted their traditional activities in the Nitassinan, a territory overlapping Quebec and Labrador. They sought injunctive relief and damages on the basis of civil liability (article 1457 CCQ), neighbourhood disturbance (article 976 CCQ) and the violation of their fundamental rights. The defendants sought to strike plaintiffs' allegations concerning Labrador because they involved the recognition of Aboriginal rights (including title) in Labrador. The defendants reasoned that Aboriginal rights over land in Labrador were property rights over which Quebec courts had no jurisdiction (article 3152 CCQ indeed provides that Quebec courts have jurisdiction to hear a real action only when the property is located in the province).

---

prevent the water from being polluted or depleted, require the destruction or modification of any works by which the water is being polluted or depleted." This property law recourse has obvious relevance for our purposes, but it has rarely been invoked (and never, to my knowledge, in a transboundary context). See *Boucher c Pohénégamook (Ville de)*, 2012 QCCS 2362 at paras 159–63, [2012] JQ no 4985 (QL); *Roy c Village de Tring-Jonction (Corporation municipale)*, 2000 CanLII 19249 at paras 133–39, (*sub nom Roy c Tring-Jonction (Village)*) [2000] JQ no 6405 (QL) (Sup Ct) [*Roy*]; *Association des résidents du lac Mercier Inc c Paradis, ès qualités de ministre de l'Environnement*, [1996] RJQ 2370 at 2379–83, 1996 CanLII 4648 (Sup Ct); Robert P Godin, "Short Essay on the Notion of *General Interest* in Article 982 of the *Civil Code of Québec* or *Je puise mais n'épuise*" (2010) 34:4 Vt L Rev 869; Charlotte Lemieux, "La protection de l'eau en vertu de l'article 982 C.C.Q.: problèmes d'interprétation" (1992) 23:1 RDUS 191.

[803] See Yaëll Emerich, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (Cheltenham: Edward Elgar, 2018) at 141–45; Yaëll Emerich, *Droit commun des biens: perspective transsystémique* (Cowansville: Yvon Blais, 2017) at 203–209. See also Denys-Claude Lamontagne, *Biens et propriété*, 8th ed (Cowansville: Yvon Blais, 2018) at para 231; Marie-Ève Arbour & Véronique Racine, "Itinéraires du trouble de voisinage dans l'espace normatif" (2009) 50:2 C de D 327 at 342–47.

[804] *Uashaunnuat*, *supra* note 112 at para 39; *St Lawrence Cement*, *supra* note 343 at para 82.

[805] See eg *Lacoste c Fiducie de la Ferme Lacoste*, 2014 QCCS 2948 at para 123, [2014] JQ no 6145 (QL); *Poiré c Sévère*, 2012 QCCS 1619 at para 19, [2012] JQ no 3511 (QL); *Grilo c Hachey*, 2010 QCCS 5424 at para 48, [2010] JQ no 11544 (QL).

The Supreme Court of Canada rejected the argument and held that Aboriginal rights were *sui generis* rights, not typical property rights. The plaintiffs' claim was properly characterized as having a *sui generis* aspect (claim based on Aboriginal rights) and a personal aspect (claims in civil liability and neighbourhood disturbance). It was a "non-classical" mixed action because it did not seek to enforce real and personal rights (as most mixed actions subject to article 3152 CCQ), but rather personal and *sui generis* rights. As such, it fell under articles 3134 (residual jurisdictional rule based on the domicile of the defendant) and 3148 CCQ (jurisdictional rule for personal actions), not article 3152 CCQ.[806] Quebec courts ultimately had jurisdiction over the entirety of the claim because the defendants had their domicile in Quebec. For our purposes, and Aboriginal rights aside, *Uashaunnuat* supports the proposition that neighbourhood disturbance claims fall under article 3148 CCQ alongside civil liability claims.[807]

Courts outside Quebec would assert jurisdiction over a local polluter on a similar basis, insofar as the litigation involves the impact of an operation on Canadian soil (for instance, generating greenhouse gas or polluting a transboundary watercourse).[808] In 2012, the Supreme Court of Canada reviewed the common law of jurisdiction and established a list of tort-specific factors which indicate a real and substantial connection between the province and the dispute. The Court held in *Van Breda* that a real and substantial connection presumptively exists when, among other things, the defendant is domiciled, resides or carries on business in the province, or when a tort occurred there.[809] These connecting factors supplement the traditional bases of jurisdiction (presence and

---

[806] See *Uashaunnuat*, *supra* note 112 at paras 53–60. The decision was strongly divided. Four of the nine judges dissented. Justices Brown and Rowe (also writing for Justices Moldaver and Côté) preferred to characterize the claim as mixed (and therefore subject to article 3152 CCQ), on the basis that Aboriginal title and other Aboriginal rights were sufficiently close to real rights for the specific purposes of private international law. See *ibid* at paras 126–206, Brown & Rowe JJ, dissenting.

[807] *Ibid* at para 58.

[808] By comparison, human rights litigation involves a greater distance between the Canadian defendant and the harmful conduct and a potentially more complex chain of command at the place of acting. Jurisdiction becomes much more contentious in this context.

[809] See *Van Breda*, *supra* note 112 at para 90. See also *Haaretz.com v Goldhar*, 2018 SCC 28 at para 36, [2018] 2 SCR 3 [*Goldhar*]; *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para 26, [2016] 1 SCR 851 [*LRMM*]; *Breeden v Black*, 2012 SCC 19 at para 19, [2012] 1 SCR 666 [*Breeden*]; *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18 at para 33, [2012] 1 SCR 636 [*Éditions Écosociété*]. Compare with the provincial rules of procedure governing service outside the jurisdiction, for example the *Ontario Rules of Civil Procedure*, *supra* note 638, ss 17.02(g), (p).

consent),[810] and create a rebuttable presumption of jurisdiction in favour of Canadian courts.[811] The list is not exhaustive. Lower courts can recognize more connecting factors in future cases based on considerations of order, fairness and comity.[812]

The situation differs slightly in the three provinces that enacted the *Court Jurisdiction and Proceedings Transfer Act* drafted by the ULCC.[813] The *CJPTA* supplants entirely the common law framework[814] and introduces the notion of ordinary residence as the primary basis for personal jurisdiction over a corporation or partnership (and also a presumptive connecting factor at common law).[815] Ordinary residence takes several forms in the *CJPTA*, including having a place of business in the province.[816] This is a large jurisdictional basis that effectively encompasses traditional presence-based jurisdiction,

---

[810] On the relationship between the two sets of jurisdictional grounds, see *Fernandes v Wal-Mart Canada Corp*, 2017 MBCA 96 at paras 16–39, 417 DLR (4th) 444; *Airia Brands Inc v Air Canada*, 2017 ONCA 792 at para 62, 417 DLR (4th) 467, leave to appeal to SCC refused, [2018] 3 SCR v; *Chevron* SCC 2015, *supra* note 112 at paras 82–87; *Breeden*, *supra* note 809 at para 19.

[811] See *Goldhar*, *supra* note 809 at paras 39–45; *LRMM*, *supra* note 809 at para 27; *Van Breda*, *supra* note 112 at paras 95–100.

[812] See *Van Breda*, *supra* note 112 at paras 91–92.

[813] See *Court Jurisdiction and Proceedings Transfer Act*, (1982) 76 Unif L Conf Proc 140, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/GJ6J-LVX7] [*CJPTA*], reprinted in Basedow et al, vol 4, *supra* note 53, 3058 & Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 264–287 [Black, Pitel & Sobkin]; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [*BC CJPTA*]; *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [*SK CJPTA*]; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2 [*NS CJPTA*]; *Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, c 61 (not yet in force) [*PEI CJPTA (not yet in force)*]; *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c C-7 (not yet in force) [*YT CJPTA (not yet in force)*]. See also Manitoba Law Reform Commission, *Private International Law*, Report 119 (2009) at 17–18 [Manitoba Law Reform Commission] (recommending the adoption of the *CJPTA* in Manitoba); Alberta Law Reform Institute, *Enforcement of Judgments*, Final Report 94 (2008) at 37–38 (recommending the adoption of the *CJPTA* in Alberta); Janet Walker in association with the Law Commission of Ontario, *Reforming the Law of Crossborder Litigation: Judicial Jurisdiction* (Toronto: Law Commission of Ontario, 2009) (study commissioned by the Ontario Law Commission to suggest legislative reform partly inspired by the *CJPTA*).

[814] See *CJPTA*, *supra* note 813, s 2(2); *BC CJPTA*, *supra* note 813, s 2(2); *SK CJPTA*, *supra* note 813, s 3(2); *NS CJPTA*, *supra* note 813, s 3(2); *PEI CJPTA (not yet in force)*, *supra* note 813, s 2(2); *YT CJPTA (not yet in force)*, *supra* note 813, s 2(2). This said, the *CJPTA* exists to bring the provinces' jurisdictional rules in line with the real and substantial connection test developed by the Supreme Court of Canada.

[815] See *CJPTA*, *supra* note 813, s 3(d); *BC CJPTA*, *supra* note 813, s 3(d); *SK CJPTA*, *supra* note 813, s 4(d); *NS CJPTA*, *supra* note 813, s 4(d); *PEI CJPTA (not yet in force)*, *supra* note 813, s 3(d); *YT CJPTA (not yet in force)*, *supra* note 813, s 3(d).

[816] See *CJPTA*, *supra* note 813, ss 7(c), 8(b); *BC CJPTA*, *supra* note 813, ss 7(c), 8(b); *SK CJPTA*, *supra* note 813, ss 6(c), 7(b); *NS CJPTA*, *supra* note 813, ss 8(c), 9(b); *PEI CJPTA (not yet in force)*, *supra* note 813, ss 7(c), 8(b); *YT CJPTA (not yet in force)*, *supra* note 813, ss 7(c), 8(b).

"in substance if not in name."[817] Like *Van Breda*, the *CJPTA* also presumes the existence of a real and substantial connection with the forum when the dispute concerns a business carried on in the province.[818]

Both under the *CJPTA* and the *Van Breda* framework, courts can easily assert jurisdiction over local polluters based on their presence or activities in a province. Any injunction or damage award will be readily enforceable in that province. Alternatively, foreign plaintiffs can choose to sue in a province based on the harmful activity having occured there. This is one aspect of jurisdiction at the place where the tort occurred. This connecting factor is particularly important in the second scenario (local victims suing foreign polluters), because plaintiffs have to rely on the *situs* of the tort to establish a real and substantial connection with the forum. By contrast, determining where the tort occurred is unnecessary in the first scenario if plaintiffs can establish that the local polluter is either domiciled in the province or carries on business there. This is why I discuss the localization of torts later on.[819]

2.2.1.1.2. Foreign land and the local action rule

The only jurisdictional obstacle standing in foreign plaintiffs' way in the first scenario seems to be the local action rule, also known as the *Moçambique* rule. It provides that courts have no jurisdiction to hear a claim concerning land and other immovable property

[817] Catherine Walsh, "General Jurisdiction over Corporate Defendants under the *CJPTA*: Consistent with International Standards?" (2018) 55:1 Osgoode Hall LJ 163 at 180 [Walsh].
[818] See *CJPTA*, *supra* note 813, s 10(h); *BC CJPTA*, *supra* note 813, s 10(h); *SK CJPTA*, *supra* note 813, s 9(h); *NS CJPTA*, *supra* note 813, s 11(h); *YT CJPTA (not yet in force)*, *supra* note 813, s 10(1)(h). The *PEI CJPTA (not yet in force)* does not list carrying on business in the province as an example of a real and substantial connection. See *PEI CJPTA (not yet in force)*, *supra* note 813. On the implications of having a residence or carrying on business in the province for the purposes of establishing presence-based or assumed jurisdiction, see Walsh, *supra* note 817; Stephen GA Pitel, "Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada" (2018) 55:1 Osgoode Hall LJ 63 at 69–72; Tanya J Monestier, "You're It! Tag Jurisdiction over Corporations in Canada" (2017) 50:3 Vand J Transnatl L 583. For certain authors, "the law of general jurisdiction over corporations is currently an unfortunate ill-ftting series of standards: too broad in the *CJPTA*; oddly narrow in Quebec; and frustratingly unclear in the common law provinces." Janet Walker, "Judicial Jurisdiction in Canada: The *CJPTA*—A Decade of Progress" (2018) 55:1 Osgoode Hall LJ 9 at 33.
[819] For further discussion on the localization of torts for jurisdictional purposes, see subsection 2.2.1.2 below.

located abroad, even if the claim relates to tort law only.[820] This ancient artefact of English law periodically rises from the dead to lurk around law reports and haunt scholars as well as unsuspecting litigants. The ILC suggests that it is incompatible with prompt and adequate compensation because it prohibits jurisdiction at the place of acting when local polluters cause transboundary damage elsewhere.[821] The problem arises only in common law provinces since the contentious aspects of the local action rule have no equivalent in Quebec civil law.

I focus here on the extension of the *Moçambique* rule to tort claims and I leave aside its application to other disputes involving real property. In my view, the local action rule no longer applies to tort claims in Canada. Judicial authorities supporting the opposite view are ancient. They have been superseded by subsequent cases and an overwhelming academic consensus. The rule, as traditionally interpreted, no longer prevents Canadian courts from asserting jurisdiction over local polluters in cases brought by foreign victims. The rest of this section makes the case for this proposition, by examining the origins of the local action rule and the cases as they stand today.

The local action rule originated in England at a time when courts had to summon juries from the place where the cause of action had arisen. Faced with increasingly sophisticated transactions, English courts started dealing with jury requirements by distinguishing between transitory actions (which could arise anywhere, such as damage to personal property) and local actions (which could only arise in one place, such as damage to real property). Only local actions required plaintiffs to specify a venue for the purposes of summoning witnesses.[822]

---

[820] See *Lucasfilm v Ainsworth*, [2011] UKSC 39 at paras 54–60, [2012] 1 AC 208 [*Lucasfilm*]; *Hesperides Hotels v Aegean Holidays Ltd* (1978), [1979] AC 508 at 541, [1978] 2 All ER 1168 (HL) [*Hesperides Hotels*]; *British South Africa Co v Companhia de Moçambique*, [1893] AC 602 at 628–29, [1891–94] All ER 640 (HL) [*Moçambique*].
[821] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, para 5, n 468.
[822] See generally Stephen Lee, "Title to Foreign Real Property in Transnational Money Claims" (1995) 32:3 Colum J Transnatl L 607 at 613–32. See also Stephen Lee, "Jurisdiction over Foreign Land: A Reappraisal" (1997) 26:3 Anglo-Am L Rev 273.

The local action rule disappeared from civil procedure in the nineteenth century but withstood scrutiny as a jurisdictional rule in *Moçambique* (1893).[823] The case concerned a company whose agents had allegedly broken into the plaintiff's premises in South Africa to take possession of its mines and mining rights, while assaulting and imprisoning some of its employees.[824] The House of Lords held that English courts did not have jurisdiction because the claim involved trespass and title to foreign land. According to the House of Lords, the fact that the rules of civil procedure no longer required plaintiffs to specify a venue had no impact on the courts' inability to hear claims over foreign land. This was a substantive jurisdictional rule which had always existed, and technical changes to civil procedure could not have altered it.[825] As the Supreme Court of the United Kingdom later put it, "[t]he essence of [*Moçambique*] is that jurisdiction in relation to land is local (that is, the claim has a necessary connection with a particular locality) as opposed to transitory (where such a connection is not necessary) and that it is contrary to international law, or comity, for one state to exercise jurisdiction in relation to land in another state."[826]

Moçambique eventually became a leading authority in Canada.[827] The scope of the rule, however, has been fraught with uncertainty. Canadian jurists have discussed whether it covers all disputes involving foreign land (including property torts such as trespass or nuisance, but also other torts such as negligence) or only those involving issues of title to foreign land (and if so, whether only primarily or also incidentally).[828] Most

---

[823] See *Moçambique*, *supra* note 820.
[824] In *Lucasfilm*, the Supreme Court of the United Kingdom recalled the political nature of the *Moçambique* case: "[t]he Moçambique company was a Portuguese company (with substantial British ownership) effectively in control of Mozambique and Cecil Rhodes' British South Africa Co was effectively in control of Southern Rhodesia. The Moçambique case was a battle between them over mines in territories which were claimed by Portugal." *Lucasfilm*, *supra* note 820 at para 60. See also
[825] See *Moçambique*, *supra* note 820 at 629.
[826] See *Lucasfilm*, *supra* note 820 at para 57.
[827] See *Duke v Andler*, [1932] SCR 734 at 740–41, 1932 CanLII 32 [*Duke*]. See also *Moradkhan v Mofidi*, 2013 BCCA 132 at para 52, 360 DLR (4th) 622; *Khan Resources Inc v WM Mining Company* (2006), 79 OR (3d) 411 at 415, 2006 CanLII 6570 (CA); *Tezcan v Tezcan* (1987), 46 DLR (4th) 176 at 179, 1987 CanLII 157 (BC CA); *Grey v Manitoba & North-Western Railway* (1896), 11 Man R 42 at 57–58, 1896 WL 9809 (WL Can) (CA), rev'd [1897] AC 254, 66 LJPC 66 (PC).
[828] See Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 330–40 [Pitel & Rafferty]; Stephen GA Pitel et al, *Private International Law in Common Law Canada: Cases, Text and Materials*, 4th ed (Toronto: Emond, 2016) at 782–96 [Pitel et al]; Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, vol 2, 6th ed (Markham: LexisNexis, 2005) (loose-leaf updated 2019, release 75) at § 23.1 [Walker]; Michael J Whincop, "Conflicts in the Cathedral: Towards a Theory of

transboundary environmental disputes do not raise issues of title (with the notable exception of Aboriginal title) but involve damage to foreign land. An expansive interpretation of the local action rule in the source state would bar foreign plaintiffs from invoking trespass or nuisance as a result of transboundary pollution. American victims faced that very problem in *Trail Smelter*.[829] As early as 1584, Lord Coke carved out an exception to the local action rule in *Bulwer's Case* where an act in one state had caused injury in another,[830] but English courts continued to apply the rule rigidly.[831]

The House of Lords reaffirmed the local action rule in 1978, in the landmark case of *Hesperides Hotels*.[832] The United Kingdom legislature abolished the tort aspects of the local action rule altogether in 1982, following accession to the European Economic Community in 1973[833] and ratification of the 1968 *Brussels Convention on Jurisdiction and the Enforcement of Judgments*.[834] Today, English courts have statutory jurisdiction to hear claims for damages involving foreign immovable property if title to property is not primarily at stake.[835] The local action rule has lost ground in other jurisdictions as well. Two Australian states abolished it,[836] not to mention the four Canadian provinces that did the same through the *Reciprocal Access Act*. Several American courts have also distanced

---

Property Rights in Private International Law" (2000) 50:1 UTLJ 41 at 57–61 [Whincop]; James G McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) at 319–29 [McLeod]; B Welling & EA Heakes, "Torts and Foreign Immovables Jurisdiction in Conflict of Laws" (1979) 18:1 UWO L Rev 295 [Welling & Heakes]; John Delatre Falconbridge, *Essays on the Conflict of Laws*, 2nd ed (Toronto: Canada Law Book, 1954) at 611–22; John Willis, "Jurisdiction of Courts—Action to Recover Damages for Injury to Foreign Land" (1937) 15:2 Can Bar Rev 112 [Willis].

[829] See the text accompanying notes 12, 551.

[830] See *Bulwer's Case* (1584), 7 Co Rep 1a, 77 ER 411 (KB). For an exception to *Moçambique* in maritime law, see *The Tolten*, [1946] 2 All ER 372, [1946] P 135 (CA).

[831] See *Doulson v Matthews*, [1775–1802] All ER Rep 144, 100 ER 1143 (KB).

[832] See *Hesperides Hotels*, *supra* note 820. Commenting on *Hesperides Hotels*, Merrills wrote that "[…] the uncompromising affirmation of the [*Moçambique*] rule [was] an important declaration of principle and, incidentally, demonstrate[d] the staying power of well-rooted conflict of laws principles in the face of strong academic opposition." JG Merrills, "Trespass to Foreign Land" (1979) 28:3 ICLQ 523 at 525.

[833] See *Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community*, 22 January 1972, 1375 UNTS 2, [1972] OJ, L 73/5 (entered into force 1 January 1973).

[834] See *Brussels Convention on Jurisdiction and the Enforcement of Judgments*, *supra* note 782.

[835] See *Civil Jurisdiction and Judgments Act 1982* (UK), c 27, s 30(1); *Hamed v Stevens*, [2013] EWCA Civ 911 at paras 11–16, [2013] ILPr 623; *Lucasfilm*, *supra* note 820 at paras 72–77; *Re Polly Peck International plc (No 2) (Marangos Hotel Company Ltd v Stone)*, [1998] 3 All ER 812 at 829–30, [1998] 2 BCLC 185 (CA).

[836] See *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW), 1989/190, s 4; *Civil Law (Wrongs) Act 2002* (ACT), 2002/40, s 220.

themselves from the rule in one way or another.[837] The EU confined it to claims that have title as their object,[838] and the ECJ confirmed that the rule did not cover claims for nuisance brought by a landowner against a foreign nuclear facility.[839] Other jurisdictions, however, continue to follow *Moçambique.* There are notable precedents in South Africa[840] and parts of Australia.[841] The courts of New Zealand recently declined to assess whether the local action rule still applies but acknowledged that it has been described as an "anomalous historic relic" and referred to this criticism as "well-founded".[842]

Canadian provinces traditionally applied the widest interpretation of the rule. In the 1930s, a Quebec plaintiff brought an action in New Brunswick against a company operating there. The plaintiff alleged that the defendant had accumulated excessive

[837] The most famous American precedent supporting the local action rule in tort is *Livingston v Jefferson*, 15 Fed Cas 660, 1811 US App Lexis 263 (D Va Cir Ct 1811). Some courts, however, have adhered to the rationale of *Bulwer's Case* and held that the local action rule does not apply when an act in one state causes injury in another. See eg *Smith v Southern Railway Co*, 136 Ky 162 at 171–72, 1909 Ky Lexis 465 (Ct App 1909); *Ducktown Sulphur, Copper & Iron Co v Barnes*, 60 SW 593 at 606–607, 1900 Tenn Lexis 201 (Sup Ct 1900). Other courts declined to apply the rule to a tort claim when title was not directly affected. See eg *St Regis*, *supra* note 169 at 35–36; *Reasor-Hill Corp v Harrison*, 220 Ark 521 at 524, 1952 Ark Lexis 744 (Sup Ct 1952); *Little v Chicago, St-Paul, Minneapolis & Omaha Railway Company*, 65 Minn 48 at 53, 1896 Minn Lexis 207 (Sup Ct 1896). The State of New York also abolished the local action rule by statute. See NY Real Property Actions Law § 121 (2017); *Stark v Howe Sound Co*, 148 Misc 686 at 690–91, 1933 NY Misc Lexis 1870 (NY Sup Ct 1933), aff'd 269 NYS 936, 1934 NY App Div Lexis 8525 (NY Sup Ct App Div 1934), amended 271 NYS 1097, 1934 NY App Div Lexis 6641 (NY Sup Ct App Div 1934); *Jacobus v Colgate*, 217 NY 235 at 239–41, 1916 NY Lexis 1306 (Ct App 1916). And in 2011, the Supreme Court of the United Kingdom mentioned that "the current prevailing view in the United States is that the local action rule does not apply to actions for trespass to foreign land." See *Lucasfilm*, *supra* note 820 at para 56. On the local action rule and tort claims in the United States, see generally June F Entman, "Abolishing Local Action Rules: A First Step Towards Modernizing Jurisdiction and Venue in Tennessee" (2004) 34:2 U Mem L Rev 251 at 264–68, 280–84; *Restatement (Second) of Conflict of Laws* § 87 (1969) as commented by the American Law Institute, *Restatement of the Law, Second: Conflict of Laws*, vol 1 (St Paul: American Law Institute, 1971) at 260–62. In the context of transboundary pollution, see Muldoon, Scriven & Olson, *supra* note 109 at 52–57; McCaffrey, "Jurisdictional Considerations", *supra* note 227 at 219–24; McCaffrey, *Transfrontier Environmental Disturbances*, *supra* note 227 at 69–70;

[838] See *Brussels I Recast Regulation*, *supra* note 782, art 24(1).

[839] See *Land Oberösterreich v ČEZ as*, C-343/04, [2006] ECR I–4557 at para 40, [2006] 2 All ER (Comm) 665.

[840] See *Atlantic Islands Development Corp Ltd v Buchan*, [1971] 1 All SA 234(C) at 240–41, 55 ILR 1 (S Afr SC).

[841] *Dagi v Broken Hill Pty Co Ltd (No 2)* (1995), [1997] 1 VR 428 at 433–41 (VSC); *Potter v Broken Hill Pty Co Ltd*, [1906] HCA 88 at 5, 3 CLR 479; W Rupert Johnson, "The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land" (2003) 31:2 UWA L Rev 266. The High Court of Australia left the status of the rule open in *Moti v The Queen*, [2011] HCA 50 at para 49, 245 CLR 456; *Régie nationale des usines Renault SA v Zhang*, [2002] HCA 10 at para 76, 210 CLR 491.

[842] *Christie v Foster*, [2019] NZCA 623 at paras 74–75, [2019] NZFLR 365.

amounts of wood in the Madawaska River flowing from Quebec to New Brunswick.[843] The accumulation had flooded the plaintiff's land in Quebec, resulting in the loss of a building and the property inside and loss of revenues derived from that building. The plaintiff sought injunctive relief and compensation. He argued that New Brunswick courts had jurisdiction because the claim did not concern title to land. Furthermore, the defendant carried on business in the province and had committed the tort there.[844]

Before the appellate division of the New Brunswick Supreme Court, the debate focused on the local action rule. In the resulting decision, *Albert v Fraser Companies Ltd* (1936), Chief Justice Baxter, also writing for Justice Grimmer, held that the *Moçambique* rule applied regardless of whether title to the land was disputed.[845] The Court held that the claim concerned damage to foreign land. The defendant had also caused damage to personal property, but only indirectly through the initial damage to real property.[846] The Court therefore dismissed the action for lack of jurisdiction.[847]

Justice Harrison, dissenting, noted that the claim did not involve any question of title.[848] He opined that *Moçambique* did not bar tort claims and chose to follow *Bulwer's Case* instead.[849] New Brunswick courts should have exercised their jurisdiction because the defendant was domiciled in the forum. If the plaintiff had to sue in Quebec, he would then have to enforce the judgment against the defendant in New Brunswick.[850]

Scholars unanimously criticize the majority's generous interpretation of *Moçambique*.[851] The case is puzzling indeed. First, the majority blindly applied the local action rule even

---

[843] See *Albert v Fraser Companies Ltd* (1936), [1937] 1 DLR 39 at 40, 1936 CanLII 268 (NBSC (AD)) [*Albert*].
[844] See *ibid* at 40–42.
[845] See *ibid* at 45.
[846] See *ibid* at 46–47. See also *Hesperides Hotels*, *supra* note 820 at 538 ("[…] in [*Albert*] there was no direct allegation in the plaintiff's statement of claim of any trespass to his personal property" at 538, Wilberforce LJ); "[t]he decision of the Supreme Court of New Brunswick in [Albert] that they had jurisdiction in a claim for damages either to real or personal property in another province was made on special facts in respect that the two branches of the claim were very closely connected to one another" at 546, Fraser of Tullybelton LJ).
[847] See *ibid* at 48.
[848] See *ibid* at 50, Harrison J, dissenting.
[849] See *ibid* at 51–52, Harrison J, dissenting.
[850] See *ibid* at 55–56, Harrison J, dissenting.
[851] See Pitel & Rafferty, *supra* note 828 at 333; Muldoon, Scriven & Olson, *supra* note 109 at 58–59; McLeod, *supra* note 828 at 327–29; McNamara, *supra* note 227 at 88–90; Welling & Heakes, *supra* note

though the facts of the case were easily distinguishable from those of *Moçambique* (where the event had occurred in a single place) and *Bulwer's Case* could have applied. Second, the majority failed to explain how foreign land affected the enforcement of an injunction and a monetary award against a defendant operating in the province. The local action rule rests on the fact that orders involving foreign land cannot be enforced but this is not the case for tort claims resulting in monetary awards. Finally, the strict application of the local action rule could deprive victims of all judicial recourse if their home state does not accept jurisdiction based on damage suffered there and no other state has jurisdiction.[852]

Justice Harrison had the better view in *Albert*. The local action rule has no justification when polluters operate in the forum and cause transboundary damage. The undesirability of the local action rule in this context is especially obvious in light of international environmental law's inclination towards the availability of private remedies. Nowhere is

828 at 314; Fairley, *supra* note 12 at 264; McCaffrey, *Transfrontier Environmental Disturbances*, *supra* note 227 at 70–71; McCaffrey, "Jurisdictional Considerations", *supra* note 227 at 218–19, 227; Gérard V La Forest, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Department of Regional Economic Expansion, 1973) at 336; Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970) 48:1 Can Bar Rev 66 at 130, n 294; Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1968) 7:1 Alta L Rev 71 at 78, n 40; Bora Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow: Background Papers* (Ottawa: R Duhamel, Queen's Printer, 1961) 211 at 221, n 62; Robert B Looper, "Jurisdiction over Immovables: The *Little* Case Revisited After Sixty Years" (1956) 40:3 Minn L Rev 191 at 202; Horas Emerson Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Cambridge, Mass: Harvard University Press, 1938) at 187, n 146; Willis, *supra* note 828 at 114. See also Seck, "Environmental Harm", *supra* note 139 at 169–71; GHL Fridman, "Where is a Tort Committed?" (1974) 24:3 UTLJ 247 at 265–67 [Fridman]; Richard S Campbell et al, "Water Management in Ontario: An Economic Evaluation of Public Policy" (1974) 12:3 Osgoode Hall LJ 475 at 490, n 50.

[852] The forum of necessity doctrine could intervene if it is indeed legally impossible to sue in either place. Some authors consider the absence of *any* competent tribunal as an "absurd" scenario. See Claude Emanuelli, *Droit international privé québécois*, 3rd ed (Montreal: Wilson & Lafleur, 2011) at para 168 [Emanuelli, *Droit international privé*]. But the application of the local action rule at the place of acting and the absence of jurisdiction at the place of injury is a real possibility. Jurisdiction may exist in some other place (where the defendant conducts other business, for instance), but then again, it may not. The forum of necessity doctrine remains exceptional in any event. See CCQ, art 3136; *CJPTA*, *supra* note 813, s 6; *BC CJPTA*, *supra* note 813, s 6; *NS CJPTA*, *supra* note 813, s 7; *PEI CJPTA (not yet in force)*, *supra* note 813, s 6; *YT CJPTA (not yet in force)*, *supra* note 813, s 6; *West Van Inc v Daisley*, 2014 ONCA 232 at paras 17–38, 119 OR (3d) 481, leave to appeal to SCC refused, [2014] 2 SCR x; *Anvil Mining*, *supra* note 133 at paras 96–103; *Van Breda v Village Resorts Limited*, 2010 ONCA 84 at para 54, 98 OR (3d) 721, aff'd 2012 SCC 17, [2012] 1 SCR 572; *Lamborghini (Canada) Inc c Automobili Lamborghini SPA* (1996), [1997] RJQ 58 at 68–69, 1996 CanLII 6047 (CA). The *SK CJPTA* does not provide for necessity jurisdiction. See *SK CJPTA*, *supra* note 813. For a comparative analysis of the doctrine in Europe, see *Naït-Liman*, *supra* note 519.

this policy more apparent than in the *ILC Principles on the Allocation of Loss*. Allowing victims to sue polluters on their own ground would have aligned with that policy had it existed in 1937 and explains why the ILC seemed to favour the complete repeal of the local action rule in this context.[853]

As sound as the criticism may be, however, it misses a more fundamental point: the local action rule simply does not have the status we pretend it has in Canadian law. At the outset, neither *Moçambique* nor *Albert* bind Quebec courts, which apply a codified body of private international law.[854] English precedents were commonly used prior to the codification, and the local action rule (or its functional equivalent) may have applied as a result.[855] Today, however, article 3152 CCQ provides that courts have jurisdiction to hear a "real action" when the property is located in Quebec, but the provision is confined to pure ownership disputes.[856] Claims for damages related to foreign land are personal actions of a patrimonial nature under article 3148 CCQ.[857]

---

[853] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, para 5, n 468. The Permanent Bureau of the HCCH also doubted the validity of the local action rule in the context of transboundary pollution. See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 104.

[854] *Cf Dell Computer*, supra note 122 at para 27 (where the Supreme Court of Canada suggested that Book Ten of the CCQ derived from English law); Emanuelli, *Étude comparative*, *supra* note 157 at paras 535–36 (who highlights several key differences between Quebec private international law and the common law); Serge Gaudet, "Le Livre X du Code civil du Québec: bilan et enjeux" (2010) 88:2 Can Bar Rev 313 at 320–21 (who insists on the influence of the French structure, tradition and method on Book Ten of the CCQ).

[855] See *Mazur v Sugarman* (1939), 42 QPR 150 at 153, n 1 (Sup Ct); *Skead v McDonell* (1873), 3 RCLJ 42 at 43 (Qc CA); *Senauer v Porter* (1863), 7 LC Jur 42 at 42 (Qc Sup Ct); H Patrick Glenn, "Droit international privé" in Barreau du Québec & Chambre des notaires, eds, *La réforme du Code civil*, vol 3: Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires (Quebec: Presses de l'Université Laval, 1993) 669 at 757–58 [Glenn, "Droit international privé"]; Éthel Groffier, *La réforme du droit international privé québécois: supplément au Précis de droit international privé québécois* (Cowansville: Yvon Blais, 1993) at 276 [Groffier]; Jean-Gabriel Castel, *Droit international privé québécois* (Toronto: Butterworths, 1980) at 691; Walter S Johnson, *Conflict of Laws*, 2nd ed (Montreal: Wilson & Lafleur, 1962) at 485–92; Eugène Lafleur, *The Conflict of Laws in the Province of Quebec* (Montreal: Theoret, 1898) at 118–22.

[856] See *Uashaunnuat*, *supra* note 112 at para 54; *CGAO c Groupe Anderson Inc*, 2017 QCCA 923 at paras 10–11, [2017] JQ no 7686 (QL); *Investissements Nolinor Inc c Air Inuit Ltd*, 2017 QCCS 3396 at paras 60–61, [2017] JQ no 9849 (QL); *Gestion Logistique AC Inc c Baffin Snowmobile Repair Shop Limited*, 2017 QCCS 4517 at paras 40–42, [2017] JQ no 13800 (QL), leave to appeal to Qc CA granted, 2017 QCCA 1356, [2017] JQ no 12306 (QL), notice of settlement, 200-09-009570-174 (4 December 2017); *Nord Iron Mines Inc c Specogna*, 2013 QCCS 230 at paras 12–16, [2013] JQ no 486 (QL); *Arab Monetary Fund c 1954933 Nova Scotia Limited*, 2004 CanLII 76390 at paras 9–14, [2004] JQ no 3903 (QL) (Sup Ct); *MacDonald Oil Exploration Ltd c MFC Bancorp Ltd*, 2002 CanLII 13432 at paras 9–12, [2002] JQ no 4141 (QL) (Sup Ct); *Bern v Bern*, [1995] RDJ 510 at 515–16, 1995 CanLII 4635 (Qc CA).

[857] See the text accompanying note 806.

At common law, scholars widely assume that *Albert* would factor in transboundary environmental disputes.[858] The ULCC and the Secretariat of the CEC viewed the case as a major barrier to litigation.[859] The Permanent Bureau of the HCCH also mentioned it as illustrative of the law in Canada.[860] Again, this assumption is overly simplistic, often asserted but rarely demonstrated. Even if Canadian courts might not disregard the local action rule altogether,[861] they could easily reject its application in tort disputes. In so doing, they would in fact be returning to a position that some judges had taken prior to *Moçambique*.[862] Substantive arguments make a strong case in this sense but even as a matter of strict precedent, *Albert* does not have significant judicial weight. First, the New Brunswick Court of Appeal could overrule its own precedent[863] and courts in other

[858] See Pitel et al, *supra* note 828 at 680; Péloffy, *supra* note 107 at 136; Van de Kerkhof, *supra* note 340 at 79–80, 82; Kruger, *supra* note 207 at 129, n 70; Sachs, *supra* note 39 at 848; Stephen C McCaffrey, "Of Paradoxes, Precedents and Progeny: The *Trail Smelter* Arbitration 65 Years Later" in Bratspies & Miller, *supra* note 66, 34 at 35; Knox, "CEC", *supra* note 771 at 88; Stephen C McCaffrey, "Liability for Transfrontier Environmental Harm: The Relationship Between Public and Private International Law" in Von Bar, *Internationales Umwelthaftungsrecht*, *supra* note 351, 81 at 84–85 [McCaffrey, "Liability"]; Michael I Jeffery, "Transboundary Pollution and Cross-Border Remedies" (1992) 18 Can-US LJ 173 at 173–75 [Jeffery]; Steven M Siros, "Borders, Barriers, and Other Obstacles to a Holistic Environment" (1992) 13:3 N Ill UL Rev 633 at 649–50 [Siros]; Cooper, *supra* note 164 at 273–74; Vaughan Black, Book Review of *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles* by Moffatt Hancock, (1985) 17:3 Ottawa L Rev 677 at 684, n 43; Armin Rosencranz, "The Uniform Transboundary Pollution Reciprocal Access Act" (1985) 15:3/4 Envtl Pol'y & L 105 at 105. Countless texts published in the 1970s and 1980s condemned the local action rule as the primary obstacle to litigation. See eg Lynn Theresa Cahalan, "Compensating Private Parties for Transnational Pollution Injury" (1984) 58:3 St John's L Rev 528 at 534; Alan T Blackwell, "Acid Rain: Corrosive Problem in Canadian-American Relations" (1982) 47:1 Sask L Rev 1 at 46; Donald Carl Arbitblit, "The Plight of American Citizens Injured by Transboundary River Pollution" (1979) 8:2 Ecology LQ 339 at 342; Ronald W Ianni, "International and Private Actions in Transboundary Pollution" (1973) 11 Can YB Intl L 258 at 269.

[859] See Secretariat of the CEC, *supra* note 227 at 227; ULCC, *supra* note 741 at 502.

[860] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 104–105.

[861] But see James G McLeod, Annotation of *Bachmann v Bachmann* (1984), 40 RFL (2d) 203, [1984] WDFL 985 (Man CA), leave to appeal to SCC refused, [1984] 1 SCR v (noting that in the context of family law, "recent decisions have shown a willingness to simply ignore the rule in order to achieve the legislative intent" at 203).

[862] See *Campbell v McGregor* (1889), 29 NBR 644 at 652–53, [1889] NBJ No 3 (QL) (SC); *Stuart v Baldwin* (1877), 41 UCQB 446 at 480, [1877] OJ No 112 (QL) (Ont). See also *Ahern v Booth* (1903), 2 OWR 696, 1903 CarswellOnt 481 (WL Can), aff'd (1904), 2 OWR 852, [1904] OJ No 763 (QL) (CA), aff'd 1904 CarswellOnt 787 (WL Can) (SCC) (local action rule not discussed even though the alleged damage concerned foreign land).

[863] See *R v Gashikanyi*, 2017 ABCA 194 at paras 4–15, [2017] 11 WWR 228; *R v Lee*, 2012 ABCA 17 at paras 44–54, [2012] 6 WWR 699; *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* (2006), 76 OR (3d) 161 at 190–97, 2005 CanLII 21093 (CA), leave to appeal to SCC refused, [2006] 1 SCR vii; *R v Neves*, 2005 MBCA 112 at paras 74–94, [2006] 4 WWR 464; *Thomson v Nova Scotia (Workers' Compensation Board)*, 2003 NSCA 14 at para 12, 212 NSR (2d) 81.

provinces could simply dismiss it as non-binding.[864] Second, scholars disapprove the local action rule in an interprovincial context—precisely the fact pattern in *Albert*.[865] Third, no court has ever applied *Albert* to a pollution case and few cases have squarely applied the local action rule to tort claims generally.[866] Taken together, these cases form a weak line of authority.[867]

By contrast, courts have ignored or declined to apply *Albert* and *Moçambique* on several occasions. In *Pembina County Water Resource District* (2017), the Federal Court of Appeal dismissed the foreign plaintiffs' claim for lack of subject matter jurisdiction under the *International Boundary Waters Treaty Act*.[868] The Court noted, however, that "the appellants allege[d] to have suffered damages as a result of torts committed in Manitoba by the respondents" and that "[a]t first glance, there [did] not appear to be anything preventing the appellants from bringing an action before the Manitoba Court of Queen's Bench."[869] The Federal Court of Appeal made no mention of the local action rule even though the claim clearly involved foreign land.

This omission is significant. Plaintiffs expressly argued that a dismissal in Federal Court would leave them without a remedy because Manitoba courts would not hear a claim that involved foreign land.[870] Simply put, the *International Boundary Waters Treaty Act* was their only chance. The Rural Municipality of Rhineland (one of the defendants) replied that Manitoba courts had presumptive jurisdiction because a tort had allegedly been committed in the province, which created a presumption of jurisdiction under the *Van*

---

[864] See *Wolf v The Queen* (1974), [1975] 2 SCR 107 at 109, 1974 CanLII 161.
[865] See Walker, vol 2, *supra* note 828 at § 23.1, n 15; David A Crerar, "A Proposal for a Principled Public Policy Doctrine Post-*Tolofson*" (1998) 8 Windsor Rev Legal Soc Issues 23 at 52, n 83 [Crerar], citing John Swan & Vaughan Black, *Materials on Conflict of Laws*, vol II, Coursepack (University of Toronto Faculty of Law, 1992). Contra *Welsh v Welsh*, 2011 ABQB 686, 9 RFL (7th) 409 ("[a]s a general rule, courts in one country have no jurisdiction to deal with immovables in another [reference omitted]. This restriction on jurisdiction applies equally to immovables located in another province of Canada" at para 14).
[866] See eg *Boslund v Abbotsford Lumber, Mining and Development Co*, [1925] 1 DLR 978 at 981, 1925 CanLII 291 (BCSC), aff'd on other grounds (1925), [1927] 1 DLR 279, 1925 CanLII 318 [*Boslund*]; *Long v Long* (1917), 44 NBR 599 at 614–15, 36 DLR 722 (SC (AD)); *Winnipeg Oil Co v Canadian Northern Railway*, [1911] 18 WLR 424 at 429, 21 Man R 274 (CA); *Brereton v Canadian Pacific Railway Co* (1898), 29 OR 57 at 59–62, 18 CLT 63 (H Ct J Ch Div) [*Brereton*].
[867] But see Morriss, *supra* note 733 at 221, n 13 (suggesting that *Albert* settled the law in Canada).
[868] See *International Boundary Waters Treaty Act*, *supra* note 646.
[869] *Pembina County Water Resource District*, *supra* note 180 at para 77.
[870] See *ibid* (Memorandum of Fact and Law of the Appellant at paras 48–50, 77–78).

Breda framework.[871] Hence the plaintiffs did have a remedy outside the Federal Court. The Federal Court of Appeal accepted Rhineland's argument. There was no reference to the local action rule, but the question would likely arise if the case resumed in Manitoba. Notably, the government of Manitoba did not address the jurisdiction of Manitoba courts in its own submissions.[872]

Other courts have questioned the local action rule more explicitly. In the seminal case of *Interprovincial Co-operatives* (1972), which I will also discuss in the third chapter, Justice Matas (the trial judge later appointed to the Manitoba Court of Appeal), expressed doubts about the majority's decision in *Albert.*[873] The dispute involved a Manitoba environmental statute, the *Fishermen's Assistance and Polluters' Liability Act*.[874] The statute created liability for damage caused to Manitoba fisheries by contaminants discharged into provincial waters or carried from elsewhere into those waters. It included a scheme whereby the province would make assistance payments to fishermen who had suffered financial loss, who in turn could assign to the province their right to sue the polluter for damages.[875] Importantly, section 4(2) of the *Fishermen's Assistance and Polluters' Liability Act* provided that "it [was] not a lawful excuse for the defendant to show that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred, if that regulatory

[871] See *ibid* (Memorandum of Fact and Law of the Respondent Rural Municipality of Rhineland at paras 56–60).
[872] Aside from the local action rule, Manitoba could potentially invoke the Crown's immunity for good faith policy decisions and other doctrines governing the conduct of public authorities, as the case involves a public road allowance. See generally *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 72–91, [2011] 3 SCR 45 and the sources cited *supra* note 188.
[873] See *The Queen in Right of the Province of Manitoba v Interprovincial Co-operatives Ltd* (1972), 30 DLR (3d) 166, (*sub nom R v Interprovincial Co-operatives Ltd*) 1972 CanLII 1009 (Man QB), rev'd (1973), 38 DLR (3d) 367, 1973 CanLII 1078 (Man CA), aff'd (1975), [1976] 1 SCR 477, 1975 CanLII 212 [*Interprovincial Co-operatives* QB].
[874] See *The Fishermen's Assistance and Polluters' Liability Act*, SM 1970, c 32 [*Fishermen Act*]. The *Act* is technically still in force today. See *The Fishermen's Assistance and Polluter's Liability Act*, RSM 1987, c F100, CCSM c F100.
[875] The Manitoba Court of Appeal explained the context of the *Act* as follows: "[a]pparently when it was found that the waters of Lake Winnipeg were being polluted by mercury and other contaminants from the Saskatchewan River and other sources, the Government of Manitoba decided to prohibit fishing in Lake Winnipeg, commercial or otherwise, and to provide compensation to those people who had been deprived of their earning power because they were fishing in a commercial way." *Hershfield v Amos* (1971), 21 DLR (3d) 597 at 597–98, 1971 CanLII 1062 (Man CA).

authority did not also have jurisdiction at the place where the contaminant had caused damage to the fishery."[876]

The Manitoba government relied on the *Fishermen Act* to sue Interprovincial Co-operatives and Dryden Chemicals on behalf of 1590 fishermen who had assigned their rights to the province after receiving over 2 million CAD of financial assistance, claiming that the defendants' chlor-alkali plants in Saskatchewan and Ontario had contaminated Manitoba waters with mercury and caused damage to local fisheries.[877] Justice Matas held that the *Fishermen Act* was constitutionally inapplicable and unenforceable against out-of-province defendants.[878]

The dispute went all to the way to the Supreme Court of Canada.[879] Four of the seven judges restored Justice Matas' decision which the Manitoba Court of Appeal had previously reversed. The majority held (although on two different grounds) that the *Fishermen Act* exceeded the constitutional powers of the legislature and was therefore invalid.[880] Manitoba could therefore rely only on common law causes of action and federal law to support its claims against out-of-province polluters.[881] The three other judges, led by Chief Justice Laskin, dissented.

For our purposes, an important aspect of the restored trial judgment went unnoticed. Manitoba argued that the impugned provision of the *Fishermen Act* concerned injury to real property, which fell squarely within the province's powers under the *Constitution Act 1867* (property and civil rights in the province).[882] In other words, the tort had

---

[876] See *Fishermen Act*, *supra* note 874, s 4(2).
[877] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 482, Laskin CJC, dissenting. Shortly after the Supreme Court issued its decision, Two First Nations sued the Dryden Paper Company, Dryden Chemicals and Reed (the corporate amalgation of Dryden Paper and Dryden Chemicals) in Ontario over the same issue. Parties settled in 1985. As part of that settlement, the province of Ontario granted an indemnity from liability to the former owners of the facility. That indemnity gave rise to further litigation in the present day when Ontario authorities issued a remediation order in relation to a mercury disposal site built by Dryden Paper on the site in 1971. See *R v Resolute FP Canada Inc*, 2019 SCC 60, 29 CELR (4th) 1 [*Resolute FP Canada*].
[878] See *Interprovincial Co-operatives* QB, *supra* note 873 at 184.
[879] See *Interprovincial Co-operatives* SCC, *supra* note 161.
[880] For further discussion on the majority's reasoning with respect to extraterritoriality, see subsection 3.2.3.2.2.2 below.
[881] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 516, Pigeon J.
[882] See *Interprovincial Co-operatives* QB, *supra* note 873 at 178–79; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act 1867*].

occurred there. Relying on *Albert*, Manitoba pleaded that its courts had exclusive jurisdiction over claims concerning injury to real property. Justice Matas rejected Manitoba's position. He quoted Justice Harrison's dissent in *Albert* at length and noted widespread academic criticism of the majority's opinion.[883] He declined to artificially locate torts at the place of acting or the place of injury for all purposes.[884] He concluded that the province could legislate subject to constitutional constraints, and could sue in its own courts regardless of whether the tort involved an injury to real property.[885] Justice Matas' approach foreshadowed the rise of a more flexible approach to tort localization,[886] but it also showed early signs of judicial disagreement with *Albert* in the context of transboundary pollution.

This is not conclusive, of course: Justice Matas was skeptical of the local action rule but ultimately, even the strictest observance of *Albert* could have led him to conclude that Manitoba courts had jurisdiction because lands in Manitoba were indeed affected. Only one judge at the Supreme Court of Canada invalidated the *Fishermen Act* on the same ground as Justice Matas, namely its improper extraterritorial reach.[887] The three others invalidated the *Fishermen Act* on the basis that only the federal government could regulate interprovincial waters. Nonetheless, they distinguished the jurisdiction of Manitoba courts over a defendant from the constitutional authority of the Manitoba legislature to regulate transboundary torts.[888]

Malo (1943) is also instructive. There, tenants brought a claim for damages in Ontario against the alleged owner and lessor of a building located in Quebec, after the roof had collapsed. The defendant denied that he was the owner or lessor. Justice Plaxton held that the Ontario courts had jurisdiction because title to foreign land only arose incidentally in the proceedings.[889] This reasoning appears at odds with the wide interpretation of *Moçambique* favoured in *Albert*, but Justice Plaxton considered the claim to be based on

[883] See *Interprovincial Co-operatives* QB, *supra* note 873 at 179–80.
[884] See *ibid* at 182.
[885] See *ibid*.
[886] See Fridman, *supra* note 851 at 272–73. For further discussion on the localization of torts for jurisdictional purposes, see subsection 2.2.1.2 below.
[887] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 525–26, Ritchie J, concurring.
[888] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 508, 510, Pigeon J.
[889] See *Malo and Bertrand v Clement*, [1943] 4 DLR 773 at 776, 1943 CanLII 357 (Ont H Ct J).

a landlord-tenant contract rather than a tort and concluded that Ontario courts had jurisdiction *in personam*. *Malo* is therefore not determinative, but it suggests certain limits to the local action rule.

Godley (1988) contradicts *Moçambique* and *Albert* more directly. The case dealt with an action for damages after a toilet in the condominium owned by the defendant leaked into the plaintiff's condominium located below.[890] The condominiums were in Florida. The defendant relied on *Moçambique* and *Brereton* (a 1898 Canadian case to the same effect[891]) and argued that Ontario courts had no jurisdiction to hear a claim involving damage to foreign immovable property. Justice Carnwath noted that several scholars were against the application of the local action rule in tort.[892] He confined the rule to disputes involving title to foreign land and expressly rejected the contrary view:

> [14] […] the presence of some damage to immovable property in this case should not disentitle the plaintiffs from bringing their action in the Province of Ontario. It is clear in the cases referred to me that one of the underlying principles, and perhaps the primary underlying principle, for the existence of the *Moçambique* rule is to ensure that in actions where title to property is in question, the jurisdiction in which the property is located must hear the matter to the exclusion of every other jurisdiction, and with that principle no one would disagree. The difficulty arises when that principle is extended to fact situations where title to the property is not in issue, but rather damage caused by the negligent acts of another person to immovable property is in question […].
>
> […]
>
> [16] […] If the *Brereton* case is authority for the proposition that in every instance where a plaintiff sues for negligence, or seeks to sue for negligence in the Province of Ontario, and where that negligence, in another jurisdiction, has resulted in damage, however slight, to what can be described as "immovable property" and that, therefore, the plaintiff is precluded from suing in Ontario, I disagree with that conclusion in *Brereton*. I prefer the underlying rationale of Mr. Justice Hogg in the *Charron* case where he finds that *Brereton* was decided mainly on the basis that title to the land was in dispute.

[890] See *Godley v Coles* (1988), 39 CPC (2d) 162, [1988] OJ No 2808 (Dist Ct), aff'd (1989), 40 CPC (2d) xlvi, 1989 CarswellOnt 4989 (WL Can) (H Ct J) [*Godley*].
[891] See *Brereton*, *supra* note 866.
[892] See *Godley*, *supra* note 890 at 164–65.

> [17] Having reviewed the two articles previously referred to above, I agree with the conclusion of the authors, that the application of the rule in *Moçambique* should be restricted to the facts of that case and that it should not be taken for authority that wherever damage to land is included in the statement of claim, that an action for negligence to recover those damages should be precluded from being brought in the Province of Ontario where the land is situate[d] elsewhere.
>
> [18] On the rationale contained in the articles, I prefer to restrict the application of the *Moçambique* rule, and find that on the facts before me the plaintiff should be entitled to continue his action in this jurisdiction.[893]

Godley supports the proposition that Canadian courts have jurisdiction to hear disputes involving damage to foreign land, when title is not disputed.[894] Edinger suggests that this represents "a slight qualification to the trespass to foreign immovables prohibition on jurisdiction."[895] This is an understatement. The case certainly has its own peculiarities. Unlike *Albert*, a substantial proportion of the claim concerned damage to movable property.[896] Read together, *Albert* and *Godley* could simply mean that courts will assess the proportion of the claim related to moveable and immovable property and decide accordingly whether it has jurisdiction. Yet *Godley* was a case in which all events had occurred in a foreign jurisdiction. Justice Carnwath nonetheless declined to apply *Moçambique*, a conclusion that even Justice Harrison rejected in *Albert* by limiting the exception to transboundary damage.[897]

---

[893] *Ibid* at 165–66 [emphasis added].
[894] See CED 4th (online), *Conflict of Laws*, "Property: Immovables" (VIII.2) at § 297 (2018); Halsbury's Laws of Canada (online), *Conflict of Laws*, "Property: Immovables: Jurisdiction over Immovables" (VII.1(2)(a)) at HCF-221, "Matters Affecting Title to Foreign Immovables/Where Title Not in Dispute" (2016 Reissue); T Wood, *supra* note 1 at 292; Seck, "Environmental Harm", *supra* note 139 at 171; Michael I Jeffery, "Seeking Redress for Environmental Harm in the Context of Transboundary Pollution: Remedies, Access, and Choice of Law Considerations" in Seymour J Rubin & Dean C Alexander, eds, *NAFTA and the Environment* (The Hague: Kluwer Law International, 1996) 463 at 481. Jeffery appears to have changed his view on the status of the local action rule between 1992 and 1996. *Cf* Jeffery, *supra* note 858 ("[t]here is little doubt that the Canadian courts would have delined jurisdiction [over a dispute involving damage to land situated in the United States, ed]" at 175). Perhaps *Godley* changed his mind, but the judgent was issued several years before the publication of both pieces.
[895] Elizabeth Edinger, "Is *Duke v Andler* Still Good Law in Common Law Canada?" (2011) 51:1 Can Bus LJ 52 at 54, n 12.
[896] See *Godley*, *supra* note 890 at para 13.
[897] See *Albert*, *supra* note 843 at 51–52, Harrison J, dissenting.

Finally, in *Schwarzinger* (2011), the British Columbia Supreme Court limited the rule formulated by the House of Lords in *Hesperides Hotels* to trespass, and not other torts.[898]

The experience of Canadian plaintiffs in the United States further undermines the jurisdictional stigma associated with transboundary environmental disputes over foreign land. In *Michie*, a group of Ontario landowners sued in the United States three corporations that operated facilities in Michigan. They claimed that the pollutants emitted across the Detroit River constituted nuisance. There was no debate on the jurisdiction of the American courts (despite the fact that it concerned foreign land) nor on the standing of the Ontario plaintiffs. The case eventually went to trial after an unrelated preliminary objection got resolved.[899] And in *St Regis*, a Canadian Mohawk band sued in the United States two companies that operated aluminum plants in the state of New York. The District Court asserted jurisdiction, expressly rejecting the local action rule. It ultimately certified the class action.[900] Those cases have no legal weight in Canada,[901] but they show that lawsuits by foreign plaintiffs in the source state are plausible and, in some instances, accepted in other states.[902]

Inconsistent if not inconclusive precedents, near-unanimous academic criticism, the legislative changes in England and the adoption of the *Reciprocal Access Act* in some provinces cast a different light on the status of the local action rule in Canada insofar as torts are concerned. Decisions such as *Interprovincial Co-operatives*, *Godley* and *Malo* carry greater weight than we acknowledge, particularly given the scarcity of authorities on point. By the same token, a controversial eighty-year-old case about log driving

---

[898] See *Schwarzinger v Bramwell*, 2011 BCSC 283 at paras 85–86, [2011] BCWLD 5387. This was *obiter*. The Court ultimately asserted jurisdiction by virtue of the *in personam* exception to the local action rule. On this exception, see *Catania v Giannattasio* (1999), 174 DLR (4th) 170 at 173–74, 1999 CanLII 1930 (Ont CA); *Duke*, *supra* note 827 at 739; Antonin I Pribetic, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdiction Issues Arising from the In Personam Exception to the Moçambique Rule for Foreign Immovables" (2009) 35:2 Adv Q 230.

[899] See *Michie*, *supra* note 172.

[900] See *St Regis*, *supra* note 169.

[901] Furthermore, both cases ended with settlements before a judgment on the merits could be issued.

[902] See Hall, "Transboundary Pollution", *supra* note 163 at 724–32. Hall relies on *Michie* and other precedents to argue that suing in the source state is viable, particularly since the local action rule is no longer an obstacle in several states. Hall even suggests that litigation by foreign plaintiffs in the source state is "[t]he simplest and least controversial type of domestic litigation against transboundary pollution […]." *Ibid* at 724. This has to be balanced, of course, against the possible survival of the local action rule in certain states, as well as practicalities such as the costs of legal proceedings in a foreign state.

should not have the precedential value it currently has in the literature. The continuing fame of *Albert* in the environmental literature is mystifying, and courts should not consider themselves bound to interpret the local action rule so widely.

In Canada, provincial legislatures could conceivably abolish the tort aspects of the local action rule by statute. Four provinces (Ontario, Manitoba, Nova Scotia and Prince Edward Island) already did through the *Reciprocal Access Act.*[903] Three provinces (British Columbia, Nova Scotia, Saskatchewan) replaced the common law framework of jurisdiction with the *CJPTA*, which does not mention the local action rule and simply states that an immovable in the province amounts to a real and substantial connection.[904] It is unlikely, however, that the ULCC or the provinces that enacted the *CJPTA* intended to implicitly abolish the local action rule.[905] Only clear legislative intent can change the common law.[906] It would take more than the *CJPTA* to repeal the local action rule, but it remains possible.

Even if provinces do not repeal the local action rule, it is realistic and probable that an appellate court would favour today a strict interpretation of the *Moçambique* precedent. One author suggests that jurisdictional challenges by defendants in transboundary environmental disputes are doomed to fail because the *Moçambique* rule no longer applies in Canada when title is not at stake.[907] While this may be overly optimistic, at the very least, we must recognize that "[t]he scope of [the *Moçambique*] rule and its numerous exceptions is complex and changing."[908]

---

[903] See *Reciprocal Access Act*, *supra* note 740; *ON Reciprocal Access Act*, *supra* note 747; *MB Reciprocal Access Act*, *supra* note 747; *NS Environment Act*, *supra* note 747, ss 144–55; *PEI Reciprocal Access Act*, *supra* note 747.
[904] See *CJPTA*, *supra* note 813, s 10(a); *BC CJPTA*, *supra* note 813, s 10(a); *SK CJPTA*, *supra* note 813, s 9(a); *NS CJPTA*, *supra* note 813, s 11(a); *PEI CJPTA (not yet in force)*, *supra* note 813, s 10(a); *YT CJPTA (not yet in force)*, *supra* note 813, s 10(1)(a).
[905] See Pitel, *supra* note 818 at 77; Pitel & Rafferty, *supra* note 828 at 332; Black, Pitel & Sobkin, *supra* note 813 at 46–48.
[906] See *Canada (Attorney General) v Thouin*, 2017 SCC 46 at para 19, [2017] 2 SCR 184; *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at para 56, [2016] 2 SCR 521; *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at para 39, [2003] 2 SCR 157; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1077, Lamer J, dissenting in part, 1989 CanLII 92.
[907] See T Wood, *supra* note 1 at 290–91.
[908] Vaughan Black & Stephen GA Pitel, "Reform of Ontario's Law of Jurisdiction" (2009) 47:3 Can Bus LJ 469 at 473.

The Supreme Court of Canada insisted that the law should reflect our growing preoccupation for the safeguard of the environment,[909] and that private international law should remain "in step with the dynamic and evolving fabric of our society."[910] This fabric now includes more sophisticated environmental rights and greater emphasis on access to justice and civil liability in international environmental law. Disregarding *Albert* responds to the *ILC Principles on the Allocation of Loss* and to broader environmental considerations.[911] It also meets the jurisdictional requirements associated with the duty to ensure prompt and adequate compensation insofar as foreign plaintiffs are concerned.

2.2.1.2. Canadian plaintiffs in Canada

Can Canadian plaintiffs sue foreign polluters in Canada over transboundary pollution originating abroad? Certain states such as Singapore expressly allow courts to assert jurisdiction in such circumstances, regardless of where the pollution comes from and as long as it affects Singaporeans.[912] Canadian law is not as explicit, and the *Reciprocal Access Act* only addresses jurisdiction at the place of acting.

Maintaining the possibility of suing at the place of injury is traditionally justified by the need to ensure fairness to plaintiffs who do not have the financial resources to sue abroad, but this may not always be the case. Canadian victims may prefer to sue in the United States if the pollution originates in the latter. Lawyers are accustomed to Canada-United

---

[909] See *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at para 9, [2013] 3 SCR 323; *St Lawrence Cement*, *supra* note 343 at para 80; *Canadian Forest Products*, *supra* note 240 at para 7; *Imperial Oil*, *supra* note 343 at para 19, [2003] 2 SCR 624; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1, [2001] 2 SCR 241; *Hydro-Québec*, *supra* note 158 at 293–94; *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at 1075–76, 1995 CanLII 112.

[910] *Facebook*, *supra* note 575 at para 36, citing *R v Salituro*, [1991] 3 SCR 654 at 670, 1991 CanLII 17.

[911] For a similar point, see William K King, "Transboundary Pollution: Canadian Jurisdiction" (1982) 1:1 Can-Am LJ 1 ("[i]t is true there has not been a judicial decision rendered on local action rule since the *Albert* case, but there has been an increase in anti-pollution legislation. This provincial desire to protect the environment could be used to infer that the dissent in *Albert* may be the best way to strengthen the application of anti-pollution laws" at 14).

[912] See *Transboundary Haze Pollution Act 2014* (No 24 of 2014, Sing), ss 4, 6; Listiningrum, *supra* note 208 at 139–40; Mahdev Mohan, "A Domestic Solution for Transboundary Harm: Singapore's Haze Pollution Law" (2017) 2:2 Bus & HR 325; Ryan Nicholas Hong, "Singapore's Transboundary Haze Pollution Act and the Shield of Sovereignty in Southeast Asia" (2016) 34 Sing L Rev 103.

States litigation. A judgment in the United States would also be readily enforceable against the polluter located there—an important factor if plaintiffs seek injunctive relief.

Should victims decide to sue in their home province, the question becomes whether environmental damage is enough for Canadian courts to assert jurisdiction over foreign polluters. This assumes that the polluting activities occurred elsewhere (at the place of acting), that the defendant has no presence in the province and that it does not consent to have the claim tried there.[913]

Again, the answer is yes in Quebec. The CCQ expressly contemplates injury suffered in the province as a jurisdictional basis for personal actions.[914] This includes neighbourhood disturbance claims.[915] Furthermore, unlike in the EU, an indirect injury suffices to establish jurisdiction.[916] The plaintiff ought to actually have suffered the injury in Quebec (as opposed to an injury recorded there based on the location of the plaintiff's patrimony),[917] but this is unlikely to be contentious in transboundary environmental disputes that involve damage other than pure economic loss.

The common law offers no such hard-and-fast rule, but it would likely lead to the same result. This is because the fact that the victim suffered an injury in the province suffices to create a presumption of jurisdiction for each of the relevant torts. To substantiate my claim, I explain the jurisdictional framework for torts set out in *Van Breda* and the *CJPTA* (2.2.1.2.1). I then apply this framework to torts that are often seen in environmental litigation: negligence, nuisance, trespass, strict liability (also known as *Rylands v Fletcher*[918]) and breach of riparian rights (2.2.1.2.2).

---

[913] The mere presence of the *plaintiff* in the forum (as opposed to the defendant) does not alone suffice to establish jurisdiction. See *Leon v Volkswagen AG*, 2018 ONSC 4265 at para 35, 52 CCLR (4th) 151; *Van Breda*, *supra* note 112 at para 86.
[914] See CCQ, art 3148, para 1(3°).
[915] See the text accompanying note 928.
[916] See *Infineon*, *supra* note 797 at para 45; *Nosseir c Sea Pro Divers sa*, 2009 QCCA 2182 at para 2, [2009] JQ no 13825 (QL); *Hoteles Decameron Jamaica Ltd c D'Amours*, 2007 QCCA 418 at paras 24–25, [2007] RJQ 550; *Spar Aerospace*, *supra* note 790 at para 36.
[917] See *Infineon*, *supra* note 797 at para 46; *E Hofmann Plastics Inc v Tribec Metals Ltd*, 2013 QCCA 2112 at para 9, [2013] QJ No 17222 (QL); *Green Planet Technologies Ltd v OTR Blackstone Tire Corporation*, 2013 QCCA 56 at para 11, [2013] QJ No 170 (QL).
[918] See *Rylands v Fletcher*, [1868] UKHL 1, LR 3 HL 330.

2.2.1.2.1. Jurisdictional framework for torts

Canadian courts assume jurisdiction based on a real and substantial connection when a tort was committed in the forum. The Supreme Court of Canada held in *Van Breda* that the *situs* of the tort was clearly an appropriate connecting factor at common law.[919] All iterations of the *CJPTA* similarly permit the assertion of jurisdiction when a tort was committed in the province.[920] As we will see, transboundary pollution creates problems in localizing the tort because the wrongful act and the injury occur in different states.

The Court, however, rejected damages sustained in the province as a presumptive connecting factor. Unreservedly accepting this factor would risk "sweeping into that jurisdiction claims that have only a limited relationship with the forum."[921] In other

---

[919] See *Van Breda*, *supra* note 112 at para 88. See also *Goldhar*, *supra* note 809 at paras 36–37 (Côté J), 166 (McLachlin CJ, Moldaver & Gascon JJ, dissenting on other points).

[920] See *CJPTA*, *supra* note 813, s 10(g); *BC CJPTA*, *supra* note 813, s 10(g); *SK CJPTA*, *supra* note 813, s 9(g); *NS CJPTA*, *supra* note 813, s 11(g); *PEI CJPTA (not yet in force)*, *supra* note 813, s 10(g); *YT CJPTA (not yet in force)*, *supra* note 813, s 10(1)(g).

[921] *Van Breda*, *supra* note 112 at para 89. On the implications of *Van Breda* for the interpretation of article 3148, para 1(3°) CCQ, see Elizabeth Edinger, "*Club Resorts Ltd v Van Breda*: Extraterritoriality Revisited" (2014) 55:2 Can Bus LJ 263 at 277–79 [Edinger, "Extraterritoriality Revisited"]; Catherine Walsh, "The International Jurisdiction of Québec Authorities in Personal Actions: An Overview" (2012) 71 R du B 249 at 269–71. It is worth noting that the English version of the judgment uses the words "damage" and "injury" (singular) rather than the word "damages" (plural). This creates unnecessary confusion. Justice LeBel appeared to really be saying (*obiter*) that continuing damages suffered in the province as a result of an event that occurred elsewhere were insufficient to ground jurisdiction. See the discussion in *Gulevich v Miller*, 2015 ABCA 411 at paras 36–43, 393 DLR (4th) 304 [*Gulevich*]. Some authors, perhaps unconsciously, use the word damages (plural) in their recollection of the case. See Brandon Kain, Elder C Marques & Byron Shaw, "Developments in Private International Law: The 2011-2012 Term—The Unfinished Project of the *Van Breda* Trilogy" (2012) 59 SCLR (2d) 277 [Kain, Marques & Shaw] ("Justice LeBel expressly refused to recognize damages sustained in the province as a presumptive connecting factor […]" at 286–87); Lawrence G Theall et al, *Product Liability: Canadian Law and Practice* (Aurora: Canada Law Book, 2001) (loose-leaf updated 2018, release 23) ("[…] an assertion that a plaintiff suffered damages in a particular jurisdiction is unsatisfactory" at § L10:25.10). See also *Canadian National Railway Co v SSAB Alabama Inc*, 2018 SKQB 272, [2018] SJ No 398 (QL) [*Canadian National Railway*] ("[i]t is correct to observe that in *Van Breda*, the Supreme Court of Canada cautions against automatically concluding a tort is located in any jurisdiction where damages are suffered" at para 59). The official French translation of *Van Breda* uses the word "*préjudice*", which does not necessarily clear up the confusion. In *Infineon*, the Court seemed to imply different meanings for damage (singular, translated to "*préjudice*") and injury (awkwardly translated to "*fait dommageable subi*"). Compare "[d]amage suffered in Quebec is an independent factor under art. 3148(3): the damage does not need to be tied to the locus of the injury or of the fault, unlike in the case of art. 3168, to give one example" with "[l]*e préjudice subi au Québec constitue un facteur indépendant prévu au par. 3148(3): il n'est pas nécessaire que le préjudice soit lié à l'endroit où le fait dommageable a été subi ou la faute commise, contrairement par exemple à l'art. 3168*." *Infineon*, *supra* note 797 at para 45 [emphasis added]. For terminological purposes, I choose to distinguish between damage/injury and damages in this thesis. See generally France Allard & Madeleine Mailhot, *Les bons mots du civil et du pénal: dictionnaire français-anglais des expressions juridiques* (Montreal: Wilson & Lafleur, 2015); Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and*

words, plaintiffs cannot rely merely on damages to sue in their home province. Absent other connections, claims for pain and inconvenience accumulating in the forum after an accident that occurred outside the province, for instance, do not provide a sufficient connection with the province.[922] The Court's view gives a certain defendant-friendly impression, but it also promotes clarity, certainty and predictability.

Importantly, the Court did not exclude the place of injury as a potential forum in all circumstances. It even acknowledged that some torts might occur at the place of injury.[923] In two companion cases, the Court did in fact locate the tort of defamation at the place of injury, where the defamatory statement had been published and caused reputational damage.[924] The Court later took the same view in *Goldhar*.[925] Admittedly, the localization of the tort of defamation at the place of injury for jurisdictional purposes remains closely tied with the nature of the tort itself. Defamation is a tort of strict liability which crystallizes upon the publication of defamatory material—a third party hears, reads or downloads the material, which causes damage to the plaintiff's reputation.[926] Environmental torts, by contrast, involve tangible injury to persons or property. But the point remains that damages sustained in the province—inappropriate as a standalone

Bilingual Lexicons: Obligations (Cowansville: Yvon Blais, 2003) sub verbo "damage", "damages", "injury", "préjudice" and "dommage". I thank my supervisor Professor Geneviève Saumier for her insights on terminological issues in the Supreme Court of Canada's jurisprudence.

[922] See eg *Neumann v Loeppky*, 2018 ABQB 307 at para 17, [2018] AJ No 1475 (QL); *Geophysical Service Incorporated v Arcis Seismic Solutions Corp*, 2015 ABQB 88 at paras 63–64, 610 AR 225 [*Geophysical Service*]. But see *Brownlie*, *supra* note 788 at paras 21, 67 (where the United Kingdom Supreme Court omitted *Van Breda* and wrongly suggested that ongoing damage in the forum sufficed to assert jurisdiction in common law Canada).

[923] See *Van Breda*, *supra* note 112 at para 89.

[924] See *Breeden*, *supra* note 809 at para 20; *Éditions Écosociété*, *supra* note 809 at paras 38–39. See also *Composers Authors and Publishers Association of Canada Limited v International Good Music Inc*, [1963] SCR 136 at 143–44, 1963 CanLII 47, citing *Jenner v Sun Oil Company Limited* (1951), [1952] OR 240 at 251, 1951 CanLII 129 (SC).

[925] See *Goldhar*, *supra* note 809 at paras 36–38 (Côté J), 99 (Karakatsanis J, concurring), 147 (Wagner J, concurring), 166 (McLachlin CJ, Moldaver and Gascon JJ, dissenting on other points). Only Justice Abella would have adopted a different jurisdictional rule for cross-border defamation. See *ibid* at para 129, Abella J, concurring.

[926] See *ibid* at para 36; *Éditions Écosociété*, *supra* note 809 at para 57; *Crookes v Newton*, 2011 SCC 47 at paras 1, 16, [2011] 3 SCR 269; *Grant v Torstar Corp*, 2009 SCC 61 at para 28, [2009] 3 SCR 640; *Braintech v Kostiuk*, 1999 BCCA 169 at para 59, 171 DLR (4th) 46, leave to appeal to SCC refused, [2000] 1 SCR vii.

connecting factor—should not be confused with the *situs* of a tort, which may be located at the place of injury.

In the post-*Van Breda* era, courts will seek to locate torts in order to decide whether to assume jurisdiction. No bright-line rule locates torts in one place or the other. The analysis should focus on where each tort crystallizes, that is, where a cause of action exists.[927] Each tort has its own characteristics which could bear on this inquiry.[928] The same logic applies to statutory torts, particularly if they resemble common law torts,[929] but the relevance of *Van Breda* in this context is debatable.[930]

In this context, the question becomes whether torts that commonly arise in transboundary environmental disputes occur in the province for jurisdictional purposes if the victim suffered damage there. More accurately, the question is whether damage suffered in the province is sufficient for courts to assume jurisdiction rather than whether a tort *occurred* there, since courts reject the rigid localization of torts at one place or the other. In my view, the answer is yes, based on an application of the *Moran* case which I explain below.

---

[927] See *George Weston* CA, *supra* note 133 at para 90; *Éditions Écosociété*, *supra* note 809 at para 3; *Gulevich*, *supra* note 921 at paras 37, 43.

[928] See eg *Thorne v Hudson*, 2016 ONSC 5507 at paras 28–30, 134 OR (3d) 301, aff'd 2017 ONCA 208, 136 OR (3d) 797, leave to appeal to SCC refused, [2017] 3 SCR x (product liability); *Central Sun Mining Inc v Vector Engineering Inc*, 2013 ONCA 601 at paras 30–32, 117 OR (3d) 313, leave to appeal to SCC refused, [2014] 1 SCR xiii [*Central Sun Mining*] (negligent misrepresentation); *2249659 Ontario Ltd v Sparkasse Siegen*, 2013 ONCA 354 at para 31, 115 OR (3d) 241 (negligent misrepresentation).

[929] See eg *Yip v HSBC Holdings plc*, 2017 ONSC 5332 at paras 203–209, [2017] OJ No 4729 (QL), aff'd 2018 ONCA 626, 141 OR (3d) 641, leave to appeal to SCC refused, 38331 (28 March 2019) [*Yip*]; *Kaynes v BP plc*, 2014 ONCA 580 at para 34, 122 OR (3d) 162, leave to appeal to SCC refused, [2015] 1 SCR viii [*Kaynes*]; *Harrowand SL v DeWind Turbines Ltd*, 2014 ONSC 2014 at para 51, [2014] OJ No 2022 (QL); *Government of Saskatchewan v Rothmans, Benson & Hedges Inc*, 2013 SKQB 357 at paras 25–27, 368 DLR (4th) 474; *Ontario (Attorney General) v Rothmans Inc*, 2013 ONCA 353 at para 45, 115 OR (3d) 561, leave to appeal to SCC refused, [2013] 3 SCR vi [*Rothmans*]; *RJ Reynold Tobacco Company c Québec (Procureur général)*, 2013 QCCA 1702 at para 22, [2013] JQ no 13088 (QL); *R v Rothmans Inc*, 2010 NBQB 381 at para 36, 373 NBR (2d) 157, leave to appeal to NBCA refused, 2011 CanLII 20626, [2011] NBJ No 116 (QL), leave to appeal to SCC refused, [2011] 4 SCR vi; *British Columbia v Imperial Tobacco Canada Ltd*, 2006 BCCA 398 at para 34, 273 DLR (4th) 711, leave to appeal to SCC refused, [2007] 1 SCR xiii [*Imperial Tobacco* CA 2006]. See also *Newfoundland and Labrador (Attorney General) v Rothmans Inc*, 2013 NLTD(G) 180, 345 Nfld & PEIR 40 (NLSC (TD)).

[930] See Stephen GA Pitel & Vaughan Black, "Assumed Jurisdiction in Canada: Identifying and Interpreting Presumptive Connecting Factors" (2018) 14:2 J Priv Intl L 193 at 209–19 [Pitel & Black]. On the localization of statutory torts, see also Pitel et al, *supra* note 828 at 685–86.

Note that the analysis below applies not only to the *Van Breda* framework of jurisdiction but also to the *CJPTA.* The *CJPTA* refers to the commission of a tort as indicative of a real and substantial connection with a province but does not explicitly address transboundary torts. Courts typically rely on the same body of common law authorities to deal with this issue.[931]

2.2.1.2.2. Jurisdiction over environmental torts

The *Moran* case provides the guiding principle to deal with jurisdiction over transboundary pollution when an injury is suffered in the forum.[932] I examine *Moran* and its relevance in today's law of jurisdiction (2.2.1.2.2.1) and I apply it to transboundary pollution (2.2.1.2.2.2).

2.2.1.2.2.1. The *Moran* case

In *Moran*, the Supreme Court of Canada had to determine whether the Saskatchewan courts had jurisdiction to hear a statutory claim for negligent manufacture on the basis that the victim had suffered the injury in the province, even though the defendant had conducted its entire operation elsewhere. The Court found that Saskatchewan courts had jurisdiction and rejected earlier cases to the contrary.[933] Justice Dickson (as he then was) held that choosing between the place of acting and the place of injury was too rigid.[934] Instead, torts occur "in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable

---

[931] See eg *Fairhurst v De Beers Canada Inc*, 2012 BCCA 257 at paras 35–46, 351 DLR (4th) 168, leave to appeal to SCC refused, [2013] 1 SCR vi [*Fairhurst*]; *Stanway v Wyeth Pharmaceuticals Inc*, 2009 BCCA 592 at paras 58–62, 314 DLR (4th) 618, leave to appeal to SCC refused, [2010] 1 SCR svi.
[932] *Moran v Pyle National (Canada) Ltd* (1973), [1975] SCR 393, 1973 CanLII 192 [*Moran*].
[933] See *Abbott-Smith v Governors of University of Toronto* (1964), 45 DLR (2d) 672 at 687, 1964 CanLII 596 (NSSC); *George Monro Ltd v American Cyanamid and Chemical Corporation*, [1944] KB 432 at 439–40, [1944] 1 All ER 386 (CA). See also *Beck v Willard Chocolate Co*, (1924), 57 NSR 246 at 248–49, 1924 CanLII 359 (CA); *Paul v Chandler & Fisher Ltd* (1923), [1924] 2 DLR 479 at 481, 1923 CanLII 464 (Ont SC); *Anderson v Nobels Explosive Co* (1906), 12 OLR 644 at 650–51, [1906] OJ No 165 (Div Ct). For a survey of Anglo-Canadian cases prior to *Moran*, see C Granger, "Conflict of Laws—Jurisdiction—Place of Commission of Tort—*Moran v Pyle*" (1975) 7:1 Ottawa L Rev 240; Joost Blom, "Service out of the Jurisdiction—Tort Committed Within the Jurisdiction—Negligent Manufacture—*Moran v Pyle (National) Canada Ltd*" (1974) 9:2 UBC L Rev 389; William H Hurlburt, "Conflict of Laws—Jurisdiction—Service Ex Juris—Place of Tort" (1974) 52:3 Can Bar Rev 470; Fridman, *supra* note 851; PRH Webb & PM North, "Thoughts on the Place of Commission of a Non-Statutory Tort" (1965) 14:4 ICLQ 1314.
[934] See *Moran*, *supra* note 932 at 408.

contemplation of the parties."[935] In the context of product liability, Justice Dickson concluded that

> […] where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.[936]

The test focuses on objective foreseeability rather than the defendant's subjective state of mind, even though reasonableness depends to some extent on what the defendant actually knew about its customers.[937] Importantly, several courts may have jurisdiction over the dispute if the manufacturer could reasonably foresee that victims would use the product in several places.

The Supreme Court of Canada issued its judgment in 1973, but courts still rely on *Moran* to determine whether the place of injury has a real and substantial connection with the dispute. The case also extends beyond negligence.[938] The British Columbia Court of Appeal, for instance, applied *Moran* to locate the tort of conspiracy at the place of injury under the *BC CJPTA*.[939] The Supreme Court of Canada also cited *Moran* at length in its seminal judgments in *Morguard Investments* and *Hunt*.[940]

Nothing in the *CJPTA* or *Van Breda* contradicts *Moran*'s rationale.[941] Locating torts in the place most substantially affected by the defendant's activities or its consequences aligns with the presumptive factors set out in *Van Breda*, which did not exclude

---

[935] *Ibid* at 409. See also *Distillers Co (Biochemicals) Ltd v Thompson*, [1971] UKPC 3, [1971] AC 458 at 467–69 (PC) (a case which Justice Dickson cited in support of his proposed approach).
[936] Ibid at
[937] See *Alteen v Informix Corp* (1998), 164 Nfld & PEIR 301 at 303–304, 1998 CanLII 18652 (NLSC (TD)).
[938] But see *Wightman c Widdrington (Succession de)*, 2013 QCCA 1187 at para 173, [2013] RJQ 1054, leave to appeal to SCC refused, [2014] 1 SCR xiii [*Wightman*], citing Adrian Popovici, "Le « locus delicti » en droit international privé québécois" (1982–83) 17:3 RJT 463 at 467 [Popovici] (suggesting that Moran does not necessarily apply to all torts outside product liability cases).
[939] See *Fairhurst*, *supra* note 931 at para 36; *Imperial Tobacco* CA 2006, *supra* note 929 at para 32.
[940] See *Hunt v T&N plc*, [1993] 4 SCR 289 at 315–16, 1993 CanLII 43 [*Hunt*]; *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1105–1107, 1990 CanLII 29 [*Morguard Investments*].
[941] See *Canadian National Railway*, *supra* note 921 at para 59.

jurisdiction at the place of injury in all cases.[942] Although the Court spoke of torts *committed* in the province rather than having *occurred* there,[943] it could hardly exclude the place of injury without explicitly overruling *Moran* or at least explain its place in the new framework for assumed jurisdiction.

Only the foreseeability caveat formulated in *Moran* has an uncertain status today (at least conceptually) as a result of a shift in the Supreme Court of Canada's jurisprudence. The Court explained in *Van Breda* that defendants could rebut the presumption of assumed jurisdiction by showing that only a minor element of the tort had occurred in the province.[944] In such a case, the relationship between the dispute and the forum is so weak that "it would […] not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction."[945] The Court mentioned reasonable expectations in a rather general fashion in *Van Breda*. Justice LeBel used those words to describe what a weak connection with the forum generally looks like. He did not refer to the defendant's expectations *per se*, but to the inherent reasonableness of assuming jurisdiction in these circumstances ("it would not be reasonable to expect").[946]

Six years after *Van Breda*, *Goldhar* (2018) changed the meaning of those words slightly, but noticeably. There, the Supreme Court of Canada put considerably more emphasis on *the defendant's* reasonable expectations. Some courts had already done so after *Van Breda*, but not consistently.[947] The shift in *Goldhar* is more striking. Justice Côté, also writing for Justices Brown and Rowe, held that the defendant could have reasonably expected to answer legal proceedings in Ontario, where the victim of its allegedly

---

[942] See *ibid* at paras 58–59; *Gulevich*, *supra* note 921 at paras 44–48.
[943] See Walker, vol 2, *supra* note 828 at § 11.5.
[944] See *Van Breda*, *supra* note 112 at para 96.
[945] *Ibid* at para 97. See also *Goldhar*, *supra* note 809 at para 43; *LRMM*, *supra* note 809 at para 27.
[946] But see *Breeden*, *supra* note 809 at para 36 (where Justice LeBel agreed with the lower courts' finding that the appellants could have reasonably foreseen that their statements would cause damage to the reputation of the plaintiff in the province). On foreseeability and the jurisdictional framework in *Van Breda*, see Byron Shaw & Scott Robinson, "Goldhar v Hareetz.com: A Product of the Supreme Court's Unfinished Project to Reform Canadian Private International Law" (2019) 49:2 Adv Q 143 at 148–51 [Shaw & Robinson].
[947] See *Geophysical Service*, *supra* note 922 at para 44; *Kaynes*, *supra* note 929 at para 29; *Central Sun Mining*, *supra* note 928 at para 33; *Sincies Chiementin SpA (Trustee of) v King*, 2012 ONCA 653 at para 13, [2012] OJ No 4562 (QL), leave to appeal to SCC refused, [2013] 2 SCR ix. *Cf Galaxy Dragon Limited v Top Water Exclusive Fund IV LLC*, 2012 ONCA 382 at para 5, [2012] OJ No 2522 (QL) (where the Court of Appeal's language reflects *Van Breda* more closely).

defamatory statement lived and conducted business.[948] Chief Justice McLachlin and Justices Moldaver and Gascon, dissenting, also identified reasonable foreseeability as a key criterion to rebut the presumption of jurisdiction.[949] Justice Abella, concurring, explained that from *Moran* to *Van Breda*, courts had always asked whether it was inherently reasonable to assume jurisdiction, a question which, for her, meant asking whether the defendant had reasonably contemplated that scenario.[950] The analysis thus becomes more subjective and defendant-focused.

With *Goldhar*, reasonable foreseeability seems to have become a formal test similar to the one used in *Moran* to locate complex torts.[951] The shift is noteworthy but inconsequential in many cases. The defendant's expectations and the inherent reasonableness of assuming jurisdiction often converge. Conceptually, things are not so simple because the jurisdictional analysis now has two stages—locating the tort and rebutting the presumption. *Moran* uses foreseeability to locate the tort and *Goldhar* uses foreseeability to rebut the presumption. But in reality, these are two sides of the same coin. Foreseeability helps establish jurisdiction when it indicates a strong connection with the forum. Conversely, unforeseeability helps rebut the presumption of jurisdiction when it indicates a weak connection with the forum. The result is the same at either stage. On another note, the reasoning in *Goldhar* may be specific to the tort of defamation.[952]

2.2.1.2.2.2. *Moran* and transboundary pollution

Combining *Moran* with the *CJPTA* or the *Van Breda* framework as interpreted in *Goldhar*, courts at the place of injury have presumptive jurisdiction over foreign polluters when they could reasonably foresee that their operations would have an impact there. The diverse sets of reasons in *Interprovincial Co-operatives*—a lawsuit by the province of Manitoba against polluters operating in Ontario and Saskatchewan—already suggested

[948] See *Goldhar*, *supra* note 809 at para 45, Côté J.
[949] See *ibid* at paras 170–71, McLachlin CJ, Moldaver and Gascon JJ, dissenting.
[950] See *ibid* at para 125, Abella J, concurring.
[951] On protecting parties' expectations in Canadian private international law, see JG Castel, "Should the Protection of the Justified Expectations of the Parties Become an Exception to or a Major Consideration When Applying the Principle of Proximity in Litigation Involving Conflict of Laws Issues?" (2019) 49:4 Adv Q 481.
[952] See the text accompanying note 926.

that *Moran* was relevant in that context. In his concurring reasons, Justice Ritchie explicitly relied on *Moran* to note in conclusion that Manitoba courts would have jurisdiction to hear Manitoba's common law claims against foreign polluters, regardless of the constitutionality of the *Fishermen Act*.[953] At trial, Justice Matas had also relied on *Moran* at length, rejecting an all-or-nothing approach to the localization of torts for jurisdictional purposes.[954] Chief Justice Laskin, dissenting with Justices Judson and Spence, approved *Moran* but used it to determine the applicable law.[955] Justice Pigeon, also writing for Justices Martland and Beetz, preferred to confine *Moran* to the jurisdictional analysis and refused to apply that precedent "to identify the legal system under which the rights and liabilities of the parties fall to be determined."[956]

Applying the *Moran* principle of foreseeability to transboundary pollution (either to locate environmental torts or to rebut the presumption of jurisdiction) implies some limits to Canadian courts' jurisdictional reach. But the words are so open-ended that they make it difficult to assess exactly when and how those limits apply in practice. The foreseeability exception made sense in *Moran* because a manufacturer has some degree of control over its distribution chain and should answer to the courts of the states where its products end up. It also made sense in *Goldhar* because the defamatory statement targeted a specific individual who lived in Ontario. The environmental consequences of industrial operations have a different character. They are obviously not commercialized nor put into the stream of commerce (except perhaps on carbon markets) and may remain unknown for decades. An American company operating near the Canadian border can contemplate that water or air pollution will have an impact across the border. But can a company operating thousands of kilometres away reasonably contemplate that its local operations will cause damage on Canadian territory? This goes to the causal connection between the polluting activity and the damage suffered in the forum.[957] This is a

[953] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 526, Ritchie J, concurring.
[954] See *Interprovincial Co-operatives* QB, *supra* note 873 at 180–82.
[955] See *ibid* at 501, Laskin CJC, dissenting.
[956] *Interprovincial Co-operatives* SCC, *supra* note 161 at 515, Pigeon J. On the impact of *Moran* in *Interprovincial Co-operatives*, see Muldoon, Scriven & Olson, *supra* note 109 ("[…] it was unclear whether the *Moran* test was accepted [in *Interprovincial Co-operatives* SCC], although a close reading of the case suggests that it in fact was accepted" at 49); Popovici, *supra* note 938 at 467 (suggesting that only the dissenting judges in *Interprovincial Co-operatives* SCC clearly approved *Moran*).
[957] See *Gariepy v Shell Oil Co* (2000), 51 OR (3d) 181 at 190, 2000 CanLII 22706 (Sup Ct).

notoriously difficult problem for plaintiffs in toxic torts and climate change litigation,[958] and it may arise early on as part of the jurisdictional analysis.[959] Even if plaintiffs successfully establish that the tort occurred in the forum, remote injuries could rebut the presumption of jurisdiction because they would amount to a very small portion of the tort and could not have been contemplated by the foreign defendant, even *prima facie*.[960] This said, neither unforeseeability nor remoteness alters the fact that applying *Moran* and *Van Breda* (or the *CJPTA*) can, at least in principle, justify jurisdiction at the place of injury.

This becomes clearer when we look at each of the relevant common law torts. Most claims against polluters or public authorities involve negligence or property torts such as nuisance, trespass, strict liability (*Rylands v Fletcher*) and breach of riparian rights. In *Interprovincial Co-operatives*, for instance, Manitoba's common law claims against polluters operating in Ontario and Saskatchewan were based on negligence, nuisance and trespass.[961]

---

[958] The Lliuya case illustrates this point. Recently, German courts agreed to hear a case brought by a Peruvian farmer to force a German energy company to pay for a small portion of the flood defences needed on his land to deal with the impacts of climate change. No issue of jurisdiction or choice of law arose but proving the causal connection between the defendant's activities in Germany and the plaintiff's injury in Peru may be daunting. See Oberlandesgericht Hamm [Higher Regional Court], 30 November 2017 (Germany), translated in Columbia Law School Sabin Center for Climate Change Law, "Climate Change Litigation Database", online: *Climate Change Litigation Database* <www.climatecasechart.com> [perma.cc/U334-XFJG]; GermanWatch, "Saúl Versus RWE—The Case of Huaraz", online: *GermanWatch* <www.germanwatch.org> [perma.cc/4LHP-SJ5P]. For background information on the case, see Will Frank, Christoph Bals & Julia Grimm, "The Case of Huaraz: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts" in Mechler et al, *supra* note 372, 475; Ciara Nugent, "Climate Change Could Destroy This Peruvian Farmer's Home: Now He's Suing a European Energy Company for Damages", *Time* (5 October 2018), online: <www.time.com> [perma.cc/J74D-4TMG]; Agence France-Presse, "German Court to Hear Peruvian Farmer's Climate Case Against RWE", *The Guardian* (30 November 2017), online: <www.theguardian.com> [perma.cc/KER6-XMFY]. See also Christian Huglo, "Justice climatique: vers un nouveau droit international de l'environnement", *Environnement et technique* 378 (March 2018) 56, also online: *Actu-Environnement* <www.actu-environnement.com> [perma.cc/5N45-U5AY].

[959] On causation, climate change and jurisdiction in European private international law, see Giansetto, *supra* note 225 at 514–15, 518–25.

[960] See *Van Breda*, *supra* note 112 at para 96.

[961] See *Interprovincial Co-operatives* QB, *supra* note 873 at 170. See also *Midwest Properties Ltd v Thordarson*, 2015 ONCA 819, 128 OR (3d) 81, leave to appeal to SCC refused, [2016] 1 SCR xviii [*Midwest Properties*] (breach of statutory duty, nuisance and negligence); *Canada (Attorney General) v MacQueen*, 2013 NSCA 143, (*sub nom MacQueen v Sydney Steel Corp*) 338 NSR (2d) 133, rehearing denied, 2014 NSCA 73, 348 NSR (2d) 221, leave to appeal to SCC refused, [2015] 1 SCR ix (trespass, nuisance, battery and strict liability); *Smith v Inco*, 2010 ONSC 3790, 52 CELR (3d) 74, rev'd 2011 ONCA 628, 107 OR (3d) 321, leave to appeal to SCC refused, [2012] 1 SCR xii, motion for reconsideration of the application for leave to appeal refused, [2014] 2 SCR ix (negligence, nuisance and strict liability); *Stephens*

Negligence follows the *Moran* reasoning. Courts at the place of injury can assume jurisdiction because damage constitutes the tort.[962] Nuisance, trespass, strict liability (*Rylands v Fletcher*) and breach of riparian rights all involve interference with property. They have the most natural connections with the place of injury, that is, where the property is located.[963] Property in the forum in fact creates a presumption of jurisdiction in non-tort disputes.[964] The local action rule itself is premised on the fact that the courts where the land is located are best equipped to deal with the dispute. It is indefensible as a rule that denies jurisdiction at the place of acting but it does confirm that the place of injury is an acceptable basis for jurisdiction in tort disputes under the *Van Breda* framework.

Scholars took the same view before *Van Breda*. McCaffrey, among others, argued that environmental torts occur at the place of injury.[965] This view remains persuasive today because *Moran* remains the primary authority on the localization of torts for jurisdictional purposes. It is also confirmed in the literature post-*Van Breda*.[966]

---

v Village of Richmond Hill (1955), [1956] OR 88, 1955 CanLII 104 (CA) (riparian rights); *KVP Co Ltd v McKie*, [1949] SCR 698, 1949 CanLII 8 (riparian rights).

[962] See *Furlan v Shell Oil Co*, 2000 BCCA 404 at para 21, [2000] 7 WWR 433, leave to appeal to SCC refused, [2001] 1 SCR xii; *GWL Properties Ltd v WR Grace & Co–Conn* (1990), 50 BCLR (2d) 260 at 264, 1990 CanLII 1369 (CA); *Moran*, *supra* note 932 at 409.

[963] See *Peace River (Town) v British Columbia Hydro & Power Authority* (1972), 29 DLR (3d) 769 at 773, 1972 ALTASCAD 40 (CanLII) (Alta SC (AD)), leave to appeal to SCC refused, [1972] SCR ix; *Albert*, *supra* note 843 at 45–46; Pitel et al, *supra* note 828 at 680.

[964] See *Knowles v Lindstrom*, 2014 ONCA 116 at paras 21–22, 118 OR (3d) 763, leave to appeal to SCC refused, [2014] 2 SCR viii.

[965] See McCaffrey, *Transfrontier Environmental Disturbances*, *supra* note 227 at 28; McCaffrey, "Jurisdictional Considerations", *supra* note 227 at 248. See also João CJG de Medeiros, "How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel" (2007) 92:2 Minn L Rev 529 at 548–49; Parrish, *supra* note 113 at 391–92; Jeffery, *supra* note 858 at 178–79; Muldoon, Scriven & Olson, *supra* note 109 at 49; Cooper, *supra* note 164 at 275; McNamara, *supra* note 227 at 81–83. But see Fairley, *supra* note 12 at 270. Fairley suggests that "the ruling decision in [*Interprovincial Co-operatives*] […] implies that a person may not sue in his own jurisdiction for damage caused there, if the instigating act (i.e. the discharge of the contaminant) was done outside his jurisdiction." In my view, Fairley confuses jurisdiction with the extraterritorial application of provincial law. *Interprovincial Co-operatives* concerned the power of a province to regulate acts committed outside his jurisdiction by statute, not the power of a provincial court to assert jurisdiction in tort disputes (which the Supreme Court of Canada had already dealt with in *Moran*).

[966] See Olszynski, Mascher & Doelle, *supra* note 107 at 36–37; Gage & Wewerinke, *supra* note 107 at 16–19; Gage & Byers, *supra* note 107 at 24–27; Péloffy, *supra* note 107 at 136. Péloffy suggests, however, that suing at the place of injury would raise constitutional problems in an interprovincial setting. See Péloffy, *supra* note 107 at 136. This is a choice of law problem which I address in subsection 3.2.1.2 below.

This result has support in American law, most notably in *Pakootas* and Minnesota's environmental long-arm statute.[967] The case of *Wyandotte Chemicals* is also illustrative. Ohio had filed a bill of complaint before the Supreme Court of the United States regarding the contamination and pollution of Lake Erie by corporations doing business in Michigan and Ontario. The Court denied the motion but suggested *obiter* that Ohio courts would have jurisdiction over the matter because the dumping of mercury into Lake Erie had disastrous effects on its territory.[968] Ohio courts did in fact assert jurisdiction later in the litigation, on the basis that "[w]here a person introduces poisonous substances into a body of water which causes injuries in Ohio, it constitutes the causing of tortious injuries by an act or omission in the forum state […] even though the substances emanated from a manufacturing plant located outside of the [s]tate of Ohio."[969]

This is not an exhaustive analysis of American law. Recent developments from the country's highest tribunal have significantly reframed the law of jurisdiction in cases where the plaintiff suffered damage in the United States, and emphasized the importance

[967] See Minn Stat § 116B.11 (2017); *Pakootas* 9th Cir 2018, *supra* note 1615 at 574–78; *Pakootas v Teck Cominco Metals*, 2004 US Dist Lexis 23041 at 5–13, 2004 WL 2578982 (WL Int) (ED Wash 2004), aff'd 452 F (3d) 1066, 2006 US App Lexis 13662 (9th Cir 2006), certiorari denied, 552 US 1095, 128 S Ct 858 (2008) [*Pakootas* ED Wash]. Both *Pakootas* cases relied on *Calder v Jones*, 465 US 783, 104 S Ct 1482 (1984).

[968] See *Wyandotte Chemicals*, *supra* note 162 at 500. On the jurisdiction of Ohio courts, see Bruce W Ficken, "Wyandotte and Its Progeny: The Quest for Environmental Protection through the Original Jurisdiction of the Supreme Court" (1974) 78:3 Dick L Rev 429 at 436, n 38; "Ohio v Wyandotte Chemicals Corp: Forum Non Conveniens in the Supreme Court" (1972) 67:1 Nw UL Rev 59 at 70–71; Don K Lloyd, "Ohio v Wyandotte Chemicals Corp: Restatement of the Original Jurisdiction of the Supreme Court of the United States" (1972) 2:2 Envtl L 358 at 360; "Original Jurisdiction—Interstate Water Pollution: Alternatives to the Original Jurisdiction of the United States Supreme Court—*Ohio v Wyandotte Chemicals Corp*, 401 U.S. 493 (1971)" (1972) 47:3 Wash L Rev 533 at 536–46; J William Wopat III, "Supreme Court Declines Original Jurisdiction in Lake Erie Pollution Case" (1971) 25:4 U Miami L Rev 794 at 799–800; Winton D Woods Jr & Kenneth R Reed, "The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case" (1970) 12:4 Ariz L Rev 691 at 696–701 (all debating whether Ohio would have asserted jurisdiction over the defendants or whether Ohio was an appropriate forum).

[969] *Ohio v BASF Wyandotte Corp*, 67 Ohio Op (2d) 239 at 247 (Cuyahoga Co Ct Com Pl 1974), aff'd 1975 Ohio App Lexis 6311, 1975 WL 182459 (WL Int) (Ohio 8th Dist Ct App 1975).

of the relationship between the forum and the defendant.[970] Suffice to say here that a Canadian version of *Pakootas* would not surprise American observers.[971]

Based on this analysis, I conclude that Canadian plaintiffs can sue foreign polluters in Canada for damages. Jurisdictional barriers have either fallen apart or become easier to overcome. Injunctions aimed at preventing damage, however, may still be ineffective. Courts can issue injunctions with extraterritorial effects,[972] but can only enforce them if the defendant is present in the jurisdiction in one way or another, such that conduct occurring elsewhere may lead to contempt proceedings in the province. Courts cannot otherwise compel foreign defendants or enforce orders against their property abroad.[973] If an injunction was granted against a foreign polluter, plaintiffs would have to seek its recognition and enforcement at the place of acting.

Summing up, both foreign and local plaintiffs can sue in Canada to seek compensation for transboundary pollution. Courts can assume jurisdiction against local polluters when they operate in the province. They can (and should) ignore the local action rule if foreign land is involved. Courts can also assume jurisdiction against foreign polluters if local plaintiffs suffered damage in the province, because it indicates sufficient connections with the forum. In common law provinces, foreign polluters can rebut the presumption of

---

[970] See *Walden v Fiore*, 571 US 277, 134 S Ct 1115 (2014); *Daimler AG v Bauman*, 571 US 117, 134 S Ct 746 (2014); *Goodyear Dunlop Tires Operations, SA v Brown*, 564 US 915, 131 S Ct 2846 (2011); *J McIntyre Machinery v Nicastro*, 564 US 873, 131 S Ct 2780 (2011).

[971] See Parrish, *supra* note 113 at 391–92; Peter Hay, "Environmental Protection and Civil Liability in the United States" in Von Bar, *Internationales Umwelthaftungsrecht*, *supra* note 351, 129 at 146–48.

[972] See *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 38, [2017] 1 SCR 824 [*Google*]; *National Bank of Canada v Weir*, 2010 QCCS 402 at para 48, [2010] RJQ 823; *Impulsora Turistica de Occidente, SA de CV v Transat Tours Canada Inc*, 2007 SCC 20 at para 6, [2007] 1 SCR 867; *Barrick Gold Corp v Lopehandia*, 71 OR (3d) 416 at 445–46, 2004 CanLII 12938 (CA).

[973] See eg *Chevron* SCC 2015, *supra* note 112 at para 46; *Italsav, srl v Dynafund Ltd*, 2011 QCCS 3643 at paras 41–43, [2011] QJ No 9660 (QL); *ICI Chèque c Travel Currency Inc*, 2005 CanLII 7020 at para 28, [2005] JQ no 1704 (QL) (Sup Ct), leave to appeal to Qc CA refused, [2005] JQ 17032 (QL) (CA); *Encaissement de chèque Montréal Ltée c Softwise Inc*, 1999 CanLII 10997 at para 40, [1999] JQ no 200 (QL) (Sup Ct); *United Services Fund (Trustees of) v Richardson Greenshields of Canada Ltd* (1988), 23 BCLR (2d) 1 at 7, 1988 CanLII 2960 (CA); *Sous-ministre du Revenu du Québec c Fornataro* (1982), [1983] RL 344 at 348–49, 1982 CanLII 2805 (Qc Sup Ct); *Lido Industrial Products Ltd v Teledyne Industries Inc* (1978), [1979] 1 FC 310 at 313–14, 1978 CanLII 2053 (FCA); *McGuire v McGuire and Desordi*, [1953] OR 328 at 335, 1953 CanLII 150 (CA). *Cf Instrubel v Republic of Iraq*, 2019 QCCA 78 at para 42, [2019] QJ No 232 (QL), aff'd 2019 SCC 61, [2019] SCJ No 61 (QL) (the seizure of a debt due by a local debtor is not a case of enforcement against foreign assets, regardless of where the funds are physically held).

jurisdiction by showing that they could not have reasonably contemplated the consequences of their activities in the province. This caveat may affect the availability of prompt and adequate compensation but only on a case-by-case basis. It does not preclude the assumption of jurisdiction altogether.

My findings cast new light on past efforts to implement equal access in North America. The *Draft Treaty on Equal Access and Remedy*, the *Reciprocal Access Act* and the *NAAEC* failed to generate tangible results but the general law of jurisdiction matches the policies that inspired them in the first place and responds to the preoccupations expressed in the *ILC Principles on the Allocation of Loss*.

2.2.2. Declining jurisdiction over transboundary pollution

Even though Canadian courts should normally be able to assert jurisdiction over a transboundary environmental dispute, other aspects of the jurisdictional analysis appear to be less in tune with equal access and the duty to ensure prompt and adequate compensation. Notably, courts have the discretionary power to refuse to exercise their jurisdiction in certain circumstances. This is called *forum non conveniens.* The doctrine originated in Scotland[974] and made its way to Canada through the common law (formally introduced in *Amchem Products*[975] and embedded into the *Van Breda* framework of jurisdiction[976]), the *CJPTA*[977] and the CCQ.[978] *Forum non conveniens* is a common law

[974] See Ardavan Arzandeh, "The Origins of the Scottish *Forum Non Conveniens* Doctrine" (2017) 13:1 J Priv Intl L 130.
[975] See *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 1993 CanLII 124 [*Amchem Products*].
[976] See *Goldhar*, *supra* note 809 at paras 46–49; *LRMM*, *supra* note 809 at paras 51–54; *Van Breda*, *supra* note 112 at paras 101–12; *Breeden*, *supra* note 809 at paras 22–29; *Éditions Écosociété*, *supra* note 809 at para 40.
[977] See *CJPTA*, *supra* note 813, s 11; *BC CJPTA*, *supra* note 813, s 11; *SK CJPTA*, *supra* note 813, s 10; *NS CJPTA*, *supra* note 813, s 12; *PEI CJPTA (not yet in force)*, *supra* note 813, s 11; *YT CJPTA (not yet in force)*, *supra* note 813, s 11; *Facebook*, *supra* note 575 at para 20; *Teck Cominco Metals Ltd v Lloyd's Underwriters*, 2009 SCC 11 at para 22, [2009] 1 SCR 321.
[978] See CCQ, art 3135; *Uashaunnuat*, *supra* note 112 at paras 67–70; *Transax Technologies*, *supra* note 795 at paras 38–52, [2017] JQ no 3880 (QL); *Droit de la famille—152222*, 2015 QCCA 1412 at paras 31–44, [2015] JQ no 8345 (QL); *Stormbreaker Marketing and Productions Inc c Weinstock*, 2013 QCCA 269 at paras 74–119, [2013] JQ no 1012 (QL), leave to appeal to SCC refused, [2013] 2 SCR xiv; *Boucher v Stelco Inc*, 2005 SCC 64 at paras 36–38, [2005] 3 SCR 279; *Spar Aerospace*, *supra* note 790 at paras 65–82; *Lexus Maritime Inc c Oppenheim Forfait GmbH*, 1998 CanLII 13001 at 7–8, [1998] JQ no 2059 (QL) (CA).

construct. It was introduced into certain mixed jurisdictions such as Quebec,[979] where substantive private law is governed by rules of the civil law tradition, but procedure remains strongly influenced by the common law tradition.[980]

In broad outline, the doctrine allows the court to refuse to exercise its jurisdiction if the defendant shows that it would be more appropriate to try the case in another forum for reasons of efficiency and fairness, even though the court seized has jurisdiction under its own rules. The discretionary power to refuse the exercise of jurisdiction keeps forum shopping in check, ensures proximity between the forum and the dispute and avoids parallel proceedings.[981]

Difficulties arise, of course, when plaintiffs, defendants and the justice system have different perspectives on which forum is the most appropriate. Courts have developed over time a series of factors to determine whether to decline jurisdiction. In *Van Breda*, the Supreme Court of Canada mentioned as examples the location of parties and witnesses, the costs of a transfer and its impact on litigation, the possibility of conflicting judgments, recognition and enforcement problems and the strengths of the connections of the parties.[982] In *Goldhar*, the Court examined convenience and expenses for parties and witnesses, the loss of a legitimate juridical advantage, fairness, recognition and enforcement problems, applicable law and the avoidance of parallel proceedings.[983] The *CJPTA* and the CCQ operate in a similar way but the list of factors varies.[984] All iterations of the test acknowledge that declining jurisdiction should remain exceptional. There must be more than just another forum where the case *could* be heard. That other

---

[979] On *forum non conveniens* in civil law, see Ronald A Brand & Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford: Oxford University Press, 2007) at 121–40; Ronald A Brand, "Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments" (2002) 37:3 Tex Intl LJ 467 at 485, 487–90.

[980] See *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at paras 27–28, [2010] 2 SCR 592; *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc*, 2001 SCC 51 at para 33, [2001] 2 SCR 743.

[981] See Pitel & Rafferty, *supra* note 828 at 117–19.

[982] See *Van Breda*, *supra* note 112 at para 110. See also *Breeden*, *supra* note 809 at paras 30–36; *Éditions Écosociété*, *supra* note 809 at paras 44–64.

[983] See *Goldhar*, *supra* note 809 at paras 96 (Côté J), 192 (McLachlin CJ, Moldaver & Gascon JJ, dissenting).

[984] With respect to the *CJPTA*, see the sources cited *supra* note 977. With respect to the CCQ, see the sources cited *supra* note 978.

forum must also be *clearly more appropriate* than the one chosen by the plaintiff, who benefits from a presumption that his or her choice is acceptable as long as the court chosen has jurisdiction.[985]

Forum non conveniens is an frequent target in the private international law and global governance discourse.[986] It is easy to see why. In the "classic" scenario, victims of gross corporate human rights violations who turn to civil courts cannot sue at the corporate domicile of the perpetrator (usually a well-developed legal system in which they can seize assets), and are forced instead to sue where the perpetrator operated and caused damage (possibly an underdeveloped legal system in which the defendant has minimal assets). This is a broad generalization,[987] but one that illustrates the fundamental objection to *forum non conveniens* in the global governance discourse—that justice will not be achieved if plaintiffs are sent back to a country with weak legal institutions and no effective redress simply because it would be more appropriate to have their claim tried there. Injustices in this context include delays in trial, additional expenses and possibly outright denial of access to an effective remedy.[988] A common line of argument blames these injustices on the judicial overuse of a doctrine that should remain exceptional,[989] and perhaps even completely unavailable when the defendant is domiciled in the jurisdiction.[990]

---

[985] See *Goldhar*, *supra* note 809 at paras 46 (Côté J), 182–83 (McLachlin CJ, Moldaver & Gascon JJ, dissenting); *LRMM*, *supra* note 809 at para 52; *Van Breda*, *supra* note 112 at paras 108–109; *Breeden*, *supra* note 809 at para 23; *Éditions Écosociété*, *supra* note 809 at para 64; *Spar Aerospace*, *supra* note 790 at para 77; *Amchem*, *supra* note 975 at 931.

[986] See eg Van Loon, "Global Legal Ordering", *supra* note 83 at 233–34; Van Loon, "Principles and Building Blocks", *supra* note 83 at 309; Van Loon, "Global Horizon", *supra* note 83 at 92–94.

[987] See on this point Louis d'Avout, "L'entreprise et les conflits internationaux de lois" (2018) 397 Rec des Cours 9, reprinted in vol 38 of the *Procket Books of the Hague Academy of International Law* (Leiden: Koninklijke Brill) [D'Avout] ("[p]*arfois vérifiée en pratique, dans certaines affaires spectaculaires très étudiées par les juristes de droit international, cette équation synthétique doit être diversement nuancée. Elle ne reflète pas, loin s'en faut, l'issue inéluctable de tout contentieux transnational de la responsabilité lié aux activités économiques délocalisées des entreprises mondiales*" at 448).

[988] See Fawcett, Ní Shúilleabháin & Shah, *supra* note 519 at para 6.129; Kiestra, *supra* note 519 at 108–10.

[989] See eg Jeffrey Talpis & Shelley L Kath, "The Exceptional as Commonplace in Québec *Forum Non Conveniens* Law: *Cambior*, A Case in Point" (2000) 34:3 RJT 731 [Talpis & Kath].

[990] The ILA Committee on International Civil and Commercial Litigation suggested in 2000 that the forum "would be entitled to give particular weight, if it considered it appropriate to do so, to the domicile of the defendant, so as to refuse to decline jurisdiction where the action was brought in the courts of the defendant's domicile […] [but] did not consider that the possibility of declining jurisdiction in cases brought in the defendant's domicile should be wholly eliminated." International Law Association,

The doctrine of *forum non conveniens* is complex and could easily be the subject of an entire thesis.[991] Others have already attempted a reformulation of Canadian law.[992] I will be brief and focus on the implications of the doctrine for the duty to ensure prompt and adequate compensation. In other words, does the existence of *forum non conveniens* in Canada prevent plaintiffs from obtaining prompt and adequate compensation in transboundary environmental disputes, given that courts would otherwise have the necessary jurisdiction to ensure its availability? This question has a theoretical and a practical side.

Theoretically, the doctrine hardly aligns with the duty to ensure prompt and adequate compensation, even though the *ILC Principles on the Allocation of Loss* are silent on this

---

"Committee on International Civil and Commercial Litigation: Third Interim Report—Declining and Referring Jurisdiction in International Litigation" (2000) 69 Intl L Assn Rep Conf 137 at 161, as considered and adopted by International Law Association, "Resolution No 1/2000: International Civil and Commercial Litigation" (2000) 69 Intl L Assn Rep Conf 13. The 2012 *Sofia Guidelines on Best Practices for International Civil Litigation for Human Human Rights Violations*, however, exclude the doctrine of *forum non conveniens* entirely when jurisdiction is based on the domicile of the defendant in the forum. See International Law Association, "Resolution No 2/2012: International Civil Litigation and the Interests of the Public" (2012) 75 Intl L Assn Rep Conf 19, Guideline 2.5(1). The Committee took the view that unconstrained application of the doctrine "upsets predictability of the rules and puts the parties in a position which is detrimental to the good administration of justice." International Law Association, "International Civil Litigation and the Interests of the Public: Final Report" (2012) 75 Intl L Assn Rep Conf 321 at 366, as considered and adopted by International Law Association, "Resolution No 2/2012: International Civil Litigation and the Interests of the Public" (2012) 75 Intl L Assn Rep Conf 19. This echoes a debate that occurred in Quebec after the introduction of *forum non conveniens* in article 3135 CCQ. Some courts held that the domicile of the defendant was not always the natural forum, and that defendants domiciled in the province could rely on the doctrine of *forum non conveniens* as any other defendant could. See *Cambior*, *supra* note 131 at para 38; *HL Boulton & Co SACA c Banque Royale du Canada* (1994), [1995] RJQ 213 at 221–22, [1994] JQ no 1448 (QL) (Sup Ct); *Banque Toronto-Dominion c Arsenault*, [1994] RJQ 2253 at 2255, [1994] JQ no 1922 (QL) (Sup Ct). Others suggested otherwise. See *Bennaouar c Machhour*, 2012 QCCA 469 at para 32, [2012] JQ no 2106 (QL); *Malden Mills Industries Inc c Huntingdon Mills (Canada) Ltd*, [1994] RJQ 2227 at 2229–30, 1994 CanLII 3779 (Sup Ct); *Gordon Capital Corp c La Garantie, compagnie d'assurances de l'Amérique du Nord*, 1993 CarswellQue 1111 (WL Can) at paras 54–59, EYB 1993-73217 (Référence) (Sup Ct), rev'd [1995] RDJ 537, 1995 CanLII 4686 (Qc CA) (decided prior to the entry into force of the CCQ). On this point, see Gérald Goldstein, *Droit international privé*, vol 2: Compétence internationale des autorités québécoises et effets des décisions étrangères (Cowansville: Yvon Blais, 2013) at para 3135.580 [Goldstein, *Droit international privé*]; Talpis & Kath, *ibid* at 810, 840–42; Sylvette Guillemard, Alain Prujiner & Frédérique Sabourin, "Les difficultés de l'introduction du *forum non conveniens* en droit québécois" (1995) 36:4 C de D 913 at 936–38. Today, the domicile of the parties is but one factor in the analysis under article 3135 CCQ. See *Omega Laboratories Ltd c Claris Lifesciences Ltd*, 2018 QCCS 2596 at paras 26–27, [2018] JQ no 5344 (QL), leave to appeal to Qc CA refused, 2018 QCCA 1356, [2018] QJ No 7982 (QL) and the sources cited *supra* note 978.

[991] For a forceful criticism of the doctrine as applied in the United States, see Maggie Gardner, "Retiring Forum Non Conveniens" (2017) 92:2 NYU L Rev 390.

[992] See Chilenye Nwapi, "Re-Evaluating the Doctrine of *Forum Non Conveniens* in Canada" (2013) 34:1 Windsor Rev Legal Soc Issues 59; Nwapi, *supra* note 138 at 361–409.

point. Proceedings may last several more years if a court dismisses the case and forces plaintiffs to sue in another forum, not to mention the delays and costs associated with the debate itself and the risk that the limitation period expires. This judicial detour hardly favours prompt compensation. Nor is the compensation adequate if the plaintiffs never relitigate their case elsewhere. Empirical evidence suggests that only a small portion of cases dismissed on the basis of *forum non conveniens* reappear on another court's docket.[993] Plaintiffs may have exhausted their financial resources or face corruption and coercion in the foreign state, forcing them to settle on disadvantageous terms with the defendants or drop their claim altogether. This is what happened in *Cambior* after dismissal in Quebec.[994] From this perspective, *forum non conveniens* contradicts international commitments to foster access to justice in environmental matters.[995] It also discriminates against foreign plaintiffs and threatens the right to a fair trial under human rights law when no such trial is available abroad.

Practically, however, the abolition of *forum non conveniens* on the altar of prompt and adequate compensation is exaggerated and unrealistic. As Anderson observes, its rules "have been framed over a period of many years without much reference to outside norms such as human rights, and have acquired their own kind of autonomy and self-referential processes of internal validation."[996] Applying the doctrine only to the most obvious cases of reprehensible forum shopping is more feasible.[997] In any event, transboundary environmental disputes do not offer the best setting to highlight potential abuses of *forum non conveniens*. Those who advocate the doctrine's incompatibility with human rights standards primarily attack the idea of sending disempowered individuals back to the courts of a country that offers no meaningful prospect of redress. This would not be the

[993] See Christopher A Whytock & Cassandra Burke Robertson, "Forum Non Conveniens and the Enforcement of Foreign Judgments" (2011) 111:7 Colum L Rev 1444 at 1448, n 18, citing David W Robertson, "Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"" (1987) 103:3 Law Q Rev 398 at 418–20; Percival, "Liability for Environmental Harm", *supra* note 231 at 51; Muir Watt, "Aspects économiques", *supra* note 53 at 301.
[994] See Scott & Wai, *supra* note 60 at 302–303; Jeffrey Talpis, *"If I Am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (Montreal: Thémis, 2001) at 49–50 [Talpis].
[995] See *Aarhus Convention*, *supra* note 406, arts 3(9), 9(4).
[996] Anderson, *supra* note 5 at 414.
[997] See Pitel & Rafferty, *supra* note 828 at 119.

case in a dispute involving pollution between Canada and the United States, or two EU states, for instance.

Other scenarios in which *forum non conveniens* could prevent prompt and adequate compensation of environmental damage are similarly narrow. Courts could dismiss a claim if it concerned a very diffuse form of pollution with a remote connection to the forum, or to avoid dealing with sensitive political issues.[998] But there is no evidence of a widespread use of *forum non conveniens* that impedes prompt and adequate compensation of environmental damage in Canada. Legislatures and courts have kept the doctrine in check more tightly here than in other common law jurisdictions, and defendants face a heavy burden in their attempts to have a claim dismissed.[999] In bilateral or regional environmental disputes, the connections between the dispute and each of the countries involved are typically strong enough that no single forum stands out as clearly more appropriate, and an attempt to invoke the doctrine will fail.[1000] While it is difficult to speculate in the abstract on the application of a fact-specific doctrine that varies across jurisdictions, *forum non conveniens* is a less serious issue for transboundary pollution

[998] See Zerk, *supra* note 229 at 113–14, 133 (insisting on the hidden regulatory context of private disputes with a foreign element).

[999] See Saumier, "PILAGG", *supra* note 138 at 5; Sylvette Guillemard & Marjorie Tête, "Le *forum non conveniens* une vingtaine d'années plus tard: encore quelques questions non résolues" (2012) 25:1 RQDI 175 at 178, n 15; Geneviève Saumier, "Le *forum non conveniens* au Québec: bilan d'une transplantation" in Sylvette Guillemard, ed, *Mélanges en l'honneur du professeur Alain Prujiner* (Cowansville: Yvon Blais, 2011) 345 at 349–50. See eg *Araya v Nevsun Resources Ltd*, 2017 BCCA 401, 419 DLR (4th) 631, aff'd 2020 SCC 5, [2020] SCJ No 5 (QL) [*Nevsun Resources* CA] (where the British Columbia Court of Appeal noted the practical and logistical difficulties of trying claims for torture, slavery and forced labour against a Canadian mining company operating in Eritrea but maintained its jurisdiction and rejected the *forum non conveniens* argument as there was a real risk of corruption and unfairness in the Eritrean justice system); *Tahoe Resources*, *supra* note 133 (where the British Columbia Court of Appeal maintained its jurisdiction and rejected the *forum non conveniens* argument for several reasons, including the weakness and lack of independence of the Guatemalan justice system). But see Manirabona, "Barrier Removal", *supra* note 138 at 47; Nwapi, *supra* note 138 at 414, 506; Talpis, *supra* note 994 at 45–46; Talpis & Kath, *supra* note 989 at 795–96; Rémi Samson, "Appréciation critique de la doctrine du *forum non conveniens* en droit québécois: si nous étions partis du bon pied…" (1999) 11 RJEUL 111 at 126 (all criticizing what they perceive is a widespread use of the doctrine).

[1000] Talpis and Kath also suggest that "[t]he forum's overriding public interest […] in the enforcement of laws which protect the global environment" may justify the dismissal of a *forum non conveniens* motion when a local polluter causes damage abroad. See Talpis & Kath, *supra* note 989 at 861–62

than for human rights litigation. I leave it to others to study its implications in other contexts.[1001]

2.2.3. Enforcing foreign judgments against local polluters

The final question in this chapter concerns the recognition and enforcement in Canada of foreign judgments obtained by victims against Canadian polluters. I focus here on enforcement[1002] because it has the most obvious implications for the duty to ensure prompt and adequate compensation. First, enforcement ensures that victims get paid. The *Chevron* saga is a striking example of the challenges faced by victims in this regard.[1003] Second, enforcement can ensure that pollution actually stops. This is because Canadian courts are prepared to enforce foreign injunctions and other non-monetary judgments in certain circumstances.[1004]

International environmental law recognizes the importance of facilitating the enforcement of foreign judgments in order to make sure that prompt and adequate compensation is not defeated after a judgment on the merits. Most civil liability treaties require the reciprocal recognition and enforcement of judgments by all parties, absent some exceptional and narrowly defined situations.[1005] More surprisingly, neither the *ILC Principles on the Allocation of Loss* nor the HCCH, the ILA or the IIL gave detailed guidance on this point.

[1001] For a counterpoint to the typical discourse describing *forum non conveniens* as a major obstacle in human rights litigation, see D'Avout, *supra* note 987 at 446–56.
[1002] On the distinction between recognition and enforcement, see Pitel & Rafferty, *supra* note 828 at 163.
[1003] See *Chevron* CA 2018, *supra* note 132; Manuel A Gómez, "A Sour Battle in Lago Agrio and Beyond: The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador" (2015) 46:2 U Miami Inter-Am L Rev 153; Manuel A Gómez, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429.
[1004] See *United States of America v Yemec*, 2010 ONCA 414 at paras 43–53, 100 OR (3d) 321; *Facebook Inc c Guerbuez*, 2010 QCCS 4649 at paras 37–41, [2010] RJQ 2373, leave to appeal to Qc CA refused, 2011 QCCA 268, [2011] JQ no 1052 (QL); *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at paras 30–31, [2006] 2 SCR 612 [*Pro Swing*].
[1005] See *Kiev Liability Protocol*, *supra* note 135, art 18; *Bunker Convention*, *supra* note 321, art 10; *Basel Liability Protocol*, *supra* note 327, art 21; *CSC*, *supra* note 322, art XIII(5); *HNS Convention*, *supra* note 326, art 40; *Lugano Convention*, *supra* note 318, art 23; *CLC*, *supra* note 289, art X; *Fund Convention*, *supra* note 289, art 8; *CRTD Convention*, *supra* note 325, art 20; *Seabed Mineral Resources Convention*, *supra* note 319, art 12; *Vienna Convention*, *supra* note 322, art XII; *Nuclear Ships Convention*, *supra* note 323, art XI(4); *Paris Convention*, *supra* note 322, art 13(d).

Here again, it is difficult to assess the implications of the rules governing the enforcement of foreign judgments in the abstract. For this reason, I do not examine every condition imposed by the common law or the CCQ, nor do I address reciprocity agreements with other provinces or foreign states. I focus instead on two issues that may become contentious in transboundary environmental disputes: the indirect jurisdiction of a foreign court (2.2.3.1) and the public law/public policy exceptions to the enforcement of foreign judgments (2.2.3.2). As explained below, neither of these issues raises insurmountable obstacles in enforcement proceedings, except in a small subset of cases involving widely divergent legal regimes purporting to apply to a sensitive issue for the source state. Other issues may arise depending on the contents of any given judgment, but they are not distinctive enough to address here.[1006]

2.2.3.1. Indirect jurisdiction of foreign courts

The first issue concerns indirect jurisdiction, or the assessment of foreign courts' jurisdiction before enforcing their judgments in the forum. Civil liability treaties typically require courts to assess indirect jurisdiction before enforcing foreign judgments.[1007] Courts in common law provinces enforce foreign judgments only if the foreign court is considered to have jurisdiction under the law of the forum—in other words, if there was a real and substantial connection between that court and the dispute or the parties.[1008] If a local polluter causes an injury to foreign victims without being present in the jurisdiction, the analysis will focus on whether the foreign court had jurisdiction following the approach established in *Moran* and *Van Breda*. If the answer is yes, as I have argued, plaintiffs should have no difficulty enforcing their judgment in all common law provinces except New Brunswick. This is because New Brunswick has adopted a statute governing

[1006] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 126.
[1007] See *Kiev Liability Protocol*, *supra* note 135, art 18(1); *Bunker Convention*, *supra* note 321, art 10(1); *Basel Liability Protocol*, *supra* note 327, art 21(1); *CSC*, *supra* note 322, art XII(5); *HNS Convention*, *supra* note 326, art 40(1); *Lugano Convention*, *supra* note 318, art 23(1); *CLC*, *supra* note 289, art X(1); *Fund Convention*, *supra* note 289, art 8; *CRTD Convention*, *supra* note 325, art 20(1); *Seabed Mineral Resources Convention*, *supra* note 319, art 12(1); *Vienna Convention*, *supra* note 322, art XII(1); *Nuclear Ships Convention*, *supra* note 323, art XI(4)(a); *Paris Convention*, *supra* note 322, art 13(d).
[1008] See *Chevron* SCC 2015, *supra* note 112 at para 32; *Pro Swing*, *supra* note 1004 at para 31; *Beals v Saldanha*, 2003 SCC 72 at paras 24–38, [2003] 3 SCR 416 [*Beals*]; *Morguard Investments*, *supra* note 940 at 1106–1107.

the enforcement of judgments issued outside Canada. The statute provides only two grounds of indirect jurisdiction: the ordinary residence of the defendant in the state of origin (which may be a problem if the plaintiffs sued at the place of injury) or its voluntary submission to the jurisdiction of the foreign court (a question of fact).[1009]

The law is different in Quebec. Courts are unlikely to enforce foreign judgments against local polluters if the only basis of indirect jurisdiction available is the fact that plaintiffs suffered damage in the foreign state, as a result of a fault committed elsewhere. Quebec courts assess the indirect jurisdiction of the foreign court using the grounds set out in article 3168 CCQ.[1010] As with article 3148 CCQ (direct jurisdiction), any single ground suffices.[1011] Crucially, however, those grounds differ from those set out in article 3148 CCQ to establish the direct jurisdiction of local courts.[1012] Article 3168(3°) CCQ provides that the foreign court has jurisdiction only if the fault, injurious act or omission and the injury occurred there.[1013] Local courts, by contrast, have direct jurisdiction over a dispute even if only one element (injury, fault, injurious act or omission) is established.[1014] Indirect jurisdiction is therefore significantly narrower than direct jurisdiction in this context,[1015] possibly because in the context of foreign judgments, Quebec courts cannot consider whether the foreign court should have applied the doctrine of *forum non conveniens* and declined to exercise its jurisdiction.[1016] The unavailability

[1009] See *Foreign Judgments Act*, RSNB 2011, c 162, s 2 [*NB Foreign Judgments Act*]. Saskatchewan also has a statute on the enforcement of foreign judgments, but the grounds of indirect jurisdiction are closer to those of the common law. See *The Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121, ss 4(a), 8–9 [*SK Foreign Judgments Act*].
[1010] See CCQ, arts 3155(1°), 3168; *Barer v Knight Brothers LLC*, 2019 SCC 13 at paras 23–35, 432 DLR (4th) 197 [*Barer*].
[1011] *Barer*, *supra* note 1010 at paras 34, 45.
[1012] See *Canada Post Corp v Lépine*, 2009 SCC 16 at paras 25–26, [2009] 1 SCR 549 [*Canada Post*].
[1013] See CCQ, art 3168(3°).
[1014] See CCQ, art 3148, para 1(3°). See also the text accompanying notes 796–797.
[1015] See *Infineon*, *supra* note 797 at para 45; *Iraq (State of) c Heerema Zwijndrecht, bv*, 2013 QCCA 1112 at paras 18–20, [2013] JQ no 6498 (QL) [*Heerema Zwijndrecht*]; *Labs of Virginia Inc c Clintrials Bioresearch Ltd*, [2003] RJQ 1876 at 1879–81, 2003 CanLII 33227 (Sup Ct); *Opron Inc c Aero System Engineering Inc*, [1999] RJQ 757 at 770–71, 1999 CanLII 11072 (Sup Ct); *Cortas Canning and Refrigerating Co v Suidan Bros Inc*, [1999] RJQ 1227 at 1232, 1999 CanLII 12203 (Sup Ct), appeal to Qc CA discontinued, 500-09-007981-996 (9 September 1999) [*Cortas Canning and Refrigerating*].
[1016] See *Canada Post*, *supra* note 1012 at paras 28–37 (holding that article 3135 CCQ cannot limit indirect jurisdiction through the "mirror" provision of article 3164 CCQ). See also *Hocking c Haziza*, 2008 QCCA 800 at paras 172–87, Bich JA, concurring, [2008] RJQ 1189 [*Hocking*].

of the "important counterweight" provided by *forum non conveniens*[1017] justifies narrowing down the grounds of indirect jurisdiction listed in the CCQ at the outset, in order to avoid condoning overly broad assertions of jurisdictions by foreign courts.[1018]

A few scholars criticized article 3168(3°) CCQ at the time of its adoption because it was overly restrictive in requiring that the entire cause of action had arisen in the foreign state,[1019] but the provision did not spark major debates in the literature or the case law. The restrictive approach of article 3168(3°) CCQ was not unprecedented. The 1971 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* established indirect jurisdiction when the facts leading to the injury had occurred in the foreign state and the author was there at the time.[1020] The HCCH's 2019 *Convention on the Recognition and Enforcement of Foreign Judgments* now takes a similar approach for non-contractual obligations.[1021] It frames indirect jurisdiction differently than in the CCQ, but it equally does not recognize jurisdiction at the place of injury alone, that is, when the defendant acted elsewhere (in cases involving product

[1017] See *Rees*, *supra* note 589 at para 45; *Spar Aerospace*, *supra* note 790 at para 57.
[1018] See Goldstein, *Droit international privé*, *supra* note 990 at para 3168.555. This said, it was not clear at the time of the adoption of the CCQ that the doctrine of *forum non conveniens* did not apply in the context of indirect jurisdiction. Certain authors thought otherwise. See the authorities cited in *Canada Post*, *supra* note 1012 at paras 30–33; *Hocking*, *supra* note 1016 at paras 174–78. Ultimately, the legislature may have simply intended to better protect Canadian judgment debtors and limit the grounds of indirect jurisdiction in article 3168 CCQ accordingly. See Emanuelli, *Droit international privé*, *supra* note 852 at para 290.
[1019] See Gérald Goldstein & Ethel Groffier, *Droit international privé*, vol 1: théorie générale (Cowansville: Yvon Blais, 1998) at para 181. See also Groffier, *supra* note 855 at 167 (noting that article 3168(3°) CCQ might lead to "problems" when the fault and the injury occur in different places). But see Gérald Goldstein & Jeffrey Talpis, "Les perspectives en droit civil québécois de la réforme des règles relatives à l'effet des décisions étrangères au Canada (1ère partie)" (1995) 74:4 Can Bar Rev 641 ("[l]*a compétence fondée sur toute la cause d'action* […], *plus restreinte que celle des tribunaux québécois, ne pose pas de problème* […]" at 650). For a discussion of the draft bill which preceded the CCQ and used a different wording than article 3168(3°) CCQ, see JA Talpis & G Goldstein, "Analyse critique de l'Avant-projet de loi du Québec en droit international privé" (1989) 91:5/6 R du N 293, (1989) 91:7/8 R du N 456 & (1989) 91:9/10 R du N 606 at 637–39 [Talpis & Goldstein].
[1020] See *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 1 February 1971, 1144 UNTS 249, art 10(4), 5:4 ILM 636 (entered into force 20 August 1979), reprinted in HCCH, *Collection of Conventions*, *supra* note 94, 112; Ch N Fragistas, "Rapport explicatif" in Hague Conference on Private International Law, *Proceedings of the Extraordinary Session of 1966: 13 to 26 April 1966. Enforcement of Judgments* (The Hague: Imprimerie Nationale, 1969) 359 at 374.
[1021] See *Convention on the Recognition and Enforcement of Foreign Judgments*, *supra* note 94, art 5(1)(j).

liability or transboundary pollution, for instance).[1022] It does not, however, displace the other grounds of indirect jurisdiction available in the domestic law of a member state.[1023]

Quebec courts have developed innovative workarounds to enforce foreign judgments even if a tort is not easily located in a single place. In *Jules Jordan Video*, a California adult film production company and its sole shareholder sought to enforce in Quebec a judgment in damages for infringement of its intellectual property. The Quebec defendants had distributed thirteen counterfeited DVDs of the plaintiffs' work in California. Justice Gouin of the Quebec Superior Court found that California courts had jurisdiction over the dispute because the defendants ought to have been aware that the DVDs would end up in California, even though they had sold them through an intermediary. As a result, the fault (the sale of the DVDs) and the resulting injury (the harm to plaintiffs' intellectual property rights) had both occurred in California under article 3168(3°) CCQ.[1024] This is a creative interpretation of the fault: the Court could have easily held that the fault had occurred in Quebec where all the defendants were located.

Glenn advocated a similar reasoning to circumvent the restrictive language of the CCQ. He suggested that plaintiffs frame their cause of action narrowly to make it fit entirely within the foreign jurisdiction.[1025] The proposal is a throwback to a pre-CCQ era when Quebec courts could only assert jurisdiction if the whole cause of action had arisen

---

[1022] See Andrea Bonomi, "New Challenges in the Context of Recognition and Enforcement of Judgments" in Ferrari & Fernández Arroyo, *supra* note 83, 390 at 408; Hans van Loon, "Embracing Diversity—The Role of the Hague Conference in the Creation of Universal Instruments" in Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela, eds, *Diversity and Integration in Private International Law* (Oxford: Oxford University Press, 2019) 31 at 41; Van Loon, "Principles and Building Blocks", *supra* note 83 at 314–15; Joost Blom, "The *Court Jurisdiction and Proceedings Transfer Act* and the Hague Conference's Judgments and Jurisdiction Projects" (2018) 55:1 Osgoode Hall LJ 257 at 283.

[1023] Indeed, the *Convention on the Recognition and Enforcement of Foreign Judgments* permits the enforcement of foreign judgments under domestic law, except in cases of exclusive indirect jurisdiction. This means that a judgment rendered at the place of injury could be enforced elsewhere if the law of the enforcing court contemplates such possibility. See *Convention on the Recognition and Enforcement of Foreign Judgments*, *supra* note 94, art 15.

[1024] See *Jules Jordan Video Inc c 144942 Canada Inc*, 2014 QCCS 3343 at paras 54–71, [2014] JQ no 7055 (QL). See also *Bellord c Jolicoeur*, 2018 QCCQ 8992 at paras 31–41, [2018] JQ no 11782 (QL) (defamatory statement about Hawaii resident posted from the defendant's computer in Quebec—fault and injury held to have occurred in the state of Hawaii for enforcement purposes).

[1025] H Patrick Glenn, "Recognition of Foreign Judgments in Quebec" (1997) 28:3 Can Bus LJ 404 at 410, cited in *Cortas Canning and Refrigerating*, *supra* note 1015 at 1232–33. See also H Patrick Glenn, "Codification of Private International Law in Quebec" (1996) 60:2 Rabel J Comp & Intl Priv L 231 at 259 (in relation to direct jurisdiction); Glenn, "Droit international privé", *supra* note 855 at 777.

there.[1026] In this context, the Supreme Court of Canada held that the failure to warn about the dangers of a product occurred where the warning should have been given, such that the whole cause of action (fault and injury) could arise in a single place even if the product had been designed or sold elsewhere.[1027] The preliminary explanatory report to the *Convention on the Recognition and Enforcement of Foreign Judgments* suggests a similar workaround.[1028] The rapporteurs admit that a judgment emanating from the place of injury may not be enforced against manufacturers located elsewhere if the cause of action derives from a defect in the manufacturing of the product. They do suggest, however, that it might be possible if the cause of action derived instead from a failure to warn the user of the dangers of a product. Courts at the place of injury would then have indirect jurisdiction because the faulty omission occurred in the forum in addition to the injury itself.[1029]

These methods were developed with the distribution of products in mind, but they can also help plaintiffs looking to enforce foreign judgments against local polluters. Quebec courts are not bound by a foreign court's findings on jurisdiction.[1030] They might find that dumping harmful substances is a continuing fault that occurred in both jurisdictions, much like the United States Court of Appeals for the Ninth Circuit concluded in *Pakootas* that the release of substances from a facility had in fact occurred entirely on American soil for *CERCLA* purposes, even though the polluter was based in Canada.[1031] Alternatively, they might find that the fault—framed as an omission to prevent pollution—occurred entirely in the foreign jurisdiction. Finally, they might find that an

---

[1026] See *E Hofmann Plastics*, *supra* note 917 at para 13; *Code of Civil Procedure*, 14–15 Eliz II 1965, c 80, art 68, para 1(2) as it appeared before 1 January 1994, amended by *Act respecting the implementation of the reform of the Civil Code*, SQ 1992, c 57, s 193(1°) and repealed by *An Act to establish the new Code of Civil Procedure*, SQ 2014, c 1, s 833.

[1027] See *Air Canada v Mcdonnell Douglas Corp*, [1989] 1 SCR 1554 at 1568–70, 1989 CanLII 54; *Wabasso Ltd v National Drying Machinery Co*, [1981] 1 SCR 578 at 591–92, 1981 CanLII 16. See also *Partner Reinsurance Company Ltd c Optimum Réassurance Inc*, 2020 QCCA 490 at paras 59–60, [2020] JQ no 2211 (QL).

[1028] See Francisco Garcimartín & Geneviève Saumier, "Judgments Convention: Revised Draft Explanatory Report", HCCH Prel Doc 1 (December 2018) at para 205, online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/8N3A-67BD].

[1029] See *ibid*.

[1030] See *Barer*, *supra* note 1010 at para 32; *Zimmermann Inc v Barer*, 2016 QCCA 260 at paras 16–19, [2016] QJ No 893 (QL); *Heerema Zwijndrecht*, *supra* note 1015 at para 15. *Cf* CCQ, art 3158 (prohibiting the review of foreign judgments on the merits).

[1031] See *Pakootas* 9th Cir 2006, *supra* note 14 at 1075.

injurious act occurred in the foreign jurisdiction. Case law defines an injurious act (a term used in articles 3148, para 1(3°) and 3168(3°) CCQ) as an event that caused damage and attracts no-fault liability.[1032] This is especially relevant in product liability claims because the CCQ imposes a no-fault regime on the manufacturers, distributors and suppliers of a product.[1033] The same reasoning applies in environmental claims involving no-fault neighbourhood disturbance under article 976 CCQ. Pollution could thus be characterized as an injurious act that occurred in the foreign jurisdiction because it attracts a form of no-fault liability.

A recent decision from the Supreme Court of Canada left open another avenue for the enforcement of foreign judgments issued by the courts of the victim state. Article 3164 CCQ provides that "[t]he jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under [the CCQ], to the extent that the dispute is substantially connected with the [s]tate whose authority is seized of the matter." In *Barer*, the majority of the Court suggested, without settling the matter, that article 3164 CCQ could plausibly be interpreted as providing a standalone basis for indirect jurisdiction when the conditions of article 3168 CCQ are not met.[1034] Justice Brown, concurring, held that article 3164 CCQ supported the existence of indirect jurisdiction based on specific provisions of the CCQ governing direct jurisdiction (articles 3136, 3138 to 3140 CCQ) even when the conditions of article 3168 CCQ are not met.[1035] Quebec courts had already taken that approach in the past.[1036] Justice Côté, dissenting, suggested as much.[1037] Of course, article 3164 CCQ cannot serve to circumvent article 3168(3°) CCQ by invoking article 3148, para 1(3°) instead.[1038] It could, however, establish the indirect jurisdiction of the courts at the place of injury when

[1032] See *Quebecor World Inc c Union Capital Corporation*, 2006 QCCS 3820 at paras 35–36, [2006] JQ no 7048 (QL); *Spar Aerospace*, *supra* note 790 at para 42. But see *Waldman v Waldman*, 2017 QCCA 1398 at para 6, [2017] QJ No 12748 (QL) (where the Court of Appeal conflates fault and injurious act).
[1033] See CCQ, art 1468.
[1034] See *Barer*, *supra* note 1010 at para 86, relying on *Canada Post*, *supra* note 1012 at para 36.
[1035] See *ibid* at paras 118–27, Brown J, concurring.
[1036] See *Ortega Figueroa c Jenckel*, 2015 QCCA 1393 at paras 25–39, [2015] JQ no 8137 (QL), leave to appeal to SCC refused, [2016] 1 SCR vi; *Bil'In (Village Council) v Green Park International Inc*, 2009 QCCS 4151 at para 60, [2009] RJQ 2579, aff'd 2010 QCCA 1455, 322 DLR (4th) 232, leave to appeal to SCC refused, [2011] 1 SCR vi.
[1037] See *ibid* at para 260, Côté J, dissenting.
[1038] See *ibid* at para 125, Brown J, concurring.

one of the exceptional provisions applies, particularly if the foreign court was a forum of necessity.[1039]

Plaintiffs going after local polluters with a foreign judgment will no doubt ask courts to be inventive in the determination of indirect jurisdiction. On the other hand, the wording of article 3168(3°) CCQ is clear, and creatively interpreting causes of action has its limits. A positive act in state *x* (discharging contaminants into a river, for instance) that causes damage in state *y* simply does not constitute a fault committed in state *y*. If it did, it would be because a statute says so. In *Pakootas*, *CERCLA*'s wording and logic gave the Court enough leverage to conclude (perhaps artificially) that the dispute was purely domestic. In most cases, however, Quebec courts will have no choice but to conclude that the fault and the damage did not occur in the same place. Enforcement of foreign judgments against local polluters is therefore less likely in Quebec than in other provinces (except New Brunswick in an international context[1040]).

On another note, article 3168(3°) CCQ may be constitutionally impermissible in an interprovincial setting. The Supreme Court of Canada held in *Morguard Investments* and *Hunt* that courts are bound to give "full faith and credit" to judgments from other provinces, so long as there exists a real and substantial connection between the dispute and the province in which the judgment was rendered.[1041] In doing so, the Court explicitly referred to the facts of *Moran* (damage suffered in a place that the defendant could have reasonably contemplated) as an example of a real and substantial connection.[1042] Justice La Forest noted that "if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment."[1043] And in *Spar Aerospace*, the Court held

[1039] See CCQ, art 3136 and the sources cited *supra* note 852. Articles 3138 and 3140 CCQ concern interim measures. As such, they are less likely to arise in the context of foreign judgments. See Geneviève Saumier, "The Recognition of Foreign Judgments in Quebec—The Mirror Crack'd?" (2002) 81:3 Can Bar Rev 677 at 702–703 [Saumier, "Mirror Crack'd"].
[1040] For further discussion on this point, see the text accompanying note 1009.
[1041] See *Hunt*, *supra* note 940 at 324–26; *Morguard Investments*, *supra* note 940 at 1100–1103. See also *Chevron* SCC 2015, *supra* note 112 at paras 29–31.
[1042] See *Hunt*, *supra* note 940 at 315–16; *Morguard Investments*, *supra* note 940 at 1105–1106.
[1043] *Morguard Investments*, *supra* note 940 at 1107.

that that each of the grounds listed in article 3148, para 1(3°) CCQ (fault, injurious act, injury and contract) was an example of a real and substantial connection.[1044] It follows that any criterion more stringent than a real and substantial connection (including the requirement in article 3168(3°) CCQ that the fault and the injury occurred in the same province) may offend the constitutionally mandated principle of full faith and credit between provinces.[1045] It may remain permissible in an international setting (that is, when the judgment emanates from the courts of another state rather than another province), but it nonetheless contradicts the principle of comity among sovereign nations.[1046]

Aside from its uncertain constitutional validity, the restrictive approach to indirect jurisdiction in article 3168(3°) CCQ hinders prompt and adequate compensation for victims of transboundary pollution. More fundamentally, it negates the regulatory function of private international law in relation to the enforcement of foreign judgments—an important way of ensuring that transboundary polluters do not escape the gravitational pull of domestic private law after a domestic court issued its judgment. It should be fixed, ideally by mirroring the extensive approach to direct jurisdiction in article 3148, para 1(3°) CCQ.

2.2.3.2. Public law and public policy exceptions to the enforcement of foreign judgments

The second issue in the context of transboundary pollution comes from two related exceptions to the enforcement of foreign judgments: foreign public law (2.2.3.2.1) and public policy (2.2.3.2.2). I address each of them in turn. I conclude with observations on the current state of the law (2.2.3.2.3).

[1044] See *Spar Aerospace*, *supra* note 790 at para 56.

[1045] On constitutional imperatives for statutes governing the enforcement of judgments from other provinces, including the CCQ, see generally *Worthington*, *supra* note 800 at 2383–85; Saumier, "Mirror Crack'd", *supra* note 1039 at 709–713; Catherine Walsh, "Conflict of Laws—Enforcement of Extra Provincial Judgments and *In Personam* Jurisdiction of Canadian Courts: *Hunt v T&N plc*" (1994) 73:3 Can Bar Rev 394 at 398–401; Joost Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World" (1997) 28:3 Can Bus LJ 373 at 379.

[1046] See *Chevron* SCC 2015, *supra* note 112 at paras 32, 51–52; *Worthington*, *supra* note 800 at 2382–83; *Beals*, *supra* note 1008 at paras 20, 28–32; *Morguard Investments*, *supra* note 940 at 1096.

2.2.3.2.1. Public law exception to the enforcement of foreign judgments

Canadian courts traditionally refuse to enforce judgments based on foreign public laws, believing those laws to be the product of the foreign state's sovereign power within its territory. As such, no other court should enforce them. This is particularly true in the areas of penal[1047] and tax law.[1048] As Blom explains, "[i]t is a virtually universal feature of systems of private international law that courts will not apply foreign laws whose purpose is to levy taxes or enforce penal sanctions."[1049] The rule prohibits direct application, that is, the application of foreign penal/tax laws by local courts as a result of choice of law rules.[1050] It also prohibits indirect application, that is, the enforcement of judgments based on foreign penal/tax law (the focus of this subsection).

[1047] See eg *Pro Swing*, *supra* note 1004 at para 34; *Banco de Vizcaya v Don Alfonso de Borbon y Austria*, [1935] 1 KB 140 at 143–45, [1934] All ER Rep 555; *Laane & Baltser v Estonian SS Line*, [1949] SCR 530 at 542, 1949 CanLII 37; *Raulin v Fischer*, [1911] 2 KB 93 at 97–98, 80 LJKB 811; *Huntington v Attrill*, [1892] UKPC 7, [1893] AC 150 at 157 (PC); *Addams v Worden* (1856), 6 LCR 237 at 240–41 (Qc BR).

[1048] See eg CCQ, art 3155(6°); *NB Foreign Judgments Act*, *supra* note 1009, s 5(f); *Hillis v Canada (Attorney General)*, 2015 FC 1082 at para 52, [2016] 2 FCR 235; *Prince v ACE Aviation Holdings Ltd*, 2014 ONCA 285 at para 54, 110 OR (3d) 140, leave to appeal to SCC refused, [2014] 3 SCR ix; *State Board of Equalization c Matol Botanical International Ltd*, 2001 CanLII 13933 at para 6, (*sub nom Jurak c Matol Botanical International Ltd*) [2001] QJ no 4913 (QL) (CA); *Stringam v Dubois*, 1992 ABCA 325 (CanLII) at para 28, [1993] 3 WWR 273; *Weir v Lohr* (1967), 65 DLR (2d) 717 at 719–20, 1967 CanLII 674 (Man QB); *United States of America v Harden*, [1963] SCR 366 at 369–71, 1963 CanLII 42; *Government of India v Taylor*, [1955] AC 491 at 503–504, [1955] 1 All ER 292 (HL); *Holman v Johnson* (1775), 1 Cowp 341 at 343, 98 ER 1120 (KB). See also, in the United States, *Pasquantino v United States*, 544 US 349 at 359–71, 125 S Ct 1766 (2005); *Attorney General of Canada v RJ Reynolds Tobacco Holdings Inc*, 268 F (3d) 103 at 109–35, 2001 US App Lexis 21775 (2nd Cir 2001), certiorari denied, 537 US 1000, 123 S Ct 513 (2002); *Her Majesty the Queen in Right of the Province of British Columbia v Gilbertson*, 597 F (2d) 1161 at 1163–64, 1979 US App Lexis 15993 (9th Cir 1979); *Moore v Mitchell*, 30 F (2d) 600 at 602, 1929 US App Lexis 2467 (2nd Cir 1929).

[1049] See Joost Blom, "Public Policy in Private International Law and Its Evolution in Time" (2003) 50:3 Nethl Intl L Rev 373 at 378 [Blom, "Public Policy"]. In Canada, see generally David Bishop Debenham, "From the Revenue Rule to the Rule of the "Revenuer": A Tale of Two Davids and Two Goliaths" (2008) 56:1 Can Tax J 1; Vaughan Black, "Old and in the Way? The Revenue Rule and Big Tobacco" (2003) 38:1 Can Bus LJ 1; Janet Walker, "Foreign Public Law and the Colour of Comity: What's the Difference Between Friends?" (2003) 38:1 Can Bus LJ 36; Jean-Gabriel Castel, "The Erosion of the Foreign Public Law Exception: Recent Canadian Developments" in James AR Nafziger & Symeon C Symeonides, eds *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (Ardsley: Transnational Publishers, 2002) 243; Felix D Strebel, "The Enforcement of Foreign Judgments and Foreign Public Law" (1999) 21:1 Loy LA Intl & Comp LJ 55 [Strebel, "Public Law" (1999)]; Felix D Strebel, *The Enforcement of Foreign Judgments and Foreign Public Law* (LL.M Thesis, University of British Columbia Faculty of Law, 1997) [unpublished] [Strebel, "Public Law" (1997)]; JG Castel, "Foreign Tax Claims and Judgments in Canadian Courts" (1964) 42:2 Can Bar Rev 277; JG Castel, "Les conflits de lois en matière d'impôts au Canada et le nouvel alinéa de l'article 79 du Code de procédure civile" (1964) 24:8 R du B 483 and the sources cited *supra* note 64.

[1050] On the public law exception in the choice of law context, see subsection 3.2.2.1.2 below.

Penal and tax laws are the two most commonly accepted categories within the public law exception. Some English cases, however, suggest a third, residuary category of foreign public laws which cannot be enforced in local courts, either directly or indirectly.[1051] This third category of "other public laws" is less clearly established than the other two, but current leading British[1052] and Anglo-Canadian[1053] texts discuss it.

The precise contents of the public law exception have attracted much debate over the years, including with respect to non-penal/tax laws.[1054] Is there a third category of unenforceable foreign public laws? Does it cover all public laws and if so, on what basis? The existence and scope of the public law exception have significant implications for transboundary environmental disputes because plaintiffs often rely on statutory causes of

---

[1051] See eg *Re State of Norway's Application (No 2)* (1989), [1990] 1 AC 723 HL 783 at 807, [1989] 1 All ER 745 (HL); *United States of America v Inkley* (1988), [1989] QB 255 at 264–65, [1988] 3 All ER 144 (CA); *Attorney-General of New Zealand v Ortiz* (1982), [1984] AC 1 at 20–24, [1982] 3 All ER 432 (CA), aff'd (1983), [1984] AC 1 HL 35, [1983] 2 All ER 93 (HL); *R v Governor of Pentonville Prison, Ex parte Budlong* (1979), [1980] 1 All ER 701 at 714, [1980] 1 WLR 1110 (QB). See also, in New Zealand, *Attorney-General for the United Kingdom v Wellington Newspapers Ltd*, [1988] 1 NZLR 129 at 173–75, [1988] NZCA 18 (WorldLII) (CA).

[1052] See Adrian Briggs, *The Conflict of Laws*, 4th ed (Oxford: Oxford University Press, 2019) at 150, 185–87; Paul Torremans et al, *Cheshire, North & Fawcett: Private International Law*, 15th ed (Oxford: Oxford University Press, 2017) at 123–25, 552–53 [Torremans et al]; Jonathan Hill & Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws*, 5th ed (Oxford: Oxford Univesity Press, 2016) at paras 1.152–54 [Hill & Ní Shúilleabháin]; David McClean & Verónica Ruiz Abou-Nigm, *Morris: The Conflict of Laws*, 9th ed (London: Sweet & Maxwell, 2016) at para 4.008; Trevor C Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 2nd ed (Cambridge: Cambridge University Press, 2015) at 424–26; Richard Fentiman, *International Commercial Litigation*, 2nd ed (Oxford: Oxford University Press, 2015) at para 10.04; Adrian Briggs, *Private International Law in English Courts* (Oxford: Oxford University Press, 2014) at paras 3.199–201 [Briggs]; Pippa Rogerson, *Collier's Conflict of Laws*, 4th ed (Cambridge: Cambridge University Press, 2013) at 250–51, 429–31; Adrian Briggs, "Private International Law" in Andrew Burrows, ed, *English Private Law*, 3rd ed (Oxford: Oxford University Press, 2013) 1183 at 1189; Lord Collins of Mapesbury et al, eds, *Dicey, Morris & Collins on the Conflict of Laws*, vol 1, 15th ed (London: Sweet & Maxwell, 2012) at paras 5.032–5.042 [Collins et al]; James J Fawcett & Paul Torremans, *Intellectual Property and Private International Law*, 2nd ed (Oxford: Oxford University Press, 2011) at paras 15.190, 19.49; AE Anton, *Private International Law*, 3rd ed by Paul R Baumont & Peter E McEleavy (Edinburgh: W Green, 2011) at paras 5.31–34; Jonathan Hill & Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, 4th ed (Oxford: Hart, 2010) at para 12.2.29 [Hill & Chong].

[1053] See CED 4th (online), *Conflict of Laws*, "Jurisdiction of the Courts: Penal or Revenue Laws of Foreign Countries" (II.5) at § 60 (2018); Pitel & Rafferty, *supra* note 828 at 39–41; Pitel et al, *supra* note 828 at 129–35; Halsbury's Laws of Canada (online), *Conflict of Laws*, "Judgments: Requirements for Recognition and Enforcement: Foreign Public Law Exception to Recognition and Enforcement" (III.3(3)) at HCF-76, "Foreign Public Law Exception" (2016 Reissue); Halsbury's Laws of Canada (online), *Conflict of Laws*, "Applicable Law Analysis: Exclusion of Foreign Law: Foreign Public Laws: Other Foreign Public Laws" (IV.7(1)(c)) at HCF-122, "Other Foreign Public Laws" (2016 Reissue); Walker, vol 1, *supra* note 828 at § 8.5, 14.7. See also Emanuelli, *Étude comparative*, *supra* note 157 at paras 327, 331.

[1054] See the authorites cited *supra* notes 1051–1053.

action to pursue their claims. Declaring all foreign public law unenforceable could lead to an outright denial of justice for plaintiffs who seek to rely on foreign public law or to enforce a judgment based on foreign public law against the defendant's assets elsewhere.

The Ontario Court of Appeal put an end to the uncertainty surrounding the public law exception in *Ivey*. American authorities had obtained judgments in Michigan under *CERCLA*, a statute governing liability for contaminated sites.[1055] The judgments ordered the reimbursement of the cleanup costs incurred by the EPA on a waste disposal site operated by Liquid Disposal.[1056] Authorities then sought to enforce those judgments in Ontario against Liquid Disposal's shareholders and officers domiciled in the province. The defendants resisted enforcement and argued that the basis of the Michigan judgments was a foreign public law.

Justice Sharpe (then a trial judge, now sitting at the Court of Appeal) found that *CERCLA* was neither penal nor fiscal. It simply pertained to the reimbursement of costs already incurred and was therefore compensatory in nature.[1057] Justice Sharpe recognized the existence of a third category of other public laws but criticized its "rather shaky foundation" and held that it did not preclude the enforcement of the Michigan judgments.[1058] The enforcement of *CERCLA* judgments, he said, did not impinge on Canadian sovereignty. Public environmental statutes supplement the common law and help impose liability on polluters. Precluding their enforcement beyond borders would defeat their purpose:

> Legislatures have determined that the complex issues of environmental protection and determination of liability for environmental harms require the positive intervention of the state. Common law actions brought by private parties who have suffered individual harm have been found wanting. The issues of liability for [cleanup] and remedial costs are dealt with awkwardly, if at all, in litigation between private parties, and most jurisdictions, including Ontario, have established regulatory regimes which encompass the imposition of civil liability for such costs. In this light, it is difficult to see the rationale for this court to refuse enforcement on the grounds that the efforts of the plaintiff to recover the costs it has incurred to remedy the

[1055] See *CERCLA*, *supra* note 13.
[1056] See *Ivey*, *supra* note 2.
[1057] *Ivey* Gen Div, *supra* note 2 at 544–45.
[1058] See *ibid* at 548.

> environmental problems at the [Liquid Disposal] site represent an illegitimate attempt to assert sovereignty beyond its borders.[1059]

The Ontario Court of Appeal upheld Justice Sharpe's judgment. The Court recalled that many jurisdictions had similar statutory regimes and that comity supported their mutual enforcement.[1060] Other courts reached similar results in enforcement actions brought by American authorities under their own securities and consumer laws.[1061]

The same logic applies in Quebec, except that it is unclear whether the public law exception applies at all. The CCQ only expressly precludes the enforcement of foreign tax judgments coming from provinces and states that do not recognize Quebec tax laws.[1062] It does not refer to a wider category of unenforceable foreign judgments based on public law.[1063] Legislative debates[1064] and commentaries from the Minister of

---

[1059] *Ibid* at 549.
[1060] See *Ivey* CA, *supra* note 2 at 374.
[1061] See *United States (Securities and Exchange Commission) v Peever*, 2014 BCCA 141, 58 BCLR (5th) 215; *United States of America v Levy* (2002), 1 CPC (6th) 386, [2002] OJ No 2298 (QL) (Sup Ct), aff'd [2003] OJ No 56 (QL), 2003 CarswellOnt 125 (WL Can) (CA); *United States Securities and Exchange Commission v Cosby*, 2000 BCSC 338, [2000] BCTC 219; *United States of America v Shull* (1999), 43 WCB (2d) 247, [1999] BCJ No 1823 (QL) (SC); *United States of America v Levy* (1999), 45 OR (3d) 129, 1999 CanLII 14817 (Gen Div). But see *United States of America v Yemec* (2003), 67 OR (3d) 394, 2003 CanLII 23436 (Sup Ct), aff'd 2004 CanLII 25211, [2004] OJ No 122 (QL) (CA) & 75 OR (3d) 52, 2005 CanLII 8709 (Div Ct) (where the Court dissolved a Mareva injunction requested by American authorities in relation to deceptive marketing practices).
[1062] See CCQ, arts 3155(6°), 3162. See also *Québec (Procureur général) c Imperial Tobacco Canada Ltd*, 2013 QCCS 2994, [2013] JQ no 7014 (QL), leave to appeal to Qc CA refused, 2013 QCCA 1702, [2013] JQ no 13088 (QL) ("[…] *il est douteux que la catégorie « recours de droit public » existe réellement, du moins lorsque vient le moment de déterminer si une action relève de la compétence internationale des tribunaux québécois. Tel qu'expliqué plus haut, les règles complètes qui gouvernent l'ordre du droit international privé se trouvent au Livre dixième du Code civil du Québec. Or, la catégorie « recours de droit public* » *n'y est pas*" at para 67),
[1063] It seems clear, however, that Quebec courts will not enforce penal judgments. See *SNC-Lavalin Group Inc c Ben Aïssa*, 2019 QCCS 465, [2019] JQ no 1057 (QL), leave to appeal to Qc CA granted, 2019 QCCA 964, [2019] JQ no 4606 (QL) ("[l]*a reconnaissance d'un jugement étranger en matière pénale n'est pas possible au Québec*" at para 115); *DR c BA*, 2007 QCCS 5985, [2008] RDF 177 (Sup Ct) ("[d]*'entrée de jeu, précisons qu'une ordonnance pénale rendue en pays étranger ne peut en soi être reconnue au Canada*" at para 59); Emanuelli, *Droit international privé*, *supra* note 852 at para 301; Claude Emanuelli, "Recognition and Enforcement of Foreign Judgments in Quebec" (2007) 9 YB Priv Intl L 343 at 352.
[1064] See "Bill 125, Civil Code of Quebec", Quebec, National Assembly, Subcommittee on Institutions, *Journal des débats*, 34-1, vol 31, No 28 (3 December 1991) at 1143–44 (Louise Harel, Jean Pineau & Gil Rémillard).

Justice[1065] do not address the issue.[1066] If the public law exception does apply, *Ivey*'s logic should too.[1067]

Overall, the *Ivey* case significantly reduced the scope of the public law exception in Canada.[1068] Courts now refuse to enforce foreign public law only when it reflects the assertion of a true sovereign power, not simply because the plaintiff is a foreign state or related entity.[1069] This is consistent with recent English authorities holding that not all foreign public laws are unenforceable, only those involving sovereign rights.[1070] It also aligns with the *Convention on the Recognition and Enforcement of Foreign Judgments* recently adopted by the HCCH, which specifically encompasses judgments in which a

[1065] See Quebec, Ministère de la Justice, *Commentaires du ministre de la justice: le Code civil du Québec, un mouvement de société*, vol 3 (Quebec: Publications du Québec, 1993) at 1051 [Ministère de la Justice du Québec].

[1066] It may be because the CCQ is primarily concerned with private law. On the other hand, the CCQ does not purport to be a private law instrument, but a body of *jus commune* at the core of every other law in the province, including public law. On this view, it would make sense to include the penal exception in article 3168 CCQ. See CCQ, Preliminary Provision; *Prud'homme v Prud'homme*, 2002 SCC 85 at paras 28–29, [2002] 4 SCR 663; Denis Lemieux, "Le rôle du *Code civil du Québec* en droit administratif" (2005) 18:2 Can J Admin L & Prac 119 at 119–120, reprinted in *Actes de la XVII^e Conférence des juristes de l'État* (Cowansville: Yvon Blais, 2006) 359; Madeleine Cantin Cumyn, "La disposition préliminaire du *Code civil du Québec*" (2005) 46:1/2 C de D 463 at 470–71; Alain-François Bisson, "La disposition préliminaire du *Code civil du Québec*" (1999) 44:3 McGill LJ 539 at 562–63. *Cf* Vincent Ranger, "Les dissonances du dialogue entre le droit privé et le droit public au Québec" in Jérémie Torres-Ceyte, Gabriel-Arnaud Berthold & Charles-Antoine M Péladeau, eds, *Le dialogue en droit civil* (Montreal: Themis, 2018) 109 at 128–137 (questionning the CCQ's alleged "structuring effect" on public law in the province).

[1067] See Guillaume Laganière, "Dialogue des systèmes en droit international privé: l'application et la reconnaissance du droit public étranger au Québec" in Torres-Ceyte, Berthold & Péladeau, *supra* note 1066, 35 at 62 [Laganière]; Talpis, *supra* note 994 at 168–70. See also JA Talpis & JG Castel, "Le Code civil du Québec: Interprétation des règles du droit international privé" in Barreau du Québec & Chambre des notaires, eds, *La réforme du Code civil*, vol 3: Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires (Quebec: Presses de l'Université Laval, 1993) 801 at 815 [Talpis & Castel].

[1068] Strebel suggests that "[t]here are no precedents stating that foreign public laws are unenforceable in Canada." Strebel, "Public Law" (1999), *supra* note 1049 at 89. See also Strebel, "Public Law" (1997), *supra* note 1049 at 57.

[1069] See *Bienstock v Adenyo Inc*, 2014 ONSC 4997, [2014] OJ No 3992 (QL), aff'd 2015 ONCA 310, [2015] OJ No 2280 (QL).

[1070] See *Pocket Kings Ltd v Safenames Ltd*, [2009] EWHC 2529 (Ch) at para 40, [2010] Ch 438; *United States Securities and Exchange Commission v Manterfield*, [2009] EWCA Civ 27 at para 24, [2009] 2 All ER 1009; *Islamic Republic of Iran v The Barakat Galleries Ltd*, [2007] EWCA Civ 1374 at para 125, [2009] QB 22; *Mbasogo v Logo Ltd*, [2006] EWCA Civ 1370 at para 50, [2007] QB 846. Australian courts have narrowed the public law exception in similar fashion. See *Evans v European Bank Ltd*, [2004] NSWCA 82 at paras 37–54, 61 NSWLR 75; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd*, [1988] HCA 25 at paras 23–41, 165 CLR 30.

state was party to the proceedings, as long as they pertain to civil or commercial matters.[1071]

2.2.3.2.2. Public policy exception to the enforcement of foreign judgments

Canadian courts can also refuse to enforce foreign judgments on the basis of public policy. The common law precludes the enforcement of foreign judgments that shock basic morality.[1072] The CCQ precludes the enforcement of foreign judgments leading to a result manifestly inconsistent with "public order as understood in international relations."[1073] The public policy exception seldom (if ever) applies in interprovincial cases,[1074] and it is narrowly construed even in international cases, preserving only the most basic moral tenets of our society.[1075] As the Supreme Court of Canada put it, "[t]he

---

[1071] See *Convention on the Recognition and Enforcement of Foreign Judgments*, *supra* note 94, arts 1(1), 2(4).

[1072] See *Chevron* SCC 2015, *supra* note 112 at para 77; *Pro Swing*, *supra* note 1004 at para 12; *Beals*, *supra* note 1008 at paras 71–77; *Morguard Investments*, *supra* note 940 at 1110. New Brunswick and Saskatchewan enacted statutes on the enforcement of foreign judgments. Both statutes contain a public policy exception. See *NB Foreign Judgments Act*, *supra* note 1009, ss 5(h)–5(i) (precluding the enforcement of foreign judgments "in respect of a cause of action that, for reasons of public policy or for similar reasons, would not have been entertained by the courts of [New Brunswick]" and those obtained in the course of proceedings which were "contrary to natural justice"); *SK Foreign Judgments Act*, *supra* note 1009, s 4(g) (precluding the enforcement of foreign judgments that are "manifestly contrary to public policy in Saskatchewan"). See also *Uniform Enforcement of Foreign Judgments Act*, s 4(g), (2003) 85 Unif L Conf Proc 225, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/TU56-L8FU].

[1073] CCQ, art 3155(5°). *Cf* CCQ, art 3081 (equivalent provision for choice of law).

[1074] *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022 at 1055, 1994 CanLII 44 [*Tolofson*] (in the choice of law context). Some of the provincial statutes governing the enforcement of judgments within Canada contain a public policy exception. See eg *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29, s 6(2)(c)(iv); *The Enforcement of Canadian Judgments Act*, 2002, SS 2002, c E-9.1001, s 7(2)(c)(iv). See also *Enforcement of Canadian Judgments and Decrees Act*, s 6(2)(c)(iv), (1992) 74 Unif L Conf Proc 317, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/F2UG-6MZA] (as amended in 1997, 2004 and 2005). But see *Canadian Judgments Act*, RSNB 2011, c 123 (where no such exception exists).

[1075] See *George Weston* CA, *supra* note 133 at para 96 (public policy exception to the applicable law); *Kriegman v Dill*, 2018 BCCA 86 at paras 6, 75, [2018] 6 WWR 660, leave to appeal to SCC refused, 38093 (14 February 2019); *SHN Grundstuecksverwaltungsgesellschaft MBH & Co v Hanne*, 2014 ABCA 168 at para 35, 575 AR 149, leave to appeal to SCC refused, [2014] 3 SCR vii; *CIMA Plastics Corporation v Sandid Enterprises Ltd*, 2011 ONCA 589 at para 20, 341 DLR (4th) 442; *Society of Lloyd's c Longtin*, 2005 CanLII 26279 at para 8, [2005] JQ no 16993 (QL) (Sup Ct); *Beals*, *supra* note 1008 at paras 71–72, 75; *Great America Leasing Corp v Yates* (2003), 68 OR (3d) 225 at 232, 2003 CanLII 16128 (CA); *Society of Lloyd's v Saunders* (2001), 55 OR (3d) 688 at 718, (*sub nom Lloyd's v Meinzer*) 2001 CanLII 8586 (CA), leave to appeal to SCC refused, [2002] 2 SCR ix; *Mutual Trust Co c St-Cyr*, [1996] RDJ 623 at 625, 1996 CanLII 6010 (CA), leave to appeal to SCC refused, [1997] 2 SCR xv; *Boardwalk Regency Corp v Maalouf* (1992), 6 OR (3d) 737 at 743, 1992 CanLII 7528 (CA); *Auerbach c Resorts International Hotel Inc* (1991), [1992] RJQ 302 at 306, 1991 CanLII 3485 (CA); *Block Bros Realty Ltd v Mollard* (1981), 122 DLR (3d) 323 at 329, 1981 CanLII 504 (BC CA) (public policy exception to the applicable law).

public policy defence turns on whether the foreign law is contrary to our view of basic morality. […] It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system."[1076] Later, in a case involving the CCQ, the Court explained that "a foreign decision will not be recognized if its outcome runs counter to the moral, social, economic or even political conceptions that underpin Quebec's legal order." [1077]

The public policy exception is distinct but closely related to the public law exception.[1078] Both aim to protect the state against the enforcement of certain foreign laws that are deemed incompatible with its own orientations. The public law exception simply focuses on certain categories of foreign laws while the public policy exception focuses on the result of their application.[1079]

Litigants have invoked the public policy exception only on a few occasions in relation to foreign environmental statutes (all of which arose in common law provinces). In *Ivey*, the defendants pleaded that *CERCLA* offended public policy because it suffered from several substantive and procedural defects that Canadian courts should not condone. After having rejected the application of the public law exception, Justice Sharpe tackled the public policy exception. He recalled that mere inconsistencies between the law of the forum and the law applied by the foreign court do not suffice to prevent the enforcement of a foreign

[1076] *Beals*, *supra* note 1008 at paras 71–72.
[1077] *RS v PR*, 2019 SCC 49 at para 53, 438 DLR (4th) 579 [*RS*]. On the distinctions between the public policy exception in Quebec and in common law provinces, see Emanuelli, *Étude comparative*, *supra* note 157 at paras 271–78, 309, 330, 394, 412, 542, 545.
[1078] See *Gulf Oil Corporation v Gulf Canada Ltd*, [1980] 2 SCR 39, 1980 CanLII 192 ("[p]ublic policy is therefore involved in the application of rules of conflict of laws, as where the enforcement of foreign law in Canadian litigation may be denied because, for example, the foreign law may be a penal law or a tax law and therefore within the categories that are denied enforcement on policy grounds. So too, where letters rogatory are addressed to a Canadian court, Canadian government intervention on grounds of public policy may simply reflect an objection to extraterritorial enforcement of foreign law in violation of Canadian sovereignty" at 62). Although the Supreme Court of Canada spoke of the relationship between public law and public policy in the choice of law context, the same relationship exists in the enforcement context, even though the exceptions operate differently there. See also *AAA Entertainment v Cinemavault Releasing International*, 2017 ONSC 100 at paras 29–40, [2017] OJ No 836 (QL) (where the Ontario Superior Court of Justice collapses the public law and public policy exceptions to the enforcement of foreign judgments).
[1079] See Blom, "Public Policy", *supra* note 1049 at 379. For other accounts of the public law and public policy exceptions as conceptually or pratically related, see Emanuelli, *Étude comparative*, *supra* note 157 at para 395; Wasserstein-Fassberg, *supra* note 64 at 36–37; Strebel, "Public Law" (1999), *supra* note 1049 at 68; Crerar, *supra* note 865 at 53; Strebel, "Public Law" (1997), *supra* note 1049 at 25.

judgment. Fundamental values of the forum must be at stake. Justice Sharpe ultimately rejected the defendants' argument that *CERCLA* was too severe to be enforced in Canada. He found that "[w]hile the measures chosen by [the Ontario] legislature do not correspond precisely with those chosen by the Congress of the [United States], they are sufficiently similar in nature to defeat any possible application of the public policy defence."[1080] The Court of Appeal did not address the issue.

In *Shield Development*, the Ontario Superior Court of Justice recognized another American judgment based on *CERCLA*, again rejecting the argument that it offended public policy.[1081] Defendants pleaded among other things that the EPA had breached public policy when it chose not to sue the true perpetrator of environmental damage in the United States (an American company) and went after its Canadian shareholders and officers instead. Justice Herman adhered to *Ivey*. She reiterated that the differences between Canadian and American environmental laws were not significant enough to trigger the public policy exception.[1082] She also held that the public policy exception was not concerned with the way in which the EPA enforced *CERCLA*.[1083] The Ontario Court of Appeal upheld her findings in a brief judgment.[1084]

Finally, in *Chevron*, the Ontario Superior Court of Justice held that Ecuador's retroactive environmental legislation did not offend Canadians' basic morality. Justice Hainey struck out Chevron's statement of defence on this point, partly prohibiting it from invoking public policy to resist the enforcement of an Ecuadorian judgment awarding compensation for environmental damage.[1085]

[1080] *Ivey* Gen Div, *supra* note 2 at 554.
[1081] See *United States of America v Shield Development Co* (2004), 74 OR (3d) 583, 2004 CanLII 66345 (Sup Ct), aff'd (2005), 74 OR (3d) 595, 2005 CanLII 17768 (CA) [*Shield Development*]. See also *United States of America v Friedland*, [1996] OJ No 4399 (QL), 1996 CarswellOnt 5566 (WL Can) (Gen Div) (dismissal of a motion by American authorities for a Mareva injunction freezing the defendant's assets in the course of *CERCLA* proceedings in the United States—no discussion of public law or public policy exceptions).
[1082] See *ibid* at 593–94.
[1083] See *ibid* at 594.
[1084] See *United States of America v Shield Development Co* (2005), 74 OR (3d) 595, 2005 CanLII 17768 (CA).
[1085] See *Yaiguaje v Chevron Corporation*, 2017 ONSC 135 at paras 108–112, 136 OR (3d) 261, leave to appeal to Div Ct refused, 2017 ONSC 2251, [2017] OJ No 1765 (QL). Justice Hainey, however, refused to strike out many of Chevron's other defences. Another part of the judgment pertaining to Chevron Canada's

One point remains unanswered in the above cases. Does an administrative authorization issued under Canadian law suffice to preclude the enforcement of a foreign judgment on public policy grounds? The question did not arise in *Ivey*, *Shield Development* and *Chevron* because the defendants did not operate on Canadian soil. They were all somehow connected to the polluting activity in the foreign state, but only through their alleged corporate affiliations. *Pakootas*, by contrast, raises a different issue. Suppose that American courts find Teck Cominco liable under *CERCLA* and seek to enforce the judgment in British Columbia. Would Teck Cominco be able to invoke public policy on the basis that Canada allows the company to operate on its territory, and even has an economic interest in doing so? In my view, it would go against the duty to ensure prompt and adequate compensation for the courts of the source state to refuse to enforce a judgment from the courts of a victim state against a defendant operating in the forum under official authorization. Such judgment does not offend basic morality. Nor does it create unacceptable differences with Canadian law, which rarely shields a licensed polluter from all liability anyway.[1086]

Overall, the public policy exception remains extremely narrow and is unlikely to have a major impact on environmental protection in one sense or the other. In the current state of the law, there is little room for defendants to frame public policy arguments when they are found liable under foreign environmental statutes and targeted for enforcement in Canada. A court could conceivably refuse to enforce a foreign judgment against a local polluter when the result is severe and particularly prejudicial to the economic interests of the forum, but it is unclear how this would fit within the current definition of the public

motion for summary judgment on the basis of the corporate veil was affirmed by the Ontario Court of Appeal, and the Supreme Court of Canada denied the plaintiffs' motion for leave to appeal. See *Chevron* CA 2018, *supra* note 132.

[1086] See Von Bar, "Environmental Damage", *supra* note 192 ("[…] in the majority of cases in which the activity is officially authorized but where neither national system frees the tortfeasor from liability, the recognizing [s]tate does not have sufficient reason to refer back to [public policy]" at 353). For further discussion on the relationship between civil liability and regulatory/statutory compliance, see the sources cited *infra* note 1451.

law/public policy exceptions.[1087] To my knowledge, there is no such precedent in Canadian law.

2.2.3.2.3. *Ivey*'s implications

Ivey and its progeny make it clear that judgments based on foreign environmental statutes that impose civil liability do not fall within the foreign public law exception to the enforcement of foreign judgments. Nor do they offend public policy simply because they differ from Canadian law. Major divergences may lead to a different result, but this has yet to be seen in the case law. This means that if *Pakootas* results in a final judgment in damages, Teck Cominco could find itself unable to rely on either exception to resist its enforcement in British Columbia.[1088]

Ivey represents an important judicial stance in favour of cross-border environmental cooperation. As the Supreme Court of Canada recalled in *Chevron*, "[c]omity […] militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored."[1089] To be sure, the fact that the United States (and not some other state) were involved undoubtedly coloured the dispute in *Ivey*. Canadian courts stressed the importance of facilitating commercial relationships with its neighbour.[1090] Justice Sharpe himself declared that it was particularly appropriate for Canadian courts to recognize the environmental laws and judgments of their neighbours.[1091] Cross-border environmental cooperation has particular importance in a closely integrated and interdependent region such as the Great Lakes. On the other hand,

---

[1087] But see Kruger, *supra* note 207 ("[…] public policy is subject to shifts, and, given the strong Canadian diplomatic response [in *Pakootas*], it is not inconceivable that the Government of Canada or of [British Columbia] could enact legislation for the non-recognition of *CERCLA* judgments, a response that is not unprecedented in Canada" at 117).

[1088] But see Janet Walker, "*Teck Cominco* and the Wisdom of Deferring to the Court First Seised, All Things Being Equal" (2009) 47:2 Can Bus LJ 192 ("[…] to the extent that the Washington proceeding was understood as a claim that was initiated to give effect to a foreign public law, the resulting judgment might be regarded as unenforceable in Canada on that basis" at 202).

[1089] *Chevron* SCC 2015, *supra* note 112 at para 53. See also *Canada Post*, *supra* note 1012 at para 36; *Pro Swing*, *supra* note 1004 at paras 26–31; *Beals*, *supra* note 1008 at paras 26–29; *Hunt*, *supra* note 940 at 321–22; *Morguard Investments*, *supra* note 940 at 1095–99.

[1090] See *Molson Coors Brewing Co v Miller Brewing Co* (2006), 83 OR (3d) 331 at 340, 2006 CanLII 35628 (Sup Ct); Vaughan Black, "A Canada-United States Full Faith and Credit Clause" (2012) 18:2 Sw J Intl L 595; Black, Blom & Walker, *supra* note 561 at 522–24 (comments by Vaughan Black).

[1091] See *Ivey* Gen Div, *supra* note 2 at 549.

Ontario courts might not have praised cooperation so readily if the foreign judgment had come from a state with very different environmental laws, or if foreign authorities had targeted a company operating in Canada (such as Teck Cominco) as opposed to Canadian shareholders and officers of a company operating in the United States. Different circumstances could have led to a different result.

Despite this particular context, *Ivey* teaches important lessons. It shows that courts are aware of the problems associated with transboundary pollution and of the role of private international law—specifically the rules governing the enforcement of foreign judgments—in ensuring compensation or protecting the environment. *Ivey* also illustrates how private international law achieves its regulatory function by acknowledging the public implications of private environmental disputes. In that case, a liberal interpretation of the rules governing the enforcement of foreign judgments, driven by the substantive objective of holding polluters liable for cleanup costs, contributed to a plaintiff-initiated form of transnational regulation. The regulation theory confirms this reading of *Ivey*, in particular Wai's assertion that a more permissive enforcement of foreign public law would help fill regulatory gaps by relying on domestic legal regimes.[1092] Perhaps *Ivey* would have unfolded differently if the United States had not been involved, but I see no principled reason to explain why it would have, unless public policy was at stake.

2.3. Conclusion of Chapter 2

I identified in this second chapter the jurisdictional requirements associated with the duty to ensure prompt and adequate compensation and explained how they have been implemented in Canada.

International environmental law has focused primarily on non-discrimination and equal access. The ILC viewed those notions as a palatable lifeline for its project and chose to sacrifice larger ambitions. Optimists will nonetheless celebrate their consecration in the *ILC Principles on the Allocation of Loss* after decades of efforts. Cynics, on the other

[1092] See Wai, "Regulatory Function", *supra* note 6 at 270. For further discussion on my theoretical framework, see the introduction and subsection 1.3.2.2 above.

hand, will observe that equal access is a low common denominator that works well in regional settings but fails to live up to the expectations on a larger scale.

I prefer a middle ground. The international recognition of equal access facilitates its dissemination and brings attention to the procedural challenges faced by victims of transboundary pollution. Equal access also gives concrete meaning to the duty to ensure prompt and adequate compensation. It is important, however, to recognize its limited impact in practice. Legal reform has proven difficult even in a closely integrated area such as North America. Neither the *International Boundary Waters Treaty Act*, the *Draft Treaty on Equal Access and Remedy*, the *Reciprocal Access Act* nor the *NAAEC* made it significantly easier or faster for victims to obtain compensation through private litigation. They are a stark reminder that even the most enthusiastic legal projects can quickly fall into oblivion. And as the *Pembina County Water Resource District* case showed, equal access itself can lead to long judicial debates if the language of the provision is ambiguous.

But this is not the point. We must go beyond the pros and cons of equal access, and query whether the general law of jurisdiction can respond to the same concerns that prompted Scandinavian countries and the OECD to act in the 1970s. I demonstrated in this chapter that the Canadian law of jurisdiction aligns with the duty to ensure prompt and adequate compensation. Compelling arguments support the assertion of jurisdiction whether Canada is the source state or the victim state. This is equal access in its essence (jurisdiction in the source state for all victims) and beyond (jurisdiction in the victim state). The argument has particular strength in North America, but courts have no reason to react differently when other states are involved unless the connections with the forum are excessively remote.

Scholars often take for granted that transboundary pollution causes insoluble jurisdictional problems. There are several reasons for the prevalence of the obstacle theory: obsolete assessments of the law blindly replicated in subsequent scholarship, old precedents repeated as mantras, scarcity of judgments on the merits upon which to extrapolate, etc. Together, they lead to a bleak conclusion: private international law

deprives plaintiffs of a chance to try their case on the merits. My analysis shows the contrary—not because of some specific environmental legal instrument, but by paying attention to the connections between international environmental law and our usual way of dealing with conflicts of jurisdiction.

Justice Sharpe's reasons in *Ivey* show that developing an environmental sensitivity in private international law is entirely feasible. His judgment is a concrete example of how the regulatory function of private international law plays out in practice. Once we accept that private international law does have a regulatory function, there is nothing illegitimate about aligning its rules with the international objective of imposing liability on transboundary polluters (which, in the context of the recognition and enforcement of foreign judgments, also means deferring to the legitimate environmental policy of a foreign state, admittedly a more common concern in modern private international law). Ultimately, understanding how and why equal access and non-discrimination have become key aspects of international environmental law allows us to take a better and more informed look at private international law and its regulatory function. This is precisely what the ILC asked states to do in order to discharge their duty to ensure prompt and adequate compensation.

3. The law applicable to transboundary pollution

This third chapter focuses on the choice of law aspects of the duty to ensure prompt and adequate compensation. After having established their jurisdiction over a transboundary environmental dispute, courts must identify the law (local or foreign) used to determine civil liability. If pollution originates in state *x* but victims suffered damage in state *y*, courts have to identify which law applies (the applicable law or *lex causae*): the law of the source state, the law of the victim state or another law such as the law of the place where the defendant is domiciled. In this chapter, I argue that Canadian law does not meet the choice of law requirements associated with the duty to ensure prompt and adequate compensation.

I have demonstrated so far that appropriate jurisdictional rules can effectively achieve equal access to courts for local and foreign plaintiffs, a paramount concern in the *ILC Principles on the Allocation of Loss*. I have resorted to the regulation theory to explain that jurisdictional rules have substantive implications because they are the first step towards a trial on the merits. They perform a regulatory function insofar as they allow for regulatory oversight by private parties in domestic courts.[1093]

Equal access (or its functional equivalent through the application of jurisdictional rules), however, does not determine whether to hold a polluter liable, nor does it affect the overall level of environmental protection. This comes down to the contents of the applicable law, selected through choice of law rules. Choice of law has an obvious regulatory impact because the promises of liability—including compensation, deterrence and environmental protection—hinge on the substantive law that governs a dispute.[1094] Private international law goes some way to fulfilling these promises when it directs the application of a law that allows victims to obtain compensation or favours environmental protection. The regulation theory suggests that imbuing choice of law rules with this substantive orientation is not parochial (i.e., serving only the interests of the forum) but

[1093] See Wai, "Regulatory Function", *supra* note 6 and the other sources cited *supra* note 60.
[1094] See Ebbesson, *supra* note 48 at 282.

internationalist in the sense that it responds to a global concern for the regulation of transnational actors.[1095]

I concluded in the second chapter that the Canadian law of jurisdiction meets the requirements of the *ILC Principles on the Allocation of Loss* and raises no significant obstacle to prompt and adequate compensation. The obstacle theory is unwarranted in that context because local and foreign victims of transboundary pollution both have satisfactory access to Canadian courts. I reach a different conclusion here.

As we will see, the duty to ensure prompt and adequate compensation entails equal remedy for all victims of transboundary pollution—in other words, that foreign victims of transboundary pollution receive at least the same treatment as victims in the source state. Choice of law rules play a fundamental role in this context because they determine which substantive law applies to the claims of foreign victims, and therefore whether they have the same rights as local victims. The duty to ensure prompt and adequate compensation also entails, evidently, that victims have a chance to obtain compensation. Again, choice of law rules play a fundamental role in this context.

Canadian courts apply in most cases the law of the place of the tort (*lex loci delicti*), understood as the law of the place where the wrongful activity occurred. This is an appropriate choice of law rule for torts, particularly when they occur in a single place, but its interpretation causes problems in relation to transboundary pollution because the fault and the injury occur in different states. This makes it difficult to locate environmental torts in one place or the other for choice of law purposes. Unlike jurisdictional rules, however, the *lex loci delicti* forces a determination because only a single law can apply to the dispute. The tort must occur at the place of acting *or* the place of injury, or else the *lex loci delicti* remains indeterminate.

There is considerable uncertainty in Canadian law over which of the two laws applies to transboundary pollution. More importantly, applying one or the other in all cases does not necessarily advance equal remedy nor prompt and adequate compensation. Applying the

[1095] See *ibid*. In the context of environmental law, see Grušić, *supra* note 10 at 186–93.

law of the place of injury in all cases is not satisfactory if foreign victims receive a lesser treatment than local victims because the law of the place of acting is more favourable than the law of the place of injury. Victims do not receive equal treatment unless they can all invoke the law of the place of acting. But applying the law of the place of acting in all cases is not satisfactory either if it prevents compensation for all victims.

The HCCH, the ILA and UNEP responded to concerns surrounding the rigid definition of the *lex loci delicti* and recommended the ubiquity principle as the preferred approach. The ubiquity principle posits that the law of the place of acting and the law of the place of injury can equally apply in transboundary environmental disputes. As we will see, the rule treats victims differently in certain scenarios, but it removes incentives for polluters to externalize the consequences of their activities to jurisdictions with low environmental standards. It can also increase the level of protection for some victims instead of lowering the bar for all. The ubiquity principle is increasingly accepted as an appropriate choice of law rule for transboundary pollution, including in EU law and in the Swiss statute that inspired Quebec private international law. UNEP recommends its adoption in domestic liability regimes.

For the reasons exposed below, the ubiquity principle would significantly improve Canada's current approach to choice of law in transbounary environmental disputes, particularly in light of equal remedy and the duty to ensure prompt and adequate compensation. Its benefits outweigh its disadvantages. In an ideal scenario, an environment-specific statute would entrench the ubiquity principle into Canadian private international law (both in Quebec and in common law provinces). Courts in common law provinces can also rely on the inherent flexibility of choice of law rules to interpret them in a victim or environment-friendly way. In this alternative scenario, courts would find that transboundary environmental torts have sufficient connections with the place of acting and the place of injury. They would conclude that plaintiffs can elect the law of either place as the *lex loci delicti.*

This chapter proceeds in the same sequence as the previous chapter—distilling key concepts of international environmental law and identifying a standard to assess whether

and how Canadian law helps ensure prompt and adequate compensation with respect to the choice of law process (and where it can go from there). I first explore the relationship between choice of law and prompt and adequate compensation through the fundamental concepts set out in the *ILC Principles on the Allocation of Loss* and other international projects, chiefly non-discrimination, equal remedy and the ubiquity principle (3.1). I then take a step back and review the current choice of law framework against the duty to ensure prompt and adequate compensation. I argue that Canadian choice of law rules cannot always ensure equal remedy and prompt and adequate compensation for victims of transboundary pollution. Specific legislative reforms or innovative judicial interpretations are required (3.2). I conclude with final remarks (3.3).

Note that this chapter focuses on the substantive aspects of transboundary environmental disputes such as the liability of polluters and the remedies available. These aspects are governed either by local law or foreign law, depending on the operation of the rules examined below. Other important aspects of transboundary environmental disputes, such as the availability of injunctive relief or the quantification of damages, may be characterized as procedural.[1096] As such, they are invariably governed by local law.[1097]

3.1. International environmental law and the approach of the ILC

This section identifies what the duty to ensure prompt and adequate compensation entails in terms of choice of law. Lefeber briefly made this connection when he suggested that choice of law had to "offe[r] protection to victims, minimiz[e] uncertainty for the defendant, and discourag[e] forum shopping."[1098] The connection requires further

[1096] On the characterization of injunctive relief to prevent environmental damage in Quebec, see Gérald Goldstein & Ethel Groffier, *Droit international privé*, vol 2: règles spécifiques (Cowansville: Yvon Blais, 2003) at para 477 [Goldstein & Groffier].
[1097] See CCQ, art 3132; *Tolofson*, *supra* note 1074 at 1067. This distinction between substance and procedure is well-known to private international lawyers and raises considerable difficulties in practice. See eg Richard Garnett, "Substance and Procedure" in Basedow et al, vol 2, *supra* note 53, 1667; Richard Garnett, *Substance and Procedure in Private International Law* (Oxford: Oxford University Press, 2012), ch 10–11; Christina Porretta, "Assessing Tort Damages in the Conflict of Laws: *Loci, Fori, Illogical*" (2012) 91:1 Can Bar Rev 97. Additionnally, it may not always be possible to separate the substantive and procedural aspects of an environmental cause of action for choice of law purposes, when the same environmental statute provides for both (*CERCLA*, for instance).
[1098] Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 266.

investigation in light of the subsequent development of the duty to ensure prompt and adequate compensation.

I begin with an overview of the ILC's position expressed in the *ILC Principles on the Allocation of Loss* (3.1.1). I investigate the notion of equal remedy (3.1.2) and I explain how Canada has formally incorporated that notion into domestic law (3.1.3). Like equal access, equal remedy is a feature of Canada-United States relations, but it remains patchy even in that setting. General choice of law rules will apply in most cases. With this conclusion in mind, I return to the *ILC Principles on the Allocation of Loss* and I identify a preferable choice of law rule beyond the minimal requirements of equal remedy (3.1.4).

3.1.1. Choice of law in the *ILC Principles on the Allocation of Loss*

The *ILC Principles on the Allocation of Loss* do not prescribe a particular approach for identifying the applicable law. Choice of law fills up only five lines and one footnote of the *Commentary to the ILC Principles on the Allocation of Loss*, in which the ILC simply acknowledges that "[s]tate practice is not uniform: different jurisdictions have adopted either the law that is most favourable to the victim or the law of the place which has the most significant relationship with the event and the parties."[1099]

The treatment of cross-border torts indeed varies immensely among states. Current practice includes the law of the place of the tort (place of acting, place of injury or both), the most favourable law or the law with the closest relationship to the dispute.[1100] This is a debate as old as private international law itself, near-impossible to solve in the abstract. One could easily forgive the ILC for avoiding an issue that lies outside its primary area of expertise. At the same time, the ILC's laconism contrasts with its approach towards jurisdiction. The ILC articulated the sixth principle on domestic remedies with a clear concern for access to justice and jurisdiction.[1101] It did not take a clear stance in favour of the European approach of letting the victim choose between courts at the place of acting or at the place of injury, but it expressly noted the ILA's conclusion that this represented

[1099] *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 87, para 9.
[1100] See generally Thomas Kadner Graziano, "Torts" in Basedow et al, vol 2, *supra* note 53, 1709 [Kadner Graziano, "Torts"].
[1101] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6.

a "firmly established" trend.[1102] In this sense, the ILC took a position and contributed to the development of private international law, which its peripheral mandate allows.[1103] When it came to the choice of law problem, the ILC simply called for further harmonization.

This restraint is unfortunate because choice of law is central to the philosophy underlying the *ILC Principles on the Allocation of Loss*. Some civil liability treaties provide that the law of the forum will govern any issue left unaddressed by the treaty itself.[1104] This rule is understandable because the point of civil liability treaties is to comprehensively harmonize domestic law in order to avoid conflicts altogether. The need for a choice of law rule disappears when states harmonize their domestic regimes because the same law applies wherever plaintiffs bring their case. No conflict can arise between jurisdictions with respect to the substantive issues covered by the treaty.[1105] The *ILC Principles on the Allocation of Loss*, by contrast, emerged in the midst of treaty failure. The ILC understood that substantive harmonization was unlikely. It gave the states much more latitude to implement the various aspects of the duty to ensure prompt and adequate compensation (including jurisdictional aspects) as they saw fit. It would have made sense for the ILC to offer more guidance on choice of law, precisely because it knew that regulatory diversity would persist and that the applicable law would have an impact on the availability of prompt and adequate compensation. Instead, the ILC settled for non-discrimination and equal remedy.

[1102] *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 87, para 8, citing ILA, "Second Report on Transnational Enforcement of Environmental Law", *supra* note 534 at 899. See also ILA, "Final Report on Transnational Enforcement of Environmental Law", *supra* note 201 at 664–68.
[1103] See *Statute of the ILC*, *supra* note 42, art 1(2) ("[t]he Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law"). But see French & Kotzé, *supra* note 512 ("[i]t is debatable how far [the allocation of loss in domestic regimes, ed] is a matter of international law (in contradistinction to domestic (or private international) law), and, more specifically, how far public international law can—or has so far provided detailed rules necessary to—prescribe the result" at 29, n 32).
[1104] See *Basel Liability Protocol*, *supra* note 327, art 19; *CSC*, *supra* note 322, arts I(k), XIV(2); *Vienna Convention*, *supra* note 322, art I(e); *Nuclear Ships Convention*, *supra* note 323, art I(12); *Paris Convention*, *supra* note 322, art 14(b). But see *Kiev Liability Protocol*, *supra* note 135, art 16 (law of the forum applicable to compensation claims, but victims can choose the law of the place where the accident occurred if the lawsuit is brought elsewhere); *Seabed Mineral Resources Convention*, *supra* note 319, art 15(2) (law of the controlling state applicable to limitations of liability).
[1105] See García-Castrillón, *supra* note 106 at 565–66.

3.1.2. Non-discrimination and equal remedy

The *ILC Principles on the Allocation of Loss* require that remedies available in the source state be at least as prompt, adequate and effective as those available in the victim state.[1106] I referred to this requirement in the second chapter as the equal remedy requirement, a subset of non-discrimination distinct from equal access.[1107] This language became a dominant trend in the 1970s when states were working on the law applicable to transboundary pollution from the angle of non-discrimination. The idea was to ensure that foreign victims of pollution could rely on all the remedies available in the source state as if they were local victims—in other words, that they were not disadvantaged when it came to the prevention and compensation of environmental damage.

The OECD, for instance, recommended that all victims be treated in a manner at least equivalent to how the source state treated local victims.[1108] It went on to list a series of procedural requirements to achieve such equivalent treatment.[1109] The *Nordic Convention* similarly provides that compensation should be assessed under rules that are no less favourable to victims than those of the source state.[1110] Many of the environmental treaties,[1111] guidelines,[1112] resolutions and reports from the ILA[1113] and the IIL,[1114] and model laws[1115] mentioned earlier in relation to equal access also speak of local remedies, treatment or standards.

[1106] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6(2).
[1107] For further discussion on the distinction between equal access and equal remedy, see subsection 2.1.2 above.
[1108] See *OECD Recommendation*, *supra* note 198, s 4(a).
[1109] See *ibid*, s 4(b).
[1110] See *Nordic Convention*, *supra* note 199, art 3, para 2.
[1111] See *Revised Protocol on Shared Watercourses*, *supra* note 691, art 3(10)(c); *Aarhus Convention*, *supra* note 406, art 3(9); *UN Watercourses Convention*, *supra* note 625, art 32; *Protocol for the Protection of the Mediterranean Sea*, *supra* note 399, art 26(4) (language restricted to administrative proceedings); *Boundary Waters Treaty*, *supra* note 646, art II, para 1.
[1112] See *Draft Principles of Conduct in the Field of the Environment*, *supra* note 692, Principle 14.
[1113] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rules 3(3)–3(4); *ILA Berlin Rules on Water Resources*, *supra* note 410 at 409, art 71(1); *ILA Helsinki Articles on Private Law Remedies*, *supra* note 364 at 405, art 2(1); *ILA Montreal Rules on Water Pollution*, *supra* note 658 at 544, art 8. See also *Restatement (Third) of Foreign Relations Law*, *supra* note 12, § 602(2).
[1114] See *IIL Resolution on Responsibility and Liability*, *supra* note 616 at 513, art 30.
[1115] See *IUCN Draft International Covenant on Environment and Development*, *supra* note 414 at 22 (art 62), 163; SFDE & GfU, *supra* note 695 at 103 (art 5), 108 (art 23); Muldoon, Scriven & Olson, *supra* note 109 at 358, s 5.

It is difficult to say what the drafters had in mind with those provisions, as opposed to those providing for equal access. Is access to equal remedies in the source state the same as equal access to its courts? What about equivalent treatment, standards or rules? Like equal access and non-discrimination, equal remedy is a broad and shape-shifting notion, inconsistently used in different legal instruments and in academic writing. Semantics aside, the important question for our purposes is whether it means anything for the designation of the applicable law. Does it guarantee that a certain law (or parts thereof) will apply, just as equal access guarantees the jurisdiction of the courts in the source state. Or is it strictly procedural? In other words, what is the relationship between equal remedy and choice of law?

At first blush, equal remedy is strictly procedural and has nothing to do with choice of law. It simply calls for the removal of procedural obstacles such as standing, security for costs, jurisdiction and others. The logic is straightforward. Foreign plaintiffs who have no standing, for instance, cannot claim remedies available to local plaintiffs in the source state. A conflict between the law of the source state and the law of the victim state may still exist, but it is theoretical because local law invariably governs procedural issues in the local court.[1116] On this view, equal remedy has no bearing on the designation of the law applicable to liability itself, only the procedural steps prior to trial. It requires the source state to remove procedural obstacles aimed at foreign plaintiffs, such that they get an equal possibility of invoking *some remedy* in the source state, regardless of how it compares to the remedies available to local plaintiffs. In other words, the substantive remedies ultimately available to foreign victims when the case is tried on the merits (and applicable as a result of choice of law rules) may be less favourable than those available to local victims, without contradicting the idea of equal remedy.

This procedural interpretation of equal remedy does not tell the whole story. Why speak of remedies at all if equal access already secures access to the courts of the source state in a transboundary context? The *Reciprocal Access Act*, for instance, contains different

[1116] See CCQ, art 3132; *Tolofson*, *supra* note 1074 at 1067.

provisions for equal access and equal remedy.[1117] This implies some difference between the two concepts (even though the *Act* further complicates things with a third separate provision on choice of law).

The ILC's own interpretation of the *Principles on the Allocation of Loss* confirms that equal remedy goes beyond procedural considerations and is directly connected with choice of law. For the ILC, the sixth principle requires not only that foreign victims get equal access to the courts of the source state, but also that they benefit from "the same *substantive level* of remedies" as local victims in the source state.[1118] From this perspective, the applicable law under choice of law rules has a clear impact on equal remedy. An injury suffered outside the source state triggers the rules of private international law. If the choice of law process leads to a law that is less favourable to foreign victims than the law of the source state (for instance, the hypothetically less favourable law of the place of injury), the objective of equal remedy is not met. Foreign victims are treated worse than victims in the source state as a result of the choice of law process.[1119] Conversely, the objective of equal remedy is met if the choice of law process leads to the law of the source state because a single law applies to all victims, but it will not help them if that law does not favour compensation.

This highlights an important difference in how we think of jurisdictional and choice of law rules in light of the requirements of the *ILC Principles on the Allocation of Loss*. We have seen that equal access (effectively achieved through appropriate jurisdictional rules) contributes *in itself* to the availability of prompt and adequate compensation. In opening the doors of the courtrooms, they make prompt and adequate compensation possible for all victims. It may not suffice to ensure equal access if other procedural obstacles subsist, but jurisdictional rules themselves can do no more than allow a court to hear their claim—the court either has or does not have jurisdiction. Achieving equal remedy

[1117] See *Reciprocal Access Act*, *supra* note 740, ss 2–4; *ON Reciprocal Access Act*, *supra* note 747, ss 2–4; *MB Reciprocal Access Act*, *supra* note 747, ss 2–4; *NS Environment Act*, *supra* note 747, ss 146–48; *PEI Reciprocal Access Act*, *supra* note 747, ss 2–4.
[1118] *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 86, paras 5–6 [emphasis added]. See also Greco, *supra* note 625 (distinguishing "[n]on-discrimination in granting access to judicial […] procedures" from "[n]on-discrimination in granting rights to claim compensation […]" at 334–37).
[1119] See Muldoon, Scriven & Olson, *supra* note 109 at 62.

through choice of law rules, on the other hand, does not necessarily ensure the availability of prompt and adequate compensation because choice of law rules can ensure equality and at the same time designate a law with low prospects of liability. This is due to the usual formulation of choice of law rules. A rule which disregards the contents of the potentially applicable law may designate the same law for all victims but cannot guarantee a substantive outcome such as prompt and adequate compensation, which depends on substantive law. This is why I occasionally refer to equal remedy and prompt and adequate compensation (more accurately, the *likelihood* of prompt and adequate compensation) as two distinct but related objectives to strive for when designing choice of law rules for transboundary pollution.

For now, suffice it to say that choice of law is undeniably relevant in the *ILC Principles on the Allocation of Loss*—whether to ensure equal remedy or prompt and adequate compensation—even though the ILC says little on this point. I return to this idea—and what kind of equality it actually requires—after a brief analysis of the implementation of equal remedy in Canada.[1120]

3.1.3. Implementation of equal remedy in Canada

Canadian initiatives to specifically implement equal remedy for foreign victims of transboundary pollution are few and far between. The *Boundary Waters Treaty* and the *International Boundary Waters Treaty Act* have an equal remedy provision for water diversion.[1121] The *Draft Treaty on Equal Access and Remedy* requires Canada to ensure that American victims of transboundary pollution are treated in a manner at least equivalent to local victims.[1122] The *Reciprocal Access Act* provides not only that foreign victims have access to the courts of the source province/state, but also that they have the same rights to relief as local victims.[1123] Likewise, the *NAAEC* tasks the CEC with the consideration and appropriate development of recommendations regarding equal access

[1120] See subsection 3.1.4.2.2 below.
[1121] See *International Boundary Waters Treaty Act*, *supra* note 646, s 4(1); *Boundary Waters Treaty*, *supra* note 646, art II, para 1.
[1122] See *Draft Treaty on Equal Access and Remedy*, *supra* note 731, art 2(a).
[1123] See *Reciprocal Access Act*, *supra* note 740, s 3; *ON Reciprocal Access Act*, *supra* note 747, s 3; *MB Reciprocal Access Act*, *supra* note 747, s 3; *NS Environment Act*, *supra* note 747, s 147; *PEI Reciprocal Access Act*, *supra* note 747, s 3.

and remedies.[1124] I discussed these instruments in the second chapter.[1125] I concluded that they did not have a strong impact on cross-border environmental litigation, and that the general law of jurisdiction would apply in most cases. The same is true for choice of law.

3.1.4. Going beyond the *ILC Principles on the Allocation of Loss*

We have seen that the *ILC Principles on the Allocation of Loss* require equal remedy, and that Canada lacks a comprehensive instrument in this sense. As in the second chapter, this is not the end of the matter. Choice of law rules may effectively achieve the same result even when no specific framework such as the *Reciprocal Access Act* is in place to ensure equal remedy, while also favouring prompt and adequate compensation. The ILC refrained from prescribing a preferable approach for choice of law. Nonetheless, the ubiquity principle has emerged as a logical extension of its framework and a sound alternative to overly rigid definitions of the *lex loci delicti*.

I first analyze the challenges of transboundary pollution in choice of law methodology (3.1.4.1). I then introduce the ubiquity principle, a method noted by the ILC, formally recommended by UNEP and now commonly used in Europe to deal with conflicts of laws in this area (3.1.4.2). The ubiquity principle, I argue, is the most appropriate way to deal with transboundary pollution through choice of law rules. It is a useful benchmark to assess Canadian law.

3.1.4.1. Transboundary pollution and the law of the place of the tort

In Canada, the law applicable to torts is typically the law of the place where the tort occurred (*lex loci delicti*), understood as the law of the place where the wrongful activity occurred.[1126] Many other states apply the *lex loci delicti*.[1127] Localizing a tort is easy when the act and its consequences occur in the same state, but again, complex torts such

[1124] See *NAAEC*, *supra* note 752, art 10(9).
[1125] See subsection 2.1.3 above.
[1126] For further discussion on Canadian choice of law rules, see subsection 3.2.1 below.
[1127] For a survey, see Kadner Graziano, "Torts", *supra* note 1100 at 1710–11; Symeon C Symeonides, "Torts and Conflict of Laws" in Mauro Bussani & Anthony J Sebok, eds, *Comparative Tort Law: Global Perspectives* (Cheltenham: Edward Elgar, 2015) 39 at 47–48 [Symeonides, "Torts and Conflict of Laws"]; Symeonides, *Codifying Choice of Law*, *supra* note 583 at 52–58.

as those associated with transboundary pollution raise greater difficulties because the act and its consequences occur in different places. The issue is not to identify where the act took place, but to choose between the law of that place and the law of the place of injury. Another option is to let the court or the plaintiff decide in each case, as we will see below.[1128]

There is an inherent tension between a state's legitimate interest in regulating conduct occurring on its territory (and our own expectation that the wrong we commit will be governed by the law of the place where we acted) and the idea that tort law does not punish wrongdoers so much as it compensates victims for the damage they suffer. The first idea favours the place of acting as the default rule and the second favours the place of injury.[1129] The dilemma is easily avoided at the jurisdictional stage because both the source state and the victim state can have an interest in hearing the dispute. It is not even necessary to speak in terms of localizing environmental torts in one place or the other. Strong connections with the forum suffice. But there can only be one applicable law, hence only one place where torts occur for choice of law purposes. How to choose?

Both connecting factors have advantages and disadvantages. Applying the law of the place of injury aligns with the compensatory function of civil liability, but it burdens the judicial process when the dispute involves multiple plaintiffs in different states, whose claims are each governed by a different law. It also poses evidentiary problems if the injury is difficult to pin to a single place (long-term exposure to harmful substances, for instance). Finally, the tortfeasor may not have foreseen that an injury would occur in a given place, which makes compliance *ex ante* difficult. Applying the law of the place of

[1128] For further discussion on this option, see subsection 3.1.4.2 below. Bear in mind that in certain states such as Canada, courts cannot apply choice of law rules on their own motion. Only parties can, and they might choose not to invoke foreign law at all in those circumstances. For further discussion on this point, see the text accompanying note 1273.

[1129] *Cf Rome II Regulation*, *supra* note 186, Preamble ("[a] connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability" at para 16); *Tolofson*, *supra* note 1074 at ("[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result" at 1050–51).

acting allows tortfeasors to predict the consequences of their actions with more certainty and avoids fragmentation. But it also downplays the interest of foreign states in compensating (and possibly preventing) damage occurring on their own territory—something which the place of acting may have no interest in doing. As the High Court of Australia rightly pointed out in a famous online defamation case,

> [c]ertainty does not necessarily mean singularity. What is important is that publishers can act with confidence, not that they be able to act according to a single legal system, even if that system might, in some sense, be described as their "home" legal system. Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place.[1130]

Much can be said on the desirability and viability of either option for torts generally. I will focus here on the particular challenges of transboundary pollution. From this perspective, no hard-and-fast definition of the *lex loci delicti* is satisfactory. Localizing environmental torts at the law at the place of acting might encourage polluters to conduct their operations in states with low environmental standards.[1131] Victims thus cannot invoke the hypothetically more favourable law of the place of injury. The extent of a polluter's ability to shop its regulatory regime depends on the nature of its operations. It is illusionary if the operations involve the extraction of natural resources located only in a certain place, but it is likely if they involve human activities which could be done in several jurisdictions. In this context, applying the law of the place of acting imposes the weaker standards of the source state on the rest of the world and ignores other states' legitimate interest in activities which impact their own environment or the well-being of their population. It allows polluters to harm foreign populations while generating profit under the protection of a law which they chose by setting up their operations in a particular country.

This does not mean that the regime "chosen" by polluters will grant them complete immunity for their actions. The law of the place of acting may be strigent: it may feature a strict liability regime or it may not recognize statutory compliance as a defence to civil

---

[1130] *Dow Jones & Company Inc v Gutnick*, [2002] HCA 56 at para 24, 210 CLR 575.
[1131] See Thomas Kadner Graziano, *La responsabilité délictuelle en droit international privé européen* (Basel: Helbing & Lichtenhahn, 2004) [Kadner Graziano, *Responsabilité délictuelle*] (describing the application of the law of the place of acting as creating a "*possibilitée cachée d'élection de droit*" at 53).

liability. And if litigation takes place in the victim state, local environmental laws may override the law of the place of acting if the court considers them to be mandatory. In the abstract, therefore, the law of the place of acting does not always favour polluters even when it is the only connecting factor used in a choice of law rule. But it becomes problematic if other, more severe regimes exist. Polluters can then *choose* to avoid those regimes by setting up their activities in a certain place, knowing that only the law of that place will apply. The problem with the law of the place of acting lies in the choice given to the polluter, not the substantive result it leads to in any given case.

Localizing environmental torts only at the place of injury, however, does not eliminate the risk that polluters shop for a favourable regulatory regime. It might in fact encourage them to conduct their operations so that the consequences occur in a neighbouring state with low environmental standards. Victims thus cannot invoke the hypothetically more favourable law of the source state. This hardly seems fair for foreign victims since local victims of the same polluter benefit from that higher standard.[1132]

The application of the law of the place of injury raises another kind of concern in the opposite scenario, that is, when it is more favourable than the law of the place of acting. At the outset, it implies that the victim state imposes on the source state a stronger environmental policy. This is a significant encroachment on the sovereignty of the source state, particularly if it affects the financial viability of its industry.[1133] But as we have seen, the victim state also has a strong interest in preventing environmental damage on its territory.

More importantly, the application of the law of the place of injury may create inequalities among victims of transboundary pollution. This is especially true for mass environmental torts which cause damage across different states. Consider a polluter operating in state *x*

[1132] On the dilemma associated with both connecting factors, see Giansetto, *supra* note 225 at paras 526–28; Grušić, *supra* note 10 at 212–13; Muir Watt, "Intérêts gouvernementaux", *supra* note 53 at 132–33; Betlem & Bernasconi, *supra* note 93 at 140; Muir Watt, "European Integration", *supra* note 53 at 18–19; Muir Watt, "Aspects économiques", *supra* note 53 at 269–70.

[1133] See Ebbesson, *supra* note 48 (suggesting, in the context of litigation outside the place of acting or the place of injury, that "[s]ome caution is required in terms of jurisdiction as well as the choice of law, in order to avoid a sense of imposing protection standards from one state or region onto another, and of disregarding the moral weight of self-determination and autonomy of the people concerned" at 291).

(place of acting) and causing pollution in states *x*, *y* and *z* (places of injury). Now consider that courts in state *x* have assumed jurisdiction and that the choice of law rule in state *x* leads to the law of the place of injury (*x*, *y* or *z*, depending on where the victim is located). In this context, the choice of law rule may create two types of inequalities. First, the choice of law rule may create inequalities between local and foreign victims. If the laws of states *y* and *z* (place of injury of foreign victims) are more favourable to compensation than the law of state *x* (place of acting and place of injury of local victims), foreign victims have an advantage over local victims. Conversely, if the laws of states *y* and *z* are less favourable to compensation than the law of state *x*, local victims have an advantage over foreign victims. Second, the choice of law rule may create inequalities among foreign victims themselves. If one of the places of injury (state *y*) has a more favourable law than the other (state *z*), applying the law of the place of injury means that victims in state *y* have an advantage over victims of the same activity in state *z*.[1134]

Summing up on the pros and cons of the law of the place of acting and the law of the place of injury, the important takeaway is that a rigid definition of the *lex loci delicti* allows polluters, in one way or another, to rely on weak domestic regimes and to avoid stringent ones—either by operating in a state with low environmental standards (if the

[1134] While the inequalities I describe are among victims of the same transboundary event, there may also be inequalities between victims of transboundary pollution and victims of domestic pollution (i.e., pollution which does not trigger the rules of private international law because it is entirely local). Consider a polluter operating in state *x* (place of acting) and causing pollution in states *x* and *y* (places of injury). Assume that the law of state *x* is more favourable to compensation than the law of state *y*. If the choice of law rule points to the hypothetically more favourable law of the place of acting, victims of transboundary pollution in state *y* receive a better treatment than victims of domestic pollution in state *y* simply because the polluter happens to operate elsewhere. See Peter Hay, "Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation" (2007) 7:4 Eur Leg F 135 at 145 [Hay]. Similar inequalities occur when the choice of law rule points to the hypothetically more favourable law of the place of injury. Victims of transboundary pollution in state *y* receive a better treatment than local victims of the same transboundary event in state *x*, but they also receive better treatment than the population of state *x* would have received if the pollution had remained entirely within state *x*. The different treatment of victims of domestic and transboundary pollution is problematic because it has no obvious rationale. As Von Bar writes, "[i]t is not easy to understand why the protection of victims should be higher in the instance of border-crossing events than it is with a domestic one." Von Bar, "Environmental Damage", *supra* note 192 at 371. Yet it is difficult to avoid. As Sand accurately points out, "[…] no choice of law can help being discriminatory in some way—if only vis-à-vis other parties involved in comparable but purely "domestic" disputes, who consequently cannot benefit from such more favourable rules as may be applicable, fortuitously or after skillful forum-shopping, to a "privileged" transnational dispute." Sand, "Domestic Procedures", *supra* note 521 at 190 [emphasis omitted].

tort is located at the place of acting) or by causing damage in a state with low environmental standards (if the tort is located at the place of injury). Of course, this is only a risk, not a certainty. Either definition of the *lex loci delicti* may well designate a law that will in fact ensure prompt and adequate compensation. Transboundary environmental disputes do not always involve two dramatically divergent laws, one very favourable to compensation and the other absolutely not. This is particularly true for interprovincial pollution in Canada. In such cases, the two laws may prove acceptable for victims. And if discrepancies do exist, choice of law rules may still lead to the most favourable of two laws. Foreign victims, for instance, are a good position if a choice of law rule designates the hypothetically more favourable law of the place of injury. Likewise, all victims are in a good position if the hypothetically more favourable law of the place of acting applies. But a rigid definition of the *lex loci delicti* reaches those results by coincidence rather than by design. Applying only one of the two laws in all cases *will* jeopardize equal remedy or the likelihood of prompt and adequate compensation in certain scenarios. A better design is possible. To align with the duty to ensure prompt and adequate compensation, a choice of law rule for transboundary pollution would have to remove incentives to pollute in a certain place and increase the prospects of liability as much as possible. To align with equal remedy, a choice of law rule would also have to strive for equality among victims. This is where the ubiquity principle comes into play.

3.1.4.2. The ubiquity principle

The ubiquity principle is the practice of applying either the law at the place of acting or the place of injury, whichever is the most favourable to compensation. The tort is ubiquitous, located in every place where it manifests itself.[1135] German courts have used

[1135] See HU Jesserun D'Oliveira, "La pollution du Rhin et le droit international privé" in Roefie Hueting et al, eds, *Rhine Pollution: Legal, Economic and Technical Aspects* (Zwolle: Tjeenk Willink, 1978) 81 at 98. D'Oliveira is one of the first scholars to have thoroughly studied the ubiquity principle in relation to transboundary pollution. See also Alfred Rest, *The More Favourable Law Principle in Transfrontier Environmental Law: A Means of Strengthening the Protection of the Individual?* (Berlin: Erich Schmidt, 1980). Von Hein explains that "[a]s a general rule, the principle of ubiquity was developed by German courts mostly because it allowed a more flexible handling of the lex loci delicti and favored the application of the lex fori. In most cases involving bi- or multilocal torts brought before a German court, at least one of the relevant places (acting or injury) could be inside Germany." Jan von Hein, "Something Old and

it since the late nineteenth century, including in transboundary environmental disputes.[1136] The ubiquity principle is now part of the German statute on private international law.[1137] Other states have a similar rule.[1138] In this kind of framework, the choice of law may belong to the plaintiff or the court.[1139] The mechanics of the rule may vary. Both laws can have equal status (a positive choice is required at the outset), or one can apply by default and be displaced only by a contrary choice.[1140] However the rule is structured, the idea of the ubiquity principle is to give enough leeway to choose the law that is the most favourable to compensation—either directly by applying the most favourable law, or indirectly by letting the victim choose.

I recommend the ubiquity principle as a choice of law rule for transboundary pollution for three reasons. First, it performs a regulatory function (3.1.4.2.1). Second, it ensures equal remedy (3.1.4.2.2). Finally, it attracts consensus and is spreading around the

---

Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution" (2008) 82:5 Tul L Rev 1663 at 1683 [Von Hein, "Rome II"].

[1136] See *Lindan*, *supra* note 785 (environmental damage in Germany caused by French chemical factory—French law applied because it was more favourable to the plaintiffs); Landgericht Saarbrücken [Regional Court], 4 July 1961, (1961) Die deutsche Rechtsprechung auf dem Gebiete des International Privatrechts (IPRspr) [German Court Rulings in Private International Law] No 38, 125 (Germany), aff'd Oberlandesgericht Saarbrücken [Regional Court of Appeal], 5 March 1963, No 2 U 191/61 (unreported) (Germany) (damage in Germany caused by French coal facility—French law applied because it was more favourable to the plaintiffs); Oberlandesgericht Saarbrücken [Regional Court of Appeal], 22 October 1957, (1958) 11:20 Neue Juristische Wochenschrift (NJW) [New Law Weekly] 752 (Germany) (environmental damage caused in Germany by French power plant—French law applied because it was more favourable to the plaintiffs); Rest, "German Courts", *supra* note 351 at 412–13; Rest, *More Favourable* Law, *supra* note 1135 at 69–72; Sand, "Domestic Procedures", *supra* note 521 at 148–49; Rest, *Convention on Compensation*, *supra* note 695 at 61–62; McCaffrey, *Transfrontier Environmental Disturbances*, *supra* note 227 at 40–46.

[1137] See *Einführungsgesetz zum bürgerlichen gesetzbuche* [Introductory Act to the Civil Code of 18 August 1896)], Bundesgesetzblatt (BGBI) [Federal Law Gazette] I 2494, s 40(1), translated in Basedow et al, vol 4, *supra* note 53, 3226 & online: *Federal Ministry of Justice and Consumer Protection* <www.bmjv.de> [perma.cc/ZV3C-CG6J] [*Introductory Act to the German Civil Code*].

[1138] For a survey, see Symeonides, "Idealism, Pragmatism, Eclectism", *supra* note 583 at 239–44; Symeonides, "Torts and Conflict of Laws", *supra* note 1127 at 48–49; Symeonides, *Codifying Choice of Law*, *supra* note 583 at 59–67, 272–75, 277–78; Symeonides, "Missed Opportunity", *supra* note 1228 at 1764–65.

[1139] For a survey, see Symeonides, "Idealism, Pragmatism, Eclectism", *supra* note 583 at 239–44; Symeonides, *Codifying Choice of Law*, *supra* note 583 at 60–61. On the advantages and disadvantages of both options, Von Bar, "Environmental Damage", *supra* note 192 at 373–75.

[1140] See *Rome II Regulation*, *supra* note 186, art 8 (law of the place of damage applicable by default if the victim does not elect the law of the place of acting); *Introductory Act to the German Civil Code*, *supra* note 1137, s 40(1) (law of the place of acting applicable by default but the victim can elect the law of the place of injury).

globe—adopted in the EU, recommended by international organizations and supported by scholars (3.1.4.2.3).

3.1.4.2.1. The regulatory function of the ubiquity principle

First, the ubiquity principle is recommendable because it reduces the incentive for polluters to establish their operations in a friendly jurisdiction or to cause damage in a jurisdiction with low environmental standards.[1141] This has a positive impact on victims, and possibly on the level of environmental standards themselves.

As I mentioned earlier, the mobility of polluters depends on the nature of their operations. The more their operations depend on human rather than natural resources, the easier it is for them to move across jurisdictions and exploit regulatory discrepancies. The ubiquity principle eliminates the problem by applying the most favourable of two laws. Victims may not obtain prompt and adequate compensation (if, for instance, neither law is particularly favourable to it), but the likelihood of compensation may increase. Meanwhile, polluters can no longer externalize the consequences of their operations by taking advantage of a weaker law.

The ubiquity principle evidently favours victims, which raises fairness concerns. But it is not unprecedented nor illegitimate. We have seen that choice of law rules already play a similar role in particular areas such as consumer law, employment law, insurance law or product liability,[1142] areas in which vulnerable parties can fall prey to the excesses of a globalized market. There is no reason why choice of law rules could not play a similar role in relation to environmental law,[1143] particularly when the well-being of an entire population (and the planet itself) is at stake. There is nothing illegitimate about a rule

[1141] See Lequette, *supra* note 583 ("[i]*l n'est, en conséquence, pas d'intérêt pour une entreprise de s'établir dans un pays pratiquant une politique écologique laxiste, dès lors que la pollution ainsi produite présente un caractère transfrontière, puisqu'elle se verra appliquer les règles plus exigeantes du pays où le dommage s'est fait sentir. Inversement, le calcul qui consisterait à s'établir dans un pays à la législation rigoureuse, à proximité d'un pays laxiste où les effets de la pollution seraient ressentis, perd également tout intérêt*" at 523).

[1142] For further discussion and references to substance-oriented rules of private international law in those areas, see subsection 1.3.2.2 above.

[1143] See Boskovic, "Regulatory Strategies", *supra* note 597 at 194–95; Von Bar, "Environmental Damage", *supra* note 192 at 363–64.

which favours the interests of the victims of transboundary pollution over those of polluters[1144] if it points to a law in sufficiently close proximity with the situation. Whether we ultimately enact such a rule is our choice,[1145] but as Wai explains, the regulation of transnational actors through the proxy of private law is a legitimate policy goal for private international law.[1146] The ubiquity principle is a way to achieve that goal in relation to transboundary pollution.

This said, protecting the victims is one thing and protecting the environment is another. Yet we often describe the ubiquity principle as capable of doing both. Muir Watt's account of the ubiquity principle adopted in the EU, in particular, goes beyond the protection of individual rights. She suggests that choice of law can remedy distortions of competition for public goods while avoiding the pitfalls of substantive harmonization and preserving states' ability to pursue their own legitimate socio-economic policies.[1147] A "specifically regulatory function of the conflict rule", she says, "induces a profound change in the way the rule is designed; rather than attaching an appropriate connecting factor to an abstract category of issues, the rule identifies the risk of distortion and seeks the best way to correct it."[1148] This systemic perspective on choice of law rules leads Muir Watt to describe the ubiquity principle adopted in the EU as a mechanism designed not to protect victims *per se*, but to correct a particular distortion (the geographic mobility of polluters in a context of regulatory competition), to raise standards in accordance with European policy and ultimately to protect the environment.[1149] As we

[1144] See Grušić, *supra* note 10 ("[i]n international environmental litigation there is no justification for favouring the interests of polluters over those of victims" at 213). See also Von Bar, "Environmental Damage", *supra* note 192 at 372.
[1145] As Van Loon suggests, awareness of the major role played by private international law in transboundary environmental disputes "may instigate legislators to use it in order to provide citizens with a remedy for cross-border environmental harm and influence environmental conduct of economic actors across borders." Van Loon, "Global Horizon", *supra* note 83 at 86. See also Van Loon, "Global Legal Ordering", *supra* note 83 at 231–32, 234; Van Loon, "Principles and Building Blocks", *supra* note 83 at 317–18. This statement betrays a clear preference for the rights of the "citizens" as opposed to those of "economic actors", but again, it is no more problematic than favouring the consumer over the merchant, or the employee over the employer.
[1146] See Wai, "Regulatory Function", *supra* note 6 and the other sources cited *supra* note 60.
[1147] See Muir Watt, "Political Economy", *supra* note 53 at 393–94 and the other sources cited *supra* note 53.
[1148] Muir Watt, "European Integration", *supra* note 53 at 20 and the other sources cited *supra* note 53.
[1149] See Muir Watt, "Beyond the Schism", *supra* note 53 at 388; Muir Watt, "Theorizing Private International Law", *supra* note 53 at 876; Muir Watt, "Fonction économique", *supra* note 53 at 120; Muir

will see below, the European legislature itself viewed the alignment of private international law with its substantive environmental policy as a fundamental justification for incorporating the ubiquity principle into the *Rome II Regulation*, at least as fundamental as the protection of victims *per se*.[1150] The Permanent Bureau of the HCCH and the ILA similarly described the ubiquity principle as strengthening environmental protection.[1151]

Promoting the ubiquity principle in this context presupposes that the law which offers the best prospects of liability for the plaintiff is also the most protective of the environment generally. It also presupposes that polluters everywhere will abide by that higher standard standard and that states will eventually adjust their own law to match it.[1152] Whether the ubiquity principle can have such an effect on compliance and the level of environmental standards brings us back to the uncertain systemic impact of tort law on environmental protection.[1153] At the very least, the ubiquity principle reduces the incentives to pollute in a place with low environmental standards, whereas discrepancies in domestic laws and a rigid definition of the *lex loci delicti* exacerbates them. This is a good beginning. It also removes incoherences in our response to global environmental challenges. Domestic measures (including civil liability) will have a role to play in the fight against transboundary pollution as long as international treaty-making, cooperation and harmonization remain difficult. In this context, it would be counterproductive for a state to enact strong pollution-control measures while tolerating choice of law rules which contribute to the under-regulation of transboundary pollution. Whether the ubiquity

---

Watt, "Intérêts gouvernementaux", *supra* note 53 at 133–34; Muir Watt, "European Integration", *supra* note 53 at 18–19.

[1150] EC, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II)*, 22 July 2003, COM(2003) 427 final at 19, [2004] OJ, C 96/5, reprinted in (2003) 5 YB Priv Intl L 345 [*2003 Rome II Proposal and Explanatory Memorandum*]. For further discussion on this point, see subsection 3.1.4.2.3.1 below.

[1151] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 80; ILA, "Second Report on Transnational Enforcement of Environmental Law", *supra* note 534 at 912. See also Betlem & Bernasconi, *supra* note 90 at 141.

[1152] For skeptical views of article 7 of the *Rome II Regulation* on this point, see Hay, *supra* note 1134 at 145; Kadner Graziano, *Responsabilité délictuelle*, *supra* note 1131 at 60 (giving victims the choice to rely on the hypothetically more favourable law of the source state does nothing to convince the victim state to improve its own law).

[1153] For further discussion on the assumptions of civil liability regimes, see subsection 1.1.4.2 above.

principle ultimately raises global standards and prevents pollution is a matter of empirical research.

3.1.4.2.2. Equal remedy and the ubiquity principle

Second, the ubiquity principle is recommendable because it fulfills the requirement of equal remedy, even though it may not achieve perfect equality among all victims of transboundary pollution.

As we have seen, equal remedy takes the source state as a point of reference to assess the treatment of local and foreign victims. Equal remedy has implications for choice of law rules because it imposes a substantive standard of protection for foreign victims (unlike equal access which is concerned with procedural and jurisdictional standards).[1154] But any choice of law rule which designates the law of the place of injury—including the ubiquity principle—may create inequalities among victims of the same activities if the law of a victim state offers better protection than the law of the source state or the law of another victim state. This discrepancy is hard to justify. Why should foreign victims receive better treatment for the same damage? Does it not contradict the idea of equal remedy? To answer these questions, we must determine what equal remedy actually requires/allows in terms of choice of law rules.

There are two possible ways of interpreting equal remedy in relation to choice of law rules. First, equal remedy could be interpreted as imposing the law of the place of acting in all circumstances, as some authors suggested when commenting on the *Boundary Waters Treaty*.[1155] All victims of transboundary pollution receive the same treatment

[1154] For further discussion on this point, see subsection 3.1.2 above.

[1155] See Dean Sherratt & Marcus Davies, "Going with the Flow: Sovereignty, Cooperation and Governance of US-Canada Transboundary and Boundary Waters" in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law* (Waterloo: Centre for International Governance Innovation, 2018) 317 ("[i]n transboundary cases of interference or diversion, [A]rticle II established that injury caused by interference in waters flowing across the boundary gave rise to a cause of action in the venue where the interference occurred, with the caveat that its law would prevail" at 324); Daniel K DeWitt, "Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909" (1993) 69:1 Ind LJ 299 ("[…] for Article II conflicts, the countries established that the law of the defendant country would control" at 308, n 66); Carter, *supra* note 721 ("Article II designates the law of the forum where the injury originated as the substantive test of rights asserted by foreign claimants" at 167). See also Maurice Tancelin, "L'environnement et la responsabilité délictuelle en « common law » canadienne" (1977) 23:2 McGill LJ 163 (explaining that Article II of the *Boundary*

prescribed by the law of the source state, even though it might deprive some victims of the hypothetically more favourable law at the place of injury and invite polluters to operate in laxer jurisdictions. On this view, the ubiquity principle contradicts equal remedy. It can lead to the law of the place of acting, but it can also lead to the law of the place of injury, which creates inequalities among victims.

Alternatively, equal remedy could be interpreted as designating any law that is *at least* as favourable to compensation as the law of the source state, even though it might favour some victims over others. Understood in this sense, equal remedy simply ensures that the applicable law never deprives foreign victims of the hypothetically greater benefits afforded by the law of the source state. It acts as a kind of public policy exception by dismissing the parts of the applicable law that go below a pre-defined substantive standard of protection (the law of the place of acting) and preserving the parts that go above that substantive standard.[1156] On this view, the ubiquity principle becomes acceptable. Foreign victims can rely on the law of the place of acting. They can also rely on their own law if it is more favourable, no matter the differences in remedies between local and foreign victims or among foreign victims who suffer damage in different states.

In my view, the second interpretation is preferable. As we have seen, equal remedy exists to ensure that foreign victims, at a minimum, are not disadvantaged compared to local victims. It does not exist to ensure that all victims receive the exact same treatment. This is evident in many equal remedy provisions. The *OECD Recommendation* mandates a treatment "at least" equivalent to that of local victims.[1157] The OECD Secretary General mentioned the application of the law of the place of acting as only one of the solutions

---

Waters Treaty is treated in Canada as "*simplement déclaratoire d'une règle de conflit de lois*" at 183). The reasoning of the authors above makes sense. The *Boundary Waters Treaty*, unlike other instruments, provides that victims will benefit from the *same* rights and remedies as victims in the source state. See *Boundary Waters Treaty*, *supra* note 646, art II, para 1. This would only be ensured by applying the law of the place of acting.

[1156] See Mahmoudi, *supra* note 565 ("[a]ccordingly, compensation of damage may not be less favourable than at the place of origin of the injury, and the law governing the permissibility of an environmentally hazardous activity should be equal to the law of the place of origin or no less severe than the latter" at 134); Sand, "Domestic Procedures", *supra* note 521 ("[t]hough not amounting to a complete choice of the applicable law, the law at the place of origin of the environmental risk is thus designated as the minimum standard on the basis of policy considerations […]" at 189).

[1157] *OECD Recommendation*, *supra* note 198, s 4(a).

available to ensure equivalent treatment, and noted that states could always go beyond this minimum protection afforded to foreign victims.[1158] A study of the OECD Secretariat also explained that equivalent treatment had "particular relevance" when the law of the source state was more favourable than the law of the victim state.[1159] The *Nordic Convention* similarly refers to rules that are "no less favourable" to those of the source state.[1160] The *ILC Principles on the Allocation of Loss* refer to remedies that are "no less prompt, adequate and effective" as those of the source state.[1161] The same goes for the *IUCN Draft International Covenant on Environment and Development*[1162] and the *ILA Toronto Rules on Transnational Enforcement of Environmental Law*.[1163] Equal remedy therefore admits the application of the law of the place of injury if it is more favourable to the victim than the law of the place of acting.[1164]

This interpretation of equal remedy avoids the biggest objection to non-discrimination generally, namely its insistence that local and foreign victims equally benefit from what might be a very low level of protection in the source state. Potential inequalities between local and foreign victims, if they exist, do not deprive local victims of any of the rights they would have in a domestic case. It is only when comparing their rights with those of other victims that we see their situation change. Foreign victims, on the other hand, would actually lose rights that they have under their home law if the hypothetically less favourable law of the place of acting applied. In this scenario, the ubiquity principle is preferable to a low baseline for all because it incentivizes polluters to avoid harming

---

[1158] See OECD Secretary General, *supra* note 632 at 46–47.
[1159] OECD Secretariat, "Equal Right of Access", *supra* note 632 at 113.
[1160] *Nordic Convention*, *supra* note 199, art 3, para 2.
[1161] *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6(2).
[1162] See *IUCN Draft International Covenant on Environment and Development*, *supra* note 414 at 22 (art 62).
[1163] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rule 3(3). See also *ILA Helsinki Articles on Private Law Remedies*, *supra* note 364 at 409; *ILA Montreal Rules on Water Pollution*, *supra* note 658 at 544.
[1164] But see McCaffrey, "OECD Principles", *supra* note 687 at 3. The *1974 OECD Recommendation* provided that "[p]olluters causing transfrontier pollution should be subject to legal or statutory provisions *no less severe* than those which would apply for any equivalent pollution occurring within their country". See *1974 OECD Recommendation*, *supra* note 683, s 4(a) [emphasis added]. Arguably, such language would accommodate a different treatment under the law of the place of injury if that law favoured the victim. Nonetheless, according to McCaffrey, section 4(a) of the *1974 OECD Recommendation* "could be taken as a choice-of-law provision calling for the application of the law of the place of an act in proceedings relating to damage in the downstream country." McCaffrey, "OECD Principles", *supra* note 687 at 3.

people beyond the borders of the source state and promotes compliance with the higher standards of neighbouring states.[1165] The ubiquity principle is an imperfect solution, but as García-Castrillón explains, "[t]he high probability of regulatory fragmentation—especially if the damage is suffered in different states—and the lack of foreseeability for the defendant are less important than the other interests involved—such as the protection of the environment, the polluter-pays principle and the 'preventive' function of liability rules."[1166] In other words, we can legitimately choose to seek higher environmental standards over a unitary solution at all costs.

The ubiquity principle ultimately complies with equal remedy as articulated in the *ILC Principles on the Allocation of Loss*. It has drawbacks for victims in certain scenarios, like any rule which leads to the law of the place of injury, but its advantages are hard to ignore.

3.1.4.2.3. Consensus surrounding the ubiquity principle

Finally, the ubiquity principle is recommendable because it attracts a wide consensus among states, international organizations and scholars with respect to transboundary pollution.

At the outset, a choice of law rule tailored to a particular tort is hardly radical. There is a well-documented tendency in today's private international law to break down civil liability into discrete subfields, each governed by their own conflict rules—in other words, a move towards the specialization of conflict rules.[1167] In the EU, for instance, the *Rome II Regulation* contains special rules for product liability, unfair competition, environmental damage, infringement of intellectual property rights, and so on.[1168] The

[1165] See *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 19.
[1166] García-Castrillón, *supra* note 106 at 569.
[1167] See Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Leiden: Brill Nijhoff, 2015) at para 304; González Campos, *supra* note 583 at 156–213; Pierre Bourel, "Du rattachement de quelques délits spéciaux en droit international privé" (1989) 214 Rec des Cours 251 at 279–81. Kadner Graziano explains that "[i]n the second half of the 20th century, the conviction that certain categories of complex torts need to be governed by specific rules has gained ground in many jurisdictions. Introducing such specific rules became one of the most important developments in the private international law of torts." Kadner Graziano, "Torts", *supra* note 1100 at 1716.
[1168] See *Rome II Regulation*, *supra* note 186, arts 5–12.

specialization of conflict rules often intersects with their materialization, that is, a concern for a particular outcome in a particular area.[1169]

Environmental law, however, is a late player to this game.[1170] In the late 1990s, the Permanent Bureau of the HCCH conducted a survey of domestic laws and noticed that only one state had adopted a specific choice of law rule for environmental damage.[1171] Back then, the Swiss *Federal Act on Private International Law* allowed victims of damaging nuisances originating in real property to choose between the law of the state in which that property was located or the law of the place of injury.[1172] At the time of the HCCH's survey, Japan was also considering a special rule for environmental damage[1173] but ultimately did not adopt it.[1174] The HCCH nonetheless pointed out that certain states

[1169] See Lequette, *supra* note 583 at 240, 247–48. For further discussion on the materialization of private international law, see subsection 1.3.2.2 below.

[1170] In 1967, Bernard Dutoit hinted at the particular features of transboundary pollution in a famous memorandum that led the HCCH to limit its work on choice of law to a few particular torts. Dutoit, however, believed that the solution to the problem of transboundary pollution lied in interstate agreements rather than private international law. See Bernard Dutoit, "Mémorandum relatif aux actes illicites en droit international privé", HCCH Prel Doc 1 (January 1967) in Hague Conference on Private International Law, *Proceedings of the Eleventh Session: 7 to 26 October 1968*, vol 3: Traffic Accidents (The Hague: Imprimerie Nationale, 1970) 9 at 19.

[1171] See Boskovic, "Droit international privé et environnement", *supra* note 542 at para 1; HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 74–77.

[1172] See *Loi fédérale sur le droit international privé* [Federal Statute on Private International Law], RS 291, RO 1988 1776, 29:5 ILM 1254 (Switzerland), s 138, translated in Basedow et al, vol 4, *supra* note 53, 3836 [*Swiss Statute on Private International Law*]. German law also contains a special provision for "intromissions emanating from real property" adopted in 1999, now subject to the rules of the *Rome II Regulation* but previously subject to the general rule for all torts, i.e., the ubiquity principle (law of the place of acting applicable by default unless the victim elects the law of the place of injury). See *Introductory Act to the German Civil Code*, *supra* note 1137, s 44 and the initial version adopted in 1999, translated in French in (1999) 88:4 Rev crit dr int privé 870.

[1173] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 74, 76–77.

[1174] See *Act on the General Rules of Application of Laws*, ss 17–19, translated in Basedow et al, vol 4, *supra* note 53, 3334 and Kent Anderson & Yasuhiro Okuda, "Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsokuhō], Law No 10 of 1898 (As Newly Titled and Amended 21 June 2006)" (2006) 8:1 Asian Pac L & Pol'y J 136 & (2006) 8 YB Priv Intl L 427. The new Japanese legislation on private international law does contain provisions for two specific torts (product liability and defamation), but not for environmental damage. On this point, see Frederike Zufall, "Shifting Role of the "Place": From *Locus Delicti* to Online Ubiquity in EU, Japanese and U.S. Conflict of Tort Laws" (2019) 83:4 Rabel J Comp & Intl Priv L 760 at 780; Toshiyuki Kono, "Comparative Analysis of Recent Developments in Private International Law in Japan and Europe from a Japanese Perspective" (2008) 51 Japanese YB Intl L 217 at 235–36; Peter Mankowski, "The New Japanese Private International Law Act from a European Perspective" (2008) 51 Japanese YB Intl L 241 at 270–75; Yuko Nishitani, "La loi applicable à la responsabilité délictuelle: le règlement « Rome II » du point de vue japonais" (2008) 60:3 Rev DI & DC 639 at 651–57; Yuko Nishitani, "The Rome II Regulation from a Japanese Point of View" (2007) 9 YB Priv Intl L 175 at 185–90; Koji Takahashi, "A Major Reform of Japanese Private International Law" (2006) 2:2 J Priv Intl L 311 at 329–31.

had adopted variations of the ubiquity principle as the general rule for all torts (Italy, for instance), presumably including environmental torts.[1175]

The HCCH's survey—and the ultimate failure of its own project—could be read as evidence of the difficulty of explicitly embedding environmental policy into choice of law rules. Certain states might resist conflict rules guided by environmental considerations if they think that such rules would favour the interests of foreigners over those of an important local industry.[1176] Lack of political interest for choice of law issues also reduces the likelihood of changes, except perhaps as part of the broader reform of an entire body of private international law.

I remain optimistic. Environmental awareness has grown exponentially since the HCCH's work on the topic. States could decide to reform choice of law rules accordingly, particularly if they recognize the value of environmental litigation. The adoption of the *Rome II Regulation* in 2007 offers a useful precedent for a method which could become increasingly popular in the twenty-first century. Obviously, we can hardly expect states with very low environmental standards to enact environment-friendly choice of law rules. Doing so would indirectly impose a higher standard on their own industry when it affects victims elsewhere. There is no reason to think they would go in this direction if they have low standards to begin with—a political problem foreseen by the OECD decades ago.[1177] But it stands to reason that states with high environmental standards would enact choice of law rules to ensure that their own residents can rely on those high standards when pollution originates elsewhere, or to protect foreign victims of pollution originating in their territory. The duty to ensure prompt and adequate compensation under international environmental law boosts the legitimacy of imposing those higher standards on foreign states through choice of law rules, because it conveys an emerging international consensus rather than the unilateral policy of a single state.

[1175] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 74–77. For a more recent survey, see the sources cited *supra* note 1138.
[1176] See Grušić, *supra* note 10 ("[i]f comprehensive and effective international environmental standards and a global system of cooperation cannot be achieved because countries are typically guided by the interests and values of local individuals and communities, why would any country adopt private international law rules that take into account and accommodate the interests and values of outsiders?" at 191).
[1177] See OECD Secretariat, "Principles", *supra* note 632 at 243–44.

The ubiquity principle also attracts consensus among organizations and experts who studied transboundary pollution. The ILC noted the practice of applying the law that is the most favourable to the victims but did not express an opinion on the matter.[1178] The ILA, however, took the position that the ubiquity principle was best equipped to foster environmental protection.[1179] It became the fifth of the *ILA Toronto Rules on Transnational Enforcement of Environmental Law*.[1180] The ubiquity principle also finds support in the work of the HCCH. The Permanent Bureau of the HCCH mentioned in its preliminary work that the ubiquity principle had more support in environmental law than as a general rule for all torts.[1181] Experts who met in the course of the HCCH's work reached the same conclusion.[1182] Just before the HCCH removed the topic from its agenda in 2010, the Permanent Bureau noted "growing support" for the ubiquity principle and recommended continued study of its possible implementation in a global instrument.[1183] Despite the abandonment of the project, the HCCH's former Secretary General recently included the ubiquity principle as one of the basic building blocks of a global private international law regime for transboundary pollution.[1184] Finally, René Lefeber, who first hinted at the connection between private international law and the duty to ensure prompt and adequate compensation, appeared to favour the ubiquity principle

[1178] See *Commentary to the ILC Principles on the Allocation of Loss*, *supra* note 134 at 87, para 9.
[1179] See ILA, "Final Report on Transnational Enforcement of Environmental Law", *supra* note 201 at 669–70; ILA, "Second Report on Transnational Enforcement of Environmental Law", *supra* note 534 at 917. See also SFDE & GfU, *supra* note 695 at 110, art 30.
[1180] See *ILA Toronto Rules on Transnational Enforcement of Environmental Law*, *supra* note 201, Rule 5(1).
[1181] See HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 87. See also Betlem & Bernasconi, *supra* note 93 at 140; ILA, "Second Report on Transnational Enforcement of Environmental Law", *supra* note 534 at 911–912.
[1182] See Chiara Zilioli, "Choice of Law" in Von Bar, *Internationales Umwelthaftungsrecht*, *supra* note 351, 177 at 182–88, 194; Beaumont, *supra* note 523 at 35–36. The ubiquity principle already had doctrinal support at the time, with respect to transboundary environmental disputes. See eg Georges AL Droz, "Regards sur le droit international privé comparé: cours général de droit international privé" (1991) 229 Rec des Cours 9 at 285–286.
[1183] HCCH, "Should the Hague Conference Revisit Civil Liability for Environmental Damage?", *supra* note 530 at 4–5. For one author, the ubiquity principle is "the most widely supported criterion" for choosing beween the law of the place of acting and the law of the place of injury in the context of transboundary environmental damage. See Fach Gómez, *supra* note 93 at 659.
[1184] See Van Loon, "Global Legal Ordering", *supra* note 83 at 234; Van Loon, "Principles and Building Blocks", *supra* note 83 at 316–17; Van Loon, "Global Horizon", *supra* note 83 at 106. The first two texts feature a foreseeability exception to the law of the place of injury, but the latter does not.

even though he did not yet consider it to be a "procedural minimum standard" in international environmental law.[1185]

Two recent iterations of the ubiquity principle warrant our attention, one in the form of a binding legal instrument and the other in the form of a nonbinding recommendation: the *Rome II Regulation* in the EU (3.1.4.2.3.1) and the 2010 *UNEP Guidelines on Liability* (3.1.4.2.3.2). Each can influence the development of Canadian law moving forward.

3.1.4.2.3.1. The *Rome II Regulation*

In the next subsections, I examine the ubiquity principle in the *Rome II Regulation* (3.1.4.2.3.1.1) and the impact of foreign rules of safety and conduct on the applicable law (3.1.4.2.3.1.2).

3.1.4.2.3.1.1. The ubiquity principle in the *Rome II Regulation*

The *Rome II Regulation* contains choice of law rules for extracontractual obligations (torts) in Europe. Article 7 of the *Rome II Regulation* incorporates the ubiquity principle in relation to environmental damage.[1186] This particular category of extracontractual disputes gets a special treatment. Victims can choose between the law of the country in which environmental damage occurred or the law of the country in which the events giving rise to environmental damage occurred. Unlike other torts, the applicable law can never be replaced by the law of the common residence of the parties (when there is one) or the law of another country manifestly closely connected with the dispute. The provision reads as follows:

> **7.** The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to [a]rticle 4(1) [law of the country in which the damage occurs, ed], unless the person

[1185] See Lefeber, *Transboundary Environmental Interference*, *supra* note 50 at 266–67.
[1186] The preamble of the *Rome II Regulation* defines environmental damage as "meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms." *Rome II Regulation*, *supra* note 186, Preamble, para 24.

> seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.[1187]

Article 7 of the *Rome II Regulation* is explicitly driven by environmental policy. The preamble states:

> **(25)** Regarding environmental damage, [a]rticle 174 of the Treaty [new article 191 of the *Treaty on the Functioning of the European Union*, ed], which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is sei[z]ed.[1188]

The rule arose from the European Commission (EC)'s concern that the exclusive application of the law of the place of injury, as generally applicable in the *Rome II Regulation*, "[w]ould give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules."[1189] The new provision seeks to correct the problem. Because it has a universal application (it can designate the law of a non-EU state),[1190] the market correction operates both intra- and extra-EU. It seeks to discourage EU polluters from exploiting the laxer laws of other EU states and non-EU states.[1191]

The rule has a protracted legislative history, which is unsurprising given its innovative approach to a complex and controversial subject matter. The preliminary draft proposal presented by the EC in 2002 contained an environment-specific choice of law rule which designated only the law of the place of damage.[1192] The provision was somewhat

---

[1187] *Rome II Regulation*, *supra* note 186, art 7.
[1188] *Ibid*, Preamble, para 25.
[1189] *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 19–20.
[1190] See *Rome II Regulation*, *supra* note 186, art 3.
[1191] See Alex Mills, *Party Autonomy in Private International Law* (Cambridge: Cambridge University Press, 2018) at 410 [Mills]; Alex Mills, "Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?" (2016) 65:3 ICLQ 541 at 565–66.
[1192] See EC, *Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations of May 3, 2002*, art 8, reprinted in Hamburg Group for Private International Law, "Comments on the European Commission's Draft Proposal for a Council Regulation on the Law

redundant because it used the same connecting factors as other torts.[1193] Public consultations on the preliminary draft proposal showed an ambivalent response. Almost no European state had an environment-specific choice of law rule in their domestic law at the time. Some states disagreed with the proposed rule.[1194] Business associations also lobbied against it.[1195] By contrast, the Permanent Bureau of the HCCH welcomed the rule but considered that it did not go far enough because it did not adopt the ubiquity principle.[1196]

The EC maintained the environment-specific provision in the *2003 Rome II Proposal* but replaced the sole connecting factor with the ubiquity principle.[1197] The change did not go unnoticed. In 2004, the European Economic and Social Committee criticized the provision as "hav[ing] nothing to do with conflicts of laws" and invited the EC to reconsider the elective approach.[1198] A deadlock occurred when the *2003 Rome II Proposal* reached the European Parliament (EP). The EP Rapporteur suggested that the general rules were sufficient and that the *Rome II Regulation* should not encroach on substantive environmental law.[1199] On first reading, the EP followed the advice of its

---

Applicable to Non-Contractual Obligations" (2003) 67:1 Rabel J Comp & Intl Priv L 1 [Hamburg Group for Private International Law].

[1193] See Cyril Nourissat & Edouard Treppoz, "Quelques observations sur l'avant-projet de proposition de règlement du Conseil sur la loi applicable aux obligations non-contractuelles « Rome II »" (2003) 130:1 JDI 7 at 30. But see Hamburg Group for Private International Law, *supra* note 1192 ("[t]he reason for an independent conflicts rule on the violation of the environment emerges from the absence of exceptions in art 8 [of the EC's Draft Proposal]" at 25)

[1194] See Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford: Oxford University Press, 2010) at para 7.01, nn 3–4 [Dickinson].

[1195] See Union of Industrial and Employers' Confederations of Europe, "Comments on the Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligation" (7 October 2002) at 8, online (pdf): *BusinessEurope* <www.businesseurope.eu> [perma.cc/3V7E-4DZF] [UNICE].

[1196] Hague Conference on Private International Law, "Comments by the Hague Conference on Private International Law on the Provisions Related to Environmental Damage of 18 September 2002" at 7ff, cited in Willibald Posch, "Some Observations on the Law Applicable to Transfrontier Environmental Damage" in Monika Hinteregger, ed, *Environmental Liability and Ecological Damage in European Law* (Cambridge: Cambridge University Press, 2008) 33 at 50–51. To my knowledge, the original document is not available in the printed proceedings of the HCCH nor on its website.

[1197] See *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 35, art 7.

[1198] EC, *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II)*, [2004] OJ, C 241/1 at 4, 7. Some scholars agreed with this statement at the time. See Willibald Posch, "The "Draft Regulation Rome II" in 2004: Its Past and Future Perspectives" (2004) 6 YB Priv Intl L 129 at 144.

[1199] See EC, *Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, EC Doc A6-0211/2005 (2005) at 10, 19, 23–24, 39.

rapporteur and deleted the provision before sending it back to the EC.[1200] The EC then issued the *2006 Amended Rome II Proposal*, in which it rejected the amendments proposed by the EP and reiterated the necessity for an environment-specific choice of law rule.[1201]

The Council forwarded a common position to the EP, which maintained the rule proposed by the EC.[1202] The EP Rapporteur reiterated its objections.[1203] The EP yielded on second reading but proposed a more restrictive definition of environmental damage.[1204] The EC rejected the amendment once again.[1205] A compromise was finally reached and adopted by the EP in third reading.[1206] The final instrument applies directly in domestic law since 11 January 2009, and binds all EU states except Denmark.[1207]

[1200] See EC, *Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations*, [2006] OJ, C 157/370.
[1201] See EC, *Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II)*, 21 February 2006, COM(2006) 83 final at 6, [2006] OJ, C 67/38.
[1202] See EC, *Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, 27 September 2006, COM(2006) 566 final, [2006] OJ, C 303/92; EC, *Common Position (EC) 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, [2006] OJ, C 289 E/68 at 69, 72.
[1203] See EC, *Recommendation on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, EP Doc A6-0481/2006 (2006) at 9, 14, 21.
[1204] See EC, *European Parliament legislative resolution on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, [2006] OJ, C 244 E/194 at 197, 201.
[1205] See EC, *Commission Opinion in accordance with point (c) of the third subparagraph of Article 251(2) of the EC Treaty on the European Parliament's amendments to the Council Common Position on the proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) amending the proposal of the Commission pursuant to Article 250(2) of the EC Treaty*, 14 March 2007, COM(2007) 126 final at 4, [2007] OJ, C 181/2.
[1206] See EC, *European Parliament legislative resolution of 10 July 2007 on the joint text approved by the Conciliation Committee for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ C 175 E/130; European Parliament, *Report on the joint text approved by the Conciliation Committee for a regulation of the European Parliament and of the Council on the law applicable to noncontractual obligations (Rome II)*, EP Doc A6-0257/2007 (2007) at 8.
[1207] See *Rome II Regulation*, *supra* note 186, Preamble, para 40, arts 1(4), 32 and Final Clause.

Numerous authors have written about article 7 of the *Rome II Regulation*,[1208] and I do not intend to conduct another doctrinal analysis of the provision, beyond exposing the substantive merits and drawbacks of the ubiquity principle itself, already set out above. Suffice it to say that the scope of article 7 of the *Rome II Regulation* is very broad.[1209] It covers environmental damage and ensuing damage to persons or property,[1210] as long as it is directly attributable to the tortfeasor[1211] and does not arise from nuclear activities or the exercise of public powers.[1212] Claimants include victims and all other persons who

---

[1208] See eg Fach Gómez, *supra* note 93 at 660–66; Grušić, *supra* note 10 at 209–15; Jan von Hein, "Article 7: Environmental Damage" in Gralf-Peter Calliess, ed, *Rome Regulations: Commentary*, 2nd ed (Alphen on the Rhine: Kluwer Law International, 2015) 603 [Von Hein, "Environmental Damage"]; Michael Wilderspin & Richard Plender, *The European Private International Law of Obligations*, 4th ed by Michael Wilderspin (London: Sweet & Maxwell, 2015), ch 21; Tamara Nissen, *Critique de l'article 7 du règlement Rome II: étude du dommage environnemental en droit international privé* (Master Thesis, Université catholique de Louvain Faculty of Law and Criminology, 2015) [unpublished] [Nissen]; Boskovic, "Droit international privé et environnement", *supra* note 542 at paras 42–59; Paola Ivaldi, "European Union, Environmental Protection and Private International Law: Article 7 of Rome II Regulation" (2013) 13:5/6 Eur Leg F 137; Spyridon Vrellis, "The Law Applicable to Environmental Damage: Some Remarks on Rome II Regulation" in Joaquín J Forner Delaygua, Cristina González Beilfuss & Ramón Viñas Farré, eds, *Entre Bruselas y La Haya: estudios sobre la unificación internacional y regional del derecho internacional privado. Liber amicorum Alegría Borrás* (Madrid: Marcial Pons, 2013) 869; Kunda, *supra* note 597; Florian Grisel, "Analyse critique de l'article 7 du Règlement du 11 juillet 2007 sur la loi applicable aux obligations non-contractuelles (« Rome II »)" (2011) 88:1 Rev DI & DC 148 [Grisel]; Angelika Fuchs, "Article 7: Environmental Damage" in Peter Huber, ed, *Rome II Regulation: Pocket Commentary* (Munich: Sellier, 2011) 202 [Fuchs]; García-Castrillón, *supra* note 106 at 565–76; Dickinson, *supra* note 1194, ch 7; Emmanuel Guinchard & Simone Lamont-Black, "Environmental Law, the Black Sheep in Rome II's Drive for Legal Certainty? Article 7 of Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations" (2009) 11:3 Envtl L Rev 161 [Guinchard & Lamont-Black]; Michael Bogdan, "The Treatment of Environmental Damage in Regulation Rome II" in John Ahern & William Binchy, eds, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Leiden: Martinus Nijhoff, 2009) 219 [Bogdan, "The Treatment of Environmental Damage"]; Michael Bogdan, "Some Reflections Regarding Environmental Damage and the Rome II Regulation" in Gabriella Venturini & Stefania Bariatti, eds, *Liber Fausto Pocar*, vol 2: New Instruments of Private International Law (Milan: Giuffrè, 2009) 95 [Bogdan, "Reflections Regarding Environmental Damage"]; Boskovic, "Regulatory Strategies", *supra* note 597; Boskovic, "Atteintes à l'environnement", *supra* note 597; Thomas Kadner Graziano, "The Law Applicable to Cross-Border Damage to the Environment: A Commentary on Article 7 of the Rome II Regulation" (2007) 9 YB Priv Intl L 71 [Kadner Graziano, "Damage to the Environment"]; Katia Fach Gómez, "The Law Applicable to Cross-Border Environmental Damage: From the European National Systems to Rome II" (2004) 6 YB Priv Intl L 291 at 310–17.

[1209] Note, however, that international conventions between EU and non-EU members which "lay down conflict-of-law rules relating to non-contractual obligations" prevail over the *Rome II Regulation.* See *Rome II Regulation*, *supra* note 186, arts 28–29. For a list of international conventions overriding the *Rome II Regulation*, see EC, *Notifications under Article 29(1) of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II)*, [2010] OJ, C 343/7. Interestingly, Finland and Sweden notified the EC that the *Nordic Convention*, *supra* note 199, fell under article 28(1) of the *Rome II Regulation.*

[1210] *Cf Environmental Liability Directive*, *supra* note 348, art 2(1)(a); *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 32 (Preamble, para 13), 35 (art 7) (varying definitions of environmental damage).

[1211] See *Rome II Regulation*, *supra* note 186, Preamble, para 17, art 4(1).

[1212] See *ibid*, arts 1(1), 1(2)(f).

seek compensation, including public authorities if their claim is civil and commercial in nature.[1213] The provision applies to nuisance, negligence and other environmental causes of action.[1214] It also extends to injunctions aimed at preventing future damage.[1215]

Beyond the intricacies of its application, the most striking feature of the *Rome II Regulation* is the explicit reference to three environmental principles in its preamble: precaution, corrective action and polluter-pays. These open-ended principles have become familiar to environmental and public international lawyers. But they have had little place so far in private international law which, while not devoid of overarching principles nor disinterested with substantive objectives such as the protection of weaker parties,[1216] tends to shy away from voicing direct policy objectives through conflict rules.

The preamble of the *Rome II Regulation* deviates from this instinctive position and articulates a clear regulatory objective aligned with substantive law,[1217] or what Michaels called an "indirect better law approach" combining unilateral choice with the more favourable law in order to achieve a certain result.[1218] The EC describes its regulatory objective as the need "to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his

[1213] On the notion of civil and commercial matters in relation to actions brought by public authorities in the EU, see the sources cited *supra* note 93.
[1214] See Torremans et al, *supra* note 1052 at 829; Grušić, *supra* note 10 at 210; Dickinson, *supra* note 1208 at para 7.14; Andrew Dickinson, "Cross-Border Torts in EC Courts: A Response to the Proposed "Rome II" Regulation" (2002) 13:5 Eur Bus L Rev 369 at 377. But see Hill & Ní Shúilleabháin, *supra* note 1052 at para 5.57; Hill & Chong, *supra* note 1052 at para 15.1.65; Adam Rushworth & Andrew Scott, "Rome II: Choice of Law for Non-Contractual Obligations" [2008] LMCLQ 274 at 283 (suggesting a narrower scope).
[1215] See *Rome II Regulation*, *supra* note 186, arts 2(2), 3.
[1216] In the EU, the 1980 *Rome Convention on the Law Applicable to Contractual Obligations*, which dates back forty years ago, already contained protective choice of law rules for consumers and employees. See *Convention on the Law Applicable to Contractual Obligations*, 19 June 1980, 1605 UNTS 59, arts 5–6, [1980], OJ L 266/1, 19:6 ILM 1492 (entered into force 1 April 1991) [*Rome Convention*]. For further discussion and references to substance-oriented rules of private international law, see subsection 1.3.2.2 above.
[1217] See Mills, *supra* note 1191 ("[i]t is evident that this rule therefore embodies a substantive policy objective—an increase in environmental protection—which is unusual in the European tradition of private international law" at 409).
[1218] Ralph Michaels, "Private International Law and the Question of Universal Values" in Ferrari & Fernández Arroyo, *supra* note 83, 148 at 163–64.

harmful activity."[1219] This regulatory stance does not come from any single approach deemed desirable in domestic law. It comes from EU treaties and directives, a form of supranational law.[1220]

Contrary to other substance-oriented conflict rules (consumer and employment contracts, for instance), article 7 of the *Rome II Regulation* does not favour the victims only for the sake of favouring the victims.[1221] It ultimately claims to have a systemic impact beyond the protection of individual rights—a bold proposition which I discussed earlier in this chapter.[1222] Indeed, the EC's explanatory memorandum to the *2003 Rome II Proposal* makes clear that the provision has two equally important objectives: "[c]onsidering the [EU's] more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection […]."[1223] In other words, the *Rome II Regulation* favours the victims partly on the assumption that their interest in compensation aligns with the EU's substantive interest in protecting the environment.[1224] Victims effectively become private attorneys general,[1225] the agents of European public policy.

European scholars seem to agree with article 7 of the *Rome II Regulation* as a means of protecting the victim or the environment.[1226] Some would extend the approach to other

---

[1219] *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 19.
[1220] See *Consolidated Version of the Treaty on the Functioning of the European Union*, [2008] OJ, C 115/01, art 191; *Environmental Liability Directive*, *supra* note 348. For Michaels, this is the true novelty of the *Rome II Regulation*. See Ralf Michaels, "The New European Choice-of-Law Revolution" (2008) 82:5 Tul L Rev 1607 at 1623.
[1221] The same is true for the jurisdictional rule set out in *Mines de potasse d'Alsace*, *supra* note 119, which favours victims but is primarily justified by proximity and the good administration of justice. For further discussion on this point, see subsection 2.1.4 above.
[1222] For further discussion on the regulatory function of the ubiquity principle, see subsection 3.1.4.2.1 above.
[1223] *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 19.
[1224] See Mills, *supra* note 1191 at 410. It will frequently be the case, but not always so. See Nissen, *supra* note 1208 at 39; Grisel, *supra* note 1208 at 161–63 (both suggesting that plaintiffs' choice will not necessarily coincide with the EU's environmental policy witin article 7 of the *Rome II Regulation*).
[1225] See Boskovic, "Responsabilité climatique", *supra* note 225 at 201; Lequette, *supra* note 583 at 523; Muir Watt, "Beyond the Schism", *supra* note 53 at 424, n 377;
Horatia Muir Watt & Fabrizio Cafaggi, "Introduction" in Cafaggi & Muir Watt, *supra* note 88, x at xxix. Muir Watt, "Intérêts gouvernementaux", *supra* note 53 at 134.
[1226] See Grušić, *supra* note 10 at 184 and the authors cited in footnote 21. But see Mills, *supra* note 1191 ("[…] it is unclear whether choice of law rules are necessarily an appropriate device to achieve

cross-border torts.[1227] Beyond the usual debates on the terminology and scope of the provision, its critics point to two major structural problems: uncertainty and the possibility for parties to agree on the applicable law after the event occurred. The first criticism questions the fairness of a built-in pro-victim/environment bias within the choice of law rule. The second, on the contrary, approves that legislative bias but considers that it does not go far enough because it allows parties to contractually deviate from it. In my view, the first point is far less problematic than critics suggest. The second point, however, has more merit.

The first criticism is that article 7 of the *Rome II Regulation* is too uncertain for defendants, who understandably wish to limit their legal exposure and avoid the law of the place of injury when it is unforeseeable. Defending claims under the law of an objectively foreseeable foreign jurisdiction is one thing—burdensome, but reasonable. Having to comply with the environmental laws of all states that could potentially be the *loci delicti* is quite another. This is a key issue in climate change litigation: a coal operator in the United States might anticipate that its activities will cause damage in Canada or Mexico, but not necessarily anywhere in the world. We may not even know for sure if certain activities have an impact on climate change (although in this case, the absence of causation might seal the fate of any private claim). The *Rome II Regulation*, however, does not contain a foreseeability exception to counterbalance uncertainty.[1228]

---

environmental objectives, rather than simply the adoption of minimum environmental standards" at 409–10).

[1227] See Liesbeth FH Enneking, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the *Rome II Regulation*: An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations Through Tort Law" (2008) 16:2 Eur Rev Priv L 283 at 310–12; Muir Watt, "European Integration", *supra* note 53 at 19, n 64; Muir Watt, "Aspects économiques", *supra* note 53 at 270. See also Catherine Kessedjian, "Questions de droit international privé de la responsabilité sociétale des entreprises: rapport général" in Kessedjian & Cantú Rivera, *supra* note 138, 3 at 47 [Kessedjian]. Kadner Graziano, by contrast, firmly supports the law of the place of injury over the ubiquity principle as the general rule for complex torts. See Kadner Graziano, "Torts", *supra* note 1100 at 1715–16; Kadner Graziano, *Responsabilité délictuelle*, *supra* note 1131 at 50–53, 60–61, 100. *Cf* Kadner Graziano, "Damage to the Environment", *supra* note 1208 at 72–76 (where the author does not expressly reject the ubiquity principle adopted in article 7 of the *Rome II Regulation*).

[1228] Symeonides has consistently favoured an objective foreseeability proviso in article 7 of the *Rome II Regulation*. See Symeon C Symeonides, "The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons" (2008) 82:5 Tul L Rev 1741 at 1768 [Symeonides, "Reciprocal Lessons"]; Symeon C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" (2008) 56:1 Am J Comp L 173 at 211 [Symeonides, "Missed Opportunity"]; Symeon C Symeonides, "Rome II: A Centrist Critique" (2007) 9 YB Priv Intl L 149 at 167 [Symeonides, "Centrist Critique"]; Symeon C Symeonides, "Tort

Defendants who cause mass environmental damage may have to defend themselves under the law of an unforeseen state, and possibly several laws if damage simultaneously occurred in different states or if victims in a single state make a different choice of law in their respective proceedings. Hence the *Rome II Regulation* is said to have significant implications for climate change litigation in Europe, even though the EP most likely did not have this particular form of environmental litigation in mind at the time.[1229]

Critics who object to the *Rome II Regulation*'s lack of predictability in environmental matters miss a fundamental point. Unforeseeability is precisely one of the objectives because it is the only way to stop polluters from taking advantage of a weaker law.[1230] Introducing a foreseeability exception would frustrate the objective because it can take decades to understand the full scope of environmental problems. Polluters could easily plead ignorance and remain governed by the favourable law of the place where they chose to operate.[1231] The ubiquity principle admittedly deprives polluters of a defence against the application of the law of the place of injury when that law sets a higher standard than the law of the state in which they operate. It also means that polluters may be found in breach of a law which they had not contemplated. Taken as a whole,

---

Conflicts and Rome II: A View from Across" in Mansel, *supra* note 585, vol 1, 935 at 951, n 60 [Symeonides, "A View from Across"]. But see Hill & Chong, *supra* note 1052 at para 15.1.64, n 138.

[1229] See Silke Goldberg & Richard Lord, "England" in Lord et al, *supra* note 107, 445 at 484, cited in Byers, Franks & Gage, *supra* note 225 at 295–96, n 139; Gage & Wewerinke, *supra* note 107 at 19; Gage & Byers, *supra* note 107 at 28. On the *Rome II Regulation* and climate change litigation, see generally Boskovic, "Responsabilité climatique", *supra* note 225 at 200–203; Lehmann & Eichel, *supra* note 225; Giansetto, *supra* note 225 at paras 525–29.

[1230] See Guinchard & Lamont-Black, *supra* note 1208 at 170. See also Giansetto, *supra* note 225 ("[l]*a poursuite d'objectifs matériels permet de faire passer au second plan les considérations liées à la proximité entre l'ordre juridique saisi et le litige. Ce qui est recherché par le critère de rattachement n'est pas la désignation d'un ordre juridique particulièrement proche de la question de droit posée, mais le choix d'un ou plusieurs ordres juridiques qui pourront satisfaire aux mieux les objectifs attribués à la règle de conflit*" at 528).

[1231] Kadner Graziano supports the exclusion of a foreseeability exception for a different reason, mentioning Chernobyl as proof that "emissions can have very far-reaching damaging effects on the environment" and advancing that "[i]n a period in which we are becoming increasingly aware of the effects of global warming, foreseeability is no longer an issue in environmental damage claims." Kadner Graziano, "Damage to the Environment", *supra* note 1208 at 73. In my opinion, foreseeability is still very much an issue, which is precisely why an exception is not desirable. It is indeed common knowledge that pollution can have disastrous impacts across borders, but those impacts may be extremely diffuse and the science behind them may still be in flux, such that considerable debate will occur over what the polluter could have known. In climate change litigation, for instance, a foreseeability exception could easily override the law of the place of injury in a particular case, even if most scientists agree on the existence of human-induced climate change generally.

however, the *Rome II Regulation* does not lead to total unpredictability for polluters because it limits the array of potentially applicable laws in other ways. Damage must be direct,[1232] a restriction similar to the one developed by the ECJ under the *Brussels I Recast Regulation* to limit potential forums.[1233] Public policy and the overriding mandatory provisions of the forum may also intervene in the choice of law process.[1234]

The second criticism of article 7 of the *Rome II Regulation* is that the freedom to agree on the applicable law after the fact undermines the legitimate regulatory objectives of the provision.[1235] The *Rome II Regulation* protects the parties' freedom to agree on the applicable law after a tort occurs,[1236] except in matters of unfair competition and infringement of intellectual property rights.[1237] The two exceptions stem from the idea that antitrust and intellectual property laws are too intimately tied to governmental policy to allow parties to deviate from the applicable law.[1238] In those areas, Mills explains that "the exclusion of party autonomy is not motivated by the desire to protect a weaker party, but rather by the degree of public interest involved in the type of dispute—it is state regulatory interests, rather than private party interests, which are balanced against (and in these cases trump) party autonomy."[1239] Critics of article 7 of the *Rome II Regulation* advocate a similar exclusion for environmental damage.

This second criticism has more merit than the first. If a close connection with governmental policy is indeed why parties cannot agree on the law applicable to unfair competition or infringements of intellectual property rights, allowing party autonomy in environmental matters makes little sense.[1240] Why craft a conflict rule in the name of the

---

[1232] See *Rome II Regulation*, *supra* note 186, Preamble, para 17, art 4(1).
[1233] See *Brussels I Recast Regulation*, *supra* note 782, art 7(2) and the sources cited *supra* note 788.
[1234] See *Rome II Regulation*, *supra* note 186, arts 16, 26.
[1235] See Giansetto, *supra* note 225 at 527, n 77; Boskovic, "Droit international privé et environnement", *supra* note 542 at para 53; Boskovic, "Regulatory Strategies", *supra* note 597 at 198–99; Boskovic, "Atteintes à l'environnement", *supra* note 597 at 202–203; Boskovic, "Efficacité", *supra* note 597 at 62–63; Muir Watt, "Intérêts gouvernementaux", *supra* note 53 at 130, n 3.
[1236] See *Rome II Regulation*, *supra* note 186, art 14(1), para 1(a).
[1237] See *ibid*, arts 6(4), 8(3). This post-tort choice of law cannot affect the rights of third parties. See *ibid*, art 14(1), para 2.
[1238] See Dickinson, *supra* note 1194 at paras 6.74, 8.54; Collins et al, vol 2, *supra* note 1052 at para 35.062.
[1239] Mills, *supra* note 1191 at 462.
[1240] See Hamburg Group for Private International Law, *supra* note 1192 ("[…] the parties' choice should be without effect where public interests are or may be involved. […] Similar considerations apply […] to the protection of the environment which usually pursues some public interests beyond the protection of the

EU's substantive environmental policy and let the parties apply a law that might disregard that greater good? Furthermore, the fairness of post-tort choice of law agreements itself is debatable. On the one hand, victims can better assess the extent of their rights under different laws after the fact, with all the evidence in hand.[1241] On the other hand, a vulnerable party before the fact remains a vulnerable party after the fact. Why would uneven bargaining power between parties vanish simply because an event has occurred, and the victim is now in a position to assert its rights? Litigating a claim before a tribunal does not necessarily make existing vulnerabilities disappear. It may in fact amplify them if the parties have widely uneven financial means. Environmental litigation is no exception.[1242]

Allowing post-tort agreements in this context contradicts the protective purpose of article 7 of the *Rome II Regulation*. Realistically, parties to a transboundary environmental dispute will rarely reach a formal agreement on the applicable law.[1243] The elective

---

landowners who are directly affected" at 35). But see Von Hein, "Rome II", *supra* note 1135 ("[party autonomy, ed] is justified in this respect because the Rome II Regulation does not oblige the victim to choose the most stringent environmental law, but merely gives him an option to do so. There may be legitimate procedural reasons to opt for the lex fori, even if it is less stringent than the law of another country, in order to have recourse to the highest civil court in countries such as Germany, where the Federal Court of Justice may not review the application of foreign law. Granting party autonomy under article 14 of Rome II in cases involving environmental damage also facilitates the settlement of claims of multiple victims in international mass-tort cases, because it enables the tortfeasor to make a settlement offer to all injured parties under a single law" at 1699–1700).

[1241] See Grušić, *supra* note 10 ("[e]*x post* choice-of-law agreements, on the other hand, are considered useful and appropriate as they enable the operator and all the victims to agree on the application of only one law, thus facilitating the settlement of disputes. *Ex post* choice-of-law agreements do not raise concerns of the abuse of the operator's typically superior bargaining power, since the victim, after the risk materializes, is in a position to assess the pros and cons of the application of different laws" at 213). Symeonides has expressed a similar view on a number of occasions, both generally and specifically with respect to the *Rome II Regulation*. See Symeonides, *Codifying Choice of Law*, *supra* note 583 at 99; Symeonides, "Reciprocal Lessons", *supra* note 1228 at 1769; Symeonides, "Missed Opportunity", *supra* note 1228 at 215; Symeonides, "Centrist Critique", *supra* note 1228 at 170.

[1242] See Janeen M Carruthers & Elizabeth B Crawford, "Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part I" (2005) 9:1 Ed L Rev 65 ("[b]ut it must be appreciated that choice *ex post facto* is not necessarily *informed* choice; permission to choose the applicable law *after* the event is no guarantee that advantage will not be taken of the weaker party" at 88 [emphasis in the original]).

[1243] See García-Castrillón, *supra* note 106 at 567–68 (describing this scenario as "rather strange"); TM de Boer, "Party Autonomy and Its Limitations in the Rome II Regulation" (2007) 9 YB Priv Intl L 19 ("[i]n the area of non-contractual obligations parties seldom exercise their freedom of choice" at 23). But see Boskovic, "Droit international privé et environnement", *supra* note 542 at para 52 (noting that this scenario may well arise in practice, as it did in *Mines de potasse d'Alsace*, *supra* note 119); Kadner Graziano, "Torts", *supra* note 1100 at 1713; Thomas Kadner Graziano, "Freedom to Choose the Applicable Law in Tort—Articles 14 and 4(3) of the Rome II Regulation" in Ahern & William, *supra* note 1208, 113 at 116

structure of the ubiquity principle certainly gives plaintiffs no incentive to do so. And even if they do, the *Rome II Regulation* ensures the application of overriding mandatory provisions of the forum,[1244] which may include environmental protection measures.[1245] Nonetheless, restrictions on party autonomy should have also applied in the context of environmental damage. It would have prevented the potential abuse of weaker parties and avoided the choice of a law at odds with the broader regulatory interests of the EU expressed in the preamble of the *Rome II Regulation*.

3.1.4.2.3.1.2. Foreign rules of safety and conduct

Article 7 of the *Rome II Regulation* is supplemented by another provision which impacts transboundary environmental litigation. Article 17 of the *Rome II Regulation* provides that "[i]n assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability."[1246] Rules of safety and conduct include public law provisions contained in environmental statutes and designed for local incidents.[1247]

Foreign rules of conduct and safety affect the operation of the ubiquity principle.[1248] If a victim chooses the law of the country in which the event giving rise to liability occurred (place of acting), local rules of safety and conduct are simply part of the applicable law. Likewise, if a victim chooses the law of the country in which the environmental damage

(emphasizing more broadly the central importance of article 14 of the *Rome II Regulation*, which allows post-tort agreements). In states where foreign law must be pleaded in order to apply, the parties' failure to raise foreign law effectively amounts to an agreement to apply local law. See eg Briggs, *supra* note 1052 at para 8.181; Goldstein & Groffier, *supra* note 1096 at para 461. The *Rome II Regulation* does not clearly provide for this scenario, but English authors suggest that the requirement to plead foreign law is a procedural matter not covered by the *Rome II Regulation*. See Torremans et al, *supra* note 1052 at 856 and the detailed analysis of the arguments on both sides in Dickinson, *supra* note 1194 at paras 14.63–76.

[1244] See *Rome II Regulation*, *supra* note 186, art 16.

[1245] See Boskovic, "Responsabilité climatique", *supra* note 225 at 202.

[1246] See *Rome II Regulation*, *supra* note 186, art 17. On the logic of this provision in the theory of private international law, see Muir Watt, "Publicisation", *supra* note 53 at 214.

[1247] See Fach Gómez, *supra* note 93 at 665; Bogdan, "The Treatment of Environmental Damage", *supra* note 1208 at 227; Bogdan, "Reflections Regarding Environmental Damage", *supra* note 1208 at 103.

[1248] But see Van Calster, *supra* note 137 at 1154. Van Calster "would argue that the additional rule on "rules of safety and conduct" of Article 17 [of the *Rome II Regulation*] has less relevance for environmental litigation than may be prima facie assumed." Without further explanation, it is difficult to say what the author had in mind here.

occurred, local rules of safety and conduct apply as part of the applicable law. But in the latter case, courts may also take into consideration the (foreign) rules of safety and conduct of the country in which the event giving rise to liability occurred. This intrusion of foreign rules of conduct and safety into the applicable law comes with an important caveat. Courts must take foreign rules of safety and conduct into account as a matter of fact. They do not have to apply them as a matter of law.

This distinction becomes particularly important if a foreign polluter relies on an administrative authorization (permit, licence, certificate, etc.) issued at the place of acting in order to escape liability under the law of the place of injury.[1249] In this scenario, the polluter is allowed to operate in one state but causes damage in another. Authors generally treat administrative authorizations as rules of safety and conduct under article 17 of the *Rome II Regulation* because they result from the application of public environmental regulation.[1250] The question becomes whether courts should defer to the regulatory policy of foreign states (expressed through authorizations to operate) if they lead to damage in the forum and the law of the forum would normally apply.

In the legislative process leading to the adoption of the *Rome II Regulation*, the EC referred to the impact of foreign authorizations on civil liability as a "difficulty" but said no more.[1251] In fact, this debate largely predates the *Rome II Regulation*.[1252] Inspired by pre-*Rome II* jurisprudence from Austria and Germany, the literature suggests that foreign licences must meet three conditions in order to be taken into consideration under article 17 of the *Rome II Regulation*: (1) the operation of the facility complies with public

[1249] Article 17 of the *Rome II Regulation*, however, is neutral and can therefore operate in other scenarios, for instance when the law of the place of acting is more stringent than the law of the place of injury. See Kessedjian, *supra* note 1227 at 47.
[1250] See García-Castrillón, *supra* note 106 at 574. See also Fach Gómez, *supra* note 93 at 666; Von Hein, "Environmental Damage", *supra* note 1208 at 617; Fuchs, *supra* note 1208 at 217; Dickinson, *supra* note 1194 at para 7.29. But see Lehmann, *supra* note 52 at 25, n 102 (noting that it is "debatable" whether article 17 of the *Rome II Regulation* includes administrative decisions such as the authorization to operate a power plant); Geert van Calster, *European Private International Law* (Oxford: Hart, 2013) at 174 (arguing that environmental permits are broader than rules of safety and conduct); Rehbinder, *supra* note 308 at 151 (arguing that the preclusive effect of an administrative authorization does not amount to a rule of safety and conduct because it is not prescriptive).
[1251] See *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 20.
[1252] See ILA, "Second Report on Transnational Enforcement of Environmental Law", *supra* note 534 at 920–26; HCCH, "Civil Liability Resulting from Transfrontier Environmental Damage", *supra* note 200 at 92–95.

international law, (2) the conditions of issuance of the foreign licence match the ones found in local law, and (3) plaintiffs had a chance to take part in the foreign proceedings leading to the attribution of the licence.[1253] The first condition refers to due diligence and other primary norms of international environmental law. The second condition refers to substantive reciprocity and the third intersects with equal access.

The test is fact driven, but it is doubtful that a foreign authorization can exonerate polluters altogether when they are otherwise liable under the law of the place of injury (assuming that the plaintiff chose that law to govern the claim).[1254] Courts have the discretion to take foreign authorizations into account as a matter of fact, but only when they consider it appropriate to do so. The EC explained in the explanatory memorandum to the *2003 Rome II Proposal* that foreign rules of safety and conduct could factor when "assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages."[1255] These are questions of degree. They suggest that the EC did not contemplate total exoneration, at least not systematically. Total exoneration would also be inconsistent with the *Environmental Liability Directive*, which allows EU states to relieve legally authorized operators from bearing the costs of remedial actions (the so-called permit defence) but does not require them to do so.[1256] Ultimately, it would

[1253] See Von Hein, "Environmental Damage", *supra* note 1208 at 623–24; Kunda, *supra* note 597 at 525; García-Castrillón, *supra* note 106 at 575; Thomas Kadner Graziano, "Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle" (2008) 97:4 Rev crit dr int privé 445 at 488–89; Kadner Graziano, "Damage to the Environment", *supra* note 1208 at 79–80. See also Fuchs, *supra* note 1208 at 219.

[1254] After the ECJ issued its judgment on jurisdiction in *Mines de potasse d'Alsace*, Dutch courts held that a French authorization to discharge pollutants did not relieve the defendant from liability in the Netherlands. See Hoge Raad der Nederlanden [Supreme Court], 23 September 1988, (1988) Rechtspraak van de Week (RvdW) [Dutch Weekly Law Reports] No 150 (Netherlands), reprinted in (1990) 21 Nethl YB Intl L 434 at 439 & in part in Alice Palmer & Cairo AR Robb, eds, *International Environmental Law Reports*, vol 4: International Environmental Law in National Courts (Cambridge: Cambridge University Press, 2005) 340, aff'g Gerechtshof Den Haag [Court of Appeal], 10 September 1986 (Netherlands), reprinted in (1988) 19 Nethl YB Intl L 497 & in part in Alice Palmer & Cairo AR Robb, eds, *International Environmental Law Reports*, vol 4: International Environmental Law in National Courts (Cambridge: Cambridge University Press, 2005) 340; Rechtbank Rotterdam [District Court], 16 December 1983, (1984) Nederlandse Jurisprudentie (NJ) [Dutch Cases] No 341 (Netherlands), reprinted in (1984) 15 Nethl YB Intl L 471.

[1255] See *2003 Rome II Proposal and Explanatory Memorandum*, *supra* note 1150 at 25.

[1256] See *Environmental Liability Directive*, *supra* note 348, art 8(4)(a). A number of states did not adopt the permit defence. See François Guy Trébulle, "La transposition de la directive du 21 avril 2004 dans les droits internes: rapport de synthèse" in Patrice Jourdain, ed, *La responsabilité environnementale: recueil des travaux du Groupe de recherche européen sur la responsabilité civile et l'assurance (GRERCA)* (Brussels: Bruylant, 2018) 15 at 24; Barbara J Goldsmith & Edward Lockhart-Mummery, "The ELD's National Transposition" in Lucas Bergkamp & Barbara J Goldsmith, eds, *The EU Environmental Liability*

be odd if article 7 of the *Rome II Regulation* aligned with EU environmental policy (particularly the polluter-pays principle) while article 17 was interpreted as providing a complete safe harbour for polluters.[1257] This said, the interaction of both provisions with respect to foreign authorizations remains unclear in practice due to a lack of case law.[1258]

Summing up, the *Rome II Regulation* innovates on several fronts. It acknowledges the problems associated with a rigid definition of the *lex loci delicti* in cases of transboundary pollution—in the EU context, the problems associated with the exclusive designation of

---

Directive: A Commentary (Oxford: Oxford University Press, 2013) 139 at 154–55. See generally Pål Wennerås, "Permit Defences in Environmental Liability Regimes: Subsidizing Environmental Damage in the EC?" (2005) 4 YB Eur Env L 149.

[1257] See Symeonides, "Missed Opportunity", *supra* note 1228 at 213–14; Symeonides, "Centrist Critique", *supra* note 1228 at 164–65; Symeonides, "A View from Across", supra note 1228 at 943–44. See also Boskovic, "Droit international privé et environnement", *supra* note 542 at para 51.

[1258] The 2009 *ČEZ* case is often cited as a relevant precedent on this point, but it has little to say on the interpretation of the *Rome II Regulation*. The *ČEZ* case involved a nuisance lawsuit brought by the Province of Upper Austria (acting as private owner of lands near the border with the Czech Republic) against a nuclear power plant located in the Czech Republic and operated by a Czech energy company in which the Czech state had a majority share. In 2006, the ECJ confirmed that Austrian courts had jurisdiction over the dispute. See *ČEZ*, *supra* note 839 at para 40. A second debate arose later over the interpretation of substantive Austrian law by Austrian courts. Austrian case law law shielded duly authorized local operators from injunctions, but not foreign operators with similar authorizations. In 2009, the ECJ concluded that the EU principle of non-discrimination based on nationality prevented Austrian courts from discriminating between local and foreign authorizations in the availability of defences to a nuisance claim against a foreign nuclear facility. See *Land Oberösterreich v ČEZ as*, C-115/08, [2009] ECR I-10265 at paras 135, 139–40, [2010] All ER (EC) 901 and the analyses of Markus Möstl, "Case C-115/08, *Land Oberösterreich v ČEZ*, Judgment of the Grand Chamber of 27 October 2008" (2010) 47:4 CML Rev 1221 at 1127–29; Wolf-Georg Schärf, "The Temelín-Judgement of the European Court of Justice" (2010) 85 Nuclear L Bull 79 at 82–85; Eckard Rehbinder, "Transboundary Nuclear Risk: The Litigation on the Temelín Nuclear Power Plant" (2010) 40:1 Envtl Pol'y & L 32 at 33–34. But the ECJ did not suggest that a licence could insulate its beneficiary from liability under the law of another state, applicable by virtue of a choice of law rule. The dispute itself did not concern the *Rome II Regulation*, which excludes obligations arising out of nuclear damage. See *Rome II Regulation*, *supra* note 186, art 1(f). In fact, it did not even involve a conflict of laws because Austrian courts were already applying Austrian law at that point of the proceedings. Note that Austrian choice of law rules provide that Austrian law governs disputes over environmental damage caused by radioactivity emanating from another state, if requested by victims. See *Bundesgesetz über die zivilrechtliche haftung für schaden durch radioaktivität (Atomhaftungsgesetz 1999)* [Federal Act on Civil Liability for Damage Caused by Radioactivity (Atomic Liability Act 1999)], Bundesgesetzblatt für die Republik Österreich (BGBI) [Federal Law Gazette for the Republic of Austria] I 170, s 23(1), translated in (1999) 63 Nuclear L Bull Supp 3 & Nuclear Energy Agency of the Organisation for Economic Co-operation and Development, "Austria: Nuclear Legislation", online (pdf): *OECD-NEA* <www.oecd-nea.org> [perma.cc/K8VW-JPXL]; Wolfgang Wurmnest, "Nuclear Liability" in Basedow et al, vol 2, *supra* note 53, 1305 at 1313; Monika Hinteregger, "The New Austrian Act on Third-Party Liability for Nuclear Damage" (1998) 62 Nuclear L Bull 27 at 33, reprinted in (2006) 35:1 Denv J Intl L & Pol'y 193. Ultimately, the only tangible impact that the *ČEZ* case might have on the choice of law process under the *Rome II Regulation* would be to render the applicable law objectionable on public policy grounds if it indeed discriminates between local and foreign operators within the EU. See *Rome II Regulation*, *supra* note 186, art 26; Collins et al, vol 2, *supra* note 1052 at para 35.071, n 363.

the law of the place of injury. It demonstrates certain states' willingness to openly imbue choice of law rules with substantive objectives such as the compensation of victims and the protection of the environment. It also reflects their belief that the ubiquity principle aligns with those objectives. The work of international organizations and scholars backs this belief. The adoption of article 7 of the *Rome II Regulation* is a welcome development despite certain flaws (admissibility of post-tort choice of law agreements) and uncertainties (impact of foreign authorizations on the applicable law). It should inspire states outside the EU.[1259]

3.1.4.2.3.2. The 2010 *UNEP Guidelines on Liability*

The *UNEP Guidelines on Liability* are the most recent attempt from a credible international organization at implementing the ubiquity principle in choice of law rules.[1260] In 2008, shortly after the ILC finalized its work on the *Principles on the Allocation of Loss* and the UNGA commended them to the attention of governments, UNEP convened a consultative meeting of government officials and experts in Nairobi to discuss the development of liability guidelines. UNEP sought to assist states in developing domestic laws on liability and compensation for environmental damage, at the request of developing states who felt that they lacked the appropriate framework.[1261] Experts from forty-four states, including Canada, attended the meeting.[1262] They agreed on a set of draft guidelines drawn from the work of an earlier expert advisory group.[1263]

[1259] See eg *International Private Law Act* (Montenegro), s 54, translated in Basedow et al, vol 4, *supra* note 53, 3513 & Toma Rajcevic, "La Loi sur le droit international privé de la République de Monténégro du 23 décembre 2013" (2015) 104:1 Rev crit dr int privé 261.

[1260] See *UNEP Guidelines on Liability*, *supra* note 539. For a historical account, see Amy Hindman & René Lefeber, "General Developments—International/Civil Liability and Compensation" (2010) 21 YB Intl Envtl L 178 at 179–81; Amy Hindman & René Lefeber, "General Developments—International/Civil Liability and Compensation" (2009) 20 YB Intl Envtl L 239 at 239–42; Amy Hindman & René Lefeber, "General Developments—International/Civil Liability and Compensation" (2008) 19 YB Intl Envtl L 214 at 214–16.

[1261] See United Nations Environment Programme, *Report of the consultative meeting of government officials and experts to review and further develop draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment* in United Nations Environment Programme Governing Council, *Fourth Programme for the Development and Periodic Review of Environmental Law: Note by the Executive Director*, UN Doc UNEP/GC/25/INF/15/Add.3 (2009) Annex II at 11.

[1262] See *ibid*.

[1263] See *Draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment* in United Nations

UNEP considered the draft guidelines at its 2009 meeting in Nairobi but requested the Secretariat to carry out further work.[1264] An intergovernmental meeting followed and the group issued a revised set of guidelines and a draft commentary later the same year.[1265] UNEP finally adopted the *UNEP Guidelines on Liability* at its 2010 meeting in Bali, alongside the *UNEP Guidelines on Access to Justice.*[1266] In its resolution, UNEP recalled the thirteenth principle of the *Rio Declaration* on liability and compensation and reiterated that liability regimes were an important part of domestic environmental protection arsenals.[1267]

The *UNEP Guidelines on Liability* are particularly relevant for our purposes as they share many of the features of the *ILC Principles on the Allocation of Loss* and come from a leading and authoritative UN agency.[1268] Importantly, the thirteenth guideline explicitly endorses the ubiquity principle:

> Subject to domestic laws on jurisdiction and in the absence of special rules established by contract or international agreement, any claim for compensation that raises a choice-of-law issue should be decided in accordance with the law of the place in which the damage occurred, unless the claimant chooses to base the

---

Environment Programme Governing Council, *Fourth Programme for the Development and Periodic Review of Environmental Law: Note by the Executive Director*, UN Doc UNEP/GC/25/INF/15/Add.3 (2009) Annex I.

[1264] See *Draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment*, UNEPGC Dec 25/11 III in United Nations Environment Programme Governing Council, *Report of the twenty fifth session of the Governing Council/Global Ministerial Environment Forum (Nairobi, 16–20 February 2009)*, UNGAOR, 64th Sess, Supp No 25, UN Doc A/64/25 (2009) Annex I at 32, paras 1–2, as noted by the UNGA in *Report of the Governing Council of the United Nations Environment Programme on its twenty-fifth session*, GA Res 64/204, UNGAOR, 64th Sess, Supp No 49, UN Doc A/RES/64/204 (2009), varying the action suggested in United Nations Environment Programme Governing Council, *Fourth Programme for the Development and Periodic Review of Environmental Law: Report by the Executive Director*, UN Doc UNEP/GC/25/11/Add.2 (2009).

[1265] See United Nations Environment Programme, *Report of the intergovernmental meeting to review and further develop draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment* in United Nations Environment Programme Governing Council, *Environmental Law: Note by the Executive Director*, UN Doc UNEP/GCSS.XI/INF/6/Add.1 (2009) Annex.

[1266] See *UNEP Guidelines on Access to Justice*, *supra* note 413; *UNEP Liability Guidelines*, *supra* note 539.

[1267] See *UNEP Guidelines on Liability*, *supra* note 539 at 15 (Resolution of the Governing Council at unnumbered para 1), citing *Rio Declaration*, *supra* note 35, Principle 13. See also *Rio+20 Declaration*, *supra* note 35 at paras 14–18.

[1268] On the significance of UNEP for international environmental lawmaking, see Bharat H Desai, *International Environmental Governance: Towards UNEPO* (Leiden: Brill Nijhoff, 2014), ch 5.

> claim on the law of the country in which the event giving rise to the damage occurred.[1269]

This thirteenth guideline replicates the essence of article 7 of the *Rome II Regulation* and the ubiquity principle. Of course, the *UNEP Guidelines on Liability* should be taken for what they are, that is, soft law. UNEP made sure to mention that they were voluntary and did not set a precedent for the future development of international law.[1270] They clearly did not have a major impact. The *UNEP Guidelines on Access to Justice* overshadowed them to the point where the words "Bali Guidelines" seem to refer exclusively to the former in legal parlance.[1271] Nonetheless, the *UNEP Guidelines on Liability* should not be forgotten. Even non-binding guidelines are noteworthy in an area where documents such as the *OECD Recommendation* and the *Nordic Convention* achieve surprisingly global recognition and influence multiple international conventions and domestic initiatives. And unlike the *ILC Principles on the Allocation of Loss*, the *UNEP Guidelines on Liability* delve straight into the choice of law problem. They provide an important piece of the puzzle for states seeking to strengthen environmental rights through domestic law.

Together with the *Rome II Regulation*, the *UNEP Guidelines on Liability* reflect an innovative way of approaching transboundary pollution through choice of law. Canada, however, has not yet followed the EU's example nor UNEP's recommendations. In the next section, I expose the current situation and prospects in Canadian private international law.

[1269] *UNEP Guidelines on Liability*, *supra* note 539, Guideline 13.

[1270] See *UNEP Guidelines on Liability*, *supra* note 539 at 15 (Resolution of the Governing Council at numbered para 1). This was apparently done to avoid interfering with ongoing negotiations on a liability regime for biosafety. See Elisabeth Mrema, "UNEP GCSS-11/GMEF: Building Confidence in the Multilateral System" (2010) 40:4 Envtl Pol'y & L 136 at 138. Negotiations led to the adoption of the *Nagoya–Kuala Lumpur Supplementary Protocol* later in 2010. See *Nagoya–Kuala Lumpur Supplementary Protocol*, *supra* note 330.

[1271] See eg Sarah Lamdan, "Beyond FOIA: Improving Access to Environmental Information in the United States" (2017) 29:3 Geo Intl Envtl L Rev 481 at 501; Uzuazo Etemire, "Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights" (2016) 28:3 J Envtl L 393.

3.2. The law applicable to transboundary pollution in Canadian private international law

In this section, I argue that Canadian private international law does not completely meet the choice of law requirements associated with the duty to ensure prompt and adequate compensation. Courts in common law provinces apply the *lex loci delicti* when the case does not fall under the *Reciprocal Access Act*, but they rigidly define the place where transboundary torts occur for choice of law purposes. This exercise will likely result in the application of the law of the place of injury, to the exclusion of the law of the place of acting. In Quebec, the CCQ offers both options, yet courts tend to favour the law of the place of acting when the case involves multiple victims located in different states. The law of the place of injury is considered an exception which depends on foreseeability.

I have already described the drawbacks associated with each connecting factor, both generally and in relation to transboundary pollution. I have also argued that any rigid definition of the *lex loci delicti* fails to comply with the requirements of the *ILC Principles on the Allocation of Loss* because it does not ensure equal remedy, allows polluters to take advantage of weaker legal regimes and reduces the likelihood of compensation in certain scenarios. The law of the place of injury is problematic if foreign victims get a lesser treatment than local victims when they sue in Canada. The law of the place of acting is problematic if all victims, while being equal, have lower prospects of compensation as a result of the polluter's choice to operate in a weak jurisdiction.[1272]

In the next subsections, I analyze the operation of choice of law rules in Canada, I explain why their result is unsatisfactory in light of the above considerations and I provide the justification for an environmental reform of Canadian choice of law. I analyze the *lex loci delicti* and its application in transboundary environmental disputes (3.2.1). I also analyze various mechanisms designed to override the applicable law when necessary, including on the basis of public policy (3.2.2). I finally address the extraterritorial scope of Canadian environmental statutes, insofar as they contain statutory causes of action which plaintiffs can invoke in private litigation (3.2.3). Indeed, even if Canadian law applies as

[1272] For further discussion on this point, see subsection 3.1.4.1 above.

a result of choice of law rules, several statutory causes of action are limited to local plaintiffs or subject to constitutional constraints on their extraterritorial application. This last subsection argues that Canadian environmental statutes do not adequately protect litigants in cases of transboundary pollution.

3.2.1. Designating the law applicable to transboundary pollution

This subsection examines the law applicable to transboundary pollution in light of the ubiquity principle used in the EU and recommended by UNEP. I cover the environmental torts typically invoked by plaintiffs in private litigation and already introduced in the second chapter on jurisdiction: civil liability and neighbourhood disturbance in Quebec, and negligence, nuisance, trespass, strict liability (*Rylands v Fletcher*) and breach of riparian rights in the rest of the country.

Contrary to jurisdiction, I approach choice of law without distinguishing foreign victims of pollution originating in Canada and local victims of pollution originating abroad. The second chapter treats the two scenarios separately for jurisdictional purposes because the relevant connecting factors are different: foreign plaintiffs will rely on the presence of the polluter in Canada whereas local plaintiffs will rely on the occurrence of a tort there. Choice of law, by contrast, comes down to the place of the tort in both cases. It may result in inequalities between local and foreign victims, but the relevant connecting factor remains the same. It is the place of the tort. I therefore discuss the two scenarios together and make distinctions when necessary.

In the next subsections, I examine the *lex loci delicti* as applied in common law provinces (3.2.1.1). I also examine choice of law rules contained in the *Reciprocal Access Act*, and their relationship with the common law in the four provinces that adopted it (3.2.1.2). I finally delve into Quebec's particular iteration of the *lex loci delicti* (3.2.1.3).

At the outset, it is important to remember that Canadian courts cannot raise foreign law on their own motion if parties choose not to plead foreign law. Local law will then apply

by default, regardless of choice of law rules.[1273] Should the ubiquity principle find its way into Canadian law, a plaintiff-initiated choice of law would sit better with the existing framework than a court-mandated one.[1274] Alternatively, a court could conceivably decide for itself the most favourable law *after* a party raises the choice of law issue.

3.2.1.1. Choice of law in Canadian common law

Courts in common law provinces apply the *lex loci delicti*—the law of the place where the tort occurred—in transboundary environmental disputes. The crux of the matter consists in determining whether the tort occurs at the place of acting or the place of injury. This tension is at the heart of private international law since the Supreme Court of Canada issued its judgment in *Tolofson*.[1275]

I explain below the choice of law rule articulated in *Tolofson* (3.2.1.1.1), its approach towards pure transboundary damage (3.2.1.1.2), its application to transboundary pollution (3.2.1.1.3) and its implications for equal remedy and prompt and adequate compensation (3.2.1.1.4).

3.2.1.1.1. *Tolofson* and the law of the place of the tort

Prior to 1994, Canadian courts applied the English common law rule formulated in *Phillips v Eyre*.[1276] A remedy was available in Canadian courts for an injury caused by an act committed abroad only if the act (1) would have been civilly actionable in the forum if it had been committed there; and (2) was unjustifiable under the law of the place where it had actually been committed.[1277] The rule spawned many controversies and uncertainties over the years, particularly with respect to car accidents.[1278] The emphasis

[1273] See CCQ, art 2809, para 2; *Threlfall v Carleton University*, 2019 SCC 50 at para 26, 439 DLR (4th) 1; *Barer*, *supra* note 1010 at para 76; *Tolofson*, *supra* note 1074 at 1053; *Pettkus v Becker*, [1980] 2 SCR 834 at 853–54, 1980 CanLII 22.
[1274] On the interaction between English rules of procedure and the ubiquity principle in article 7 of the *Rome II Regulation*, see Dickinson, *supra* note 1194 at para 7.26.
[1275] See *Tolofson*, *supra* note 1074.
[1276] See *Phillips v Eyre* (1870), LR 6 QB 1 at 28–29, 22 TLR 869 (Ex Ch).
[1277] See *Samson*, *supra* note 155 at at 378–79; *McLean v Pettigrew* (1944), [1945] SCR 62 at 76–77, 1944 CanLII 69.
[1278] For a historical account of the law in England and in Canada, see *Tolofson*, *supra* note 1074 at 1039–46.

on the law of the forum under the first branch of the rule recalled a bygone era in which civil law served a punitive function akin to criminal law, which applied strictly territorially.[1279] The rule was also thought to encourage reprehensible forum shopping because a behaviour did not need to be civilly actionable in the place where it was committed to give rise to a remedy in Canadian courts.[1280]

Courts seized with transboundary environmental disputes in the 1970s and 1980s would have applied the *Phillips v Eyre* rule in such a context.[1281] This is what Justice Ritchie of the Supreme Court of Canada did in *Interprovincial Co-operatives*. Recall that the case involved a Manitoba environmental statute creating liability for damage caused to Manitoba fisheries by contaminants discharged in provincial waters or carried from elsewhere into those waters. It also nullified the preclusive effect of administrative authorizations granted by foreign authorities to discharge pollutants. Adhering to the justifiability standard in the second part of the rule, Justice Ritchie found that the polluting activities were justified under the law of the place of acting because the defendants were licensed in Ontario and Saskatchewan. Hence Manitoba could not, by imposing liability on the defendants under the *Fishermen Act*, deprive them of rights validly acquired in their home province.[1282]

The dissenting judges in *Interprovincial Co-operatives*, led by Chief Justice Laskin, relied on *Moran* (a jurisdictional case)[1283] to find that the tort had occurred in Manitoba. This meant that Manitoba had not legislated extraterritorially when it enacted the *Fishermen Act*.[1284] The reasons of the dissenting judges foretold a different approach to

---

[1279] See UK Law Comission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict* (UK Report No 193, Scottish Report No 129) (London: Her Majesty's Stationery Office, 1990) at 7.
[1280] See see *Tolofson*, *supra* note 1074 at 1052; Pitel & Rafferty, *supra* note 828 at 262; Walker, vol 2, *supra* note 828 at § 35.4.
[1281] See Siros, *supra* note 858 at 655–56; McNamara, *supra* note 227 at 93–104; McCaffrey, "Comparative Survey", *supra* note 227 at 83–84; McCaffrey, *Transfrontier Environmental Disturbances*, *supra* note 227 at 35–36. *Cf Boslund*, *supra* note 866 at 980–81 (fire spreading from British Columbia into the state of Washington—action by American plaintiffs maintainable in British Columbia because the defendant's acts were wrongful in both jurisdictions).
[1282] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 521–23, Ritchie J, concurring.
[1283] See *Moran*, *supra* note 932.
[1284] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 500–501, Laskin CJC, dissenting, and the comments of Pitel et al, *supra* note 828 at 681.

choice of law in tort.[1285] In the decades that followed, some authors drew from *Moran* to suggest that the *lex loci delicti* or the law of the most substantially affected state would apply in a transboundary environmental dispute, without insisting on civil actionability under the law of the forum when the forum was not the place of acting.[1286] Choice of law rules, however, remained unchanged.

The Supreme Court of Canada broke free of the *Phillips v Eyre* rule in *Tolofson* (1994).[1287] English courts had already changed the rule to one of double civil actionability[1288] and shortly before *Tolofson* was decided, double actionability was abolished altogether by statute in the United Kingdom.[1289] The Court, led by Justice La Forest, completely rejected the double-barrelled approach as it stood in Canada. The Court noted that the rule inappropriately asked the courts to pass judgment on activities occurring in foreign countries. Its focus on the *lex fori* undermined the territoriality principle in the name of now-obsolete considerations such as the dominance of the British colonial empire, the superiority of its laws and the impracticability of proving the

[1285] See Joost Blom, "The Conflict of Laws and the Constitution: Interprovincial Co-Operatives Ltd v The Queen" (1977) 11:1 UBC L Rev 144 [Blom, "The Conflict of Laws and the Constitution"] ("Chief Justice Laskin's evident approval of the American "state interests" approach to the resolution of conflicts problems in tort was referred to earlier. It may be a straw in the wind foretelling the demise, so far as Canada is concerned, of *Phillips v Eyre*" at 156). See also Elizabeth Edinger, "Territorial Limitations on Provincial Powers" (1982) 14:1 Ottawa L Rev 57 (noting that the judges disagreed on the localization of the tort, but "potential disagreement [on the appropriate choice of law rule for torts] was evident" at 82) [Edinger, "Territorial Limitations"]. *Cf* Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38:2 UBC L Rev 373 at 379, n 29 (mentioning initial concerns that *Interprovincial Co-operatives* may have had constitutionalized the *Phillips v Eyre* rule). But see *Pearson v Boliden Ltd*, 2002 BCCA 624 at paras 60–61, 64, 222 DLR (4th) 453, leave to appeal to SCC refused, [2003] 2 SCR ix (suggesting that the *lex loci delicti* choice of law rule was not directly applicable to the question raised in *Interprovincial Co-operatives* and, in that case, to the extraterritorial application of provincial securities laws); John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63:2 Can Bar Rev 271 ("[a]s Laskin CJC explicitly states, *Phillips v Eyre* has nothing to do with the issue raised [in *Interprovincial Co-operatives*]" at 303); Pallemaerts, *supra* note 377 ("[…] it is questionable whether anything can be inferred from the [*Interprovincial Co-operatives*] case as to the place of commission of transboundary pollution for the purpose of the choice of law" at 168).

[1286] See Gallob, *supra* note 731 at 103–107 (suggesting that the law of the most substantially affected jurisdiction would apply by virtue of *Moran*); Cooper, *supra* note 164 at 276 (suggesting that either the *lex loci delicti* or the *lex fori* would apply); Alfred Rest, *International Protection of the Environment and Liability: The Responsibility of States and Individuals in Cases of Transfrontier Pollution* (Berlin: Erich Schmidt, 1978) at 141 (suggesting that the *lex loci delicti* would apply by virtue of *Moran*).

[1287] See *Tolofson*, *supra* note 1074.

[1288] See *Boys v Chaplin*, [1971] AC 356 at 388, [1969] 3 WLR 322 (HL).

[1289] See *Private International Law (Miscellaneous Provisions) Act 1995* (UK), c 42, ss 10–13 [*Private International Law (Miscellaneous Provisions) Act*]; *Lucasfilm*, *supra* note 820 at paras 78–81.

domestic law of distant states.[1290] The Court also rejected the uncertainty associated with the American doctrine of the proper law of the tort.[1291]

The Court replaced the double-barrelled approach with the *lex loci delicti* on the basis that it met normal expectations and that it was certain, easy to apply, predictable and in line with a growing international consensus.[1292] Importantly, the Court defined the *lex loci delicti* as the law of the place where the wrongful activity took place (for instance, where a car accident occurs).[1293] As the Court would explain in a subsequent case, "the rationale for the rule is that in the case of most torts, the occurrence of the wrong constituting the tort is its most substantial or characteristic element, and the injury or consequences are typically felt in the same place."[1294] This is why it made sense for the Court to locate torts at the place of acting.

3.2.1.1.2. The treatment of pure transboundary damage in *Tolofson*

In *Tolofson*, the Supreme Court of Canada recognized two broad sets of circumstances calling for adjustments to the *lex loci delicti*.[1295] The first concerns a small subset of international cases—but not interprovincial ones—in which the *lex loci delicti* works an injustice justifying the application of local law instead.[1296] This so-called flexible exception raised debates among litigants, scholars, and indeed the bench in *Tolofson*

[1290] See *Tolofson*, *supra* note 1074 at 1052–53.
[1291] See *ibid* at 1055–57, citing *Babcock v Jackson*, 12 NY (2d) 473, 1963 NY Lexis 1185 (NY Ct App 1963).
[1292] See *ibid* at 1049–51.
[1293] See *ibid* ("[…] the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*" at 1050). See also *George Weston* CA, *supra* note 133 ("[…] tort claims should be governed by the substantive law of the place where the activity or wrong occurred, that is to say, the *lex loci delicti*" at para 83); *Wightman*, *supra* note 938 ("[i]*l paraît assez évident que la loi du lieu où l'activité s'est déroulée (where the activity occurred) est celle du comportement fautif*" at para 162). See also Matthew Castel, "Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet" (2013) 51:1 Alta L Rev 153 ("[w]ith respect to torts, the choice of law rule in common law Canada is the *lex loci delicti*, interpreted as the law of the place where the wrongful act or omission occurred" at 161); Jean-Gabriel Castel, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33:1 Osgoode Hall LJ 35 [Castel] ("[Justice La Forest] was of the opinion that, for choice of law purposes, the place of tort is where the wrongful activity occurred" at 72).
[1294] *Éditions Écosociété*, *supra* note 809 at para 50. See also *Van Breda*, *supra* note 112 at para 37; *Castillo v Castillo*, 2005 SCC 83 at para 27, [2005] 3 SCR 870, Bastarache J, concurring [*Castillo*].
[1295] Justice La Forest also opened the door to a public policy exception overrriding the *lex loci delicti* in international cases, as well as the possibility to decline jurisdiction based on *forum non conveniens* when the tort is not actionable under local law. See *Tolofson*, *supra* note 1074 at 1054–55.
[1296] See *Tolofson*, *supra* note 1074 at 1054–63.

itself. Justices Major and Sopinka concurred with the majority but would have recognized the same exception for interprovincial cases.[1297] Commentators suggested that the outright rejection of an interprovincial exception was unsound,[1298] as did the Manitoba Law Reform Commission in 2009.[1299] Courts, however, repeatedly shut the door.[1300] Meanwhile, some judges began to generously interpret the notion of injustice in international cases. They applied, for instance, the law of the common residence of the parties instead of the *lex loci delicti* when the accident had occurred in a foreign country but involved residents of the same province.[1301] Appellate courts eventually intervened to limit the flexible exception to the most unusual cases.[1302] As such, the exception could cover egregious violations of basic human rights by corporations operating abroad, when foreign law does not offer minimal protection to victims, but Canadian courts have yet to formally endorse even such an extreme scenario.[1303]

[1297] See *ibid* at 1078, Major & Sopinka JJ, concurring.

[1298] See in particular Pitel & Rafferty, *supra* note 828 at 267; Stephen GA Pitel & Jesse R Harper, "Choice of Law for Tort in Canada: Reasons for Change" (2013) 9:2 J Priv Intl L 289 at 300–301, 308 [Pitel & Harper].

[1299] See Manitoba Law Reform Commission, *supra* note 813 at 7–9, 18.

[1300] See *Soriano v Palacios* (2005), 255 DLR (4th) 359 at 363, 2005 CanLII 18840 (CA), leave to appeal to SCC refused, [2006] 1 SCR xv; *Bezan v Vander Hooft*, 2004 ABCA 44 at paras 10–11, 346 AR 272 [*Bezan*]; *Brill v Korpaach Estate*, 1997 ABCA 205 at para 19, 148 DLR (4th) 467; *Leonard v Houle* (1997), 36 OR (3d) 357 at 363, 1997 CanLII 1218 (CA), leave to appeal to SCC refused, [1998] 1 SCR xi [*Leonard*].

[1301] See *Hanlan v Sernesky* (1997), 35 OR (3d) 603 at 610–11, 1997 CanLII 12290 (Gen Div), aff'd (1998), 38 OR (3d) 479, 1998 CanLII 5809 (CA).

[1302] See *Roy v North American Leisure Group* (2004), 73 OR (3d) 561 at 563–64, 2004 CanLII 43078 (CA); *Britton v O'Callaghan* (2002), 62 OR (3d) 95 at 99, 2002 CanLII 41471 (CA); *Wong v Lee* (2002), 58 OR (3d) 398 at 403–406, 2002 CanLII 44916 (CA); *Chomos v Economical Mutual Insurance Co* (2002), 61 OR (3d) 28 at 36–37, 2002 CanLII 45021 (CA); *Somers v Fournier* (2002), 60 OR (3d) 225 at 237–41, 2002 CanLII 45001 (CA); *Integral Energy & Environmental Engineering Ltd v Schenker of Canada Ltd*, 2001 ABCA 263 at para 15, 206 DLR (4th) 265, leave to appeal to SCC refused, [2002] 3 SCR viii..

[1303] See Walker, vol 2, *supra* note 828 at § 35.9(h). In *George Weston*, the Ontario Court of Appeal rejected the argument that the application of Bangladeshi law to a civil liability claim relating to the collapse of the Rana Plaza building in Bangladesh would amount to an injustice under *Tolofson* because Bangladeshi law discriminated against women claimants and did not allow for punitive damages. See *George Weston* CA, *supra* note 133 at paras 92–96. In *Nevsun Resources*, plaintiffs pleaded that the law of the place of the tort (Eritrea) could not govern their claims against a Canadian mining company for torture, slavery and forced labour because it would create an injustice. See *Nevsun Resources* CA, *supra* note 999 at paras 49–51. Courts have yet to resolve the issue as the applicable law was raised in a *forum non conveniens* analysis and held to be an equivocal factor in that case. For similar parallels between *Tolofson*'s injustice exception and human rights issues, see *Huang v Silvercorp Metals Inc*, 2016 BCSC 1168 at para 24, [2016] BCJ No 1336 (QL); *Davidson Tisdale Ltd v Pendrick* (1998), 116 OAC 53 at 61, 31 CPC (4th) 164 (Div Ct).

The second set of special circumstances recognized in *Tolofson* is more relevant for our purposes because it has to do with pure transboundary damage. In an oft-quoted statement, Justice La Forest explained that complex torts are not easily localized in a single place for the purposes of identifying the *lex loci delicti*:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti.* There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. […][1304]

The Court strongly suggests here that when an act and its consequences occur in different states, the *lex loci delicti* is the law of the place of injury. This is a significant departure from the Court's general understanding of the *lex loci delicti* as the law of the place of acting. Justice La Forest's statement, however, raises more questions than answers. It implies that "torts arising directly from transnational/interprovincial activity" are somehow different from transboundary torts but does not explain what the difference might be. Transboundary pollution, to name one example, can certainly be both. Nor does it explain the circumstances in which the damage will indeed constitute the wrong for choice of law purposes. Justice La Forest himself mentioned libel as a tort potentially occurring at the place of publication.[1305] Subsequent jurisprudence confirmed that in this context, the *lex loci delicti* is indeed the law of the place of publication, that is, where the defamatory statement is communicated and its reputational effects are felt.[1306] But the law is not always as clear for other torts.[1307] As the Ontario Superior Court of Justice

---

[1304] *Tolofson*, *supra* note 1074 at 1050 [emphasis added].
[1305] See *Tolofson*, *supra* note 1074 at 1041–42.
[1306] See *Goldhar*, *supra* note 809 at para 88; *Breeden*, *supra* note 809 at para 33; *Éditions Écosociété*, *supra* note 809 at para 62. In the context of jurisdiction, see the text accompanying notes 923–926.
[1307] *Cf Barrick Gold Corporation v Goldcorp Inc*, 2011 ONSC 3725 at paras 645–55, 99 BLR (4th) 1 (where the Ontario Superior Court of Justice referred both to a "defining activity" test and a "consequences

noted, "*Tolofson* clearly recognizes the complexities of trans-border torts and refrains from making a definitive statement that the place of the tort is always where the harm was suffered."[1308]

The localization of torts for choice of law purposes came back to the Supreme Court of Canada in *Éditions Écosociété* and *Breeden* (2012), two cross-border defamation cases.[1309] The debate on the appropriate choice of law rule for defamation stemmed from the fact that the *lex loci delicti* would lead to the application of different laws in different courts if a defamatory statement was published in multiple places, thus favouring libel tourism—a situation further exacerbated if the statement was posted online and made available worldwide.[1310] In a lengthy *obiter*, Justice LeBel, writing for the Court in *Éditions Écosociété*, questioned whether the *lex loci delicti* (defined in this context as the law of the place of publication) or the law of the place of the most substantial harm to the reputation should apply to cross-border defamation claims.[1311] Justice LeBel refused to give a definite answer.

The Court's restraint makes sense because the two cases did not hinge on choice of law. They involved the jurisdiction of Ontario courts and the doctrine of *forum non conveniens*. The law applicable to the dispute was merely one of the factors to be considered in deciding whether to decline jurisdiction in favour of another state, and Ontario law applied under either choice of law rule. Yet the Court seemed particularly interested in the issue. Unfortunately, its lengthy detour into *Tolofson*'s territory only caused more confusion.[1312] In *Tolofson*, the Court had left the door open to an injury-

---

felt" test to localize the torts of inducing breach of contract, interference with contractual relations and conspiracy).

[1308] See *Silver v Imax Corporation* (2009), 86 CPC (6th) 273 at 324, 2009 CanLII 72334 (Ont Sup Ct), appeal quashed, [2010] OJ No 6242 (QL), 2010 CarswellOnt 11219 (WL Can) (CA), leave to appeal to Ont Div Ct refused, 2011 ONSC 1035, 105 OR (3d) 212 [*Silver*]. See also *Wightman*, *supra* note 938 ("[l]*e locus du délit n'est pas définitivement tranché dans l'arrêt* Tolofson" at para 169).

[1309] See *Breeden*, *supra* note 809; *Éditions Écosociété*, *supra* note 809.

[1310] See eg Walker, vol 2, *supra* note 828 at § 35.8

[1311] See *Éditions Écosociété*, *supra* note 809 at paras 49–62. See also *Breeden*, *supra* note 809 at paras 32–33.

[1312] See Shaw & Robinson, *supra* note 946 ("*Goldhar* exacerbates the already existing uncertainty by continuing to leave litigants and lower courts in the lurch, debating what the appropriate choice of law rule should be" at 166); Kain, Marques & Shaw, *supra* note 921 at 299 ("[t]he Court's treatment of choice of law in *Éditions Écosociété* and *Black* is a good example of why common law courts should limit their reasons to the issues that are necessary to decide the case before them. At the very least, if the nation's

based definition of the *lex loci delicti* for certain torts. Arguably, the caveat was not so much an exception to the *lex loci delicti* as a different way of localizing certain torts in order to identify the *lex loci delicti*—in other words, a different interpretation of the same choice of law rule.[1313] In *Éditions Écosociété*, however, the Court went further. It interpreted *Tolofson*'s caveat as opening the door to brand-new choice of law rules for certain torts, including defamation.[1314]

Uncertainty persisted for a few years after *Éditions Écosociété*.[1315] In 2015, the Court declined to hear a case involving the localization of the tort of conversion for choice of law purposes, in spite of the appellant's invitation to reassess choice of law rules for torts.[1316] The Court signalled then its reluctance to revisit the issue.

This reluctance became clearer when the Court issued its opinion in *Goldhar* (2018), a case involving jurisdiction over online defamation and incidentally the applicable law as part of the *forum non conveniens* analysis. Parties squarely debated the relevance of the *lex loci delicti* in their written submissions.[1317] The Court had a good opportunity to revisit Justice La Forest's caveat in *Tolofson* and to determine whether to deviate from

highest Court decides to raise an issue of whether there should be a new legal rule, then it ought to resolve it. By reinvigorating the *possibility* that another choice of law rule in tort exists beyond the *lex loci delicti*, the Supreme Court has needlessly introduced the risk of confusion into the Canadian choice of law paradigm" at 299 [emphasis in the original]).

[1313] See Walker, vol 1, *supra* note 828 ("[h]owever, where all the facts and events that constitute the wrongful activity occur in one state but the foreseeable consequences of that activity are felt in another state, [Justice La Forest] seemed to be prepared to consider the place of injury, that is where the harm ensued, as the place of tort" at § 35.8); Castel, *supra* note 1293 at 73 (*idem*). But see Pitel & Harper, *supra* note 1298 ("[…] the conduct and harms involved in many other torts like conspiracy, intentional interference with economic relations, defamation, and negligent misrepresentation can easily span borders. Does the *lex loci delicti* rule apply to these torts? The notion that in *Tolofson* the court was laying down a general rule indicates that it does, but the passage quoted above [the caveat on transboundary damage, ed] suggests otherwise" at 296).

[1314] See *Éditions Écosociété*, *supra* note 809 at paras 50–51.

[1315] See *Gravel c Lifesitenews.com (Canada)*, 2013 QCCS 36 at paras 65–70, [2013] JQ no 81 (QL); *Court v Debaie*, 2012 ABQB 640 at para 49, 550 AR 231 (application of both choice of law rules—same result under either one of them).

[1316] See *Coady v Quadrangle Holdings Ltd*, 2015 NSCA 13 at paras 57–60, 70–78, 355 NSR (2d) 324, leave to appeal to SCC refused, [2015] 2 SCR vi; Supreme Court of Canada, "Summary: *Blair Coady v Quadrangle Holdings Limited*", online: *Supreme Court of Canada* <www.scc-csc.ca> [perma.cc/4J3R-KSWY].

[1317] See *Goldhar*, *supra* note 809 (Factum of the Appellant at paras 78–88; Factum of the Respondant at paras 112–40).

the *lex loci delicti* or its dominant interpretation in certain cases, as suggested by Justice LeBel in *Éditions Écosociété*.

Seven of the nine judges reaffirmed the *lex loci delicti* in defamation disputes (again, defined in this context as the law of the place of publication).[1318] Justice Côté, also writing for Justices Brown and Rowe, was not convinced of the need for a new rule on the facts of the case. She did not wish to discourage the Court to hold otherwise in a later case, but only on the basis of proper evidence and submissions.[1319] Justice Karakatsanis agreed with "much of [her] reasoning", which presumably includes the appropriate choice of law rule since her reasons do not refer to this issue.[1320] Chief Justice McLachlin and Justices Moldaver and Gascon, dissenting on other points, expressly maintained the *lex loci delicti*.[1321] Only Justices Abella and Wagner (as he then was), concurring in the result, would have replaced it with the law of the place of substantial harm to the reputation in the context of defamation.[1322]

Goldhar thus reinforced the status of the *lex loci delicti* as the choice of law rule for torts, absent future changes in the defamation context. Unfortunately, none of the five sets of reasons clarified *Tolofson*'s caveat on pure transboundary damage. This is disappointing because online defamation is certainly one of the thorny situations that would have preoccupied Justice La Forest in *Tolofson*. Justice Abella briefly made the parallel,[1323] but her proposal for a new choice of law rule pre-empted further discussion on the localization of torts under *Tolofson*'s framework. More fundamentally, her reasons suggest, as did Justice LeBel's in *Éditions Écosociété*, that *Tolofson* opened the door to different choice of law rules for certain torts, as opposed to an injury-based definition of the *lex loci delicti* in cases where consequences constitute the wrong.[1324] The rest of the

[1318] See Shaw & Robinson, *supra* note 946 at 158.
[1319] See *Goldhar*, *supra* note 809 at paras 84–94, Côté J.
[1320] See *ibid* at para 99, Karakatsanis J, concurring.
[1321] See *ibid* at paras 196–204, McLachlin CJ, Moldaver and Gascon JJ, dissenting.
[1322] See *ibid* at paras 104–19 (Abella J, concurring), 144–46 (Wagner J, concurring). Justice Abella would have employed the substantial harm to reputation test jurisdictional purposes as well. See *ibid* at paras 120–30, Abella J, concurring. Justice Wagner, by contrast, would have adopted the test for choice of law purposes only. See *ibid* at paras 147–49, Wagner J, concurring.
[1323] See *Goldhar*, *supra* note 809 at paras 111–12, Abella J, concurring. See also Shaw & Robinson, *supra* note 946 at 167.
[1324] See *ibid*.

bench made no comment on this point. Accordingly, it remains unclear whether *Tolofson*'s caveat supports alternative choice of law rules or simply alternative methods of localization (and in the latter case, for which torts).[1325]

3.2.1.1.3. *Tolofson* and transboundary pollution

Going back to transboundary pollution, we must conclude that the choice of law rule remains the *lex loci delicti*. The question becomes where environmental torts occur for choice of law purposes. Transboundary pollution is a perfect illustration of the kind of thorny situations contemplated by Justice La Forest in *Tolofson* because the act occurs in one place and its consequences occur elsewhere. In these circumstances, the *lex loci delicti* could be the law of the place of acting (aligning with *Tolofson*'s definition of the place where a tort generally occurs) but it could also be the law of the place of injury.

The localization of torts does not follow strict or arbitrary rules. The analysis should focus on where each tort crystallizes, that is, where a cause of action exists.[1326] Jurisdictional rules have a certain relevance in this inquiry.[1327] The Supreme Court of Canada explained in *Goldhar* that "[i]n circumstances where the *situs* of the tort leads to the assumption of jurisdiction in the chosen forum, [the] *lex loci delicti* will inevitably also point to the chosen forum on the question of applicable law."[1328] Should a court assume jurisdiction on the basis that the plaintiff suffered damage in the province (hence that a tort occurred there in the sense of *Moran* and *Van Breda*), the *lex loci delicti* would likely be the law of the forum. Courts also frequently rely on jurisdictional precedents to localize torts for choice of law purposes,[1329] a possible side effect of the much larger body of case law pertaining to jurisdiction. This said, the processes of assuming

[1325] On the questions raised by *Tolofson* in this regard, see Pitel & Rafferty, *supra* note 828 at 268–70; Pitel & Harper, *supra* note 1298 at 295–96.
[1326] See the sources cited *supra* notes 927–929.
[1327] For further discussion on the localization of torts for jurisdictional purposes, see subsection 2.2.1.2 above.
[1328] *Goldhar*, *supra* note 809 at para 90.
[1329] See eg *Thorne v Hudson Estate*, 2017 ONCA 208 at paras 7–11, 136 OR (3d) 797, leave to appeal to SCC refused, [2017] 3 SCR x [*Thorne*] (where the Ontario Court of Appeal upheld the trial judge's reliance on *Central Sun Mining*, *supra* note 928, a jurisdictional case, to find that the tort of negligent misrepresentation occurs where a person receives the misrepresentation and acts upon it, for both jurisdictional and choice of law purposes).

jurisdiction on the basis of a tort occurring in the forum (*Van Breda*) and of identifying the *lex loci delicti* (*Tolofson*) remain conceptually distinct.[1330] A single applicable law implies that there can only be one place where a tort occurs. Jurisdictional rules call for no such restriction. Two states may well have a sufficient interest to hear the dispute if some element of the tort occurred there, without even concluding that the entire tort occurred there. Thus, "what is meant by the place of a tort can be different in the jurisdiction context than in the choice of law context."[1331] A standalone analysis is required, even though it may borrow from jurisdictional precedents.

In my view, courts seized with allegations of negligence, nuisance, trespass, strict liability (*Rylands v Fletcher*) or breach of riparian rights related to transboundary pollution would apply the law of the place where the injury was suffered. Again, we should distinguish negligence (3.2.1.1.3.1) and property torts (3.2.1.1.3.2).

3.2.1.1.3.1. The law applicable to negligence

Negligence depends on an injury which constitutes the tort.[1332] In this context, the *lex loci delicti* is the law of the place where the injury occurred. This is consistent with the view of the dissenting judges in *Interprovincial Co-operatives*, who relied on *Moran* to find that the cause of action had arisen in Manitoba, where the effects of the pollution were felt.[1333]

Post-*Tolofson* case law supports this proposition. In product liability cases, courts follow the logic of *Moran* and locate negligence at the place of injury for choice of law purposes.[1334] In *Lilydale Cooperative* (2013), the plaintiff, an Alberta company, had bought a fryer from the defendant, an Ontario company. The fryer had later caused a fire in the plaintiff's plant in Alberta. The plaintiff sued in negligence. The Ontario Superior

[1330] See *Moran*, *supra* note 932 at 397; Pitel & Black, *supra* note 930 at 196–97.
[1331] Pitel & Black, *supra* note 930 at 197. See also Pitel & Rafferty, *supra* note 828 at 269; Walker, vol 2, *supra* note 828 at § 35.8.
[1332] See the sources cited *supra* note 962.
[1333] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 501, Laskin CJC, dissenting.
[1334] Quebec courts had also relied on *Moran* by analogy in product liability cases, prior to the codification of private international law in the CCQ. See *A Côté et Frères Ltée c Laboratoires Sagi Inc* (1983), [1984] CS 255, 1983 CarswellQue 400 (WL Can) at X.

Court of Justice applied the law of Alberta because the damage had occurred there.[1335] In *Ostroski* (1995), the plaintiff had been injured at her residence in Pennsylvania when the chair manufactured by the Ontario defendants had tipped over. Again, the General Division of the Ontario Court of Justice applied the law of Pennsylvania because the damage had occurred there.[1336] In *Shane* (2003), the Ontario Superior Court of Justice hinted—in the context of a *forum non conveniens* analysis—that Ontario law could govern the issue of the negligent design and manufacture of a tractor built in England and destroyed by fire in Ontario.[1337] The Supreme Court of the Northwest Territories left the door open to a similar reasoning in *Stewart* (1996).[1338] None of these cases discusses whether *Moran*'s foreseeability requirement also applies in the choice of law context, such that the law of the place of injury would only apply if the manufacturer could reasonably foresee that the product would be used or consumed there.[1339] In *Ostroski*, however, the Court quoted *Moran* and held that Pennsylvania, and not Ontario, was a place "substantially [a]ffected by the defendant's activities or its consequences and the law of which is likely to have been in the contemplation of the parties."[1340]

The jurisprudence of the Ontario Court of Appeal confirms the importance of the place of injury in identifying the law applicable to negligence. In *Leonard* (1997), the plaintiffs had been involved in a car accident during a high-speed police chase which had begun in Ontario and then crossed over into Quebec.[1341] They sued the police officers and the

---

[1335] See *Lilydale Cooperative Limited v Meyn Canada Inc*, 2013 ONSC 5313 at para 23, [2013] OJ No 4986 (QL), aff'd 2015 ONCA 281, 126 OR (3d) 378 [*Lilydale Cooperative*].
[1336] See *Ostroski v Global Upholstery Co*, [1995] OJ No 4211 (QL) at paras 13–14, 1995 CarswellOnt 874 (WL Can) (Gen Div).
[1337] See *Shane v JCB Belgium NV*, 2003 CanLII 49357 at para 48, [2003] OJ No 4497 (QL) (Sup Ct). T
[1338] See *Stewart v Stewart Estate*, [1996] 8 WWR 624 at 631, 1996 CanLII 3636 (NWTSC). See also *Ross v Ford Motor Co* (1997), [1998] NWTR 175 at 180–81, 1997 CanLII 4517 (SC).
[1339] For a proposal incorporating the notion of foreseeability in the choice of law rule for torts, see Peter Kincaid, "Justice in Tort Choice of Law" (1996) 18:2 Adel L Rev 191 at 206–207; Peter Kincaid, "*Jensen v Tolofson* and the Revolution in Tort Choice of Law" (1995) 74:4 Can Bar Rev 537 at 561. As I mentioned earlier when discussing *Moran* and again when responding to the critics of the *Rome II Regulation*, foreseeability is ill-adapted to an environment-specific choice of law rule because we often ignore the full scope of the problem. The same problem arises in article 3126, para 1 CCQ, as we will see below. For further discussion on *Moran*'s foreseeability requirement in the jurisdictional context, see subsection 2.2.1.2.2.2 above. For further discussion on foreseeability in the *Rome II Regulation*, see subsection 3.1.4.2.3.1.1 above. For further discussion on foreseeability in article 3126, para 1 CCQ, see subsection 3.2.1.2 below.
[1340] See *Ostroski*, *supra* note 1336 at para 13.
[1341] See *Leonard*, *supra* note 1300.

person they were chasing for negligence. The Ontario Court of Appeal had to locate the tort of negligence in either Quebec or Ontario in order to identify the *lex loci delicti*. The Court held that the tort had occurred in Quebec because the injury had occurred there.[1342] For the Court, no wrong existed without an injury. Plaintiffs sued because they had suffered an injury in Quebec, not because the police had breached whatever duty they might have had in Ontario.[1343] The analogy with transboundary pollution is admittedly imperfect because *Leonard* involved a car chase across Ontario and Quebec which had resulted in an accident in Quebec—in other words, both the act (or part thereof) and the damage had occurred in Quebec. Nonetheless, *Leonard* was cited and applied in *Lilydale*, a product liability case in which the allegedly negligent act had occurred entirely elsewhere.[1344]

George Weston (2018) illustrates a similar principle.[1345] Victims of the tragic collapse of the Rana Plaza building in Bangladesh sued Loblaws—a Canadian retailer that purchased clothes from a manufacturer operating in the Rana Plaza—and a company retained by Loblaws to perform audits of factories in Bangladesh. Among the many disputed issues was the law applicable to claims in negligence and vicarious liability against Loblaws. The plaintiffs argued that Loblaws' alleged wrongful conduct (acquiring knowledge of the working conditions in Bangladesh and signing contracts regarding its operations in Bangladesh, for instance) had occurred in Ontario, where it operated. Hence, Ontario law governed the claims even though the resulting injury had occurred in Bangladesh. The trial judge rejected the argument. Citing *Moran*, Justice Perell held that Loblaws' wrongdoing had "occurred in Bangladesh, the country substantially affected by its acts or omissions and the country whose citizens suffered the consequences of the wrongdoing."[1346] Hence the *lex loci delicti* was Bangladeshi law.[1347] The Court of Appeal

[1342] See *ibid* at 364.
[1343] See *ibid* at 364–65.
[1344] See *Lilydale Cooperative*, *supra* note 1335 at para 23.
[1345] See *George Weston* CA, *supra* note 133.
[1346] *Das v George Weston Ltd*, 2017 ONSC 4129 at para 248, [2017] OJ No 3542 (QL), aff'd 2018 ONCA 1053, 43 ETR (4th) 173, leave to appeal to SCC refused, 38529 (8 August 2019) [*George Weston* Sup Ct].
[1347] See *ibid* at para 265.

affirmed Justice Perell's judgment and recalled that the injury in Bangladesh had "crystallized the alleged wrong."[1348] Both courts relied on *Leonard* in their reasons.[1349]

Summing up, the above cases strongly suggest that the law applicable to a negligence claim—the *lex loci delicti* under *Tolofson*—is the law of the place of injury.[1350] Courts might revert back to the law of the place of acting under *Tolofson* if too many victims rely on too many different laws in the same litigation, making the judicial process impracticable, but cases show no sign of such "exception within the exception" outside Quebec.[1351]

3.2.1.1.3.2. The law applicable to property torts

Although authorities are scant, the *lex loci delicti* of property torts is probably the law of the place where the injury occurred.[1352] This is because trespass, nuisance, strict liability (*Rylands v Fletcher*) and breach of riparian rights all involve interference with property. And even if "the wrongful act takes place in a different jurisdiction [than where the property is situated], the location of the property is probably still the weightiest factor in determining the *lex loci delicti*."[1353]

3.2.1.1.4. Implications for equal remedy and prompt and adequate compensation

The outcome of the choice of law analysis is clear enough but the rules themselves strike me as unsatisfactory in the context of transboundary pollution because courts have to separate the components of various torts and choose one among them—most likely environmental damage itself—in order to identify the *lex loci delicti*. There is a difference between applying one law at a time (which choice of law ought to do) and claiming that only one connecting factor is appropriate in all cases. Fundamentally,

---

[1348] *George Weston* CA, *supra* note 133 at para 90.
[1349] See *ibid* at para 90; *George Weston* Sup Ct, *supra* note 1346 at para 241.
[1350] See Forcese, *supra* note 138 ("[i]n the context of a tort claim, "the place where the activity occurred" is increasingly viewed as the place where the harm occurs" at 207).
[1351] The Quebec Court of Appeal has developed such a rule in its interpretation of article 3126, para 1 CCQ. For further discussion on this point, see subsection 3.2.1.3 below.
[1352] In the jurisdictional context, see the sources cited *supra* note 963.
[1353] Pitel et al, *supra* note 828 at 680. See also Reid Mortensen, "Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches" (2006) 55:4 ICLQ 839 at 854.

locating torts at the place of injury is not illogical. It aligns with the idea that civil liability focuses on the damage rather than the wrong, and that the victim state has a strong interest in protecting its population and its environment from pollution originating in other states.[1354] It can very well lead to prompt and adequate compensation in some cases.

The problem is that this definition of the *lex loci delicti* does not always ensure equal remedy, nor does it always give victims the benefit of the more favourable law. Foreign victims suing Canadian polluters in Canadian courts are in a good position if the law of the place of injury is more favourable to compensation than the law of the place of acting. This scenario ensures equal remedy—understood as a minimum standard—because the remedies available to foreign victims are at least equally prompt, adequate and effective as (and in fact better than) the ones available to local victims. This scenario also increases the prospects of compensation. The same goes when local victims sue foreign polluters in Canadian courts in circumstances where local law is more favourable than the law of the place of acting. But the opposite scenario (where the law of the place of acting is more favourable than the law of the place of injury) puts foreign victims at a disadvantage compared to local victims when they sue Canadian polluters in Canadian courts. The same discrepancies occur when local victims sue foreign polluters in Canadian courts in circumstances where the law of the place of acting is more favourable than local law. This undermines equal remedy and does not favour compensation. More fundamentally, it incentivizes polluters to direct the consequences of their operations in a jurisdiction with weaker standards.

Interpreting the *lex loci delicti* as referring to the law of the place of acting instead of the law of the place of injury would solve the issue of equal remedy. It would also avoid the practical problems associated with the application of multiple laws to multiple victims in the same litigation. But it would create an incentive for polluters to establish their operations in laxer jurisdictions, which is at odds with the duty to ensure the availability of prompt and adequate compensation. It would also make *Tolofson*'s caveat on pure

[1354] For further discussion on this point, see subsection 3.1.4.1 above.

transboundary damage disappear and indirectly overrule jurisprudence which, as we have seen, suggests that certain torts do occur at the place of injury for choice of law purposes. Valuable considerations support the law of the place of acting as a general choice of law rule for torts.[1355] *Tolofson* made it clear and, as we will see, the Quebec Court of Appeal showed a similar inclination.[1356] But the interests of victims and the protection of the environment should prevail in the specific context of transboundary pollution. They favour neither the law of the place of injury nor the law of the place of acting alone.

The *lex loci delicti* as applied by Canadian courts thus fails to meet the *UNEP Guidelines on Liability* and the broader consensus surrounding the ubiquity principle. Even worse, the law on this point is plagued with uncertainty. My critique assumes that courts would indeed rely on *Moran* and *Tolofson* to locate environmental torts at the place of injury. It is likely, but we have few authoritative statements on this point. More than twenty years after *Tolofson*, and even after *Goldhar*, the Supreme Court of Canada has yet to define what it meant with its caveat on transboundary torts. We do not even know for certain that the law of the place of injury will apply, and the workings of a foreseeability requirement (a possible by-product of the analogy with *Moran* in product liability cases) also remain unclear.[1357]

How should we correct the course? Statutory reform is the most straightforward option. It has already been contemplated in the past: the Manitoba Law Reform Commission recommended a legislative iteration of the *lex loci delicti*,[1358] and two authors called for the ULCC to adopt uniform choice of law rules for torts.[1359] Choice of law rarely makes its way into the political agenda, but with sufficient pressure from scholars and law reform bodies, it might. And as global environmental issues increasingly take centre

[1355] For further discussion on this point, see subsection 3.1.4.1.
[1356] But see Castel, *supra* note 1293 ("[i]n order to avoid using the determination of the place of tort as an escape device, it would have been better if the Court had definitely held that in all situations the place of injury is the place of tort, instead of just alluding to it" at 73).
[1357] A Quebec scholar who endeavoured to compare the rules of private international law throughout Canada could only reach one conclusion when it came to the law applicable to transboundary torts at common law: "[a]*u final, la solution n'est pas claire*." Emanuelli, *Étude comparative*, *supra* note 157 at para 509.
[1358] See Manitoba Law Reform Commission, *supra* note 813
[1359] See Pitel & Harper, *supra* note 1298 at 308.

stage, special choice of law rules for environmental damage could be part of the discussion.

In the absence of statutory reform, an authoritative follow-up to *Tolofson* remains a possibility.[1360] A case involving a complex tort other than defamation could make its way to the Supreme Court of Canada. Faced with a choice between the law of the place of acting and the law of the place of injury, and provided that a party raises the choice of law issue, the Court could decide to adopt the most favourable of the two laws as the *lex loci delicti*.

Such judicial reform is entirely conceivable. Choice of law in common law provinces is primarily judge-made.[1361] The Supreme Court of Canada has not shied away from major reforms of private international law in the last thirty years, including choice of law rules. In *Tolofson*, the Court repudiated decades of choice of law jurisprudence in order to accommodate the modern needs of society.[1362] In *Goldhar*, four judges left the door open to a complete overhaul of *Tolofson* in defamation cases,[1363] and two judges actually made the leap.[1364] Introducing the ubiquity principle is a less drastic change to the current framework because it continues to rely on the place of the tort. It simply changes the way in which we approach its localization in a small subset of cases. The Supreme Court of Canada would need to adapt, expand or distinguish *Tolofson* (depending on its interpretation of Justice La Forest's caveat on pure transboundary damage) but not overrule it altogether. Its bedrock principles would remain intact.

Jennifer Orange's proposal in the context of human rights litigation offers a useful basis for discussion in this context. In a paper published in 2001, Orange explains that the *lex loci delicti* falls short of ensuring justice for victims of serious human rights violations committed abroad when their home law does not provide for adequate civil remedies. She

[1360] But see *ibid* ("[i]t is unlikely that this [remedying defects of the current rule, ed] will be done by the courts in the foreseeable future. It would require a case with particularly compelling facts to reach the Supreme Court of Canada before that court could reconsider the scope of the exception to the *lex loci delicti* rule" at 308).
[1361] See *Goldhar*, *supra* note 809 at para 144, Wagner J, concurring.
[1362] See *Tolofson*, *supra* note 1074 at 1047.
[1363] See *Goldhar*, *supra* note 809 at para 99 (Karakatsanis J, concurring).
[1364] See *ibid* at paras 104–19 (Abella J, concurring), 144–46 (Wagner J, concurring).

focuses on torture—an example she readily describes as "extreme",[1365] but her point extends to other areas as well. Courts, she argues, ought to interpret *Tolofson* as affording enough flexibility to disregard foreign law when its application would undermine peremptory norms of public international law such as the prohibition of torture.[1366]

According to Orange, this flexibility might operate as "a direct public policy exception to the sole possible *lex loci delicti* or as a principle of choice between two or more plausible *lex loci delictis*."[1367] The first option is the most obvious way of disregarding the applicable law when peremptory norms of public international law are at stake. Justice La Forest referred to injustice and the "breach of some overriding norm" as reasons to deviate from the general approach he prescribed in *Tolofson*. This language matches the kind of cases Orange is preoccupied with.[1368] The second option is more wide-ranging and also more useful for our purposes. Orange points out that certain human rights cases may feature two plausible *lex loci delictis*, when an act in one place cause damage in another. In such circumstances, "it would be faithful to *Tolofson*'s own general reasoning and its specific *data* to draw on overriding norms for aid in making principled choices between more than one plausible *lex loci delicti* for a given torture tort claim."[1369] Ultimately, she says, international human rights law should tip the balance in favour of the law that is the most conducive to compensation.[1370]

Orange's second option builds on *Tolofson*'s flexibility to introduce the ubiquity principle in substance if not in name. Paradoxically, this second option has limited use in

---

[1365] Orange, *supra* note 562 at 323.
[1366] Note that the Supreme Court of Canada later held that "Canada is not obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad." *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 157, [2014] 3 SCR 176. See also *Steen v Islamic Republic of Iran*, 2013 ONCA 30 at para 31, 114 OR (3d) 206; *Bouzari v Iran* (2004), 71 OR (3d) 675 at 693–94, 696, 2004 CanLII 871 (CA), leave to appeal to SCC refused, [2005] 1 SCR vi [*Bouzari*]. This may affect Orange's specific argument in relation to torture committed abroad, but not her broader argument that courts should depart from the *lex loci delicti* when it violates a peremptory norm of public international law.
[1367] Orange, *supra* note 562 at 322.
[1368] See *Tolofson*, *supra* note 1074 at 1047, 1050. On peremptory international law as overriding norms under *Tolofson*, see Nwapi, *supra* note 138 at 455; Orange, *supra* note 562 at 302, 321. A direct exception could even extend to treaty obligations, customary norms or general principles of international law. See Nwapi, *supra* note 138 at 463, 466–67; Orange, *supra* note 562 at 303, 321.
[1369] Orange, *supra* note 562 at 321–22 [emphasis in the original].
[1370] See *ibid* at 322.

the areas she focuses on in her paper, which do not necessarily involve two plausible *lex loci delictis*. How could torture occur in more than one place, except perhaps as a result of a governmental decision taken elsewhere?[1371] Even in the case of a transnational corporation violating human rights abroad, it is not always easy to geographically disassociate the act from its consequences. Some portion of the chain of events leading to the injury will likely have occurred at the place of injury as well, making it easy for courts to localize the entire tort there and to ignore corporate decisions that occurred elsewhere.[1372] But transboundary pollution may involve an injury suffered in one place as a result of an activity occurring entirely elsewhere. Choosing between the law of the place of acting and the law of the place of injury is considerably more difficult in this context. This is where Orange's reading of *Tolofson* is the most useful because there are clearly two places where the tort potentially occurs.

Orange's analysis offers two important lessons in the context of transboundary pollution. First, public international law should factor in the identification of the *lex loci delicti*. When a tort conceivably occurs in more than place, the *lex loci delici* should favour compensation in order to give effect to a substantive policy articulated in international environmental law—equal remedy and the duty to ensure prompt and adequate compensation. Second, statutory reform is ideal,[1373] but the common law affords courts enough flexibility to adopt the ubiquity principle without having to wait for political momentum that may never come.

Reform would bring Canadian private international law in line with a growing international consensus. The Supreme Court of Canada recalled on numerous occasions that Canadian law ought to reflect our growing environmental preoccupations.[1374] Instruments such as the *Rome II Regulation* or the *UNEP Guidelines on Liability* respond

[1371] Orange suggests that a victim who flees elsewhere after being tortured continues to suffer an injury, hence the tort becomes disassociated in the sense of *Tolofson*'s caveat. See *ibid* at 294, 311–12. *Cf Tolofson*, *supra* note 1074 ("[t]hough the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well" at 1050).
[1372] See eg *George Weston* CA, *supra* note 133 at para 85.
[1373] See Orange, *supra* note 562 at 294, 323.
[1374] See the sources cited *supra* note 909.

to those preoccupations. Courts would be wise to consider them as part of an incremental evolution of our choice of law framework.

I now leave aside the common law and turn to the statutory choice of law rules found in the *Reciprocal Access Act* and the *Civil Code of Quebec*.

3.2.1.2. Choice of law in the *Reciprocal Access Act*

The rule set out in *Tolofson* applies in all provinces except Quebec, but the *Reciprocal Access Act* also contains statutory choice of law rules. In Ontario, Manitoba, Nova Scotia and Prince Edward Island, the *Reciprocal Access Act* requires courts in the source state to always apply their own law.[1375] The ULCC designed this provision to provide legal certainty: polluters on both sides of the border would expect the application of their home law, and victims would know precisely which law would apply should they choose to sue polluters on their own turf.[1376] In this sense, the *Reciprocal Access Act* reflects pre-*Tolofson* tendencies to apply local law in tort disputes under the double actionability/justifiability rule.[1377]

The interaction between the *Reciprocal Access Act* and the common law is unclear. The ULCC intended to supplement existing rights, not replace them.[1378] Years later, however, *Tolofson* brought about radical changes in the choice of law process. It rejected the *lex fori* orientation of the prior rule and made the *lex loci delicti* prevail. The choice of law provision contained in the *Reciprocal Access Act* contracts sharply with the common law post-*Tolofson*. The *Act* imposes local law, which effectively coincides with the law of the place of acting in the context of the *Act*. *Tolofson*, by contrast, acknowledges that the law of the place of injury might govern the dispute when the act and the injury occur in different states. This is an irreconcilable conflict.

[1375] See *Reciprocal Access Act*, *supra* note 740, s 4; *ON Reciprocal Access Act*, *supra* note 747, s 4; *MB Reciprocal Access Act*, *supra* note 747, s 4; *NS Environment Act*, *supra* note 747, s 148; *PEI Reciprocal Access Act*, *supra* note 747, s 4.
[1376] See ULCC, *supra* note 741 at 503.
[1377] For further discussion on the law pre-*Tolofson*, see subsection 3.2.1.1.1 above.
[1378] See *Reciprocal Access Act*, *supra* note 740, s 6; *ON Reciprocal Access Act*, *supra* note 747, s 6; *MB Reciprocal Access Act*, *supra* note 747, s 6; *NS Environment Act*, *supra* note 747, s 150; *PEI Reciprocal Access Act*, *supra* note 747, s 6.

It is clear in my view that the *Reciprocal Access Act* overrides *Tolofson*, subject to constitutional constraints. No province amended its statute after the judgment.[1379] Clear legislation trumps the common law,[1380] and the *Reciprocal Access Act* is unambiguous. It admits no judicial discretion and leaves no room for alternative connecting factors.

Yet there may be an argument that the rigidity of the *Reciprocal Access Act* makes it unconstitutional with respect to *interprovincial* pollution. *Tolofson* made clear that "an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns."[1381] In other words, applying the law of the forum when the tort occurred wholly in another province amounts to an improper extraterritorial application of provincial law. The necessary implication is that a province cannot validly impose its own law by statute in such circumstances (the same logic underlies the absence of a flexible exception to the *lex loci delicti* in interprovincial cases[1382]).

The constitutional requirements for choice of law remain nebulous, precisely because the Supreme Court of Canada stopped short of defining them in *Tolofson.* The judgment arguably did not constitutionalize the *lex loci delicti* within Canada.[1383] This has been the prevailing view among scholars.[1384] It is also reflected in the Court's willingness to

---

[1379] See by analogy Pitel & Harper, *supra* note 1298 ("[t]he Quebec Legislature has not taken any steps to alter [article 3126 CCQ] since *Tolofson* was decided. As a result, a different choice-of-law rule applies in Quebec than in Canada's other provinces" at 295)
[1380] See the sources cited *supra* note 906.
[1381] *Tolofson*, *supra* note 1074 at 1066 [emphasis added]. For further discussion on the extraterritorial application of provincial environmental laws, see subsection 3.2.3.2.2.2 below.
[1382] For further discussion on the flexible exception, see subsection 3.2.1.1.2 above.
[1383] See *Castillo*, *supra* note 1294 at para 51, Bastarache J, concurring; *British Columbia v Imperial Tobacco Canada Ltd*, 2004 BCCA 269 at para 171, 239 DLR (4th) 412, Rowles J, concurring, aff'd 2005 SCC 49, [2005] 2 SCR 473 [*Imperial Tobacco* CA 2004]. But see *Lapierre v Lecuyer*, 2018 ONSC 1540 at para 12, [2018] OJ No 2034 (QL) (holding that provinces cannot create legislative exceptions to the *lex loci delicti* in interprovincial litigation); *Giesbrecht c Succession de Nadeau*, 2017 QCCA 386 at para 23, [2017] JQ no 2163 (QL), leave to appeal to SCC refused, [2017] 3 SCR vii [*Giesbrecht*] (recalling that the *lex loci delicti* must suffer from few exceptions in Canada because of constitutional imperatives).
[1384] See eg Joost Blom, "Constitutionalizing Canadian Private International Law—25 Years Since *Morguard*" (2017) 13:2 J Priv Intl L 259 at 288–89 [Blom, "Constitutionalizing Canadian Private International Law"]; Pitel & Harper, *supra* note 1298 at 306–308; Catherine Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims" (1997) 76:1 Can Bar Rev 91 at 113, reprinted in Jacob Ziegel & Shalom Lerner, eds, *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the*

consider other connecting factors for defamation,[1385] and its assertion that the Constitution does not require uniformity in conflict rules.[1386]

In the end, I believe the *Reciprocal Access Act* remains constitutionally valid. Courts must apply a law that has some connection to the dispute, not necessarily the *lex loci delicti*.[1387] When courts apply their own law pursuant to the *Reciprocal Access Act*, an important part of the dispute—the polluting activity—has a connection with the forum. This is sufficient for constitutional purposes. It follows that Ontario, Manitoba, Nova Scotia and Prince Edward Island can validly impose their own law by statute when pollution originates in their territory. Meanwhile, courts in the victim state remain free to apply whatever law they deem appropriate, again subject to constitutional constraints.[1388] Constitutional problems aside, however, the choice of law provision in the *Reciprocal Access Act* effectively amounts to imposing the law of the place of acting, and with it, the concerns associated with a rigid localization of environmental torts for choice of law purposes.

3.2.1.3. Choice of law in the *Civil Code of Quebec*

A different choice of law framework applies in Quebec. As this subsection demonstrates, it does not share all the defects of the common law, but it treats victims of transboundary pollution less favourably than the *Rome II Regulation* or the *UNEP Guidelines on Liability*.

The CCQ follows the logic of *Tolofson* and departs from an earlier ruling of the Supreme Court of Canada which had introduced the pre-*Tolofson* common law double

---

International Academy of Commercial and Consumer Law (Oxford: Hart, 1998) 237 [Walsh, "Products Liability"]; Castel, *supra* note 1293 at at 63–66. But see Jason Herbert, "The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of *Tolofson v Jensen*" (1998) 56:1 UTLJ 3 ("[t]here is nothing illegitimate about imposing uniformity on such framework rules for the sake of promoting the structural interests of the federal union. It would be only fitting for *Tolofson* to be constitutionalized, as the natural trajectory of [Justice Laforest's] legacy in the conflict of laws and federalism" at 45).

[1385] See *Breeden*, *supra* note 809 at paras 32–33; *Éditions Écosociété*, *supra* note 809 at paras 49–62 and the vigorous debate among judges in *Goldhar*, *supra* note 809.

[1386] See *Van Breda*, *supra* note 112 at para 21.

[1387] See Castel, *supra* note 1293 at 66.

[1388] See Jeffery, *supra* note 858 at 177; ULCC, *supra* note 741 at 503.

actionability/justifiability rule into Quebec civil law,[1389] much to civilists' dismay.[1390] Article 3126, para 1 CCQ brings back the *lex loci delicti* in the province. It states that the law of the place of acting governs the issue of civil liability, except when a foreseeable injury appeared in another state, in which case the law of the place of injury may apply:

> **3126.** The obligation to make reparation for injury caused to another is governed by the law of the State where the act or omission which occasioned the injury occurred. However, if the injury appeared in another State, the law of the latter State is applicable if the author should have foreseen that the injury would manifest itself there.
>
> In any case where the author and the victim have their domiciles or residences in the same State, the law of that State applies.[1391]

Like article 3148 CCQ (jurisdiction), article 3126 CCQ (choice of law) encompasses neighbourhood disturbance and civil liability claims. As I explained in the second chapter, neighbourhood disturbance can lead to injunctive relief and damages, and is often invoked alongside civil liability. In *Uashaunnuat*, the Supreme Court of Canada characterized the Innus' claims in civil liability and neighbourhood disturbance as a personal action for jurisdictional purposes (and ultimately characterized the entire claim as a non-classical mixed action because it also sought the recognition of *sui generis* Aboriginal rights).[1392] The Court made no comment on choice of law rules but its characterization of the Innus' claims makes it unlikely that article 3097 CCQ (which determines the law applicable to "real rights and their publication") [1393] would apply over article 3126 CCQ (which determines the law applicable to "the obligation to make

[1389] See *O'Connor v Wray*, [1930] SCR 231 at 248–49, 1930 CanLII 51.
[1390] See Paul-André Crépeau, "De la responsabilité civile extracontractuelle en droit international privé québécois" (1961) 39:1 Can Bar Rev 3. On the controversy, see also Goldstein & Groffier, *supra* note 1096 at para 464; Jeffrey A Talpis, "The Civil Law Heritage in the Transformation of Quebec Private International Law" (1992) 84:1 Law Libr J 177 at 179; Jean-Guy Fréchette, Guy Minette & Danielle Codère, "Des conflits de lois en matière de délit et de quasi-délit en droit international privé québécois" (1973) 4:1 RDUS 55 at 61–62.
[1391] The second paragraph of article 3126 CCQ is not relevant for our purposes.
[1392] See *Uashaunnuat*, *supra* note 112 at para 58.
[1393] See CCQ, art 3097, para 1 ("[r]eal rights and their publication are governed by the law of the place where the property concerned is situated").

reparation for injury caused to another").[1394] Different rules apply, however, for claims related to defective products[1395] or raw materials originating in Quebec.[1396]

With article 3126, para 1 CCQ, the Quebec legislature framed the place of acting as the default connecting factor for civil liability and left the door open to the law of the place of injury, subject to a foreseeability requirement.[1397] The Quebec Court of Appeal, however, strongly defers to the default rule. In *Wightman* and *Giesbrecht*, it held that the law of the place of injury applies only exceptionally under article 3126, para 1 CCQ,[1398] and not when it leads to a chaotic result because of the number of victims spread across multiple states (in those cases, a large group of wronged creditors and the victims of a plane crash).[1399] In doing so, the Court gave particular weight to how the Supreme Court of Canada had defined the *lex loci delicti* in *Tolofson*,[1400] as well as the underlying principle of order in Canadian private international law.[1401]

The Court of Appeal understandably strove for a pragmatic, orderly and judicially convenient solution in complex cases involving many victims. The Court made a good case for the law of the place of acting in such context, but it read too much into article 3126, para 1 CCQ. First, the injury exception is not really an exception to a general principle, but a different connecting factor triggered by a different fact pattern (an act and an injury occurring in different states).[1402] The so-called exception loses its exceptionality

---

[1394] For an argument in this sense, see Goldstein & Groffier, *supra* note 1096 at para 477. For further discussion in the jurisdictional context, see the text accompanying note 806.
[1395] See CCQ, art 3128.
[1396] See CCQ, art 3129; *Worthington*, *supra* note 800. See also CCQ, arts 3151, 3165(1°).
[1397] See Glenn, "Droit international privé", *supra* note 855 at 737.
[1398] See *Wightman*, *supra* note 938 at paras 183–84. The Court of Appeal ultimately applied the rules of private international law in force at the time of the events prior to the adoption of the CCQ in 1994. *Act respecting the implementation of the reform of the Civil Code*, SQ 1992, c 57, s 85; *An Act Respecting the Civil Code of Lower Canada*, S Prov C 1865 (29 Vict), c 41, art 6, para 3 as repealed by the CCQ, Final Provision; *Widdrington (Estate of) v Wightman*, 2011 QCCS 1788 at paras 3347, 3387, 83 CCLT (3d) 1, aff'd in part 2013 QCCA 1187, [2013] RJQ 1054, leave to appeal to SCC refused, [2014] 1 SCR xiii.
[1399] See *Giesbrecht*, *supra* note 1383 at para 28; *Wightman*, *supra* note 938 at para 192.
[1400] See *ibid* at paras 21–22.
[1401] See *Wightman*, *supra* note 938 at para 192, relying on *Tolofson*, *supra* note 1074 ("[t]he underlying principles of private international law are order and fairness, but order comes first for it is a precondition to justice" at 1058).
[1402] In *Giesbrecht*, the Court of Appeal made a parallel between *Tolofson*'s caveat (transboundary torts and inherently transnational/interprovincial activity) and the injury exception. See *Giesbrecht*, *supra* note 1383 at para 21, n 17.

if that fact pattern occurs frequently.[1403] Second, the CCQ makes no distinction between foreseeable damage to victims in a single state and foreseeable damage to victims in multiple states.[1404] How can the court force the application of the law of the place of acting in certain disputes but not others, given the clear wording of article 3126, para 1 CCQ?[1405]

Dubious interpretation aside, *Wightman* and *Giesbrecht* suggest that the law of the place of acting will apply by default when a polluter causes injuries in multiple states and all victims sue in Quebec. The injury exception, however, remains crucial in transboundary environmental disputes involving a single victim or multiple victims in a single state.

Article 3126, para 1 CCQ and the commentaries of the Minister of Justice do not specify who can invoke the injury exception, but its logic is to benefit plaintiffs by giving them the option to invoke the hypothetically more favourable law of the place of injury. In *Wightman*, the Court of Appeal blamed the defendants for trying to strategically avoid liability by invoking the law of the place of injury (Ontario). It explained that "[t]he rule of the place of the injurious act to determine the applicable law was designed and accepted by certain legislators (particularly in Europe) in order to protect victims and facilitate their access to a court likely to provide them with adequate compensation. The exception in the current article 3126 [CCQ] translates that same concern."[1406]

Arguably, article 3126, para 1 CCQ does not allow for plaintiffs to choose between the most favourable of two laws, unlike the ubiquity principle in the *Rome II Regulation*, for instance. A strict reading indicates that article 3126, para 1 CCQ *requires* the application of the law of the place of injury when the tortfeasor could have foreseen that an injury would occur there.[1407] In other words, complex torts are *always* governed by the law of

---

[1403] *Cf* Groffier, *supra* note 855 ("[l]*a loi du fait générateur ne sera pas très souvent applicable étant donné les nombreuses exceptions et règles particulières*" at 119).
[1404] See Gérald Goldstein, "Le caractère "exceptionnel" frappe encore! Une nouvelle victime par ricochet: la clause d'exception de l'art 3082 CCQ" (2018) 96:2 Can Bar Rev 402 at 406–408 [Goldstein, "Victime par ricochet"].
[1405] For an alternative approach to address the problem of indirect victims in *Giesbrecht*, see *ibid* at 408–10.
[1406] *Wightman*, *supra* note 938 at para 193 [unofficial translation available on CanLII].
[1407] See eg *Surin c Puma Canada Inc*, 2017 QCCS 3821, [2017] JQ no 11313 (QL) ("[l]*'exception prévue à l'article 3126* [CCQ] *comporte deux volets. Premièrement, le préjudice doit être apparu dans un autre État que celui de la lex loci delicti. Deuxièmement, l'auteur du préjudice devait prévoir que le préjudice se*

the place of a foreseeable injury rather than the law of the place of acting. At the same time, the Court of Appeal implied in *Wightman* that defendants could not rely on the injury exception to avoid the law of the place of acting because the exception sought to protect victims (not to mention that it would be odd for a defendant to plead that it had foreseen the damage associated with its own conduct in order to make a case for the injury exception). Plaintiffs, on their part, will presumably rely on the injury exception only if it leads to a more favourable law than the law of the place of acting. Article 3126, para 1 therefore effectively provides them with an option—the law of the place of acting applies, unless they choose to plead the law of the place of injury and establish that the defendant could have foreseen the injury.

I suppose the court could always raise the hypothetically less favourable law of the place of injury (and the foreseeability of that injury) on its own motion if it thinks that the law of the place of acting cannot apply, but it would contradict the rationale of article 3126, para 1 CCQ. If a defendant cannot rely on the injury exception, then the court should not raise it on its own motion when it benefits the defendant. This is particularly true if the law of the place of injury is foreign law. A party would then have to plead its contents for the court to apply it,[1408] which brings us back to square one—a defendant pleading the hypothetically less favourable law of the place of injury to avoid or limit liability.

The person who chooses to raise the injury exception bears the onus of establishing foreseeability.[1409] Courts assess foreseeability on an objective standard ("should have foreseen"), supplemented by an inquiry into the defendant's actual knowledge.[1410]

---

manifesterait dans cet autre État. Si ces deux conditions sont remplies, c'est la loi du lieu du préjudice qui s'applique plutôt que celle de l'État où le fait générateur du préjudice est survenu" at para 24).

[1408] See CCQ, art 2809 and the sources cited *supra* note 1273.

[1409] See *Royal Bank of Canada v Capital Factors Inc*, 2013 QCCS 2214 at para 70, [2013] QJ No 5190 (QL) [*Capital Factors*]. Scholars disagree this point. See Gérald Goldstein, *Droit international privé*, vol 1: Conflits de lois: dispositions générales et spécifiques (Cowansville: Yvon Blais, 2011) at para 3126.555 (victim/plaintiff must prove foreseeability); Emanuelli, *Droit international privé*, *supra* note 852 at para 567, n 2138 (the person who invokes foreseeability must prove it); Walker, vol 1, *supra* note 828 at § 35.6 (victim/plaintiff must prove foreseeability—alternatively, presumption that the damage was foreseeable unless the defendant proves otherwise); Goldstein & Groffier, *supra* note 1096 at para 466 (victim/plaintiff must prove foreseeability); Talpis & Castel, *supra* note 1067 at 890 (defendant must prove unforeseeability in order to avoid the law of the place of injury).

[1410] See Emanuelli, *Droit international privé*, *supra* note 852 at para 567. See also *Capital Factors*, *supra* note 1409 at para 81; *Cambior*, *supra* note 131 at para 60. *Cf* Talpis & Castel, *supra* note 1067 at 890 (foreseeability must always be assessed objectively).

Unsurprisingly, pollution dispersed across large geographical areas raises the greatest difficulties. A local operator at the border can easily determine whether its activities impact people in the United States, except perhaps when science is inconclusive. But the analysis becomes increasingly difficult as transboundary pollution becomes more diffuse. Climate change litigation involving local greenhouse gas emitters and foreign victims, for instance, would not necessarily lead to the law of the place of injury. Strategic defendants might convince the courts that they could not anticipate the damage caused, either because available information did not reveal any damage in the jurisdiction or because no scientific evidence indicated that their operations harmed the environment.

Overall, article 3126, para 1 CCQ comes closer to the rationale of the ubiquity principle and the requirements of the duty to ensure prompt and adequate compensation than its common law counterpart because it openly admits the application of the law of the place of injury as an alternative for plaintiffs. This fulfills the equal remedy requirement in the *ILC Principles on the Allocation of Loss*[1411] and ultimately removes some of the incentives for polluters to take advantage of a weaker legal regime. The default stance in favour of the place of acting means that foreign plaintiffs who sue Canadian polluters benefit from equally prompt, adequate and effective remedies as Canadian plaintiffs suing Canadian polluters, even if their own law is less advantageous. The possibility of applying the law of the place of injury means that foreign plaintiffs do not lose the benefits of their own law if it is more favourable, even though different plaintiffs might get different treatment under their own laws.

At the same time, article 3126, para 1 CCQ is more restrictive than the ubiquity principle in the *Rome II Regulation* or the *UNEP Guidelines on Liability*. Foreign victims who wish to invoke the hypothetically more favourable law of the place of injury against local polluters—and local victims who wish to invoke their own law against foreign polluters—must establish foreseeability. Article 3126 CCQ also refers to injuries *caused* to another person and *appearing* in another state—concepts that are difficult to reconcile with transient forms of transboundary pollution. The provision contrasts with the

[1411] See *ILC Principles on the Allocation of Loss*, *supra* note 37, Principle 6(2).

plaintiff-friendly approach to product liability claims under article 3128 CCQ. There, the legislature chose not to adopt a defence of commercialization or foreseeability which would have allowed manufacturers to escape the law of the place of acquisition of the product if they did not expect the product to be used there.[1412] Polluters, by contrast, can evade the law of the place of injury when foreseeability is too difficult to establish in court.

Courts could conceivably interpret foreseeability as a mere *prima facie* requirement. In other words, plaintiffs would simply have to demonstrate that the defendant's activities reasonably could have *some* consequences across the border. This requirement would easily be met if, for instance, a watercourse flowed from state *x* to state *y*. The very presence of a watercourse would then suffice to establish foreseeability and trigger the law of the place of injury,[1413] and the exact cause of the damage suffered in state *y* (i.e., causation) would be left for trial. But again, even a *prima facie* foreseeability requirement is problematic when the pollution is more diffuse than in this example. How could victims of climate change meet their burden against foreign greenhouse gas emitters, for instance?[1414]

Summing up, it will remain difficult for many litigants to rely on the law of the place of injury instead of the law of the place of acting under article 3126, para 1 CCQ, especially now that the Court of Appeal has tightened the exception in *Wightman* and *Giesbrecht*.

[1412] See CCQ, art 3128. See also *Swiss Statute on Private International Law*, *supra* note 1172, ss 135(1)(b) (consent exception); *Convention on the Law Applicable to Products Liability*, 2 October 1973, 1056 UNTS 187, art 7, 11:6 ILM 1283 (entered into force 1 October 1977), reprinted in HCCH, *Collection of Conventions*, *supra* note 94, 202 (foreseeability exception). I argued elsewhere that such an exception makes sense for product liability. See Guillaume Laganière, "La loi applicable à la responsabilité du fabricant en droit international privé canadien et européen" (2016) 57:1 C de D 99 at 119–20. For further discussion on article 3128 CCQ, see the text accompanying notes 1421–1422.

[1413] See Goldstein & Groffier, *supra* note 1096 ("[…] *il est impossible qu'une personne puisse déverser des substances dans une rivière sans prévoir qu'elle pourrait cause un préjudice en aval, de l'autre côté de la frontière*" at para 477).

[1414] Whatever interpretation we choose, damage obviously becomes entirely foreseeable after the plaintiff complains to the defendant, who refuses to cease its activities. Subsequent damage necessarily meets the foreseeability requirement, if only from a subjective perspective. See Howarth, *supra* note 81 at 1108.

To fix this, the Quebec legislature should formally implement the ubiquity principle and bring the CCQ in line with the *UNEP Guidelines on Liability*.[1415]

My proposition is supported by the literature. At least four prominent scholars recommended an elective solution to favour the victim in environmental matters. When the CCQ came into force, Talpis and Castel argued that the legislature should have introduced a special regime allowing victims to elect the law of the residence/establishment of the polluter or the law of the place of injury. An elective solution, they said, would help develop a stronger body of environmental law.[1416] Similarly, Goldstein and Groffier favoured the ubiquity principle due to the special attributes of transboundary pollution.[1417]

The import of the ubiquity principle would be especially intuitive as the CCQ already draws heavily from the *Swiss Statute on Private International Law*,[1418] which contains a special rule for environmental nuisances based on the victim's choice of law.[1419] Borrowing from EU instruments is not unprecedented either as the CCQ follows in some respects the 1980 *Rome Convention on the Law Applicable to Contractual Obligations*.[1420] Finally, the CCQ is already familiar with the idea of letting the victim choose the applicable law. Article 3128 CCQ lets the victim choose between the law of the manufacturer's establishment/residence and the law of the place of acquisition of the product to govern the liability of the manufacturer of movable property.[1421] Article 3128

[1415] A judicial reform seems unlikely. Quebec private international law is almost entirely codified. Courts can hardly build a true ubiquity principle from article 3126, para 1 CCQ, particularly given the Court of Appeal's judgments in *Wightman* and *Giesbrecht*.

[1416] See Talpis & Castel, *supra* note 1067 at 891–92 (advocating for the application of the law of the place of residence/establishment of the polluter or the law of the place of damage, at the victim's choice).

[1417] See Goldstein & Groffier, *supra* note 1096 at para 477. See also Talpis & Goldstein, *supra* note 1019 at 510, 518 (criticizing the legislature's failure to adopt the most favourable law principle for all torts and suggesting in the alternative that the legislature enact special rules for certain torts, as it had done for product liability).

[1418] See Ministère de la Justice du Québec, *supra* note 1065 at 1040; Jeffrey Talpis & Gérald Goldstein, "The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law" (2009) 11 YB Priv Intl L 339 at 370–72.

[1419] See *Swiss Statute on Private International Law*, *supra* note 1172, ss 133 (torts), 138 (damaging nuisances originating in real property).

[1420] Ministère de la Justice du Québec, *supra* note 1065 at 1034–35, citing *Rome Convention*, *supra* note 1216.

[1421] See CCQ, art 3128. See eg *Lamothe c Chrysler Canada Inc*, 2009 QCCQ 12757 at paras 31–37, [2009] JQ no 16927 (QL).

CCQ is not a perfect example of the ubiquity principle as traditionally understood in the literature on transboundary pollution, because it does not use the place(s) of a cross-border tort as connecting factors (even though the fault might occur at the manufacturer's establishment/residence and the injury might occur at the place of acquisition). The idea, however, remains the same: to let the victim choose the most favourable of two laws to govern a particular kind of dispute, when the legislature deems it necessary to correct imbalances and favour compensation.[1422]

Quebec missed a chance to innovate when it failed to retain the Swiss approach of an environment-specific choice of law rule in 1994. Twenty-five years later, the ubiquity principle has proliferated. International organizations and scholars have accepted its application in transboundary environmental disputes. Quebec, like the common law, should follow.

3.2.2. Displacing the applicable law

In certain circumstances, the law normally designated by choice of law rules (*Tolofson* or the CCQ) can be displaced in favour of another. I address each of these exceptions below, namely the displacement of foreign law by local law (3.2.2.1) and the displacement of any law by a mandatory provision of foreign law (3.2.2.2).

My analysis will remain brief because very few cases admit the displacement of the designated law in any event. Some of the exceptions below also overlap with rules on the enforcement of foreign judgments discussed in the second chapter, or the built-in caveats in *Tolofson* discussed earlier in this chapter. Note that the *Reciprocal Access Act* does not formally incorporate any of the exceptions below.

[1422] See Zheng Jianing & Gerald Goldstein, "Analyse comparative de la loi chinoise de 2011 portant sur les conflits de lois à la lueur du droit international privé québécois" (2014) 48:2 RJTUM 329 at 376. But see Kim Thomassin & Martin Boodman, "Choice of Law and Manufacturer's Liability in Quebec" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2012* (Toronto: Carswell, 2012) 209 at 228 (describing the purpose of article 3128 CCQ as ensuring predictability, proximity and, only as a complement, offering a "limited choice" to the victim).

3.2.2.1. Displacement of foreign law

When choice of law rules lead to foreign law, courts may invoke the public law exception (3.2.2.1.1.1) or the public policy exception (3.2.2.1.2) to apply their own law instead.[1423] In addition, the CCQ contains a mechanism to replace the applicable law with another law that is more closely connected with the dispute (3.2.2.1.1.3).

3.2.2.1.1. Public law exception to the applicable law

The public law exception to the enforcement of foreign judgments can also be framed as a choice of law rule, in the sense that courts must apply local law when the claim involves foreign penal laws, tax laws or other public laws.[1424] In other words, courts refuse to directly apply foreign public law, just as they refuse to indirectly apply it through the enforcement of a foreign judgment based on foreign public law. I examined the implications of the public law exception when I discussed the enforcement of foreign judgments.[1425] My conclusions also apply here. *Ivey* supports the proposition that courts will not refuse to apply foreign environmental law simply because it is public in nature.[1426] Only the assertion of a true sovereign power will trigger the exception. Likewise, nothing in the CCQ precludes the application of all foreign public laws. Article 3080 CCQ provides that when the law of a foreign state applies, it applies to the exclusion of its own rules of private international law.[1427] I argued elsewhere that this wording excludes other carve-outs such as foreign public law as a whole.[1428]

3.2.2.1.2. Public policy exception to the applicable law

The public policy exception can also displace foreign law, perhaps more efficiently than the public law exception. I examined the public policy exception when I discussed the

[1423] For further discussion on mandatory local laws, see subsection 3.2.3.1 below.
[1424] See Andrew Dickinson, "Acts of State and the Frontiers of Private (International) Law" (2018) 14:1 J Priv Intl L 1 at 10; Adrian Briggs, "The Revenue Rule in the Conflict of Laws: Time for a Makeover" [2001] 2 Sing JLS 280 at 295–96.
[1425] On the foreign public law exception in the context of foreign judgments, see subsection 2.2.3.2.1 above.
[1426] See *Ivey*, *supra* note 2.
[1427] See CCQ, art 3080. *Cf Swiss Statute on Private International Law*, *supra* note 1172, s 13 ("[l]*'application du droit étranger n'est pas exclue du seul fait qu'on attribue à la disposition un caractère de droit public*").
[1428] See Laganière, *supra* note 1067 at 41–44.

enforcement of foreign judgments in the second chapter.[1429] Similar considerations apply at the choice of law stage,[1430] except that in this context, both the victim and the polluter could rely on the exception.

First, polluters could rely on the public policy exception to avoid overly *stringent* foreign environmental laws which would normally apply under choice of law rules. The current scope of the public policy exception makes this argument difficult, but not impossible. In *Ivey*, Ontario courts declined to apply to public policy exception in the enforcement context,[1431] but the dispute involved a close neighbour (the state of Michigan) with a familiar legal system. As I explained in the second chapter, it made sense for Canadian courts to stress the importance of comity and cooperation with the United States. It does not necessarily mean that they would adopt the same stance towards all legal systems.[1432]

Second, victims could rely on the public policy exception to avoid overly *lenient* foreign laws which contradict basic environmental principles.[1433] This is a plausible argument in light of multiple pronouncements in favour of environmental protection by the Supreme Court of Canada.[1434] Public policy in this scenario might even include fundamental precepts of international environmental law.[1435] But again, such cases will be exceptional

---

[1429] For further discussion on this point, see subsection 2.2.3.2.2 above.
[1430] In Quebec, different provisions apply to each problem. Article 3081 CCQ refers to international public policy as a way to displace the applicable law, while article 3155(5°) refers to the same concept as a ground to refuse the enforcement of a foreign judgment.
[1431] See *Ivey* Gen Div, *supra* note 2 at 554.
[1432] For further discussion on *Ivey* and its precedential value, see subsection 2.2.3.2.3 above.
[1433] See Goldstein & Groffier, *supra* note 1096 at para 477.
[1434] See the sources cited *supra* note 909. In Quebec, however, the notion of international public policy ("public order as understood in international relations") is more restrictive than purely domestic public policy. See CCQ, arts 3081, 3155(5°) and the comments of the Supreme Court of Canada in *RS*, *supra* note 1077 ("[p]ublic order as understood in international relations is generally more limited than its domestic law counterpart [citations omitted]. The reason for this lies in a desire to apply Quebec rules of conflict that allow for the application of a foreign law under certain conditions even if that law is inconsistent with Quebec law" at para 53).
[1435] See Boskovic, "Droit international privé et environnement", *supra* note 542 ("[…] *nous disposons d'ores et déjà d'un moyen classique qui est de faire jouer un rôle important à l'exception d'ordre public (notamment en développant et intégrant au mécanisme classique d'ordre public l'ordre public transnational) et de considérer qu'une loi qui n'assure pas une protection suffisante de l'environnement est contraire à l'ordre public. En effet, l'idée de renforcer la substance de l'ordre public international en le nourrissant notamment des nouvelles sources du droit pour remplacer cette communauté de droit qui fait défaut en matière environnementale est une idée riche qui sera certainement à explorer*" at para 50). In Canada, see eg *Union of India v Bumper Development Corporation*, [1995] 7 WWR 80 at 98–103, 1995 CanLII 9072 (Alta QB), aff'd 1995 WL 1745548 (WL Can) (Alta CA), leave to appeal to SCC refused, [1996] 3 SCR vi (attempt by the judgment debtor to invoke public policy by referring to the 1970

and quite fact-specific because transboundary environmental disputes rarely implicate basic morality to a point where the public policy exception comes into play, in one way or the other.

3.2.2.1.3. Quebec's residual escape clause

Finally, the CCQ contains a residual escape clause to counteract the abnormal application of choice of law rules. Article 3082 CCQ provides that another law can apply if the dispute is only remotely connected with the designated law and more closely connected to another.[1436] The provision ensures proximity but applies only in "rare, exceptional and truly extraordinary" cases.[1437] I will say no more on this provision because it is unlikely to play a determinative role in transboundary environmental disputes.[1438] Indeed, article 3126 CCQ can lead to the law of the place of acting or the law of the place of injury, and both places are sufficiently closely connected to the dispute to prevent the application of article 3082 CCQ.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, Can TS 1978 No 33, 10:2 ILM 289 (entered into force 24 April 1972)). See also Blom, "Canada", *supra* note 138 at 219; Lehmann, *supra* note 52 at 28–29; Cecilia Fresnedo de Aguirre, "Public Policy in Private International Law: Guardian or Barrier?" in Ruiz Abou-Nigm & Blanca Noodt Taquela, *supra* note 1022, 341 at 354–56; Emanuelli, *Étude comparative*, *supra* note 157 at paras 274, 277, 394; Emanuelli, *Droit international privé*, *supra* note 852 at para 299; Blom, "Public Policy", *supra* note 1049 at 395–97 (all describing the public policy exception in private international law as capable of relecting some principles of public international law).

[1436] See CCQ, art 3082.

[1437] *Giesbrecht*, *supra* note 1383 at para 35 [translated by author]. But see Goldstein, "Victime par ricochet", *supra* note 1404 at 414–18; Sylvette Guillemard & Van Anh Ly, "Commentaire sur la décision *Giesbrecht c Nadeau (Succession de)*: une interprétation surprenante de l'article 3082 C.c.Q." in *Repères* (March 2018), EYB2018REP2432 (Référence) (both criticizing the Court of Appeal's interpretation of article 3082 CCQ in *Giesbrecht*).

[1438] Castel suggests that article 3082 CCQ does not apply "where there exist alternative choice-of-law rules, as in articles 3126 and 3128 CCQ." Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52:3 McGill LJ 555 at 565–66. See also Talpis & Castel, *supra* note 1067 at 827 (suggesting that article 3082 CCQ has no impact on the law applicable under article 3128 CCQ, but without mentioning article 3126 CCQ). Courts, however, impose no such restriction. In *Giesbrecht*, the Court of Appeal explicitly held that article 3082 CCQ could override the law applicable under article 3126 CCQ, and indeed applied the escape clause on the facts of the case. See *Giesbrecht*, *supra* note 1383 at para 33. See also *Capital Factors*, *supra* note 1409 at paras 92–93; *Spar Aerospace*, *supra* note 790 at para 62.

3.2.2.2. Mandatory foreign laws

Courts may also displace the applicable law by applying mandatory *foreign* laws.[1439] This technique echoes the consideration of foreign rules of conduct and safety under article 17 of the *Rome II Regulation*.[1440] Canadian courts, for instance, may refuse to enforce contracts that require the parties to breach foreign law in order to perform their obligations.[1441] They may also refuse to issue an order requiring a person residing in a foreign jurisdiction to break the law of that jurisdiction.[1442]

In Quebec, article 3079 CCQ is more explicit and wide-ranging,[1443] but equally exceptional. It admits the application of mandatory foreign laws when legitimate and manifestly preponderant interests require it.[1444] The dispute must be closely connected with the foreign state and the court must have considered the purpose of the foreign law and the consequences of its application.[1445] The test is extremely stringent. Despite several attempts, no litigant has met its requirements since it came into force in 1994.

Deferring to mandatory foreign laws fosters international comity by recognizing the interest of foreign states in promoting their own legislative policies. But this deference stops when the interests of the forum begins, and even when the two have equal weight. Early cases required the courts to balance foreign bank secrecy precluding the

---

[1439] For further discussion on mandatory local laws, see subsection 3.2.3.1 below.
[1440] See *Rome II Regulation*, *supra* note 186, art 17.
[1441] See *Gillespie Management Corp v Terrace Properties* (1989), 62 DLR (4th) 221 at 222, 1989 CanLII 2813 (BC CA), Southin JA, concurring.
[1442] See *Frischke v Royal Bank of Canada* (1977), 17 OR (2d) 388 at 399, 1977 CanLII 1069 (CA). *Cf R v Spencer* (1983), 145 DLR (3d) 344 at 352–53, 1983 CanLII 3111 (Ont CA), aff'd [1985] 2 SCR 278, 1985 CanLII 4 (appellant was a compellable witness in the forum, unlike in *Frischke*). But see *Google*, *supra* note 972 ("Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Justice Fenlon noted, "Google acknowledges that most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong"" at para 44).
[1443] On the absence of a formal equivalent to article 3079 CCQ in common law provinces, see Emanuelli, *Étude comparative*, *supra* note 157 at paras 308–309.
[1444] CCQ, art 3079. Courts can therefore truly apply mandatory foreign laws to the dispute ("give effect to") rather than merely take them into consideration, as an earlier draft of the CCQ provided. See *Avant-projet de loi portant réforme du Code civil du Québec du droit de la preuve et de la prescription et du droit international privé*, 2nd sess, 33rd Leg, Quebec, 1988, art 3442 (Report from Committee on Institutions filed 21 March 1989); Talpis & Castel, *supra* note 1067 at 815.
[1445] See *ibid*.

administration of evidence against the principles of full disclosure and an open justice system. The latter prevailed on the basis that they were matters of public concern in Quebec.[1446] Assessing the legitimate and preponderant character of mandatory foreign laws and balancing them against the forum's own interests thus necessarily go beyond the parties' own rights. It also involves important public—some say political—considerations.[1447]

The door to foreign mandatory laws may not be as tightly shut to environmental protection as it is to foreign bank secrecy. The expression of a strong legislative preference for environmental protection in a foreign state could supplant an overly lenient local law precisely because the environment is a matter of public concern.[1448] A court might consider that the interests at stake are sufficiently legitimate and manifestly preponderant under article 3079 CCQ if they concern the well-being of a large population and the state's duty to ensure prompt and adequate compensation. Defendants would undoubtedly raise countervailing considerations related to the forum's economic and industrial policy, but the argument is at least conceivable in law.

Defendants too can rely on article 3079 CCQ in transboundary environmental disputes. In proceedings brought in Canada and hypothetically governed by the law of the place of injury, foreign defendants may attempt to plead that they are formally authorized to operate under their own law. I hinted at this issue when I discussed the public policy

---

[1446] See *Globe-X Management Ltd (Proposition de)*, 2006 QCCA 290 at paras 43–48, [2006] RJQ 724, leave to appeal to SCC refused, [2006] 2 SCR xiii; *BHF-Bank Aktiengesellschaft v Wightman*, 1997 CanLII 8639 at paras 3–5, 1997 CarswellQue 3790 (WL Can) (Sup Ct); *Banque Paribas (Suisse) SA c Wightman*, 1997 CanLII 10291 at 2–7, (*sub nom Banque Paribas (Suisse) SA c Coopers & Lybrand*) [1997] JQ no 77 (QL) (CA). *Cf Schreiber Jr c CDL 7000 Holdings LP*, 2007 QCCA 131 at paras 1–2, [2007] JQ no 677 (QL) (where the Court of Appeal deems unnecessary to deal with article 3079 CCQ because the foreign law in dispute does not have an extraterritorial scope). See also *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 at paras 151–54, 52 CBR (6th) 45 (Newfoundland and Labrador's pension laws not overriding mandatory provisions); *Jovalco Group Corporation c International Association of Bridge Structural, Ornemental and Reinforcing Iron Workers, Local 765*, 2014 QCCS 3647 at paras 67–70, [2014] JQ no 9022 (QL) (statute governing the Ontario Labour Relations Board not overriding mandatory provision).

[1447] See Gérald Goldstein, "La condition incertaine des lois de police étrangères et du secret bancaire en droit international privé québécois" (1997) 76:3 Can Bar Rev 449 ("[i]*l s'agit en définitive de régler un conflit d'intérêts gouvernementaux, entre celui de l'État dont la loi impérative prétend « forcer la compétence » de son ordre juridique d'origine et celui de l'État dont la loi est désignée par la règle de conflit normale. On ne peut que difficilement camoufler l'aspect politique du débat. Comment rester objectif*?" at 460).

[1448] See by analogy Talpis & Kath, *supra* note 989 at 861–62.

exception to the enforcement of foreign judgments,[1449] and later the *Rome II Regulation*.[1450] In Canada, the question remains: can the law of the place of acting (where a licence was issued) override the law of the place of injury and exonerate the defendant on the basis that it is mandatory?

In a domestic scenario where a defendant has an administrative authorization or complies with the law, the answer is no. Compliance with statutory requirements does not preclude civil liability, and vice versa.[1451] Defendants can invoke administrative authorizations in some circumstances, but those authorizations hardly confer absolute immunity. Quebec's *Environment Quality Act*, for instance, precludes injunctions against polluters when they comply with all the provisions of a certificate of authorization.[1452] Yet plaintiffs can always seek to invalidate the certificates themselves.[1453] They can also still rely on general causes of action such as civil liability and neighbourhood disturbance.[1454] Likewise, the defence of statutory authority gives tortfeasors a chance to escape liability

[1449] For further discussion on the public policy exception to the enforcement of foreign judgments, see subsection 2.2.3.2.2 above.
[1450] For further discussion on foreign rules of safety and conduct in the *Rome II Regulation*, see subsection 3.1.4.2.1.2 above.
[1451] On the relationship between civil liability and statutory requirements in civil and common law, see *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at para 48, 440 DLR (4th) 78; *Infineon*, *supra* note 797 at paras 96–98; *St Lawrence Cement*, *supra* note 343 at paras 32–36; *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 29, 1999 CanLII 706 [*Ryan*]; *The Queen v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225–27, 1983 CanLII 21; *Morin v Blais* (1975), [1977] 1 SCR 570 at 579–80, 1975 CanLII 3.
[1452] See *QC Environment Quality Act*, *supra* note 637, s 19.7. Many environmental statutes deal with the impacts of administrative authorizations on liability in one way or another. See eg *Environmental Management Act*, SBC 2003, c 53, s 47(4)(b) (liability for contaminated site remediation despite the terms of any authorization to discharge waste into the environment); *NWT Environmental Rights Act*, *supra* note 637, ss 6(5)(b), 9 (defence to statutory cause of action when the activity complies with a standard or approval—other remedies preserved); *NU Environmental Rights Act*, *supra* note 637, ss 6(5)(b), 9 (idem); *YT Environment Act*, *supra* note 637, ss 9(1)(a), 37 (defence to statutory cause of action when the activity complies with a permit, licence or certain other statutory authorizations—other remedies preserved).
[1453] See *Centre québécois du droit de l'environnement c Oléoduc Énergie Est Lté*, 2014 QCCS 4147 at paras 53–56, [2014] JQ no 9245 (QL); *Calvé c Gestion Serge Lafrenière Inc*, [1999] RJQ 1313 at 1318–20, 1999 CanLII 13814 (CA) [*Calvé*]; *St-Jean-de-Matha (Municipalité de) c Québec (Procureur général)* (1998), [1999] RJQ 143 at 150, 1998 CanLII 12117 (Sup Ct); *Lepage c Lepage*, [1983] JQ no 683 (QL) at para 20, 1983 CarswellQue 1081 (WL Can) (Sup Ct).
[1454] See *Regroupement des citoyens contre la pollution c Alex Couture Inc*, 2006 QCCS 950 at paras 69–72, 21 CELR (3d) 273, aff'd 2007 QCCA 565, [2007] RJQ 859; *MacGuire c Montréal (Ville de)*, 1989 CarswellQue 1453 (WL Can) at para 83, EYB 1989-77534 (Référence) (Sup Ct); *Entreprises BCP Ltée c Bourassa* (1984), 14 CELR 144 at 147, 1984 CarswellQue 254 (WL Can) (CA). See also *Calvé*, *supra* note 1453 at 1325–27. *Cf Roy*, *supra* note 802 at paras 138–39 (certificate of authorization under the *QC Environment Quality Act* precludes the destruction or modification of a sewage system under article 982 CCQ but does not affect the riparian owner's right to compensation in case of pollution).

for nuisance when a statute clearly authorizes the activity and the nuisance which arises from the activity is practically impossible to avoid,[1455] but the defence remains extremely narrow, and better suited to public bodies owing their existence to a statute than private defendants.[1456] Those few selected examples show that so-called licences to pollute do not always have a determinative impact on civil liability in domestic law.[1457]

The Supreme Court of Canada's judgment in *Interprovincial Co-operatives* suggests that the same is true with respect to transboundary pollution.[1458] Manitoba's *Fishermen Act* nullified the preclusive effect of administrative authorizations to discharge pollutants granted by foreign authorities (in that case, two neighbouring provinces).[1459] Although the majority of the Court invalidated the statute, six judges (three in the majority and three dissenting) found that the defendants' licence to operate in Ontario and Saskatchewan did not shield them from common law liability in Manitoba.

Justice Pigeon held that a province could not "validly licen[c]e on its territory operations having an injurious effect outside its borders so as to afford a defence against whatever remedies are available at common law in favour of persons suffering injury thereby in

---

[1455] See *Ryan*, *supra* note 1451 at paras 54–56; *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181 at 1224–25, 1989 CanLII 15. See eg *Sutherland v Vancouver International Airport Authority*, 2002 BCCA 416 at para 118, 215 DLR (4th) 1, leave to appeal to SCC refused, [2003] 1 SCR xi (noise nuisance from international airport authorized by statute). The same principles apply in Quebec. See *Coalition pour la protection de l'environnement du parc linéaire « Petit train du nord » c Comté des Laurentides (Municipalité régionale)* (2004), [2005] RJQ 116 at 126–31, 2004 CanLII 45407 (Sup Ct), aff'd 2005 QCCA 664, [2005] JQ no 9042 (QL); *Voisins du train de banlieue de Blainville Inc c Agence métropolitaine de transport*, 2004 CanLII 9803 at paras 101–11, [2004] JQ no 6601 (QL) (Sup Ct), aff'd 2007 QCCA 236, [2007] JQ no 1202 (QL); *Ouimette c Canada (Procureur général)*, [2002] RJQ 1228 at 1250–51, 2002 CanLII 30452 (CA), leave to appeal to SCC refused, [2003] 1 SCR xv. See also *St Lawrence Cement*, *supra* note 343 at paras 97–98. Most provinces have also enacted right-to-farm legislation which explicitly relieves agricultural owners and operators from civil liability for normal agricultural practices. See eg *Farming and Food Production Protection Act*, 1998, SO 1998, c 1, s 2; *Act respecting the preservation of agricultural land and agricultural activities*, CQLR c P-41.1, ss 79.17–79.19.2; *Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c 131, s 2. On right-to-farm legislation, see generally Benidickson, *supra* note 1 at 110–11; Laura Alford & Sarah Berger Richardson, "Right-to-Farm Legislation in Canada: Exceptional Protection for Standard Farm Practices" (2019) 50:1 Ottawa L Rev 131; Jonathan J Kalmakoff, ""The Right to Farm": A Survey of Farm Practices Protection Legislation in Canada" (1999) 62:1 Sask L Rev 225.

[1456] See Collins & McLeod-Kilmurray, *supra* note 1 at 162–63.

[1457] The same appears to be true in many legal systems. See Howarth, *supra* note 81 at 1116; Monika Hinteregger, "Environmental Liability" in Lees & Viñuales, *supra* note 81, 1025 at 1041 [Hinteregger].

[1458] See *Interprovincial Co-operatives* SCC, *supra* note 161.

[1459] See *Fishermen Act*, *supra* note 874, s 4(2).

another province."[1460] The reasoning was predicated on his opinion that only the federal legislature had jurisdiction over interprovincial matters, such that only the federal legislature could have validly exonerated the defendants from the consequences of their conduct in Manitoba. But Chief Justice Laskin, dissenting with Justices Judson and Spence, reached the same conclusion through a different route, and commented on the common law along the way. First, Chief Justice Laskin held that a licence issued either under provincial *or* federal legislation "[did] not have an extra-territorial reach to entitle each of [the appellants] with impunity to send their pollutants into the waters of another province."[1461] He concluded with an *obiter* suggesting that the *Fishermen Act* may not have been necessary, as "there [was] bound to be doubt whether a foreign jurisdiction [could] license the pollution of waters in a neighbouring state so as to provide a defence to an action brought in the latter for injury to property therein."[1462]

In my view, administrative authorizations do not exonerate polluters from the consequences of their conduct felt outside the province. Victims of transboundary pollution can still claim any remedy available under the applicable law. Simply, that same law will also determine whether and how to recognize administrative authorizations in local courts.[1463]

3.2.3. Extraterritorial application of statutory causes of action

So far, I have assumed that the applicable law provides a remedy for environmental damage. At a minimum, it would come from general rules on civil liability found in most legal regimes. But environmental statutes can also contain causes of action (also known as citizen suit provisions) that supplement or overlap with general civil liability. These provisions have several uses. They can turn a violation of regulatory standards into an actionable wrong without having to prove fault, add or remove defences and limitations to liability, provide particular remedies such as injunctive relief, etc. They give more

[1460] *Interprovincial Co-operatives* SCC, *supra* note 161 at 511, Pigeon J.
[1461] *Ibid* at 499, Laskin CJC, dissenting.
[1462] *Ibid* at 506, Laskin CJC, dissenting.
[1463] See Goldstein & Groffier, *supra* note 1096 at para 477.

teeth to environmental law,[1464] especially since the mere breach of a statutory duty does not always entail liability.[1465]

Statutory causes of action, however, do not always indicate clearly whether and how they apply to transboundary pollution.[1466] Foreign victims of pollution originating in Canada may not have access to statutory causes of action under the same conditions as local victims even if Canadian law governs their claim, which threatens equal remedy. Likewise, local victims of pollution originating elsewhere may not be able to invoke statutory causes of action against foreign polluters even if Canadian law applies to their claim.

These issues relate to extraterritoriality, but the terminology remains controversial. The authors of an extensive study of extraterritoriality in Canada distinguish true extraterritorial jurisdiction from extraterritorial effects and extended territorial jurisdiction.[1467] The first concept refers to the exercise of state power entirely beyond borders, in foreign states or in the global commons. The second concept refers to domestic measures having a ripple effect beyond borders. The third concept refers to the application of domestic laws to a situation that has local *and* extraterritorial aspects. Whether this last scenario should also be labelled "extraterritorial" is open for debate

[1464] On the importance of statutory causes of action in environmental class actions, see James Boyd, "A Statutory Solution to Ontario's Environmental Class Action Problem: Section 99(2) of the *Environmental Protection Act*" (2019) 14:2 Can Class Action Rev 421 at 425–30.
[1465] On the relationship between civil liability and regulatory/statutory compliance, see the sources cited *supra* note 1451.
[1466] See Secretariat of the CEC, *supra* note 227 ("[...] the usual emphasis on territorial application of laws may cause environmental laws to be written and/or interpreted with a focus on the internal, rather than foreign, effects of the activities regulated by the laws. As a result, statute-based actions for environmental damage may be restricted, by the language or intent of the statute, to property or residents of the jurisdiction enacting the statute" at 244). Hinteregger advances that no public environmental laws could extend beyond borders to regulate transboundary pollution, hence the advantages of tort law, applied through conflict rules: "[c]ontrary to public law, which can only be enacted within national borders and by the authorities of the enacting state, tort law can be applied and enforced by foreign courts. Tort law can thus cover cross-border pollution, which, however, requires effective rules on choice of jurisdiction and enforcement of claims." Hinteregger, *supra* note 1457 at 1042. This view is only correct if the term "public law" refers to the assertion of a true sovereign power. As we have seen, other public laws (for instance, a compensatory scheme such as *CERCLA*, which resembles private law mechanisms) are not necessarily inapplicable or unforceable in a transboundary context through rules of private international law. See subsections 2.2.3.2.1 and 3.2.2.1 above.
[1467] See Steve Coughlan et al, *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (Toronto: Irwin Law, 2014), ch 4 [Coughlan et al]. See also Stephen Coughlan et al, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6:1 CJLT 29.

because it may still involve strong connections with the forum,[1468] but it is unquestionably the most relevant for our purposes because transboundary pollution concerns, at a minimum, one source state and one victim state.

Extraterritoriality looms large in international environmental law. It is a recurring theme in the ongoing discussion of business and human rights, as developed states face increasing pressure to regulate the activities of their corporations abroad.[1469] Extraterritoriality is also at the heart of trade disputes over unilateral state actions to protect the environment.[1470] And of course, extraterritorial concerns are raised whenever we suggest that states have a responsibility to protect the environment of foreign populations or the global commons.

In Canada, extraterritoriality stands at the crossroads of private international law, public international law, constitutional law and statutory interpretation.[1471] *Private international law* determines whether local law applies to private disputes with a foreign element (or whether local statutes are considered mandatory such that they apply regardless of choice of law rules). *Public international law* sets out the ground rules governing whether and to what extent states can assert their legislative or enforcement jurisdiction.[1472] *Constitutional law* distributes these powers to the units of the federation. Indeed, only the federal legislature has the power to enact extraterritorial legislation,[1473] and only if

---

[1468] See Stephen GA Pitel, Book Review of *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* by Steve Coughlan et al, (2016) 58:1 Can Bus LJ 113 at 115–17. See also the work of Sara Seck cited *supra* note 139.
[1469] See the sources cited *supra* notes 138–140.
[1470] See *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico)* (2012), WTO Doc WT/DS381/AB/R (Appellate Body Report); *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaints by India et al)* (2001), WTO Doc WT/DS58/AB/RW (Appellate Body Report); *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia)* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report), 39:1 ILM 121; *United States—Restrictions on Imports of Tuna (No 1) (Complaint by Mexico)* (1991), GATT Doc DS21/R, 39th Supp BISD 155 (1991–92), 30:6 ILM 1598; *United States—Restrictions on Imports of Tuna (No 2) (Complaint by the European Communities)* (1994), GATT Doc DS29/R, 33:4 ILM 842.
[1471] *Cf Imperial Tobacco* CA 2004, *supra* note 1383 at para 23 (listing four questions in relation to extraterritoriality: impermissible extraterritorial purpose of a statute, impermissible extraterritorial effects of a statute, jurisdiction and choice of law).
[1472] See *R v Hape*, 2007 SCC 26 at paras 57–66, [2007] 2 SCR 292 [*Hape*]; *Case of the SS Lotus (France v Turkey)* (1927), PCIJ (Ser A) No 10 at 18–21.
[1473] See *Statute of Westminster 1931* (UK), 22 & 23 Geo V, c 4, s 3. For judicial confirmation of Parliament's power to legislate extraterritorially under the *Statute of Westminster*, see *Hape*, *supra* note

expressly stated or necessarily implied.[1474] Finally, canons of *statutory interpretation* help determine whether a statute is clear enough to apply extraterritorially (the so-called presumption against extraterritoriality).

A complete examination of extraterritoriality lies beyond the scope of this thesis. I am concerned here with the application of environmental law in private disputes with a foreign element. I therefore leave aside the public international law of jurisdiction and the prosecution of extraterritorial environmental offences by Canadian public authorities (already the subject of recent doctoral work).[1475] My focus remains on private international law and incidentally on the principles of constitutional law and statutory interpretation that are relevant to my inquiry. My analysis is by no means exhaustive. I do not assess the precise extraterritorial scope of each statutory cause of action found in Canadian environmental law, nor do I delve into their substantive requirements (beyond their availability in a transboundary context). This inquiry would be inherently factual in any event. It would hinge on the nature of the offence, the wording of the prohibition and the objectives of the legislative scheme as a whole. Instead, I aim to unravel some of the conceptual challenges associated with the extraterritorial application of environmental law in private litigation, with the objective of ensuring equal remedy and prompt and adequate compensation to all victims.

1472 at para 66; *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45 at para 54, [2004] 2 SCR 427 [*SOCAN*]; *Hunt*, *supra* note 940 at 328; *Reference Re Newfoundland Continental Shelf*, [1984] 1 SCR 86 at 103, 1984 CanLII 132 [*Newfoundland Continental Shelf*]; *Interprovincial Co-operatives* SCC, *supra* note 161 at 512, Pigeon J; *Reference Re Offshore Mineral Rights*, [1967] SCR 792 at 816, 1967 CanLII 71 [*Offshore Mineral Rights*]; *Ontario (Attorney General) v Canada (Attorney General)*, [1947] AC 127 at 147, 1947 CanLII 301 (PC) [*Privy Council Appeals*]; *Co-operative Committee on Japanese Canadians v Canada (Attorney General)* (1946), [1947] AC 87 at 104, 1946 CanLII 361 (PC); *British Columbia Electric Railway Co Ltd v R*, [1946] AC 527 at 541–43, 1946 CanLII 352 (PC); *British Coal Corp v The King*, [1935] AC 500 at 520, 1935 CanLII 308 (PC); *Croft v Dunphy* (1932), [1933] AC 156 at 163, 167, 1932 CanLII 317 (PC).

[1474] See *Interpretation Act*, RSC 1985, c I-21, s 8(1); *SOCAN*, *supra* note 1473 at para 54; *Bolduc v Quebec (Attorney General)*, [1982] 1 SCR 573 at 577–78, 1982 CanLII 224; *Arcadi v The King* (1931), [1932] SCR 158 at 159, 1931 CanLII 68; *Ontario (Attorney General) v Reciprocal Insurers*, [1924] AC 328 at 344–45, (*sub nom R v Craigon*) 1924 CanLII 460 (PC).

[1475] See Nwapi, *supra* note 138, ch 4; Amissi Melchiade Manirabona, *Entreprises multinationales et criminalité environnementale transfrontalière: applicabilité du droit pénal canadien* (Cowansville: Yvon Blais, 2010) [Manirabona, *Criminalité environnementale transfrontalière*].

I begin this subsection with a primer on the complex relationship between extraterritoriality and choice of law (3.2.3.1). I then turn to statutory causes of action in Canada (3.2.3.2).

3.2.3.1. Extraterritoriality and choice of law

Reconciling choice of law theory with the extraterritorial application of regulatory laws (including environmental statutes) is a difficult task.[1476] Riles notes that "[w]hen regulators or market participants make a claim about the application of one or another body of law to a given party or transaction, they are already making an implicit claim about what the scope of their domestic law should be. Whether they recognize it or not, they are making a [conflict of laws] argument."[1477] But this argument is often buried in a statutory interpretation exercise that fails to consider other states' interest in applying their own regime.[1478] The terminology used by the courts exacerbates the confusion. In Canada, the notion of a "real and substantial connection" has split into two different branches—one expressing constitutionally imposed territorial limits on provincial powers (the constitutional branch) and the other expressing an organizing principle for all conflict rules (the private international law branch).[1479] The use of a single expression for two very different concepts testifies to the close but potentially confusing relationship between extraterritoriality and choice of law.[1480]

Leave public authorities out of the equation and difficulties remain. Suppose that an individual invokes a local statutory cause of action and that his/her claim has a foreign element. One might be tempted to conclude that the statutory cause of action will apply only if choice of law rules designate local law. But the problem is thornier than it seems. Should the court determine whether the statute expressly or implicitly applies to this fact

[1476] See generally Maria Hook, "The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes" in Michael Douglas et al, eds, *Commercial Issues in Private International Law: A Common Law Perspective* (Oxford: Hart, 2019) 175; Ralf Michaels, "Towards a Private International Law for Regulatory Conflicts?" (2016) 59 Japanese YB Intl L 175.
[1477] Riles, *supra* note 556 at 89.
[1478] See *ibid* at 90–91.
[1479] See *Van Breda*, *supra* note 112 at paras 22–43. See also *Barer*, *supra* note 1010 at para 129, Brown J, concurring.
[1480] See Blom, "Constitutionalizing Canadian Private International Law", *supra* note 1384 at 288–89; Edinger, "Extraterritoriality Revisited", *supra* note 921 at 279–80.

pattern and ignore the presence of an equivalent regime elsewhere? Should it first identify the applicable law under choice of law rules?

The law on this point is straightforward in Quebec. Article 3076 CCQ provides that "rules of law in force in [the province] which are applicable by reason of their particular object" override conflict rules altogether. The analysis focuses on whether "vital interests" are at stake,[1481] such that a local rule applies directly to an international fact pattern.

The common law is less principled towards this issue. Recent cases on secondary market misrepresentation claims with respect to shares traded on local and foreign markets provide a good illustration. In *Yip*, the plaintiff initiated a class action against HSBC Holdings, alleging that it was responsible towards investors under the *Ontario Securities Act* for misrepresentation regarding shares traded entirely on foreign markets.[1482] The Ontario Superior Court of Justice dismissed the claim for lack of jurisdiction but Justice Perell admitted that if the case proceeded in Ontario, HSBC Holdings could rely on the securities laws of the countries where the shares were traded as a matter of choice of law.[1483] The Ontario Court of Appeal upheld the judgment without straying from the jurisdictional issue.[1484]

A few months later, Justice Perell addressed this point again in *Paniccia.* He dealt with a class action brought under the *OSA* against a company trading its shares on Canadian and American markets. The defendants argued that Ontario courts could not hear the claims of Canadian purchasers of shares traded in the United States, because choice of law rules required the exclusive application of American law to those claims. Justice Perell agreed to decide the matter immediately and embarked on the choice of law analysis. He concluded that Ontario courts were bound to apply Ontario law precisely because the

[1481] See *B(G) c C(C)*, [2001] RJQ 1435 at 1440, 2001 CanLII 20627 (CA). See also *Kuwait Airways Corp v Iraq*, 2010 SCC 40 at para 12, [2010] 2 SCR 571; *United European Bank and Trust Nassau Ltd c Duchesneau*, 2006 QCCA 652 at para 58, [2006] RJQ 1255.
[1482] See *Securities Act*, RSO 1990, c S.5, ss 138.1–138.14 [*OSA*].
[1483] See *Yip*, *supra* note 929 at paras 240–42. See also *Silver*, *supra* note 1308 at 320–28.
[1484] See *Yip v HSBC Holdings plc*, 2018 ONCA 626, 141 OR (3d) 641, leave to appeal to SCC refused, 38331 (28 March 2019).

OSA applied extraterritorially in these circumstances.[1485] He thought that "it would be an example of juridical irony for a court then or now to conclude on the one hand that [the *OSA*] can apply extra-territorially but to conclude on the other hand that the choice of law rule mandates that [the *OSA*] does not apply with respect to the defendant's shares that traded outside of Ontario."[1486] Justice Perell ultimately ruled that Ontario law applied to the claim and that Ontario was an appropriate forum.

I do not propose to review the extraterritorial scope of the *OSA* nor the jurisdiction of the courts to try such issues.[1487] I do note, however, that Justice Perell tied his choice of law reasoning in *Yip* and *Paniccia* to the interpretation of the *OSA*'s extraterritorial scope itself. He expressly distinguished *Yip* from *Paniccia* on this basis. In the former, foreign securities law could have applied because the *OSA* did not extend to shares traded entirely on foreign markets. In the latter, Ontario law applied because the *OSA* extended to shares traded on local and foreign markets.[1488]

What role, if any, does choice of law play in this context? Riles observes that "[a] statute cannot reach beyond its own legitimate limits regardless of what it may subjectively assert about the scope of its own regulatory authority."[1489] Should we assume that regulatory legislation is overriding and mandatory, or else that it contains a unilateral choice of law rule that systematically designates local law? When, then, will courts apply foreign regulatory law on the merits? Would their historical reluctance to apply foreign public law resurface? Again, article 3076 CCQ provides a principled framework to deal with these issues, but the common law is not so clear.

[1485] See *Paniccia v MDC Partners Inc*, 2017 ONSC 7298 at paras 81–97, [2017] OJ No 6389 (QL) [*Paniccia*].
[1486] *Ibid* at para 92.
[1487] See eg Brandon Kain & Byron Shaw, "Mapping the Serbonian Bog: The Territorial Limits of Secondary Market Securities Act Claims Under the Canadian Constitution" (2012) 53:1 Can Bus LJ 63 & (2012) 53:2 Can Bus LJ 233 [Kain & Shaw]; Tanya J Monestier, "Is Canada the New Shangri-La of Global Securities Class Actions?" (2012) 32:2 Nw J Intl L & Bus 305.
[1488] See *Paniccia*, supra note 1485 at para 79.
[1489] Riles, *supra* note 556 at 90.

This is a live problem in many areas.[1490] I think it is hazardous—and unnecessary for the purposes of this thesis—to draw any firm conclusion. My point here is to emphasize the blurred line that exists between what we describe as the extraterritorial application of regulatory statutes in private litigation and the choice of law analysis. Each methodological stance comes with conceptual difficulties, doubled with constitutional puzzles insofar as provincial legislation is concerned. Environmental law is not the most practical canvas to explore the problem in depth because unlike securities or antitrust law, statutory causes of action in environmental law are not widely used in a transboundary context.[1491]

In the next subsection, I draw from constitutional and statutory interpretation principles to examine statutory causes of action in Canada. This analysis is useful regardless of the conceptual stance we take towards extraterritoriality and choice of law. Under article 3076 CCQ or the *Yip*/*Paniccia* approach, it can help determine whether a statute supplants the choice of law process entirely because it applies extraterritorially or because the forum deems it mandatory. Under a classic choice of law analysis, it can help determine whether a statute actually applies on the facts of a case, once we know that Canadian law is indeed the applicable law by virtue of conflict rules. The latter is a step further in the analysis—the conflict of laws was resolved in favour of the law of a Canadian province, and its contents are now applied to the dispute.

[1490] See Jürgen Basedow, "The Hague Conference and the Future of Private International Law: A Jubilee Speech" (Lecture delivered at the Hague Conference of Private International Law's 125th Anniversary Conference, Hong Kong, China, 18 April 2018), (2018) 82:4 Rabel J Comp & Intl Priv L 922 ("[s]tates tend to declare their own policies to be absolute not only in the domestic context but also in international settings. This is usually designated as an extraterritorial application. An early case was the application of antitrust law under the so-called effects doctrine. More recent examples can be found in capital market law and in data protection" at 937)

[1491] As a side note, I observe that as a matter of positive law, the Canadian doctrine of extraterritoriality remains largely unexplored in relation to environmental law. The leading study of extraterritoriality in Canada contains seven case studies, none of which addresses environmental protection. See Coughlan et al, *supra* note 1467, ch 7. *Cf* Jennifer A Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas. A Report for the Harvard Corporate Social Responsibility Initiative to Help Inform the Mandate of the UNSG's Special Representative on Business and Human Rights" (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59, ch 6, online (pdf): *Harvard Kennedy School Mossavar-Rahmani Center for Business and Government* <www.hks.harvard.edu> [perma.cc/4SKH-BTJ7] (exploring extraterritoriality in six areas, including environmental regulation).

3.2.3.2. Statutory causes of action in Canada

Certain statutory causes of action may be available to victims of transboundary pollution in Canada. To account for constitutional constraints, I distinguish between federal (3.2.3.2.1) and provincial law (3.2.3.2.2). I conclude with final remarks on prompt and adequate compensation (3.2.3.2.3).

The analysis in the next subsections does not apply to domestic laws implementing international liability regimes.[1492] Unlike other domestic laws, those were deliberately drafted with bilateral or multilateral issues in mind. They reflect (at least in part) obligations agreed upon by the states.[1493] Stretching a purely domestic cause of action to cover transboundary pollution raises different preoccupations, particularly when it involves local standards or policies which foreign states do not share. This is what I am concerned with here.

3.2.3.2.1. Federal law

Federal environmental law contains two noteworthy causes of action. First, the *Canadian Environmental Protection Act*—the centrepiece of federal environmental policy—allows any person suffering loss or damage resulting from a violation of the *Act* to seek compensation or injunctive relief from the courts.[1494] Victims can also recover loss or damage to property at the sentencing stage of a penal prosecution.[1495] Second, the *Fisheries Act* enables licensed commercial fishermen to recover losses of income

[1492] See eg *Marine Liability Act*, SC 2001, c 6; *Canada Shipping Act, 2001*, SC 2001, c 26; *Antarctic Environmental Protection Act*, SC 2003, c 20; *Migratory Birds Convention Act, 1994*, SC 1994, c 22; *International Boundary Waters Treaty Act*, *supra* note 646; *Nuclear Liability and Compensation Act*, *supra* note 361.
[1493] The implementation of international agreements is one of the primary observable bases of extraterritorial action in Canada. It is both easier and more readily justifiable in this context. See Coughlan et al, *supra* note 1467 at 148–50, 155.
[1494] See *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 39–40 [*CEPA*]. See generally Joseph F Castrilli, *Annotated Guide to the Canadian Environmental Protection Act*, vol 1 (Aurora: Canada Law Book, 2009) (loose-leaf updated 2019, release 43) at § CEPA.49–51; Marcia Valiante, ""Welcomed Participants" or "Environmental Vigilantes"? The CEPA Environmental Protection Action and the Role of Citizen Suits in Federal Environmental Law" (2002) 25:1 Dal LJ 81 [Valiante].
[1495] See *ibid*, s 292.

suffered as a result of the unauthorized deposit of a deleterious substance in water frequented by fish.[1496]

To determine whether *CEPA* and the *Fisheries Act* apply in transboundary environmental disputes, we must distinguish two scenarios: foreign victims suing in Canada for pollution originating in Canada (3.2.3.2.1.1) and local victims suing in Canada for pollution originating abroad (3.2.3.2.1.2).

3.2.3.2.1.1. Foreign plaintiffs in Canada

The statutory cause of action in the *Fisheries Act* is clearly inapplicable in the first scenario—foreign victims suing in Canada for pollution originating in Canada. Foreign victims are not licensed commercial fishermen in Canada and the prohibition of deleterious substances applies only to Canadian fisheries waters.[1497] *CEPA*, however, imposes no particular requirement on the identity of plaintiffs: all persons may initiate proceedings in Canada. Nor is *CEPA*'s definition of environment limited to Canada.[1498] Foreign plaintiffs may therefore sue Canadian polluters under *CEPA*. The presumption against extraterritoriality does not come into play because applying *CEPA* to local polluters can hardly be considered extraterritorial. It is simply a matter of equal remedy for foreign victims of transboundary pollution.

3.2.3.2.1.2. Canadian plaintiffs in Canada

The opposite scenario—local victims suing in Canada for pollution originating abroad—is more difficult because it involves the application of domestic legislation to polluters

[1496] See *Fisheries Act*, RSC 1985, c F-14, s 42(3) [*Fisheries Act*].
[1497] See *ibid*, s 34(1); Secretariat of the CEC, *supra* note 227 at 244–45.
[1498] See *CEPA*, *supra* note 1494, s 3(1); *Hydro-Québec*, *supra* note 158 at 262, Lamer CJC and Iacobucci J, dissenting; Manirabona, *Criminalité environnementale transfrontalière*, *supra* note 1475 at 97–97. In his doctoral thesis published in 2010, Manirabona persuasively demonstrates the feasibility of prosecuting violations of *CEPA* committed entirely abroad by Canadian polluters, on the basis of the nationality of the offender, the protective principle or the objective territoriality principle in public international law. See Manirabona, *Criminalité environnementale transfrontalière*, *supra* note 1475 at 83–102. *Cf* Catherine M Wilmarth, "Mining Megaliths in the Argentine Andes: Where Will Victims of Environmental Degradation Find Justice?" (2012) 36:3 Wm & Mary Envtl L & Pol'y Rev 959 ("[*CEPA*] contains a few provisions that imaginably provide a structure for a complainant about environmental damage by a Canadian corporation in a foreign country to bring their cause in Canada. At the same time, it does not really focus [...] on cross-border violations" at 984).

that are presumably already regulated elsewhere. This was the essence of Teck Cominco's contention in *Pakootas*: the smelter was regulated by Canadian authorities and it operated with permits issued under Canadian law, with no possibility of even obtaining similar permits from the EPA as a foreigner.[1499]

In my view, statutory causes of action in *CEPA* or the *Fisheries Act* can apply to foreign polluters in relation to damage suffered in Canada. The *Edwards* case supports this view.[1500] The dispute involved the private prosecution of a violation of the *Fisheries Act* (a regulatory offence).[1501] In Canada, anyone[1502] who believes that a person has committed a federal indictable offence within the territorial jurisdiction of a court may present the information to a judge, who may issue a summons or a warrant to compel that person to answer charges.[1503] The private prosecution of environmental offences rarely succeeds, not least because public prosecutors have virtually unfettered discretion to take over the proceedings or withdraw the charges at any time after information is sworn,[1504] and have repeatedly done so in the past.[1505] Stays of proceedings have tempered the

---

[1499] See *Pakootas* ED Wash, *supra* note 967 at 44–45.
[1500] See *Edwards*, *supra* note 170.
[1501] See *Fisheries Act*, *supra* note 1496.
[1502] Authors suggest that this includes nonresidents. See Muldoon, Scriven & Olson, *supra* note 109 at 151–52.
[1503] See *Criminal Code*, RSC 1985, c C-46, ss 504(a)(b), 507.1 [*Criminal Code*]. The Ontario Court of Appeal held that "territorial jurisdiction" refers to the courts of the province as a whole rather than administrative regions within the province, such that any Ontario justice of the peace is obliged to receive the information, not just those in the administrative region in which the alleged incident occurred. See *R v Ellis*, 2009 ONCA 483 at para 38, 95 OR (3d) 481.
[1504] See *Klippenstein v R*, 2019 MBCA 27 at paras 3–4, [2019] MJ No 72 (QL), leave to appeal to SCC refused, 38670 (26 September 2019); *Klippenstein v R*, 2019 MBCA 13 at para 7, [2019] MJ No 27 (QL), leave to appeal to SCC refused, 38656 (26 September 2019); *R v Ackerman*, 2018 MBCA 75 at para 5, [2018] MJ No 202 (QL); *R v McHale*, 2010 ONCA 361 at para 42, 256 CCC (3d) 26, leave to appeal to SCC refused, [2010] 3 SCR vi [*McHale*]; *Re Bradley and The Queen* (1975), 9 OR (2d) 161 at 169, 1975 CanLII 766 (CA). The discretion to take over private prosecutions belongs to the core of the Attorney General's prosecutorial discretion, reviewable only in cases of flagrant impropriety or bad faith amounting to an abuse of process. See *R v Anderson*, 2014 SCC 41 at para 40, [2014] 2 SCR 167; *R v Nixon*, 2011 SCC 34 at para 21, [2011] 2 SCR 566; *Miazga v Kvello Estate*, 2009 SCC 51 at para 45, [2009] 3 SCR 339; *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 46, [2002] 3 SCR 372. As the Manitoba Court of Appeal puts it, "[d]ecisions in relation to a private prosecution are exercises of prosecutorial discretion and will not be second-guessed or interfered with on a judicial review absent demonstration of the very high threshold of an abuse of process." *Canadian Broadcasting Corporation v Morrison*, 2017 MBCA 36 at para 25, [2017] 7 WWR 486.
[1505] See eg *Labrador Métis Nation v Canada (Attorney General)*, 2006 FCA 393, 277 DLR (4th) 60 (unsuccessful challenge of the Attorney General's decision to stay a private prosecution initiated by First Nations against Newfoundland & Labrador for the destruction of fish habitat and the obstruction of river flow).

expectations of environmental lawyers over the years,[1506] but private prosecutions remain a useful tool to draw attention to environmental issues.[1507]

In *Edwards*, an environmental advocate residing in Ontario asked the courts of the province to issue a summons to DTE Energy, an electricity provider operating coal power plants in Michigan. Scott Edwards claimed that DTE Energy violated the *Fisheries Act* by discharging mercury into the St-Clair River separating Ontario from Michigan. The *Fisheries Act* encourages this procedure: persons who lay information regarding violations of the *Fisheries Act* are entitled to half of the proceeds of any penalty imposed after a conviction.[1508] A first judge refused to issue the summons. Edwards sought to compel the issuance of the summons through a mandamus application before the Ontario Superior Court of Justice.

Before the Ontario Superior Court of Justice, Edwards' counsel made extensive submissions on the extraterritorial application of the *Fisheries Act*. He pleaded that the

---

[1506] See generally Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution" (2004) 13:2 J Envtl L & Prac 153; Bryce C Tingle, "The Strange Case of the Crown Prerogative over Private Prosecutions or Who Killed Public Interest Law Enforcement?" (1994) 28:2 UBC L Rev 309; Robert W Proctor, "Individual Enforcement of Canada's Environmental Protection Laws: The Weak-Spirited Need Not Try. An Alberta Example" (1991) 14:1 Dal LJ 112; Ian Carwright, "A Private Prosecution in Alberta: A Painful Process" (1990) 1:1 J Envtl L & Prac 110.

[1507] See eg *Podolsky v Cadillac Fairview Corp*, 2013 ONCJ 65, 75 CELR (3d) 1 (trial by way of private prosecution charging defendents with offences related to the injury and death of migratory birds as a result of the use of reflective glass in a commercial office complex—defendents ultimately acquitted); *R v Syncrude Canada Ltd*, 2010 ABPC 229, [2010] 12 WWR 524 (conviction of an oil company charged with offences related to the death of migratory birds that landed on the settling basin on a tar sands facility—proceedings began as a private prosecution and were then taken over by public authorities); *R v Kingston (Corp of the City)* (2004), 70 OR (3d) 577, 2004 CanLII 39042 (CA), leave to appeal to SCC refused, [2005] 1 SCR viii (conviction of a municipality charged with offences related to leachate migrating from a former dump site into a river—charges laid by a private citizen and public authorities). On the importance of private prosecutions in environmental law, see generally John Swaigen, Alberta Koehl & Charles Hatt, "Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment" (2013) 26:1 J Envtl L & Prac 31; James S Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, 2nd ed (Edmonton: Environmental Law Centre, 2004); Kernaghan Webb, "Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" (1991) 36:3 McGill LJ 770; Marilyn Kansky, "Private Prosecutions from the Public's Perspective" in Linda F Duncan, ed, *Environmental Enforcement: Proceedings of the National Conference on the Enforcement of Environmental Law* (Edmonton: Environmental Law Centre, 1985) 108; Sargent H Berner, *Private Prosecution and Environmental Control Legislation: A Study* (Ottawa: Department of the Environment, 1972).

[1508] See *Fishery (General) Regulations*, SOR/93-53, s 62(1)(a). For a similar mechanism, see also *YT Environment Act*, *supra* note 637, s 19(2). Fines for the offences invoked in *Edwards* were substantial, going up to several hundreds of thousands of dollars at the time. See *Fisheries Act*, RSC 1985, c F-14, s 40(1)–40(2) as it appeared on 16 November 2008.

court had jurisdiction on the basis of a real and substantial connection because DTE Energy's activities, albeit located in the United States, caused damage on Canadian soil. He presented Edwards' claim as a mirror image of *Pakootas*, which "tells us that our friends down south are allowing prosecutions […] of people who are doing the same type of environmental crime in the other direction."[1509]

Justice Donohue granted the request for mandamus and ordered the issuance of the summons. By doing so, he effectively held that there were reasonable grounds that DTE Energy was breaching Canadian law by dumping toxic substances into Canadian waters. The dispute earned media coverage on both sides of the border.[1510] A DTE Energy spokesperson declared that the proceedings were "baffling" in light of the company's compliance with American law.[1511] Parties ultimately reached an agreement and charges were withdrawn in 2009.[1512] Edwards explained later in an interview that mercury emissions from DTE Energy's facility had significantly decreased, partly as a result of the charges laid against it. In this sense, the prosecution was a success to him.[1513] However, Edwards wished that public authorities had gotten involved and prosecuted the case instead of staying on the sidelines. He criticized their lack of collaboration, implying that if there were indeed gaps in the regulation of transboundary pollution, the problem may not be with the territorial scope of environmental law but with its actual enforcement.[1514]

Environmental advocates such as Scott Edwards undoubtedly celebrated the Court's decision for holding an American polluter accountable under Canadian law, while others

---

[1509] *Edwards*, *supra* note 170 at para 95. On this point, see Hsu & Parrish, *supra* note 7 at 6, n 21; Hall, "Transboundary Pollution", *supra* note 163 at 738, n 338.
[1510] See Jim Lynch, "Border Battles: Canada, U.S. increasingly at Odds over Pollution Issues", *The Detroit News* (27 June 2008) A1, also online: *Blue Fish* <www.bluefish.org> [perma.cc/GD4N-DWYP]; "Michigan Utility Sued Under Canada's Fisheries Act", *The Globe and Mail* (28 April 2008) A6; Martin Mittelstaedt, "Ruling Paves Way for Mercury Emissions Lawsuit", *The Globe and Mail* (16 January 2008), online: <www.theglobeandmail.com> [perma.cc/3UEQ-N3KZ] [Mittelstaedt]; Louis-Gilles Francoeur, "Pollution de la rivière St. Clair, en Ontario: un citoyen canadien poursuit l'américaine DTE Energy", *Le Devoir* (21 January 2008) A2, also online: <www.ledevoir.com> [perma.cc/259R-NS85].
[1511] See Mittelstaedt, *supra* note 1510 at 2.
[1512] See McAree & Vince, *supra* note 167 at 58.
[1513] See "Living at the Barricades—Edwards v DTE: Case Closed" (13 April 2010) at 00h:15m:08s, online (podcast) (blog entry by Dylan Neild; podcast by Mark Mattson and Krystyn Tully): *Lake Ontario Waterkeeper* <www.waterkeeper.ca/blog/17193> [perma.cc/VK6K-PQ75].
[1514] *Ibid* at 00h:22m:49s.

expressed concern about regulatory overlap.[1515] Realistically, the case offers meagre jurisprudential support for the extraterritorial reach of environmental law in a private dispute. The case began with the private prosecution of a regulatory offence, not a civil claim.[1516] Neither DTE Energy nor the Attorney General appeared in court to make submissions on the *mandamus* application.[1517] The reported judgment is *verbatim*, and Justice Donohue simply adopted certain paragraphs of Edwards' factum as his reasons.[1518] The case never went to trial. And of course, a summons says nothing about the culpability of an accused.

Nonetheless, *Edwards* shows that Canadian courts are prepared to extend the application of federal environmental law to foreign polluters when they cause damage in Canada.[1519] Justice Donohue accepted the proposition that there was a real and substantial connection between Canada and the offence, as required by the Supreme Court of Canada

---

[1515] See Gracer, Mahony & Dyck, *supra* note 167 at 187–90. On the broader implications of *Edwards*, see Kruger, *supra* note 207 at 141; Bret Benedict, "Transnational Pollution and the Efficacy of International and Domestic Dispute Resolutions Among the NAFTA Countries" (2009) 15:4 L & Bus Rev Americas 863 at 880–81.

[1516] But see Manirabona, *Criminalité environnementale transfrontalière*, *supra* note 1475 at 100 (citing a civil case to conclude that the "effects doctrine" allows the prosecution of criminal offences committed abroad).

[1517] Nor were they required to. The pre-inquiry process to determine whether the court should issue a summons or a warrant under section 507.1 of the *Criminal Code* is usually held in private and in the absence of the proposed accused. See *McHale*, *supra* note 1504 at paras 48, 58, 75; *Southam Inc v Coulter* (1990), 75 OR (2d) 1 at 12, 1990 CanLII 6963 (CA). By contrast, a mandamus application challenging the refusal to issue a summons or a warrant may be held in open court, in private or subject to a publication ban, as determined by the courts. Service to the proposed accused is not always required. The Crown is the proper responding party. On the confidentiality of mandamus applications in this context, see *Ambrosi v British Columbia (Attorney General)*, 2012 BCSC 720 at paras 15–54, 263 CRR (2d) 232; *R v Shallow*, [2009] OJ No 3204 (QL) at paras 6–21, 2009 WL 7755524 (WL Can) (Sup Ct); *R v Parkinson*, 2008 CanLII 68177 at paras 8–35, [2008] OJ No 5340 (QL) (Sup Ct); *R v Friesen* (2008), 229 CCC (3d) 97 at 104–16, 2008 CanLII 12493 (Ont Sup Ct). Counsel in *Edwards* advised the court that he had served the Attorney General with a notice of application. See *Edwards*, *supra* note 170 at paras 14–16.

[1518] See *Edwards*, *supra* note 170 at para 178, adopting as Justice Donuhue's reasons paragraphs 24–30, 47, 52, 59–65 of the Applicant's Factum. On the permissibility of such "judicial copying", see *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras 10–76, [2013] 2 SCR 357.

[1519] It is unclear, however, whether Justice Donohue considered that the offence had been committed in Canada, or that it had been committed elsewhere and caused effects in Canada. Justice Donohue adopted as his reasons paragraph 52 of the Applicant's Factum, in which Edwards argued that the offence had occurred in Canada because a deleterious substance had been deposited into Canadian waters. But he also adopted as his reasons paragraphs 59–65 of the Applicant's Factum, in which Edwards alternatively argued that the offence had occurred outside Canada and was prosecutable in Canada under section 481.2 of the *Criminal Code*. See *Edwards*, *supra* note 170 (Applicant's Factum). On this point, see Muldoon, Scriven & Olson, *supra* note 109 at 153–54.

jurisprudence in criminal law.[1520] If environmental damage suffered in Canada represents a sufficiently strong connection in that context, why would it not suffice to invoke statutory causes of action against foreign polluters in civil litigation, when the language of a statute allows for it?

This would not open the floodgates of litigation any more than applying the law of the place of injury to common law torts. The American experience is instructive on this point because their courts have grappled with the extraterritorial scope of domestic environmental law more frequently than their Canadian counterparts. The *Pakootas* case is unique due to its history and the immense scholarly attention it received,[1521] but other cases reveal a more nuanced picture. Courts have considered the application of American

---

[1520] See *Hape*, *supra* note 1472 at para 59; *R v Larche*, 2006 SCC 56 at para 59, [2006] 2 SCR 762; *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at 670, 1998 CanLII 818; *R v Terry*, [1996] 2 SCR 207 at 215–16, 1996 CanLII 199; *United States of America v Lépine*, [1994] 1 SCR 286 at 299–301, 1994 CanLII 116; *R v Finta* (1992), 92 DLR (4th) 1 at 100, 1992 CanLII 2783 (Ont CA), aff'd [1994] 1 SCR 701, 1994 CanLII 129; *R v Libman*, [1985] 2 SCR 178 at 212–13, 1985 CanLII 51.

[1521] See *Pakootas* 9th Cir 2006, *supra* note 14 at 1082. For commentary specific to *Pakootas*, see eg Ellis, "Extraterritorial Jurisdiction", *supra* note 333; Craik, "Second *Trail Smelter* Dispute", *supra* note 66; Kruger, *supra* note 207; Jennifer S Addis, "A Missed Opportunity: *How Pakootas v Teck Cominco Metals, Ltd* Could Have Clarified the Extraterritoriality Doctrine" (2009) 32:4 Seattle UL Rev 1011; Gregory J Battista & Hilary R Stedwill, "Choosing Pragmatic Over Polite: Should International Transboundary Pollution Be a Matter for Courts or Consul? The Case of *Pakootas v Teck Cominco Metals, Ltd*" (2008) 16:2 Envtl Liability 35; Nathan L Budde, "*Pakootas v Teck Cominco Metals, Ltd*: When Outside the Borders Isn't Extraterritorial, Or, Canada Is in Washington, Right?" (2007) 15:2 Tul J Intl & Comp L 675; Jordan Diamond, "How CERCLA's Ambiguities Muddled the Question of Extraterritoriality in *Pakootas v Teck Cominco Metals, Ltd*" (2007) 34:3 Ecology LQ 1013; Brandy Parker, "Recent Developments in Environmental Law. Comprehensive Environmental Response, Compensation and Liability Act: *Pakootas v Teck Cominco Metals, Ltd*" (2007) 20:2 Tul Envtl LJ 468; Libin Zhang, "*Pakootas v Teck Cominco Metals, Ltd*" (2007) 31:2 Harv Envtl L Rev 545; Gerrit Betlem, "Trail Smelter II: Transnational Application of CERCLA" (2007) 19:3 J Envtl L 389; Ann R Klee, Chet M Thompson & Ashley Riveira, "The Extraterritorial Application of U.S. Law: Is What's Sauce for the Goose Good for the Gander?" in Rocky Mountain Mineral Law Institute, *Proceedings of the 53rd Annual Conference of the Rocky Mountain Mineral Law Institute* (Westminster: Rocky Mountain Mineral Law Foundation, 2007); Kate McDonald, "*Pakootas v Teck Cominco Metals, Ltd*: Finding a Sustainable Solution to Transboundary Pollution" (2006) 41:1 Ga L Rev 311; Jamie L Wilhite, "International Pollution: Can We Really Just Blame Canada?" (2006) 21:2 J Nat Resources & Envtl L 159; Robinson-Dorn, *supra* note 341; Richard A Du Bey et al, "CERCLA and Transboundary Contamination in the Columbia River" (2006) 21:1 Nat Resources & Envt 11; Gerald F George, "Environmental Enforcement Across National Borders" (2006) 21:1 Nat Resources & Envt 3; Rachel Kastenberg, "Closing the Liability Gap in the International Transboundary Water Pollution Regime Using Domestic Law to Hold Polluters Accountable: A Case Study of *Pakootas v Teck Cominco Ltd*" (2005) 7 Or Rev Intl L 322; Katherine Hausrath, "Crossing Borders: The Extraterritorial Application of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)" (2005) 13:1 U Balt J Envtl L 1; Erin F Greenfield, "CERCLA's Applicability Abroad: Examining the Reach of a U.S. Environmental Statute in the Face of a Cross-Border Pollution Dispute" (2005) 19:3 Emory Intl L Rev 1697; Gerald F Hess, "The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA" (2005) 18:1 Geo Intl Envtl L Rev 1; Craik, *supra* note 12; Gerald F George, "Over the Lie: Transboundary Application of CERCLA" (2004) 34:3 Envtl L Rep 10275.

law[1522] to a wide range of environmental preoccupations: compensating damage caused by domestic and foreign greenhouse gas emissions,[1523] protecting foreign endangered species,[1524] cultural and historical heritage,[1525] the high seas,[1526] the Antarctic,[1527] and other areas beyond national jurisdiction,[1528] dealing with pollution from American military bases on foreign soil,[1529] supervising local projects with foreign implications[1530] or foreign projects funded or supported by the United States,[1531] monitoring the

[1522] I am not referring here to the *ATS*, a possible doorway to international environmental law in domestic courts (as opposed to domestic environmental law), subject to the same presumption against extraterritoriality as other statutes. See the sources cited *supra* note 144.
[1523] See eg *City of New York*, *supra* note 220 at 475–76; *City of Oakland* (1), *supra* note 219 at 1024–26. But see William S Dodge, "Misusing the Presumption Against Extraterritoriality in Climate Change Litigation" (2019) 1:2 Cts & Just LJ 118 (criticizing the applifcation of the federal presumption against extraterritoriality in *City of New York* and *City of Oakland*).
[1524] See eg *Born Free USA Inc v Norton*, 278 F Supp (2d) 5 at 19–20, 2003 US Dist Lexis 13770 (DDC 2003), rev'd 2004 US App Lexis 936, 2004 WL 180263 (WL Int) (DC Cir 2004); *United States of America v Mitchell*, 553 F (2d) 996 at 1001–1005, 1977 US App Lexis 12970 (5th Cir 1977).
[1525] See eg *Centre for Biological Diversity v Mattis*, 868 F (3d) 803 at 822, n 7, 2017 US App Lexis 15841 (9th Cir 2017); *Okinawa Dugong v Gates*, 543 F Supp (2d) 1082 at 1088–89, 2008 US Dist Lexis 5234 (ND Cal 2008).
[1526] See eg *Basel Action Network v Maritime Administration*, 370 F Supp (2d) 57 at 71–72, 2005 US Dist Lexis 3278 (DDC 2005).
[1527] See eg *Environmental Defense Fund Inc v Massey*, 986 F (2d) 528 at 530–37, 1993 US App Lexis 1380 (DC Cir 1993).
[1528] See eg *Natural Resource Defense Council v United States Department of the Navy*, 2002 US Dist Lexis 26360 at 29–41, 2002 WL 32095131 (WL Int) (CD Cal 2002); *Blue Water Fishermen's Association v National Marine Fisheries Service*, 158 F Supp 2d 118 at 122–23, 2001 US Dist Lexis 13478 (D Mass 2001).
[1529] See eg *Arc Ecology v United States Department of the Air Force*, 411 F (3d) 1092 at 1097–98, 2005 US App Lexis 11242 (9th Cir 2005); *NEPA Coalition of Japan v Aspin*, 837 F Supp 466 at 467–68, 1993 US Dist Lexis 17090 (DC Cir 1993).
[1530] See eg *Indigenous Environmental Network v United States Department of State*, 347 F Supp (3d) 561 at 579–80, 587–88, 2018 US Dist Lexis 191510 (D Mont 2018), rev'd as moot, 2019 US App Lexis 17095, 2019 WL 2542756 (WL Int) (9th Cir 2019); *Backcountry Against Dumps v Chu*, 215 F Supp (3d) 966 at 980–82, 2015 US Dist Lexis 188415 (SD Cal 2015), reconsidered 2017 US Dist Lexis 114496, 2017 WL 2988273 (WL Int) (SD Cal 2017), appeal voluntarily dismissed, 2018 WL 1989500 (WL Int) (9th Cir 2018); *Consejo de Desarrollo Economico de Mexicali AC v United States of America*, 438 F Supp (2d) 1207 at 1234–36, 2006 US Dist Lexis 48182 (D Nev 2006), rev'd on other grounds 482 F (3d) 1157, 2007 US App Lexis 8166 (9th Cir 2007); *Border Power Plan Working Group v Department of Energy*, 260 F Supp (2d) 997 at 1016–17, 2003 US Dist Lexis 9333 (SD Cal 2003); *Defenders of Wildlife v Norton*, 257 F Supp (2d) 53 at 66–67, 2003 US Dist Lexis 5031 (DDC 2003).
[1531] See eg *Centre for Biological Diversity v Export-Import Bank of the United States*, 2014 US Dist Lexis 111762 at 14–17, 2014 WL 3963203 (WL Int) (ND Cal 2014); *Friends of the Earth Inc v Mosbacher Jr*, 488 F Supp (2d) 889 at 908–909, 2007 US Dist Lexis 24268 (ND Cal 2007); *Lujan v Defenders of Wildlife*, 504 US 555 at 585–89, 112 S Ct 2130 (1992), Stevens J, concurring; *Sierra Club v Adams*, 578 F (2d) 389 at 391, n 14, 1978 US App Lexis 1218 (DC Circ 1978); *National Organization for the Reform of Marijuana Laws v United States*, 452 F Supp 1226 at 1232–33, 1978 US Dist Lexis 17299 (DDC 1978), aff'd No 78-1669 (DC Cir 1979).

transboundary transit of nuclear materials and other dangerous goods,[1532] etc. Judicial approaches are somewhat disparate depending on the facts of each case and the language of the statute at stake.[1533] But in the end, American courts seldom extend domestic environmental law beyond borders, before or after *Pakootas*.[1534] *Edwards* is unlikely to have any greater effect in Canada.

Summing up, *CEPA* applies in proceedings brought in Canada by foreign victims against local polluters. There is also a good possibility that *CEPA* and the *Fisheries Act* apply in proceedings brought in Canada by local victims against foreign polluters. This would not dramatically alter the Canadian approach to extraterritoriality as long as a sufficient connection exists with the forum.

[1532] See eg *Mayaguezanos por la Salud y el Ambiante v United States of America*, 198 F (3d) 297 at 300–301 1999 US App Lexis 33416 (1st Cir 1999); *Hirt v Richardson*, 127 F Supp (2d) 833 at 843–45, 1999 US Dist Lexis 19403 (WD Mich 1999); *Greenpeace USA v Stone*, 748 F Supp 749 at 758–61, 1990 US Dist Lexis 13261 (D Hawaii 1990); *Amlon Metals*, *supra* note 702 at 674–76; *Natural Resources Defense Council v Nuclear Regulatory Commission*, 647 F (2d) 1345 at 1365–68, 1993 US App Lexis 1380 (DC Cir 1981).

[1533] Pre-2010 cases should also be read carefully. The Supreme Court of the United States has significantly reframed the presumption against extraterritoriality since then. See *Westerngeco LLC v Ion Geophysical Corp*, 138 S Ct 2129 at 2136–38, 201 L Ed (2d) 584 (2018); *RJR Nabisco Inc v European Community*, 136 S Ct 2090 at 2099–2101, 195 L Ed (2d) 476 (2016); *Kiobel*, *supra* note 144 at 114–25; *Morrison v National Australia Bank*, 561 US 247 at 255–61, 130 S Ct 2869 (2010). On the current state of the law, see William S Dodge, "The New Presumption Against Extraterritoriality" (2020) 133:5 Harv L Rev 1582; William S Dodge, "The Presumption Against Extraterritoriality in the U.S. Supreme Court Today" in Andrea Bonomi and Krista Nadakavukaren Schefer, eds, *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?* (Zurich: Schulthess, 2018) 187. The American Law Institute is working on a new restatement of conflict of laws and has issued a partially revised restatement of foreign relations law, both of which are relevant to an understanding of the law of extraterritoriality in the United States. See *Restatement (Fourth) of Foreign Relations Law*, *supra* note 702.

[1534] See Jonathan Remy Nash, "The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws" (2010) 50:4 Va J Intl L 997 at 998–99, revised and updated in Jonathan Remy Nash, "The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws" in Handl, Zekoll & Zumbansen, *supra* note 308, 125. On the extraterritorial application of United States environmental law, see generally Hunter, Salzman & Zaelke, *supra* note 209 at 1461–1473; Joanne Sum-Ping, "New Approach to Extraterritorial Application of Environmental Statutes: Uncovering the Effects of Plan Colombia" (2006) 31:1 Colum J Envtl L 139; Browne C Lewis, "It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act" (2004) 25:6 Cardozo L Rev 2143; Lauren Levy, "Stretching Environmental Statutes to Include Private Causes of Action and Extraterritorial Application: Can It Be Done?" (1997) 6:1 Dick J Envtl L & Pol'y 65.

3.2.3.2.2. Provincial law

Provincial law calls for a different analysis. Eight provinces have statutory causes of action, but their scope and requirements vary greatly, ranging from narrow boilerplate provisions to full-blown environmental bills of rights.[1535]

In Ontario, all persons have a right to compensation for loss or damage resulting from the spill of a pollutant, which they can exercise against the owner and the person having control of the pollutant.[1536] Ontario residents can also bring an action when the violation of environmental statutes threatens Ontario public resources.[1537] In Quebec, injunctive relief is available to persons domiciled in the province and frequenting the place (or its immediate vicinity) in which a violation allegedly occurred.[1538] In Alberta, persons who suffer loss or damage as a result of conduct that resulted in a conviction may sue the offender.[1539] Injunctive relief is also available.[1540] In Newfoundland and Labrador, convictions are evidence of negligence and are actionable by persons who suffer loss or damage as a result.[1541] Nova Scotia has a similar provision, but a conviction is only *prima facie* evidence of negligence and the amount recoverable is limited to reasonably foreseeable loss or damage.[1542] The Northwest Territories, Nunavut and Yukon guarantee their residents the right to seek compensation or injunctive relief in order to protect the

[1535] The *Reciprocal Access Act* adopted by Ontario, Manitoba, Nova Scotia and Prince Edward Island does not create any substantive right to compensation. See ULCC, *supra* note 741 at 503.
[1536] See *Environmental Protection Act*, RSO 1990, c E.19, s 99(2) [*ON Environmental Protection Act*]; *Midwest Properties*, *supra* note 961 at paras 42–55.
[1537] See *ON Environmental Bill of Rights*, *supra* note 637, s 84(1); *Environmental Bill of Rights General Regulation*, O Reg 73/94, s 9.
[1538] See *QC Environment Quality Act*, *supra* note 637, ss 19.2–19.3, para 1. No statutory right to compensation exists in this scheme.
[1539] See *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 219 [*AB Environmental Protection and Enhancement Act*].
[1540] See *ibid*, s 225. See also *Water Act*, RSA 2000, c W-3, s 155 (similar provision in legislation governing the use, management and protection of water in the province).
[1541] See *Environmental Protection Act*, SNL 2002, c E-14.2, s 110 [*NL Environmental Protection Act*].
[1542] See *NS Environment Act*, *supra* note 747, s 142. In 2016, Nova Scotia MP Lenore Zann (Nova Scotia New Democratic Party) tabled a private bill guaranteeing the right of Nova Scotia residents to sue for violations of environmental legislation. The bill was retabled on several occasions. It not been adopted yet. See Bill 28, *An Act to Establish an Environmental Bill of Rights*, 2nd Sess, 63th Leg, Nova Scotia, 2018, cl 33(1) (first reading 13 September 2018); Bill 26, *An Act to Establish an Environmental Bill of Rights*, 1st Sess, 63th Leg, Nova Scotia, 2017, cl 33(1) (first reading 5 October 2017); Bill 7, *An Act to Establish an Environmental Bill of Rights*, 3rd Sess, 62th Leg, Nova Scotia, 2016, cl 33(1) (first reading 14 October 2016); Bill 178, *An Act to Establish an Environmental Bill of Rights*, 2nd Sess, 62th Leg, Nova Scotia, 2016, cl 33(1) (first reading 5 May 2016).

environment and the public trust from contaminants.[1543] British Columbia,[1544] Manitoba,[1545] New Brunswick, Saskatchewan[1546] and Prince Edward Island do not have a statutory cause of action.

Again, there are two scenarios in transboundary environmental disputes: foreign victims suing in Canada for pollution originating in Canada (3.2.3.2.2.1) and local victims suing in Canada for pollution originating abroad (3.2.3.2.2.2).

3.2.3.2.2.1. Foreign plaintiffs in Canada

In the first scenario—foreign victims suing in Canada for pollution originating in Canada—plaintiffs can rely on statutory causes of action in Ontario (*Environmental Protection Act*), Alberta, Newfoundland and Labrador and Nova Scotia.[1547] This is hardly a cause for concern because the activity which triggers the statute originates in the province. The availability of recourse, however, remains subject to the wording of the substantive obligation itself. Ontario, for instance, defines natural environment as the air,

---

[1543] See *NWT Environmental Rights Act*, *supra* note 637, s 6(1); *NU Environmental Rights Act*, *supra* note 637, s 6(1); *YT Environment Act*, *supra* note 637, s 8(1).

[1544] In 2016, British Columbia MP and leader of the Green Party of British Columbia Andrew Weaver tabled a private bill guaranteeing the right of British Columbia residents to sue for violations of environmental legislation, including to obtain interim relief and compensation. See Bill M236, *Environmental Bill of Rights, 2016*, 5th Sess, 40th Leg, British Columbia, 2016, cl 30(1), 30(2) (first reading 17 May 2016). The bill no longer appears on the legislative agenda for the current session.

[1545] In 2015, the government of Manitoba (formed at the time by the New Democratic Party of Manitoba) tabled a bill guaranteeing its residents the right to sue for violations of environmental legislation. See Bill 220, *The Environmental Rights Act*, 2nd Sess, 41th Leg, Manitoba, 2017, cl 8(1) (first reading 26 April 2017); Bill 20, *The Environmental Rights Act*, 5th Sess, 40th Leg, Manitoba, 2016, cl 14(1) (first reading 2 March 2016). In April 2016, the Progressive Conservative Party of Manitoba won the provincial general election and formed a new majority government. It was highly critical of the bill, which incidentally no longer appears on the legislative agenda. See "Bill C-220, Environmental Rights Act", 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings: Official Report*, 41-2, vol 70, No 82A (9 November 2017) at 3585–3594 (James Allum, Nahanni Fontaine, Brad Michalesk, Alan Lagimodiere, Greg Selinger, Rick Wowchuk & Blair Yakimoski). For a criticism of Bill 20 when it was first tabled, see Heather Fast & Patricia Fitzpatrick, "Modernizing Environmental Protection in Manitoba: *The Environmental Rights Act* as One Component of Environmental Reform" (2017) 30:3 J Envtl L & Prac 295.

[1546] A provision similar to the *ON Environmental Protection Act* existed in Saskatchewan but was repealed when a new environmental statute came into force in 2015. See *The Environmental Management and Protection Act, 2002*, SS 2002, c E-10.21, s 15(3), as repealed by *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, s 100; *Boart Longyear Inc v Mudjatik Enterprises Inc*, 2016 SKCA 22 at para 19, [2016] 5 WWR 40.

[1547] See *ON Environmental Protection Act*, *supra* note 1536, ss 1(1), 99(2); *AB Environmental Protection and Enhancement Act*, *supra* note 1539, s 219; *NS Environment Act*, *supra* note 747, ss 3(aj), 142; *NL Environmental Protection Act*, *supra* note 1541, ss 2(w), 110.

land and water *of the province*, meaning there can be no violation outside the province.[1548] Foreign plaintiffs are excluded *de facto* whenever a statute uses such terms.[1549] Alberta, Newfoundland and Labrador and Nova Scotia define the environment more generally.[1550]

By contrast, statutory causes of action in Ontario (*Environmental Bill of Rights*), the Northwest Territories, Nunavut and Yukon exclude foreign plaintiffs altogether. Quebec courts also denied statutory injunctive relief to an American citizen who had a residence in the province but was not domiciled there.[1551] The Secreteriat of the CEC denounced residency requirements on the basis that they reduced transboundary access to courts in North America.[1552] They go against equal remedy, and removing them would help ensure prompt and adequate compensation to foreign victims of transboundary pollution.

3.2.3.2.2.2. Canadian plaintiffs in Canada

The opposite scenario—local victims suing in Canada for pollution originating abroad—hinges on the constitutional validity of a provincial statute purporting to apply to a foreign polluter. Unlike Federal Parliament, provinces cannot legislate extraterritorially.[1553] In a recent case, the Quebec Superior Court held that the

---

[1548] See *ON Environmental Protection Act*, *supra* note 1536, s 1(1).
[1549] See Jeffery, *supra* note 858 at 181. But see *ON Environmental Protection Act*, *supra* note 1536, s 3(2) ("[n]o action taken under [the *Act*] is invalid by reason only that the action was taken for the purpose of the protection, conservation or management of the environment outside Ontario's borders"). *Cf* Secretariat of the CEC, *supra* note 227 at 245 ("[section 3(2)] raises a question as to whether foreign damage can also be a basis for a statute-based damages action);
[1550] See *AB Environmental Protection and Enhancement Act*, *supra* note 1539, s 1(t); *NS Environment Act*, *supra* note 747, s 3(r); *NL Environmental Protection Act*, *supra* note 1541, s 2(m).
[1551] See *Coalition Verte v Technoparc Montréal*, 2017 QCCS 1693 at paras 29–39, 11 CELR (4th) 102, applying *QC Environment Quality Act*, *supra* note 637, s 19.3, para 1.
[1552] See Secretariat of the CEC, *supra* note 227 at 243–46. See also Muldoon, Scriven & Olson, *supra* note 109 at 123–24, 351–52.
[1553] See *Constitution Act 1867*, *supra* note 882, ss 92(2), (8), (10)(c), (13), (14), (16) ("in the [p]rovince); *1068754 Alberta Ltd v Québec (Agence du revenu)*, 2019 SCC 37 at para 83, 434 DLR (4th) 469; *Van Breda*, *supra* note 112 at para 21; *Pro Swing*, *supra* note 1004 at para 25; *Castillo*, *supra* note 1294 at para 30, Bastarache J, concurring; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 26–27, [2005] 2 SCR 473 [*Imperial Tobacco* SCC 2005]; *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 CSC 40 at paras 50–51, [2003] 2 RCS 63; *Morguard Investments*, *supra* note 940 at 1109; *Reference Re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 238, 1984 CanLII 17 [*Upper Churchill Water Rights Reversion Act*]; *R v Thomas Equipment Ltd*, [1979] 2 SCR 529 at 534, Laskin CJC, dissenting, 1979 CanLII 226; *Burns Foods Ltd v Manitoba (Attorney General)* (1973), [1975] SCR 494 at 502–503, 1973 CanLII 194; *Gray v Kerslake* (1957), [1958] SCR 3 at 18, 1957 CanLII 21; *Ladore v Bennett*, [1939] AC 468 at 474–75, 1939 CanLII 270 (PC) [*Ladore*]; *Royal Bank of Canada v The*

Environment Quality Act did not have extraterritorial scope so as to prevent a local company from shipping contaminated soil to Ontario for treatment in accordance with Ontario laws.[1554] In other words, the *Environment Quality Act* applied only to soil decontamination activities in Quebec. As we will see, case law indicates that provincial environmental laws cannot reach out-of-province polluters, but the reasoning is questionable and may be outdated.

Civil causes of action are within the provinces' jurisdictional purview,[1555] but like all provincial statutes, they cannot apply extraterritorially. The current test to determine whether provincial statutes have constitutionally permissible territorial reach is highly contextual.[1556] The Supreme Court of Canada insists on the presence of meaningful connections with the province and respect for the legislative sovereignty of other territories.[1557] The statute's pith and substance (its essential character or dominant feature) must relate to matters within provincial powers, whether tangible or intangible. Civil causes of action will comply with constitutional requirements only if there is a sufficiently strong relationship between the enacting territory, the subject matter of the legislation and the persons made subject to it.[1558]

King, [1913] AC 283 at 298, 1913 CanLII 401 (PC) [*Royal Bank*]. See also the sources cited *supra* note 1473, notably *SOCAN*, *supra* note 1473 at para 54; *Hunt*, *supra* note 940 at 321; *Newfoundland Continental Shelf*, *supra* note 1473 at 103; *Interprovincial Co-operatives* SCC, *supra* note 161 at 512, Pigeon J; *Offshore Mineral Rights*, *supra* note 1473 at 816–17; *Privy Council Appeals*, *supra* note 1473 at 147.

[1554] See *Englobe*, *supra* note 160 at paras 32–39.

[1555] See *Constitution Act 1867*, *supra* note 882, s 92(13); *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 20, [2005] 3 SCR 302; *Imperial Tobacco* SCC 2005, *supra* note 1553 at para 32; *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 672–73, 1989 CanLII 133.

[1556] Elizabeth Edinger has written extensively on the evolution of the judicial approach to extraterritoriality over the years. See Edinger, "Extraterritoriality Revisited", *supra* note 921; Elizabeth Edinger, "*British Columbia v Imperial Tobacco Canada Ltd*: Extraterritoriality and Fundamental Principles" (2006) 43:2 Can Bus LJ 301; Elizabeth Edinger, "*British Columbia v Imperial Tobacco Canada Ltd*: Extraterritoriality Post *Unifund*" (2005) 41 Can Bus LJ 359; Elizabeth Edinger & Vaughan Black, "A New Approach to Extraterritoriality: *Unifund Assurance Co v CIBC*" (2004) 40:2 Can Bus LJ 161; Elizabeth R Edinger, "The Constitutional Validity of Provincial Mutual Assistance Legislation: *Global Securities v British Columbia (Securities Commission)*" (1999) 33:1 UBC L Rev 169; Elizabeth Edinger, "Constitutional Law—The Doctrines of Colourability and Extraterritoriality" (1985) 63:1 Can Bar Rev 203; Edinger, "Territorial Limitations", *supra* note 1285. See also RE Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985) 7 SCLR 511.

[1557] See *Imperial Tobacco* SCC 2005, *supra* note 1553 at paras 26–36; *Unifund*, *supra* note 1553 at paras 50–81.

[1558] See *ibid.*

The Supreme Court of Canada examined the provincial power to regulate transboundary pollution in *Interprovincial Co-operatives* (1975).[1559] The dispute involved statutory liability for damage caused to Manitoba fisheries by contaminants discharged in provincial waters or carried from elsewhere into those waters.[1560] In a 4-3 verdict, Court invalidated Manitoba's *Fishermen Act*, albeit on two different grounds. Justice Pigeon, also writing for Justices Martland and Beetz, found that the *Fishermen Act* did not simply protect the province's fisheries but effectively oversaw licensed activities conducted in another province. The *Fishermen Act* was invalid because its subject matter was interprovincial and therefore fell under exclusive federal jurisdiction.[1561] Justice Ritchie, by contrast, refused to endorse Justice Pigeon's reasoning because the parties had not argued the issue. Instead, he found that rules of private international law (namely the pre-*Tolofson* double actionability/justifiability rule) entitled out-of-province polluters to have their licences recognized in Manitoba. The province had therefore exceeded its jurisdiction when it nullified civil rights validly acquired in another province and entitled to recognition in Manitoba.[1562] Chief Justice Laskin, also writing for Justices Judson and Spence, disagreed with both his colleagues. He defined the purpose of the *Fishermen Act* as the compensation of damage caused in Manitoba to Manitoba property. The rights asserted by the defendants, he said, stemmed from a "licence to pollute" that was devoid of extraterritorial effect. For Chief Justice Laskin, the *Fishermen Act* could not impact extraprovincial rights which the defendants simply did not have.[1563]

The provincial *Fishermen Act* was never again applied by the courts. Shortly after the Supreme Court of Canada issued its judgment in *Interprovincial Co-operatives*, Parliament amended the federal *Fisheries Act* to introduce a statutory cause of action for commercial fishermen.[1564] Interestingly, two pulp mills later challenged the

---

[1559] See *Interprovincial Co-operatives* SCC, *supra* note 161.
[1560] See *Fishermen Act*, *supra* note 874.
[1561] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 505–16, Pigeon J.
[1562] See *Ibid* at 516–26, Ritchie J, concurring.
[1563] *Ibid* at 481–505, Laskin CJC, dissenting.
[1564] See *Fisheries Act*, *supra* note 1496, s 42(3); *An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof*, SC 1976–77, c 35, s 7(3); "Bill C-38, An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof", House of Commons, Standing Committee on Fisheries and Forestry, *Minutes of Proceedings and Evidence*, 30-2, No 34 (21 June 1977) at 44–45 (JC Carton, Director of Legal Services of the Department of Fisheries and the Environment); Faieta

constitutionality of that provision in response to a lawsuit brought by a commercial crab fisherman, arguing that the new cause of action fell under exclusive provincial jurisdiction (property and civil rights).[1565] The British Columbia Supreme Court allowed the challenge to proceed on the merits,[1566] but subsequently dismissed the case on other grounds, leaving the constitutional argument unaddressed.[1567]

It is difficult to draw firm conclusions with the guidance provided in *Interprovincial Co-operatives*. As Black and Swan put it, "[t]he several reasons for judgment deal very inadequately with the serious problem of interprovincial water pollution."[1568] The Supreme Court of Canada did its best to summarize the outcome in a later case,[1569] but even one of our leading constitutional scholars admits that the *ratio decidendi* of the majority is hard to grasp.[1570] The case is a true head-scratcher indeed.

Overall, the case suggests that provinces cannot legislate to protect their property from pollution originating in another province or state. But the different routes taken by Justices Pigeon and Ritchie on extraterritoriality, and the dissent which makes it a 3-3-1 verdict, mean that this point is not settled.[1571] Even if it were, the rules governing choice

---

et al, *supra* note 1 at 177. For further discussion on this statutory cause of action, see subsection 3.2.3.2.1 above.

[1565] See *Constitution Act 1867*, *supra* note 882, s 92(13). The Supreme Court of Canada upheld the penal prohibition to discharge deleterious substances in water frequented by fish (now section 36 of the *Fisheries Act*) in *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292, 1980 CanLII 210.

[1566] See *Gagnier v Canadian Forest Products Ltd* (1990), 51 BCLR (2d) 218 at 223–25, 1990 CanLII 538 (SC).

[1567] See *Gagnier v Canadian Forest Products Ltd*, 1991 CanLII 143, [1991] BCJ No 2634 (QL) (SC).

[1568] Vaughan Black & John Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment? *Lloyd's Underwriters v Cominco Ltd*" (2008) 46:2 Can Bus LJ 292 at 292–93, n 3.

[1569] See *Crown Zellerbach Canada*, *supra* note 2 at 434–36. See also *Resolute FP Canada*, *supra* note 877 ("[…] in [*Interprovincial Co-operatives*], this Court held that Manitoba lacked the constitutional jurisdiction to enact and pursue a statutory claim against Dryden Chemical in respect of the mercury contamination into the rivers" at para 103, Côté & Brown JJ, dissenting in part).

[1570] See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2018, release 1) at § 13.3(d) [Hogg]. For commentary on *Interprovincial Co-operatives*, see generally François Chevrette & Herbert Marx, *Droit constitutionnel: notes et jurisprudence* (Montreal: Presses de l'Université de Montréal, 1982) at 1178–79 [Chevrette & Marx]; McNamara, *supra* note 227 at 114–18; Fairley, *supra* note 12 at 268–70; Joost Blom, "The Conflict of Laws and the Constitution", *supra* note 1285; Michael Terry Hertz, "'Interprovincial,' the Constitution, and the Conflict of Laws" (1976) 26:1 UTLJ 84; William H Hurlburt, "Conflict of Laws—Choice of Law—Place of Tort" (1976) 54:1 Can Bar Rev 173; Nicole Duplé, "La difficile application de la notion d'extraterritorialité" (1975) 16:4 C de D 961.

[1571] See T Bradbrooke Smith, "The Canadian Legislative Position" (1982) 5 Can-US LJ 66 at 70 ("I would venture to suggest that from [*Interprovincial Co-operatives*] we cannot arrive at a determinative rule on the issue" at 70); Chevrette & Marx, supra note 1570 ("[*Interprovincial Co-operatives*] *ne précise guère l'état du droit au sujet de l'extraterritorialité, vu la diversité des motifs des trois groupes de juges*" at 1178). But

of law and extraterritoriality have evolved considerably since and the precedential value of *Interprovincial Co-operatives* is now doubtful.[1572]

First, the Supreme Court of Canada rejected the double actionability/justifiability rule invoked by Justice Ritchie and replaced it with the *lex loci delicti* in 1995.[1573] For Justice Ritchie, the polluting activities were justified under the law of the place of acting because the defendants were licensed in Ontario and Saskatchewan, and their rights were entitled to recognition in Manitoba.[1574] Today, environmental torts may plausibly be located at the place of injury, as Chief Justice Laskin suggested in his dissent.[1575] The law of the place of injury would be the *lex loci delicti*, and it would not matter whether the conduct was justified under the law of Ontario and Saskatchewan.

Second, the result in *Interprovincial Co-operatives* rests on a now-outdated approach to extraterritoriality. Both Justices Pigeon and Ritchie relied on the *Royal Bank* case to invalidate the *Fishermen Act*.[1576] In *Royal Bank* (1913), the Judicial Committee of the Privy Council suggested that provincial statutes could never have extraterritorial effects, however incidental.[1577] In 1984, nine years after *Interprovincial Co-operatives*, the Supreme Court of Canada rejected *Royal Bank*. It held that provincial statutes were valid if their pith and substance related to intraprovincial matters, notwithstanding that they

---

see Halsbury's Laws of Canada (online), *Environment*, "Overview: Provincial Jurisdiction over the Environment: Provincial Legislative Jurisdiction" (I.4(1)) at HEN-21, "Limits to Provincial Jurisdiction: Geographical Limit" (2018 Reissue); Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)*, "The Environment and Natural Resources: The Environment: Federal Regulation of Extra-Provincial Actions" (XI.1(1)) at HCL-202, "Extra-Provincial Actions" (2015 Reissue) (describing limits to provincial jurisdiction over transboundary pollution with reference to *Interprovincial Co-operatives*).

[1572] See Olszynski, Mascher & Doelle, *supra* note 107 ("[t]he decision is four decades old and has been heavily criticized, including by one of Canada's leading constitutional scholars" at 38).

[1573] See *Tolofson*, *supra* note 1074.

[1574] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 521–23, Ritchie J, concurring.

[1575] See *ibid* at 500–501, Laskin CJC, dissenting. For further discussion on the localization of torts for choice of law purposes and the reasonings of Justice Ritchie and Chief Justice Laskin, see subsection 3.2.1.1 above.

[1576] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 511–512, Pigeon J, 523–24, Ritchie J, concurring. *Cf* Gérald Goldstein, "L'interprétation du domaine d'application international du nouveau Code civil du Québec" in *Le nouveau Code civil: interprétation et application. Les journées Maximilien-Caron 1992* (Montreal: Themis, 1992) 81 at 113–14 (suggesting that the approaches in *Royal Bank* and *Interprovincial Co-operatives* are in fact distinct).

[1577] See *Royal Bank*, *supra* note 1553 at 298.

had incidental or consequential effects on extraprovincial rights.[1578] This new approach—which the Court has followed ever since[1579]—markedly differs from the early cases applied by Justices Pigeon and Ritchie.

Because the Supreme Court of Canada is now more flexible when it assesses the extraterritorial impact of provincial statutes, it could well subscribe to Chief Justice Laskin's opinion on the nature of the *Fishermen Act*—a statute aimed at compensating damage suffered in Manitoba to Manitoba property[1580]—and find that its extraterritorial impacts remain incidental, hence constitutionally permissible. This is a popular opinion among scholars, and rightly so in my view.[1581] The net result would be that "any corporation that builds and operates a factory discharging a contaminant into an interprovincial river takes the risk that the downstream province will legislate so as to compensate its citizens, at the expense of the corporation, for the damage that the pollution causes."[1582] This is hardly unacceptable, particularly since holders of licences are seldom, if ever, entitled to full immunity from the consequences of their operations within a province.[1583]

[1578] See *Upper Churchill Water Rights Reversion Act*, *supra* note 1553 at 332. At the heart of this case was a conflict between two decisions of the Privy Council, *Royal Bank*, *supra* note 1553 ("[t]he statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it" at 298) and *Ladore*, *supra* note 1553 ("[…] though [the impugned statutes] affect rights outside the [p]rovince they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the [p]rovince" at 482–83). The Supreme Court of Canada favoured *Ladore*.

[1579] See *Imperial Tobacco* SCC 2005, *supra* note 1553 at para 28; *Castillo*, *supra* note 1294 at para 33, Bastarache J, concurring; *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21 at para 24, [2000] 1 SCR 494; *Hunt*, *supra* note 940 at 321. Whether *Van Breda* altered the law of extraterritoriality is a subject for debate. See *Van Breda*, *supra* note 112 at paras 21, 31–33; Kain & Shaw, *supra* note 1487 at 80–83 (Part 1), 252 (Part 2); Edinger, "Extraterritoriality Revisited", *supra* note 921.

[1580] See *Interprovincial Co-operatives* SCC, *supra* note 161 at 501, Laskin CJC, dissenting.

[1581] See Hogg, *supra* note 887 at § 13.3(d); Robert Wisner, "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt v T&N plc*" (1995) 40:3 McGill LJ 759 at 775–76; Pierre Brun, "La pollution du partage des compétences par le droit de l'environnement" (1993) 24:2 RGD 191 at 198; Joost Blom, "Conflict of Laws and Constitutional Law—Extraterritorial Provincial Legislation—The Queen v Thomas Equipment Ltd" (1982) 16:2 UBC L Rev 357 at 370; Blom, "The Conflict of Laws and the Constitution", *supra* note 1285 at 154–55. See also Neil Finkelstein, *Laskin's Constitutional Law*, vol 1, 5th ed (Toronto: Carswell, 1986) at 571.

[1582] Blom, "The Conflict of Laws and the Constitution", *supra* note 1285 at 155.

[1583] For further discussion on this point, see subsection 3.2.2.2 above.

The scope of the federal/provincial jurisdiction over transboundary pollution remains debatable, but may come under judicial scrutiny in the near future as governments defend their power to adopt carbon pricing measures.[1584] Until then, *Interprovincial Co-operatives* remains a key precedent when analyzing the extraterritorial scope of provincial environmental law. It may not represent good or even intelligible law, but it still casts a long shadow.

3.2.3.2.3. Enabling prompt and adequate compensation through statutory causes of action

Victims of transboundary pollution should not count on statutory causes of action to supplement civil liability and increase the likelihood of compensation. Several provinces simply have no such mechanism, and the ones that do often narrow it to the extreme. Provisions triggered only by formal convictions, for instance, hardly promote a wide access to justice for the public if regulatory enforcement is lacklustre.[1585] Meanwhile, political pressure may prevent the adoption of new statutory causes of action.[1586] The

[1584] Certain Canadian provinces, for instance, are challenging the constitutionality of federal carbon legislation before the Supreme Court of Canada. See *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186; *Reference Re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, [2020] AJ No 234 (QL) [*Alberta Reference*]; *Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, [2019] 9 WWR 377, appeal filed to the SCC as of right, 38663 (31 May 2019); *Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 OR (3d) 65, appeal filed to the SCC as of right, 38781 (28 August 2019). Those cases went in another direction, but the matter is not far-removed from the fundamental issue in *Interprovincial Co-operatives*, namely the power of provinces to regulate transboundary pollution. For mentions of the case in this context, see Bryan P Schwartz, "The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals" (2018) 41:1 Man LJ 211 at 259, n 83 (legal opinion to the Government of Manitoba); Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36:2 NJCL 331 at 366–67; Stewart Elgie, "Kyoto, the Constitution, and Carbon Trading: Waking a Sleeping *BNA* Bear (or Two)" (2007) 13:1 Rev Const Stud 67 at 118, n 234; Elisabeth DeMarco, Robert Routliffe & Heather Landymor, "Canadian Challenges in Implementing the *Kyoto Protocol*: A Cause for Harmonization" (2004) 42:1 Alta L Rev 209 at 234–36; Hélène Trudeau & Suzanne Lalonde, "La mise en œuvre du *Protocole de Kyoto* au Canada: concertation ou coercition?" (2004) 34:1 RGD 141 at 184–85. See also *Alberta Reference*, *ibid* at para 533, n 464, Wakeling JA, concurring.

[1585] On environmental law enforcement in Canada, Stepan Wood, "Canada" in Lees & Viñuales, *supra* note 81, 108 at 124–25 [S Wood]; David R Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015) at 195–97.

[1586] In 2011, federal MP and environmental lawyer Linda Duncan (New Democratic Party) tabled a private bill guaranteeing the right of all Canadians to sue for violations of federal environmental legislation. The bill was retabled on several occasions, and the House of Commons debated it on second reading in June 2019. It has not been adopted yet. A federal general election was held on 21 October 2019 and the bill will need to be retabled during the first session of the forty-third Parliament. See Bill C-438, *An Act to enact the Canadian Environmental Bill of Rights and to make related amendments to other Acts*, 1st sess, 42nd Parl,

Species at Risk Act is a good example.[1587] Private bills which preceded the adoption of the *Act* allowed private parties to commence actions against persons who threatened protected species.[1588] Subsequent bills introduced by the government removed that cause of action and maintained only the right to apply for investigation,[1589] apparently out of concern for farmers and ranchers who could have been the target of costly lawsuits by environmental groups.[1590]

Scholars and environmental advocates have long denounced the scarcity and weaknesses of existing statutory causes of action.[1591] As Wood explains in his Canadian contribution

---

2019, cl 17(2) (second reading 6 June 2019); Bill C-202, *An Act to establish a Canadian Environmental Bill of Rights and to make a related amendment to another Act*, 1st sess, 42nd Parl, 2015, cl 18(1) (first reading 9 December 2015); Bill C-634, *An Act to establish a Canadian Environmental Bill of Rights*, 2nd Sess, 41st Parl, 2011, cl 18(1) (first reading 29 October 2014); Bill C-469, *An Act to establish a Canadian Environmental Bill of Rights*, 2nd Sess, 40th Parl, 2009, cl 23(1) (first reading 29 October 2009), reinstated 3rd Sess, 40th Parl, 2010, cl 23(1) (3 March 2010) (adopted by the Standing Committee on Environment and Sustainable Development 15 February 2011). See also the initiatives in British Columbia, Manitoba and Nova Scotia, discussed *supra* notes 1542, 1544–1545.

[1587] See *Species at Risk Act*, SC 2002, c 29.

[1588] See Bill C-295, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 1st Sess, 37th Parl, 2001, cl 64 (first reading 4 March 2001); Bill C-300, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 2nd Sess, 36th Parl, 1998, cl 64 (first reading 3 November 1998); Bill C-445, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 1st Sess, 36th Parl, 1998, cl 64 (first reading 8 October 1998); Bill C-65, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 2nd Sess, 35th Parl, 1996, cl 60 (first reading 31 October 1996; referred to Committee on Environment and Sustainable Development 29 November 1996).

[1589] See Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, 2nd Sess, 37th Parl, 2000, cl 93(1) (assented to 12 December 2002), SC 2002, c 29, relying on the approval of Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, 1st Sess, 37th Parl, 2002, cl 93(1) (third reading in the House of Commons 11 June 2002; second reading in the Senate 13 June 2002); Bill C-33, *An Act respecting the protection of wildlife species at risk in Canada*, 2nd Sess, 36th Parl, 2000, cl 93(1) (first reading 11 April 2000).

[1590] See House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 36-2 (19 September 2000) (David Anderson), online: *House of Commons* <www.ourcommons.ca> [perma.cc/ZCG5-JE28] (where the Minister of Environment explained: "[w]e listened to the recommendations of the species at risk working group who said that civil suit provisions should not be part of this act. The notion that individual farmers or ranchers could be targeted by citizens' groups—not for major transgressions, but for simply letting their cattle into the wrong field—struck directly at Canadians' sense of fairness. However, we did retain the elements from Bill C-65 that enabled individuals to request a formal investigation if they had reason to believe that an offence had been committed or that one was planned" at 1655). On the process that led to the removal of the statutory cause of action from earlier bills, see Valiante, *supra* note 1494 at 86–88. On the *Species at Risk Act*'s complete legislative history, see Nadine Hoffman, "Species at Risk Act: A Comprehensive Inventory of Legislative Documents 1973-2017" (Paper delivered at the Symposium on Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection, Faculty of Law, University of Calgary, Canada, 2–3 March 2018), online (pdf): *Canadian Institute of Resources Law* <www.cirl.ca> [perma.cc/LJF6-LYCA].

[1591] See eg David R Boyd, "Elements of an Effective Environmental Bill of Rights" (2015) 27:3 J Envtl L & Prac 201 at 213–19; David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and*

to a recent book on comparative environmental law, "[t]heir demanding prerequisites, narrow scope, and broad defences make them so unattractive that few have been commenced and none has yet produced a trial decision on the merits."[1592] But the portrait is even bleaker in a transboundary context. First, the residency requirements imposed in several provinces prevent foreign victims from relying on statutory causes of action against local polluters.[1593] Second, constitutional constraints may prevent local victims from relying on statutory causes of action against foreign polluters. Even if a court held that those constraints no longer exist today, uncertainty acts as a powerful deterrent to litigation.

The law may be unsatisfactory, but the reform agenda is clear. Clarifying the scope of the provinces' power to regulate transboundary pollution, widening the scope of existing statutory causes of action and adopting new ones would help ensure equal remedy and prompt and adequate compensation to all victims of transboundary pollution. In the meantime, victims can always fall back on federal legislation, free from constitutional limitations and with at least one precedent in hand (*Edwards*).

3.3. Conclusion of Chapter 3

I identified in this third chapter the choice of law requirements associated with the duty to ensure prompt and adequate compensation and explained how they have been implemented in Canada. International environmental law has focused primarily on non-discrimination and equal remedy. And yet, equal remedy has triggered few meaningful attempts at legal reform in North America. Surely, more can be done than the *Boundary Waters Treaty*, the *International Boundary Waters Treaty Act*, the *Draft Treaty on Equal Access and Remedy*, the *Reciprocal Access Act* and the *NAAEC* have managed to achieve.

But again, we must ask ourselves whether general choice of law rules can respond to the concerns that prompted those isolated sparks of legal innovation, which the ILC picked up on to develop the duty to ensure prompt and adequate compensation. The regulation

Policy (Vancouver: UBC Press, 2003) at 246–48; Elaine L Hugues & David Iyalomhe, "Substantive Environmental Rights in Canada" (1999) 30:2 Ottawa L Rev 229 at 247–53.
[1592] S Wood, *supra* note 1585 at 126.
[1593] See Secretariat of the CEC, *supra* note 227 at 243–46.

theory supports the assertion that choice of law rules have a regulatory impact in environmental law. They can legitimately favour victims over polluters. They can legitimately seek to increase the likelihood of compensation and to raise environmental standards. And they can do so openly. They are a crucial aspect of the *ILC Principles on the Allocation of Loss*, even though the ILC obscured them in the name of a diversified state practice. The objectives here are twofold. First, we must ensure that foreign victims get at least the same treatment as local victims through choice of law rules. Second, we must ensure that victims can avail themselves of a law that favours prompt and adequate compensation. The ubiquity principle has emerged as the most appropriate choice of law rule to meet those objectives. It should not come as a surprise that the EU adopted it and UNEP now recommends its adoption in domestic civil liability regimes.

Letting the victim choose between the law of the place of acting and the law of the place of injury as the *lex loci delicti* is not a perfect solution. It may lead to fragmentation among the claims of different plaintiffs. It makes compliance harder for defendants, particularly if they cannot plead unforeseeability. But it also ensures equal remedy, favours compensation and ultimately disincentivizes polluters from taking advantage of weaker legal regimes. It reflects and responds to the challenges of transboundary pollution in private international law better than any rigid definition of the *lex loci delicti* would.

The Canadian choice of law framework lags behind. Local and foreign victims have equal access to the courts, but they may be treated differently once they get there as a result of choice of law rules. Victims may also lose the benefit of the more favourable law as a result of a rigid definition of the *lex loci delicti*. This is particularly true in common law provinces. The CCQ leans closer to the ubiquity principle, but victims still face a narrowly interpreted injury exception and a foreseeability requirement. To make things worse, statutory causes of action across the country are ill-suited to transboundary environmental disputes.

The lack of clear and binding appellate case law magnifies those problems. The *Reciprocal Access Act* has never been judicially tested, let alone its choice of law rule

(which is unsurprising given the *Act*'s extremely narrow scope). The Quebec Court of Appeal has only dealt with article 3126 CCQ twice, in cases that share few of the attributes of transboundary environmental disputes. The Supreme Court of Canada has never dissipated the uncertainty surrounding *Tolofson*'s adjustments to the *lex loci delicti*. Statutory reform is nowhere in sight. Victims of transboundary pollution pay the price of this uncertainty and polluters carry on.

Solutions are there for the taking. A strong consensus has developed around the ubiquity principle. It is achievable through legislative or judicial reform. By that, I do not mean a complete overhaul of the choice of law framework, but a surgical intervention to better deal with the peculiarities of environmental torts. This would increase the likelihood of compensation for victims of transboundary pollution who choose to sue in Canada and ultimately contribute to environmental justice.

GENERAL CONCLUSION

Research findings

I identified in this thesis a duty to ensure the availability of prompt and adequate compensation for all victims of transboundary pollution. The precise status of the duty in public international law remains open for debate, but it is mentioned in numerous environmental treaties and other documents such as UNGA resolutions and soft law instruments.[1594] It forms the backbone of the *ILC Principles on the Allocation of Loss*. Scholars treat it as an emerging principle of international environmental law or an existing one.[1595] A clear duty to ensure *the availability of* prompt and adequate compensation is the best we can achieve in the current state of international law. The doctrine of state responsibility remains difficult to grasp with respect to environmental damage and equally difficult to incorporate into a treaty, as the *Paris Agreement* recently showed us.[1596] The doctrine of state liability is virtually nonexistent.[1597] Civil liability treaties are plentiful, but most do not have wide membership even though they helpfully focus on private parties rather than states.[1598] In this context, the duty to ensure prompt and adequate compensation is a promising way forward.

Throughout this thesis, I made clear that I viewed the *ILC Principles on the Allocation of Loss* as a stepping-stone for the further development of international liability law. Of course, we must be careful not too read too much into them. They represent a watered-down political compromise on a historically controversial issue. States have been somewhat indifferent to their contents despite repeated calls from the UNGA. But the *ILC Principles on the Allocation of Loss* say more about the future of international liability law than about its current state. They may not codify existing international law, but they provide a realistic roadmap to improve the situation of victims through concepts such as equal access and equal remedy. States can discharge their obligations through a variety of means so long as prompt and adequate compensation remains available.

[1594] See subsections 1.2.1.1 and 1.2.1.2 above.
[1595] See subsection 1.2.1.3 above.
[1596] See subsections 1.1.2 and 1.1.4.3 above.
[1597] See subsection 1.1.3 above.
[1598] See subsection 1.1.4 above.

Regulatory diversity is embraced rather than being perceived as an impediment to treaty-making. This is an important step we ought to acknowledge.

The reader will have noticed a drastic—and perhaps challenging—shift between the contents of the first and the second/third chapter of this thesis. I began with the vast topic of liability in international environmental law, then delved into the intricacies of Canadian private international law. This includes important but somewhat specific problems such as the local action rule,[1599] the localization of a tort,[1600] the public law exception,[1601] and the extraterritorial reach of provincial statutes.[1602] It is perfectly reasonable to be well versed in international environmental law, but not in private international law, and vice versa.

This is a conscious shift on my part. In fact, it is the point of my thesis. Translating the *ILC Principles on the Allocation of Loss* or the *UNEP Guidelines on Liability* (and everything that came before them) into a domestic regime of private international law reveals its regulatory function. It shows that we can work towards meaningful environmental justice using a very different discipline which, unlike international environmental law, addresses the public interest somewhat less directly. I chose to study *Canadian* private international law for reasons explained in the introduction, but a similar translation process can occur in any state. It can also occur with any of the substantive rules of civil liability set out in the *ILC Principles on the Allocation of Loss*, the *UNEP Guidelines on Liability* or other soft law instruments (identity of the person liable, standard of care, defences and other rules not discussed in this thesis).

I endeavoured in this thesis to identify what the duty to ensure prompt and adequate compensation entails in terms of jurisdictional and choice of law rules in Canada. My conclusions are the following.

First, prompt and adequate compensation entails equal access to the courts for local and foreign victims. I discussed this subset of non-discrimination in the second chapter. The

[1599] See subsection 2.2.1.1.2 above.
[1600] See subsection 2.2.1.2 above.
[1601] See subsections 2.2.3.2.1 and 3.2.2.1 above.
[1602] See subsection 3.2.3.2.2.2 above.

general law of jurisdiction can achieve this result if courts have jurisdiction at the place of acting (in order for foreign victims to sue Canadian polluters) *and* at the place of injury (in order for local victims to sue foreign polluters). Jurisdiction at the place of acting does not cause much problem because it flows from the activities of the polluter in Canada. It does, however, imply the abolition of the local action rule which prevents courts from hearing disputes involving foreign land.[1603] Jurisdiction at the place of injury implies the recognition that the tort has occurred there, or at least that courts at the place of injury have a sufficiently strong connection with the dispute.[1604] Neither is a problem in Canadian private international law. The local action rule has doubtful precedential value in tort disputes, such that Canadian courts can (and should) assert jurisdiction over a local polluter that caused damage elsewhere.[1605] Courts in all provinces can also assert jurisdiction over a foreign polluter based on damage suffered in the forum.[1606] Local and foreign victims of transboundary pollution have equal access to Canadian courts insofar as jurisdiction is concerned. Residency requirements in environmental statutes and procedural mechanisms such as security for costs distinctively affect foreign plaintiffs,[1607] but equal access is generally secured. No reform is necessary. Attempts to enforce a foreign judgment against a Canadian polluter, however, may trigger a debate on the public law/public policy exception.[1608] Indirect jurisdiction requirements in Quebec and in New Brunswick (in an international context) may also prevent the enforcement of a judgment rendered at the place of injury,[1609] but the prospects of enforcement are generally acceptable in most provinces.

Second, prompt and adequate compensation entails equal remedy for local and foreign plaintiffs and the application of a substantive law which favours compensation. I discussed this other subset of non-discrimination in the third chapter. Again, the general choice of law framework can reach this result if it lets plaintiffs choose between the law

[1603] See subsection 2.2.1.1 above.
[1604] See subsection 2.2.1.2 above.
[1605] See subsection 2.2.1.1.2 above.
[1606] See subsection 2.2.1.2.2 above.
[1607] See subsection 2.1.2 above.
[1608] See subsection 2.2.3.1 above.
[1609] See subsection 2.2.3.2 above.

of the place of acting and the law of the place of injury. This is the ubiquity principle.[1610] It removes the possibility for polluters to take advantage of a weaker law and maximizes victims' chances of recovery. The common law is problematic in this regard because it tends to favour a single law (place of injury).[1611] Quebec civil law admits an option albeit on somewhat restrictive terms.[1612] Direct implementation of the ubiquity principle into the common law framework (by statute or judicial follow-up to *Tolofson*) and the CCQ (necessarily by statute) would better fulfill the requirements of prompt and adequate compensation.

The time may be ripe for another attempt at legislative reform, albeit of different kind than the ones contemplated in the 1970s and 1980s. Those years were fruitful in producing equal access/remedy proposals designed to be incorporated into national law, particularly with the impetus provided by the recommendations of the OECD.[1613] The same was true in North America with the *Reciprocal Access Act*.[1614] The sheer number of scholarly articles published in those years signalled a strong desire to facilitate cross-border litigation in the hope that it would complement or replace state intervention in environmental matters. Enthusiasm gradually faded and private litigation revealed its limits (which, arguably, were obvious from the start but downplayed by its most enthusiastic advocates). The spirit of attempted reforms, however, remains as relevant as ever, and private litigation continues to play an important role in environmental law.[1615] The regulation theory in private international law opens up new and promising ways of dealing with transboundary pollution.[1616] It allows us to squarely focus on jurisdictional and choice of law rules—something every state is familiar with—rather than on all-encompassing and politically sensitive legal instruments designed to facilitate cross-border environmental litigation or to harmonize entire civil liability regimes. Whether

[1610] See subsection 3.1.4.2 above.
[1611] See subsection 3.2.1.1 above.
[1612] See subsection 3.2.1.3 above.
[1613] See subsections 2.1.2 and 3.1.2 above.
[1614] See subsections 2.1.3 and 3.1.3 above.
[1615] See S Wood, *supra* note 1585 ("[d]espite the emergence of modern environmental regulation, civil litigation remains important. It is often the only way to recover compensation for environmental harm, it can fill gaps in legislative schemes, it can be used proactively to prevent harm, and it can put issues on the public agenda when government and industry refuse to listen" at 118).
[1616] See subsection 1.3.2.2 above.

through targeted statutory reform or judicial evolution, this project seems more realistic than the unfinished reforms of the past decades. The proposals contained in this thesis can certainly make their way into a treaty or model law specifically aimed at transboundary pollution, but they do not have to. This is the important takeaway.

Other areas of investigation

I investigated in this thesis the phenomenon of cross-border environmental litigation before domestic courts and the claim that private international law can help ensure prompt and adequate compensation. My approach raises four broad policy questions which relate to other sites of legal investigation not directly addressed in this thesis. These policy questions contextualize my argument within a broader set of equally important legal processes.

First, what are the respective roles of state and non-state law in environmental matters? Every budget cut or report of lacklustre enforcement brings back the question of whether state action (and indirectly the private parties who rely on state action in litigation before domestic courts) can adequately protect the environment. To what extent do private environmental standards developed by industries and NGOs and so-called global environmental law[1617] play a role alongside state intervention or private parties acting as state proxies? Would it amount to condoning the disengagement of the state as the regulator of environmentally harmful conduct?

Second, what are the respective roles of courts and legislatures? Are domestic courts truly major actors in global governance?[1618] Are they equipped to deal with complex environmental problems? Should we turn instead to politically accountable actors to make the difficult policy decisions required in this area?

Third, what are the respective roles of public and private law? Can private law be more than a backup option? Does it have systemic implications, not just for victims who seek

[1617] See eg the sources cited *supra* note 100.
[1618] See eg the sources cited *supra* note 574.

compensation but for the protection of the environment itself? Is command-and-control legislation the only way to protect the environment?[1619]

Fourth, what are the respective roles of prevention and compensation? Faced with the catastrophic consequences of climate change and the loss of biodiversity across the globe, it is easy to conclude that (international) environmental law simply fails to prevent transboundary damage.[1620] Should we resign ourselves to address damage *ex post*, sometimes awkwardly through legal regimes that are not obviously designed for such a daunting task? What can we do to improve administrative processes and prospectively account for the transboundary impacts of human activity?

Perhaps these questions will never be fully answered, not singlehandedly by jurists anyway. At the very least, legal research should strive for a meaningful dialogue between scholars who devote their time to one or the other. My thesis is but one component of this larger collective effort.

Concluding thoughts

Throughout my work, I struggled with two common assumptions in the way we think about liability for transboundary pollution. These assumptions obscured the answers I was looking for because they implied that private international law could not regulate transboundary pollution in a meaningful way. The first assumption is that a global phenomenon (or at least one that transcends borders) requires a global legal response. Domestic regimes are but second-best options. They respond to some of the challenges of transboundary pollution, but their response is inherently chaotic and generally insufficient. They rely on a territorial understanding of the law and thus fail to grasp the *entirety* of the global problem, no matter how private international law defines their

[1619] See eg the sources cited *supra* note 88.
[1620] See eg Maljean-Dubois, *supra* note 252 ("[s]*i l'on met en parallèle l'impressionnant développement du droit international de l'environnement et l'aggravation rapide des problems environnementaux dont fait état régulièrement les rapports sur l'environnement, force est de constater que le foisonnement des règles n'a pas produit les effets escomptés*" at 251); Jan G Laitos & Lauren Joseph Wolongevicz, "Why Environmental Laws Fail" (2014) 39:1 Wm & Mary Envtl L & Pol'y Rev 1 ("[w]e have been exceptionally aggressive in utilizing our legal institutions to manage, regulate, and protect environmental and natural resources, yet there is a growing consensus that the earth and its planetary systems are in serious trouble. Why have all these laws been unable to do the job?" at 3–4).

respective reach. The second assumption is that existing legal frameworks do not adequately deal with transboundary pollution because its magnitude or characteristics are unprecedented. This is particularly true for climate change. Something new is required, ideally in the form of a global regime (which then brings us back to the first assumption).

Most, if not all areas of the law, face constant pressure to stay relevant in light of new phenomena which legislatures and courts had not foreseen. New problems arise, the law adapts, and so on. But there are few areas in which we feel a need to justify our own relevance as strongly and consistently as we do in private international law.[1621] Each international phenomenon brings a new wave of arguments "pro-private international law" or "against-private international law". The debate focuses not on the contents of the rules themselves, but on their very legitimacy, relevance and usefulness. The Internet—described in the early days as borderless and practically immune to territorial forms of regulation—is an obvious example.[1622] Decades after it went mainstream, so-called exceptionalists and unexceptionalists still debate whether Internet-based technologies have distinct and global implications that warrant an equally distinct and global form of regulation, as opposed to a web of domestic regimes held together by private international law.[1623] Divergent characterizations of the Internet as border-free or border-bound have an impact on the kinds of legal solutions we propose to deal with its challenges. Views on the relevance or usefulness of private international law vary accordingly.[1624] This is equally true for transboundary pollution, and indeed all problems described as inherently international.

[1621] Going so far as to promote private international law as "an offer we cannot refuse." Chris Thomale, "The Forgotten Discipline of Private International Law: Lessons from *Kiobel v Royal Dutch Petroleum*—Part 2" (2016) 7:3 Transnatl Leg Theory 287 at 312.
[1622] See eg David R Johnston & David Post, "Law and Borders—The Rise of Law in Cyberspace" (1996) 48:5 Stan L Rev 1367.
[1623] In the early days of the mainstream Internet, compare the views of David Post, "Against "Against Cyberanarchy"" (2002) 17:4 BTLJ 1365 and Jack L Goldsmith, "Against Cyberanarchy" (1998) 65:4 U Chicago L Rev 1199. More recently, compare the views of Jennifer Daskal, "The Un-Territoriality of Data" (2015) 125:2 Yale LJ 326 and Andrew Keane Woods, "Against Data Exceptionalism" (2016) 68:4 Stan L Rev 729.
[1624] See Andrea Slane, "Tales, Techs and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet" (2008) 71:3 Law & Contemp Probs 129.

The two assumptions described above, as well as our general discomfort towards private international law as a still-useful method to deal with regulatory conflicts, may explain why the discipline has not greatly factored in our legal response to global environmental problems so far—why the obstacle theory described in the first chapter still prevails in the literature. I am not saying that those assumptions are wrong. We may have good reasons to favour a truly global response to pollution over a variety of domestic approaches haphazardly strung together. Likewise, we may have good reasons to design new legal instruments for our day and age rather than attempt to stretch existing law in implausible ways. As Berman suggests when criticizing unexceptionalist accounts of the Internet, the very idea that so-called established legal principles can apply to new international phenomena is somewhat circular because new international phenomena keep established legal principles in a constant state of flux.[1625] The problem is therefore not that the two assumptions cannot be justified with respect to liability for transboundary pollution. The problem is that they are distracting and often insufficiently nuanced. No approach based on state responsibility requires the demonstration that transboundary pollution is *inherently* international or should *always* be attributable to states, just as no approach based on domestic civil liability requires the demonstration that international law is *absolutely* ineffective and that domestic legal regimes are perfectly comfortable with the issue because *only* private parties are concerned.

I chose a research angle that avoids the pitfalls of an all-or-nothing approach and focuses instead on the complex and understated connections between private international law and international environmental law. Understanding the regulatory function of *private* international law with respect to transboundary pollution is impossible if we ignore the states' commitment to ensure the availability of prompt and adequate compensation, expressed through treaties, custom and soft law instruments with obvious relevance to the problem. By the same token, understanding the development of the duty to ensure prompt and adequate compensation in *public* international law is impossible if we focus only on states themselves, without acknowledging the possibility (and desirability) of holding

[1625] See Paul Schiff Berman, "*Yahoo! v LICRA*, Private International Law and the Deterritorialisation of Data" in Muir-Watt et al, *supra* note 52, 393 at 402–404.

private parties liable in domestic law, a possibility which international environmental law itself embraces.

Some will argue that domestic law can solve the liability conundrum in international environmental law. Others will disagree. But we can hardly have this conversation if we do not clearly understand how domestic environmental regimes operate in relation to one another—more specifically how private international law performs a regulatory function by coordinating various approaches to liability and environmental protection in domestic law. I argued in this thesis that this regulatory function exists, and more importantly, that it is informed by a duty to ensure the availability of prompt and adequate compensation for all victims of transboundary pollution. This is a sound conceptual basis for a conversation that must continue.

*****

BIBLIOGRAPHY[1]

INTERNATIONAL MATERIALS

Treaties and other agreements

Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, 22 November 1978, 1153 UNTS 187, Can TS 1978 No 20 (entered into force 22 November 1978) as amended by the Protocol of 16 October 1983, Can TS 1983 No 22, TIAS No 10798 (entered into force 16 October 1983), the Protocol of 18 November 1987, 2185 UNTS 504, Can TS 1987 No 32, TIAS No 11551 (entered into force 18 November 1987) and the Protocol of 7 September 2012, Can TS 2013 No 8, TIAS No 13212 (entered into force 12 February 2013), superseding *Agreement Between Canada and the United States of America on Great Lakes Water Quality*, 15 April 1972, 837 UNTS 213, Can TS 1972 No 12, 11:4 ILM 694 (entered into force 25 April 1972).

Agreement Between the Government of Canada and the Government of the United States of America on Air Quality, 13 March 1991, 1852 UNTS 79, Can TS 1991 No 3, 30:3 ILM 678 (entered into force 13 March 1991) as amended by the Protocol of 7 December 2000, Can TS 2000 No 26 (entered into force 7 December 2000).

Agreement Concerning Co-operation, Finland, Denmark, Iceland, Norway and Sweden, 23 March 1962, 434 UNTS 145 (entered into force 1 July 1962).

Agreement Concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport, Federal Republic of Germany and Austria, 19 December 1967, 945 UNTS 87, Bundesgesetzblatt (BGBI) [Federal Law Gazette] II 13 (entered into force 17 May 1974).

Agreement Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, Canada and United States, 25 March 1965, 607 UNTS 141, Can TS 1966 No 22, 4:3 ILM 468 (entered into force 11 October 1966).

Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (Unofficial Version), 18 December 2018, online (pdf): *Government of Canada* <www.international.gc.ca> [perma.cc/FMP9-3N4S] (not yet in force).

Agreement on Environmental Cooperation Between Canada and the Republic of Honduras, 5 November 2013, Can TS 2014 No 24 (entered into force 1 October 2014).

Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Costa Rica, 23 April 2001, Can TS 2002 No 18 (entered into force 1 November 2002).

Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Chile, 6 February 1997, Can TS 1997 No 51, 36:5 ILM 1196 (entered into force 5 July 1997).

[1] McGill Law Journal, *Canadian Guide to Uniform Legal Citation*, 9th ed (Toronto: Thomson Reuters, 2018).

Agreement on the Environment Between Canada and the Hashemite Kingdom of Jordan, 28 June 2009, Can TS 2012 No 23 (entered into force 1 October 2012).
Agreement on the Environment Between Canada and the Republic of Colombia, 21 November 2008, Can TS 2011 No 12 (entered into force 15 August 2011).
Agreement on the Environment Between Canada and the Republic of Panama, 13 May 2010, Can TS 2013 No 10 (entered into force 1 April 2013).
Agreement on the Environment Between Canada and the Republic of Peru, 1 August 2009, Can TS 2009 No 16 (entered into force 1 August 2009).
Agreement on the Settlement of Claims Relating to Gut Dam, Canada and United States, 18 November 1968, 19:6 USTA 7863, TIAS No 6624 (entered into force 18 November 1968).
Antarctic Treaty, 1 December 1959, 402 UNTS 71, Can TS 1988 No 34, 19:4 ILM 860 (entered into force 23 June 1961).
ASEAN Comprehensive Investment Agreement, 26 February 2009 (entered into force 29 March 2012), online (pdf): *ASEAN* <www.asean.org> [perma.cc/3Q5C-ACT7].
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 1673 UNTS 57, Can TS 1992 No 19, 28:3 ILM 657 (entered into force 5 May 1992).
Canada-United States Settlement of Gut Dam Claims: Report of the Agent of the United States Before the Lake Ontario Claims Tribunal, 27 September 1968, 8:1 ILM 118 (1968).
Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 2226 UNTS 208, UKTS 2004 No 17, 39:5 ILM 1027 (entered into force 11 September 2003).
Comprehensive Economic and Trade Agreement, Canada and European Union, 30 October 2016, [2017] OJ, L 11/23 (not yet in force, provisionally applied in part 21 September 2017).
Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 23 March 1981, UN Doc UNEP/16.22/7, 20:3 ILM 746 (entered into force 5 August 1984).
Convention for the Protection of the Mediterranean Sea Against Pollution, 16 February 1976, 1102 UNTS 27, 15:2 ILM 290 (entered into force 12 February 1978).
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447, UKTS 2005 No 24, 38:3 ILM 517 (entered into force 30 October 2001).
Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, Can TS 1993 No 24, 31:4 ILM 818 (entered into force 29 December 1993).
Convention on Choice of Court Agreements, 30 June 2005, 44:6 ILM 1294 (entered into force 1 October 2015), reprinted in Hague Conference on Private International Law, *Collection of Conventions: 1951–2009* (The Hague: Hague Conference on Private International Law, 2009) 476.
Convention on Civil Liability for Bunker Oil Pollution Damage, 23 March 2001, Can TS 2010 No 3, 40:6 ILM 1493 (entered into force 21 November 2008).
Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, 10 October 1989, UN Doc ECE/TRANS/79 (not yet in force).

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 26 June 1993, Eur TS 1993 No 150, 32:5 ILM 1228 (not yet in force).

Convention on Civil Liability for Nuclear Damage, 21 May 1963, 1063 UNTS 265, UKTS (Misc) 1964 No 9, 2:4 ILM 727 (entered into force 12 November 1977) as amended by the Protocol of 12 September 1997, 2241 UNTS 270, 36:6 ILM 1454 (entered into force 4 October 2003).

Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, UKTS (Misc) 1977 No 8, 16:6 ILM 1450.

Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 309, Can TS 1998 No 11, 30:3 ILM 800 (entered into force 27 June 1997).

Convention on International Access to Justice, 25 October 1980, 1510 UNTS 375, 19:6 ILM 1505 (entered into force 1 May 1988), reprinted in Hague Conference on Private International Law, *Collection of Conventions: 1951–2009* (The Hague: Hague Conference on Private International Law, 2009) 300.

Convention on International Liability for Damage Caused by Space Objects, 29 March 1972, 961 UNTS 187, Can TS 1975 No 7, 10:5 ILM 965 (entered into force 1 September 1972).

Convention on Long-Range Transboundary Air Pollution, 13 November 1979, 1302 UNTS 217, Can TS 1983 No 34, 18:6 ILM 1442 (entered into force 16 March 1983).

Convention on Supplementary Compensation for Nuclear Damage, 12 September 1997, Can TS 2017 No 30, 36:6 ILM 1454 (entered into force 15 April 2015).

Convention on the Law Applicable to Products Liability, 2 October 1973, 1056 UNTS 187, 11:6 ILM 1283 (entered into force 1 October 1977), reprinted in Hague Conference on Private International Law, *Collection of Conventions: 1951–2009* (The Hague: Hague Conference on Private International Law, 2009) 202.

Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, UKTS 2015 No 5, 36:3 ILM 703 (entered into force 17 August 2014), as adopted by the UNGA in *Convention on the law of the non- navigational uses of international watercourses*, GA Res 51/229, UNGAOR, 51st Sess, Supp No 49, UN Doc A/RES/51/229 (1997) Annex.

Convention on the Liability of the Operators of Nuclear Ships, 25 May 1962, 57:1 AJIL 268 (not yet in force).

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, Can TS 1978 No 33, 10:2 ILM 289 (entered into force 24 April 1972).

Convention on the Protection and Use of Transboundary and International Lakes, 17 March 1992, 1936 UNTS 269, UKTS (Misc) 1995 No 5, 31:6 ILM 1313 (entered into force 6 October 1996).

Convention on the Protection of the Black Sea Against Pollution, 21 April 1992, 1764 UNTS 3, 32:4 ILM 1110 (entered into force 15 January 1994).

Convention on the Protection of the Environment (With Protocol), Denmark, Finland, Norway and Sweden, 19 February 1974, 1092 UNTS 279, 13:3 ILM 591 (entered into force 5 October 1976).

Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019, online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/P2HL-39GR] (not yet in force).

Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971, 1144 UNTS 249, 5:4 ILM 636 (entered into force 20 August 1979), reprinted in Hague Conference on Private International Law, *Collection of Conventions: 1951–2009* (The Hague: Hague Conference on Private International Law, 2009) 112.

Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, 2105 UNTS 457, UKTS 2003 No 5, 31:6 ILM 1333 (entered into force 19 April 2000).

Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, 956 UNTS 251, UKTS 1968 No 69, 55:4 AJIL 1082 (entered into force 1 April 1968) as amended by the Additional Protocol of 28 January 1964, 956 UNTS 251, UKTS 1968 No 69 (entered into force 1 April 1968), the Protocol of 16 November 1982, 1519 UNTS 319, UKTS 1989 No 6 (entered into force 7 October 1988) and the Protocol of 12 February 2004, UKTS (Misc) 2015 No 6 (not yet in force).

Convention Related to Certain Complaints Arising from the Operation of the Smelter at Trail, British Columbia, Canada and United States, 15 April 1935, Can TS 1935 No 20, 49 Stat 3245 (entered into force 3 August 1935).

Convention Related to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 17 December 1971, 974 UNTS 255, UKTS (Misc) 1972 No 39, 11:2 ILM 277 (entered into force 15 July 1975).

Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, 31 January 1963, 1041 UNTS 358, UKTS 1975 No 44, 2:4 ILM 685 (entered into force 4 December 1974) as amended by the Additional Protocol of 28 January 1964, 956 UNTS 251, UKTS 1975 No 44 (entered into force 4 December 1974), the Protocol of 16 November 1982, 1650 UNTS 446, UKTS 1992 No 17 (entered into force 1 August 1991) and the Protocol of 12 February 2004, UKTS (Misc) 2015 No 7 (not yet in force).

Free Trade Agreement Between Canada and the Republic of Korea, 22 September 2014, Can TS 2015 No 3 (entered into force 1 January 2015).

International Convention on Civil Liability for Oil Pollution Damage, 27 November 1992, 1956 UNTS 255, UKTS 1996 No 86 (entered into force 30 May 1996) as amended by IMO Res LEG.1(82), 18 October 2000, IMO Doc Res LEG.1(82) (entered into force 1 November 2003), superseding *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 3, Can TS 1989 No 46, 9:1 ILM 45 (entered into force 19 June 1975).

International Convention on Liability and Compensation for the Carriage of Hazardous and Noxious Substances by Sea, 3 May 1996, UKTS (Misc) 1997 No 5, 35:6 ILM 1406 (not yet in force) as amended by the Protocol of 30 April 2010, IMO Doc LEG/CONF.17/10, UKTS (Misc) 1997 No 5 (not yet in force).

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 27 November 1992, 1953 UNTS 373, UKTS 1996 No 87 (entered into force 30 May 1996), as amended by IMO Res LEG.2(82), 18 October 2000, IMO Doc Res LEG.2(82) (entered into force 1 November 2003) and the Protocol of 16 May 2003, Can TS 2010 No 4, UKTS 2012 No 48 (entered into force 3 March 2005), superseding *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 1110 UNTS 57, Can TS 1989 No 47, 11:2 ILM 284 (entered into force 16 October 1978).

Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention, 21 September 1988, 1672 UNTS 293, UKTS (Misc) 1989 No 12 (entered into force 27 April 1992).

Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 24 April 1978, 140 UNTS 133, 17:3 ILM 511 (entered into force 1 July 1979).

Liability Arising from Environmental Emergencies, 14 June 2005, [2011] ATNIF 7, 45:1 ILM 5 (not yet in force), reprinted in Antarctic Treaty Consultative Meeting, *Final Report of the Twenty-Eighth Antarctic Treaty Consultative Meeting: Stockholm, Sweden, 6–17 June 2005* (Buenos Aires: Antarctic Treaty Secretariat, 2005) at 63–72, Annex VI to the *Protocol on Environmental Protection to the Antarctic Treaty*, 4 October 1991, ATCM Doc XI ATSCM/2/3/2, UKTS 1999 No 6, 30:6 ILM 1461 (entered into force 14 January 1998).

Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 15 October 2010, 50:1 ILM 108 (entered into force 5 March 2018).

Nairobi International Convention on the Removal of Wrecks, 18 May 2007, UKTS 2016 No 30, 46:4 ILM 697 (entered into force 14 April 2005).

North American Agreement on Environmental Cooperation, Canada, United States and Mexico, 14 September 1993, Can TS 1994 No 3, 32:6 ILM 1480 (entered into force 1 January 1994).

North American Free Trade Agreement, Canada, United States and Mexico, 17 December 1992, Can TS 1994 No 2, 32:2 ILM 289 (entered into force 1 January 1994).

Paris Agreement, 12 December 2015, Can TS 2016 No 9, 55:4 ILM 743 (entered into force 4 November 2016).

Protocol for the Protection of the Marine Environment Against Pollution from Land-Based Sources, 21 February 1990, 2399 UNTS 3 (entered into force 1 February 1993).

Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, 14 October 1994, UN Doc UNEP(OCA)/MED IG.4/4, [2013] OJ, L 4/15 (entered into force 24 March 2011).

Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 21 May 2003, UNECE Joint Dec 1 in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary

Watercourses and International Lakes and to the Convention on the Transboundary Effects of Industrial Accidents, *Report of the 2nd joint special session held at Kiev (Ukraine) on 21 May 2003*, UN Doc ECE/MP.WAT/12 & ECE/CP.TEIA/10 (2003) Annex (not yet in force).

Protocol on Civil Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste, 10 December 1999, COP5 Dec V/29 in Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, UN Doc UNEP/CHW.5/29 (1999) Annex III (not yet in force).

Protocol on Settlement of Canada's Claim for Damages Caused by "Cosmos 954", Canada and Union of Soviet Socialist Republics, 2 April 1981, Can TS 1981 No 8, 20:3 ILM 689 (entered into force 2 April 1981).

Revised African Convention on the Conservation of Nature and Natural Resources, 11 July 2003 (not yet in force).

Revised Protocol on Shared Watercourses of the Southern African Development Community, 7 August 2000, 40:2 ILM 321 (entered into force 22 September 2003).

Statute of the Hague Conference on Private International Law, 9 & 31 October 1951, 220 UNTS 121, UKTS 1955 No 65, 60:2 AJIL 461 (entered into force 15 July 1955), reprinted in Hague Conference on Private International Law, *Collection of Conventions: 1951–2009* (The Hague: Hague Conference on Private International Law, 2009) 2.

Treaty of the Southern African Development Community, 17 August 1992, 32:1 ILM 120, 5:2 Afr J Intl & Comp L 418 (entered into force 5 October 1993).

Treaty Relating to the Boundary Waters and Questions Arising Along the Border Between the United States and Canada, United Kingdom and United States, 11 January 1909, UKTS 1910 No 23, 36 US Stat 2448 (entered into force 5 May 1910).

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, UKTS 1999 No 81, 21:6 ILM 1261 (entered into force 16 November 1994).

United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, Can TS 1994 No 7, 31:4 ILM 851 (entered into force 21 March 1994).

United States–Mexico–Canada Agreement, 30 November 2018, online: *Government of Canada* <www.international.gc.ca> (not yet in force).

Jurisprudence

Arbitral tribunals

ADC Affiliate Ltd v Republic of Hungary (2006), 15 ICSID Rep 534 (International Center for Settlement of Investment Disputes).

CME Czech Republic BV v Czech Republic (2006), 9 ICSID Rep 264, 15:4 WTAM 83 (UNCITRAL).

Government of the State of Kuwait v American Independent Oil Company (AMINOIL) (1982), 21:5 ILM 976, 66 ILR 518 (ad hoc).
Libyan American Oil Company (LIAMCO) v Government of the Lybian Arab Republic (1981), 20:1 ILM 1, 62 ILR 140 (ad hoc).
Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic (1977), 17:1 ILM 1, 53 ILR 389 (ad hoc).
Trail Smelter Arbitral Decision (United States v Canada) (1941), 3 RIAA 1905, 33:1 AJIL 182 & 35:4 AJIL 684 (ad hoc).

International courts and tribunals

Case concerning Aerial Herbicide Spraying (Ecuador v Colombia), Order of 13 September 2013, [2013] ICJ Rep 278.
Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States), [1986] ICJ Rep 14.
Case concerning Pulp Mills on the River Uruguay (Uruguay v Argentina), [2010] ICJ Rep 14.
Case concerning the Factory at Chorzów (1928), PCIJ (Ser A) No 17.
Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia), [1997] ICJ Rep 92.
Case of the SS Lotus (France v Turkey) (1927), PCIJ (Ser A) No 10.
Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), [2015] ICJ Rep 665.
Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), [2018] ICJ Rep 15.
Corfu Channel Case (United Kingdom v Albania), [1949] ICJ Rep 4.
Environment and Human Rights (Colombia) (2017), Advisory Opinion OC-23/17, Inter-Am Ct HR (Ser A) No 23.
In the Matter of the People of Enewetak (2000), 39:5 ILM 1214 (Marshall Islands Nuclear Claims Tribunal).
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep 226.
Naït-Liman v Switzerland [GC], No 51357/07, [2018] ECHR 243.
Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, [2011] ITLOS Rep 10, 50:4 ILM 458.
Tolstoy Miloslavsky v United Kingdom (1995), ECHR (Ser A) 51 (No 316-B), 20 EHRR 442.
United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia) (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report), 39:1 ILM 121.
United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaints by India et al) (2001), WTO Doc WT/DS58/AB/RW (Appellate Body Report).
United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico) (2012), WTO Doc WT/DS381/AB/R (Appellate Body Report).

United States—Restrictions on Imports of Tuna (No 1) (Complaint by Mexico) (1991), GATT Doc DS21/R, 39th Supp BISD 155 (1991–92), 30:6 ILM 1598.
United States—Restrictions on Imports of Tuna (No 2) (Complaint by the European Communities) (1994), GATT Doc DS29/R, 33:4 ILM 842.

Arguments

Claim Against the USSR for Damage Caused by Soviet Cosmos 954, 23 January 1979, 18:4 ILM 899.
Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia), [1997] ICJ Rep 92 (Memorial of the Republic of Hungary).

United Nations

Resolutions, decisions and other documents

Adoption of the Paris Agreement, COP21 Dec 1/CP.21 in Conference of the Parties to the United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum, Part two: Action taken by the Conference of the Parties at its twenty-first session*, UN Doc FCCC/CP/2015/10/Add.1 (2016) 2, as noted by the UNGA in *Protection of global climate for present and future generations of humankind*, GA Res 71/228, UNGAOR, 71st Sess, Supp No 49, UN Doc A/Res/71/228 (2016).
Allocation of loss in the case of transboundary harm arising out of hazardous activities, GA Res 61/36, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/36 (2006) Annex, reprinted in United Nations, *The Work of the International Law Commission*, vol 2, 9th ed (New York: UN, 2017) at 418–21.
Charter of Economic Rights and Duties of States, GA Res 3281 (XXIX), UNGAOR, 29th Sess, Supp No 31, UN Doc A/9631 (1974) 50, 14:1 ILM 251.
Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Can TS 1945 No 7 (entered into force 24 October 1945).
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm, GA Res 74/189, UNGAOR, 74th Sess, Supp No 49, UN Doc A/RES/74/189 (2019).
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm, GA Res 71/143, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/143 (2016).
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm, GA Res 68/114, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/114 (2013).
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm, GA Res 65/28, UNGAOR, 65th Sess, Supp No 49 UN Doc A/RES/65/28 (2010).
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm, GA Res 62/68, UNGAOR, 62nd Sess,

Supp No 49, UN Doc A/RES/62/68 (2007) Annex, reprinted in United Nations, *The Work of the International Law Commission*, vol 2, 9th ed (New York: UN, 2017) at 412–18.

Declaration of the United Nations Conference on the Human Environment, 21st Plenary Mtg, in United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment: Stockholm: 5–16 June 1972*, UN Doc A/CONF.48/14/Rev.1 (1972) 3, 11:6 ILM 1416.

Draft articles on the law of the non-navigational uses of international watercourses, GA Res 49/52, UNGAOR, 49th Sess, Supp No 49, UN Doc A/RES/49/52 (1994).

Draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, UNEPGC Dec 25/11 III in United Nations Environment Programme Governing Council, *Report of the twenty fifth session of the Governing Council/Global Ministerial Environment Forum (Nairobi, 16–20 February 2009)*, UNGAOR, 64th Sess, Supp No 25, UN Doc A/64/25 (2009) Annex I, as noted by the UNGA in *Report of the Governing Council of the United Nations Environment Programme on its twenty-fifth session*, GA Res 64/204, UNGAOR, 64th Sess, Supp No 49, UN Doc A/RES/64/204 (2009), varying the action suggested in United Nations Environment Programme Governing Council, *Fourth Programme for the Development and Periodic Review of Environmental Law: Report by the Executive Director*, UN Doc UNEP/GC/25/11/Add.2 (2009).

Draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment in United Nations Environment Programme Governing Council, *Fourth Programme for the Development and Periodic Review of Environmental Law: Note by the Executive Director*, UN Doc UNEP/GC/25/INF/15/Add.3 (2009) Annex I.

Draft principles of conduct in the field of the environment for the guidance of states in the conservation and harmonious utilisation of natural resources shared by two or more states, 17:5 ILM 1097 (1978), as approved by UNEPGC in *Co-operation in the field of the environment concerning natural resources shared by two or more States*, UNEPGC Dec 6/14 in United Nations Environment Programme Governing Council, *Report of the Governing Council on the work of its sixth session: 9–25 May 1978*, UNGAOR, 33rd Sess, Supp No 25, UN Doc A/33/25 (1978) 154 and noted by the UNGA in *Co-operation in the field of the environment concerning natural resources shared by two or more states*, GA Res 34/186, UNGAOR, 34th Sess, Supp No 46, UN Doc A/RES/34/186 (1979).

Energy Charter Treaty, 21 November 1990, 2080 UNTS 95, UKTS 2000 No 78, 34:2 ILM 381 (entered into force 16 April 1998).

Guidelines for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, COP15 Dec IG 17/4 in United Nations Environment Programme, *Report of the 15th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols*, UN Doc UNEP(DEPI)/MED IG.17/10 (2008) Annex V.

Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, UNEPGC Dec SS.XI/5 B in United Nations Environment Programme Governing Council, *Report of the Governing Council/Global Ministerial Environment Forum on the work of its eleventh special session (Bali, Indonesia, 24–26 February 2010)*, UNGAOR, 65th Sess, Supp No 25, UN Doc A/65/25 (2010) Annex I, as noted by the UNGA in *Report of the Governing Council of the United Nations Environment Programme on its eleventh special session*, GA Res 65/162, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/162 (2010).

Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, UNEPGC Dec SS.XI/5A in United Nations Environment Programme Governing Council, *Report of the Governing Council/Global Ministerial Environment Forum on the work of its eleventh special session (Bali, Indonesia, 24–26 February 2010)*, UNGAOR, 65th Sess, Supp No 25, UN Doc A/65/25 (2010) Annex I, as noted by the UNGA in *Report of the Governing Council of the United Nations Environment Programme on its eleventh special session*, GA Res 65/162, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/162 (2010).

Malmö Ministerial Declaration, UNEPGC Dec SS.VI/1, 6th Special Sess, 5th Mtg, UN Doc UNEP/GC/DEC/SS.VI/1 (2000).

Oil slick on Lebanese shores, GA Res 74/208, UNGAOR, 74th Sess, Supp No 49, UN Doc A/RES/74/208 (2019).

Oil slick on Lebanese shores, GA Res 73/224, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/224 (2018).

Oil slick on Lebanese shores, GA Res 72/209, UNGAOR, 72nd Sess, Supp No 49, UN Doc A/RES/72/209 (2017).

Oil slick on Lebanese shores, GA Res 71/218, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/218 (2016).

Oil slick on Lebanese shores, GA Res 70/194, UNGAOR, 70th Sess, Supp No 49, UN Doc A/RES/70/194 (2015).

Oil slick on Lebanese shores, GA Res 69/212, UNGAOR, 69th Sess, Supp No 49, UN Doc A/RES/69/212 (2014).

Oil slick on Lebanese shores, GA Res 68/206, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/206 (2013).

Oil slick on Lebanese shores, GA Res 67/201, UNGAOR, 67th Sess, Supp No 49, UN Doc A/RES/67/201 (2012).

Oil slick on Lebanese shores, GA Res 66/192, UNGAOR, 66th Sess, Supp No 49, UN Doc A/RES/66/192 (2011).

Oil slick on Lebanese shores, GA Res 65/147, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/67/147 (2010).

Oil slick on Lebanese shores, GA Res 64/195, UNGAOR, 64th Sess, Supp No 49, UN Doc A/RES/64/295 (2009).

Oil slick on Lebanese shores, GA Res 63/211, UNGAOR, 63rd Sess, Supp No 49, UN Doc A/RES/63/211 (2008).

Oil slick on Lebanese shores, GA Res 62/188, UNGAOR, 62nd Sess, Supp No 49, UN Doc A/RES/62/188 (2007).

Oil slick on Lebanese shores, GA Res 61/194, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/194 (2006).
Permanent sovereignty over natural resources, GA Res 1803 (XVII), UNGAOR, 17th Sess, Supp No 17, UN Doc A/5217 (1962) 15, 2:1 ILM 223.
Permanent sovereignty over natural resources, GA Res 3171 (XXVIII), UNGAOR, 28th Sess, Supp No 30, UN Doc A/9030 (1973) 52, 13:1 ILM 238.
Protection of the marine environment against pollution from land-based sources, UNEPGC Dec 13/18/II in United Nations Environment Programme Governing Council, *Report of the Governing Council on the work of its thirteenth session: 14–24 May 1985*, UNGAOR, 40th Sess, Supp No 25, UN Doc A/40/25 (1985) 53 as noted by the UNGA in *International Co-operation in the field of the environment*, GA Res 40/200, UNGAOR, 40th Sess, Supp No 53, UN Doc A/Res/40/200 (1985), reprinted in (1985) 14:2/3 Envtl Pol'y & L 77.
Provisional Rules for Claims Procedure, UNCCGC Dec 10, 6th Sess, UN Doc S/AC/26/1992/10 (1992) Annex, 31:5 ILM 1053.
Resolution 674, UNSCOR, 45th Year, 2951st Mtg, UN Doc S/RES/674 (1990) 25, 29:6 ILM 1561.
Resolution 686, UNSCOR, 46th Year, 2978th Mtg, UN Doc S/RES/686 (1991) 8, 30:2 ILM 568.
Resolution 687, UNSCOR, 46th Year, 2981st Mtg, UN Doc S/RES/687 (1991) 11, 30:3 ILM 947.
Resolution 692, UNSCOR, 46th Year, 2987th Mtg, UN Doc S/RES/692 (1991) 18, 30:3 ILM 864.
Responsibility of States for internationally wrongful acts, GA Res 74/180, UNGAOR, 74th Sess, Supp No 49, UN Doc A/RES/74/180 (2019).
Responsibility of States for internationally wrongful acts, GA Res 71/133, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/133 (2016).
Responsibility of States for internationally wrongful acts, GA Res 68/104, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/104 (2013).
Responsibility of States for internationally wrongful acts, GA Res 65/19, UNGAOR, 65th Sess, Supp No 49, UN Doc A/RES/65/19 (2010).
Responsibility of States for internationally wrongful acts, GA Res 62/61, UNGAOR, 62nd Sess, Supp No 49, UN Doc A/RES/62/61 (2007).
Responsibility of States for internationally wrongful acts, GA Res 59/35, UNGAOR, 59th Sess, Supp No 49, UN Doc A/RES/59/35 (2004).
Responsibility of States for internationally wrongful acts, GA Res 56/83, UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) Annex, reprinted in United Nations, *The Work of the International Law Commission*, vol 2, 9th ed, (New York: UN, 2017) at 399–412.
Rio Declaration on Environment and Development, UNCED Res 1, 19th Plenary Mtg in United Nations Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–4 June 1992*, vol 1, UN Doc A/CONF.151/26/Rev.1(Vol 1) (1992) 2, Annex I, 31:4 ILM 874.
Statute of the International Law Commission, GA Res 174 (II), UNGAOR, 2nd Sess, UN Doc A/519 (1947) Annex, reprinted as amended in United Nations, *The Work of*

the International Law Commission, vol 1, 9th ed (New York: UN, 2017) at 283–90.

Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law, Annex I to *Report of the World Commission on Environment and Development*, UN Doc A/42/427 (1987) Annex, as adopted by UNEPGC in *Report of the World Commission on Environment and Development*, UNEPGC Dec 14/14 in United Nations Environment Programme Governing Council, *Report of the Governing Council on the work of its fourteenth session: 8–19 June 1987*, UNGAOR, 42nd Sess, Supp No 25, UN Doc A/42/25 (1987) 60 and noted by the UNGA in *Report of the World Commission on Environment and Development*, GA Res 42/187, UNGAOR, 42nd Sess, Supp No 49, UN Doc A/RES/42/187 (1987), reprinted in Experts Group on Environmental Law, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London: Graham & Trotman, 1987).

The future we want, GA Res 66/288, UNGAOR, 66th Sess, Supp No 49, UN Doc A/RES/66/288 (2012) Annex.

Towards a Global Pact for the Environment, GA Res 72/277, UNGAOR, 72th Sess, Supp No 49, UN Doc A/RES/72/277 (2018).

Warsaw international mechanism for loss and damage associated with climate change impacts, COP19 Dec 2/CP.19 in Conference of the Parties to the United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, Addendum, Part two: Action taken by the Conference of the Parties at its nineteenth session*, UN Doc FCCC/CP/2013/10/Add.1 (2013) 6, as noted by the UNGA in *Protection of global climate for present and future generations of humankind*, GA Res 69/220, UNGAOR, 69th Sess, Supp No 49, UN Doc A/RES/69/220 (2014).

World Charter for Nature, GA Res 37/7, UNGAOR, 37th Sess, Supp No 51, UN Doc A/RES/37/7 (1982) Annex, 22:2 ILM 455.

Meetings

UNGA, 74th Sess, 52nd Plenary Mtg, Agenda Item No 19, UN Doc A/74/PV.52 (2019).

Reports

Ad Hoc Open-Ended Working Group Established Pursuant to General Assembly Resolution 72/277, *Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, UN Doc A/AC.289/6/Rev.2 (2019), as endorsed by the UNGA in *Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277*, GA Res 73/333, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/333 (2019).

Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/74/131 and Add.1 (2019).
Secretary-General of the United Nations, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, UN Doc A/73/419 (2018).
Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/71/136 and Add.1 (2016).
Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/68/170 (2013).
Secretary-General of the United Nations, *Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm*, UN Doc A/65/184 and Add.1 (2010).
United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Installment of "F4" Claims*, UN Doc S/AC.26/2004/16 (2004).
United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Fourth Installment of "F4" Claims*, UN Doc S/AC.26/2004/17 (2004).
United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Installment of "F4" Claims*, UN Doc S/AC.26/2005/10 (2005).
United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning the Third Installment of "F4" Claims*, UN Doc S/AC.26/2003/31 (2003), 43:3 ILM 704.
United Nations Economic Commission for Europe, Compliance Committee, *Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, 55th Mtg, UN Doc ECE/MP.PP/C.1/2016/10 (2016), as endorsed by UNECE Dec VI/8k in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the sixth session of the Meeting of the Parties—Addendum: Decisions adopted by the Meeting of the Parties*, UN Doc ECE/MP.PP/2017/2/Add.1 (2017) 54.
United Nations Economic Commission for Europe, Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2008/23 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, 29th Mtg, UN Doc ECE/MP.PP/C.1/2010/6/Add.1 (2010), as endorsed by UNECE Dec IV/9i in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the fourth session of the Meeting of the Parties—Addendum: Chisinau*

Declaration and decisions adopted by the Meeting of the Parties, UN Doc ECE/MP.PP/2011/2/Add.1 (2011) 58.

United Nations Economic Commission for Europe, Compliance Committee, *Findings and recommendations with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystre deep-water navigation canal construction (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine))*, 7th Mtg, UN Doc ECE/MP.PP/C.1/2005/2/Add.3 (2005), as endorsed by UNECE Dec II/5b in United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the Second Meeting of the Parties—Addendum*, UN Doc ECE/MP.PP/2005/2/Add.8 (2005).

United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2nd ed (Geneva: UN, 2014).

United Nations Environment Programme & Office for the Coordination of Humanitarian Affairs, "Cyanide Spill at Baia Mare Romania: UNEP/OCHA Assessment Mission" (March 2000), online (pdf): *ReliefWeb* <www.reliefweb.int> [perma.cc/2Q76-RS3X].

United Nations Environment Programme, Division of Environmental Policy Implementation, *Liability and Compensation Regimes Related to Environmental Damage: A Review* (Nairobi: UNEP, 2003).

United Nations Environment Programme, *Putting Rio Principle 10 into Action: An Implementation Guide* (Nairobi: UNEP, 2015).

United Nations Environment Programme, *Report of the consultative meeting of government officials and experts to review and further develop draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment* in United Nations Environment Programme Governing Council, *Fourth Programme for the Development and Periodic Review of Environmental Law: Note by the Executive Director*, UN Doc UNEP/GC/25/INF/15/Add.3 (2009) Annex II.

United Nations Environment Programme, *Report of the intergovernmental meeting to review and further develop draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment* in United Nations Environment Programme Governing Council, *Environmental Law: Note by the Executive Director*, UN Doc UNEP/GCSS.XI/INF/6/Add.1 (2009) Annex.

United Nations Environment Programme, Working Group on Scientific and Technical Cooperation for MED POL, *Principles, methodology and guidelines for the protection of the marine environment against pollution from land-based sources*, UN Doc UNEP/WG.118/INF.23 (1985).

United Nations Human Rights Council, Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, "Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises" (16 July 2019), online (pdf): *United Nations*

Human Rights Office of the High Commissioner <www.ohchr.org> [perma.cc/83TR-SF8B].

United Nations Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox. Mapping Report*, UN Doc A/HRC/25/53 (2013), as noted by the United Nations Human Rights Council in *Human rights and the environment*, HRC Res 25/21, 25th Sess, UN Doc A/HRC/RES/25/21 (2014).

United Nations Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/59 (2018), as noted by the United Nations Human Rights Council in *Human rights and the environment*, HRC Res 37/8, 37th Sess, UN Doc A/HRC/RES/37/8 (2018).

United Nations Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31 (2011) Annex, as endorsed by the United Nations Human Rights Council in *Human rights and transnational corporations and other business enterprises*, HRC Res 17/4, 17th Sess, UN Doc A/HRC/RES/17/4 (2011).

Letters

Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context, "Correspondence on Specific Compliance Issues as a Result of Information Provided to the Committee" (16 March 2010), UN Doc EIA/IC/INFO/4 (2010).

United Nations Security Council, *Identical Letters Dated 6 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council* (6 April 1991), UN Doc S/22456 (1991).

International Law Commission

International Law Commission, "Comments and observations received from Governments" (UN Doc A/CN.4/562 and Add.1) in *Yearbook of the International Law Commission 2006*, vol 2, part 1 (New York: UN, 2013) 89 (UN Doc A/CN.4/SER.A/2006/Add.1).

International Law Commission, "First Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur" (UN Doc A/CN.4/531) in *Yearbook of the International Law Commission 2003*, vol 2, part 1 (New York: UN, 2010) 71 (UN Doc A/CN.4/SER.A/2003/Add.1).

International Law Commission, "International Responsibility. Fourth Report by FV García Amador, Special Rapporteur. Responsibility of the State for Injuries

Caused in its Territory to the Person or Property of Aliens—Measures Affecting Acquired Rights" (UN Doc A/CN.4/119) in *Yearbook of the International Law Commission 1959*, vol 2, part 1 (New York: UN, 1960) 1 (UN Doc A/CN.4/SER.A/1959/Add.1).

International Law Commission, "Report of the Commission to the General Assembly on the work of its twenty-fifth session" (UNGAOR, 28th Sess, Supp No 10, UN Doc A/9010/Rev.1 (1973)) in *Yearbook of the International Law Commission 1973*, vol 2, part 2 (New York: UN, 1975) 161 (UN Doc A/CN.4/SER.A/1973/Add.l), as noted by *Report of the International Law Commission*, GA Res 3071(XXVIII), UNGAOR, 28th Sess, Supp No 30, UN Doc A/9334 (1973).

International Law Commission, "Report of the Commission to the General Assembly on the work of its thirty-fourth session" (UNGAOR, 37th Sess, Supp No 10, UN Doc A/37/10 (1982)) in *Yearbook of the International Law Commission 1982*, vol 2, part 2 (New York: UN, 1983) 1 (UN Doc A/CN.4/SER.A/1982/Add.1), as noted by the UNGA in *Report of the International Law Commission*, GA Res 37/111, UNGAOR, 37th Sess, Supp No 51, UN Doc A/RES/37/700 (1982).

International Law Commission, "Report of the Commission to the General Assembly on the work of its forty-sixth Session" (UNGAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994)) in *Yearbook of the International Law Commission 1994*, vol 2, part 2 (New York: UN, 1997) 1 (UN Doc A/CN.4/SER.A/1994/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its 46th session*, GA Res 49/51, UNGAOR, 49th Sess, Supp No 49, UN Doc A/RES/49/51 (1994).

International Law Commission, "Report of the Commission to the General Assembly on the work of its fifty-third session" (UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001)) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2007) 1 (UN Doc A/CN.4/SER.A/2001/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its fifty-third session*, GA Res 56/82, UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/82 (2001).

International Law Commission, "Report of the Commission to the General Assembly on the work of its fifty-eight session" (UNGAOR, 61st Sess, Supp No 10, UN Doc A/61/10 (2006)) in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, 2013) 1 (UN Doc A/CN.4/SER.A/2006/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its fifty-eighth session*, GA Res 61/34, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/34 (2006).

International Law Commission, "Report of the Commission to the General Assembly on the work of its sixty-third session" (UNGAOR, 66th Sess, Supp No 10, UN Doc A/66/10 (2011)) in *Yearbook of the International Law Commission 2011*, vol 2, part 2 (New York: UN, 2018) 1 (UN Doc A/CN.4/SER.A/2011/Add.1), as noted by the UNGA in *Report of the International Law Commission on the work of its sixty-third session*, GA Res 66/98, UNGAOR, 66th Sess, Supp No 49, UN Doc A/RES/66/98 (2011).

International Law Commission, "Report of the Commission to the General Assembly on the work of its sixty-fifth session" (UNGAOR, 68th Sess, Supp No 10, UN Doc

A/68/10 (2013)) in *Yearbook of the International Law Commission 2013*, vol 2, part 2 (New York: UN, 2018) 1, as noted by the UNGA in *Report of the International Law Commission on the work of its sixty-fifth session*, GA Res 68/112, UNGAOR, 68th Sess, Supp No 49, UN Doc A/RES/68/112 (2013).

International Law Commission, "Report of the Commission to the General Assembly on the work of its seventieth session" (UNGAOR, 73rd Sess, Supp No 10, UN Doc A/73/10 (2018)) at 157–200, as noted by the UNGA in *Report of the International Law Commission on the work of its seventieth session*, GA Res 73/265, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/265 (2018).

International Law Commission, "Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Prepared by the Secretariat" (UN Doc A/CN.4/543) in *Yearbook of the International Law Commission 2004*, vol 2, part 1 (New York: UN, 2010) 85 (UN Doc A/CN.4/SER.A/2004/Add.1).

International Law Commission, "Third Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur" (UN Doc A/CN.4/566) in *Yearbook of the International Law Commission 2006*, vol 2, part 1 (New York: UN, 2013) 71 (UN Doc A/CN.4/SER.A/2006/Add.1).

United Nations, *The Work of the International Law Commission*, 9th ed (New York: UN, 2017).

Hague Conference on Private International Law

Dutoit, Bernard, "Mémorandum relatif aux actes illicites en droit international privé", HCCH Prel Doc 1 (January 1967) in Hague Conference on Private International Law, *Proceedings of the Eleventh Session: 7 to 26 October 1968*, vol 3: Traffic Accidents (The Hague: Imprimerie Nationale, 1970) 9.

Fragistas, Ch N, "Rapport explicatif" in Hague Conference on Private International Law, *Proceedings of the Extraordinary Session of 1966: 13 to 26 April 1966. Enforcement of Judgments* (The Hague: Imprimerie Nationale, 1969) 359.

Garcimartín, Francisco & Geneviève Saumier, "Judgments Convention: Revised Draft Explanatory Report", HCCH Prel Doc 1 (December 2018), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/8N3A-67BD].

Hague Conference on Private International Law, "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?", HCCH Prel Doc 8 (April 2000) in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session: 6 to 22 June 2001*, vol 1: Miscellaneous Matters (Leiden: Koninklijke Brill, 2008) 320, reprinted from Christophe Bernasconi, "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?" (1999) 12 Hague YB Intl L 35.

Hague Conference on Private International Law, "Comments by the Hague Conference on Private International Law on the Provisions Related to Environmental Damage of 18 September 2002", cited in Willibald Posch, "Some Observations on the Law

Applicable to Transfrontier Environmental Damage" in Monika Hinteregger, ed, *Environmental Liability and Ecological Damage in European Law* (Cambridge: Cambridge University Press, 2008) 33 at 50–51.

Hague Conference on Private International Law, "Conclusions and Recommendations Adopted by the Council on General Affairs and Policy of the Conference" (7–9 April 2010), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/3WKU-G993].

Hague Conference on Private International Law, "Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference", HCCH Prel Doc 10 (June 2000), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/RAX9-Z2TF].

Hague Conference on Private International Law, "Final Act of the Nineteenth Session" in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session: 6 to 22 June 2001*, vol 1: Miscellaneous Matters (Leiden: Koninklijke Brill, 2008) 33 at 46.

Hague Conference on Private International Law, "Note on the Law Applicable to Civil Liability for Environmental Damage", HCCH Prel Doc 3 (April 1995) in Hague Conference on Private International Law, *Proceedings of the Eighteenth Session: 30 September to 19 October 1996*, vol 1: Miscellaneous Matters (The Hague: SDU, 1999) 72.

Hague Conference on Private International Law, "Note on the Law Applicable to Civil Liability for Environmental Damage", HCCH Prel Doc 9 (May 1992) in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session: 10 to 29 May 1993*, vol 1: Miscellaneous Matters and Centenary (The Hague: SDU, 1995) 186, reprinted in Christian von Bar, ed, *Internationales umwelthaftungsrecht* [International Environmental Liability Law], vol 1 (Köln: Heymann, 1995) 225.

Hague Conference on Private International Law, "Should the Hague Conference Revisit the Scope and Nature of Possible Work in the Field of Civil Liability for Environmental Damage?", HCCH Prel Doc 12 (February 2010), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc/B394-5JWC].

Hague Conference on Private International Law, "The HCCH and the United Nations Sustainable Development Goals", HCCH Info Doc 3 (January 2020), online (pdf): *Hague Conference on Private International Law* <www.hcch.net> [perma.cc//V2UG-M9Z6].

Council of Europe

Council of Europe, Committee of Ministers, *Resolution 71(5) on Air Pollution in Frontier Areas*, Doc 2934, Appendix VIII (1971), reprinted in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 251 & (1971) 19 Eur YB 262.

World Bank

World Bank, "Guidelines on the Treatment of Foreign Direct Investment" in World Bank, *Legal Framework for the Treatment of Foreign Direct Investment*, vol 2 (Washington, DC: World Bank, 1992) 33, reprinted in (1992) 31:6 ILM 1379 & (1992) 7:2 ICSID Rev 297.

Organisation for Economic Co-operation and Development

OECD Council, Environment Committee, "Report on Equal Right of Access" in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 23.

OECD Secretariat, "Equal Right of Access in Matters of Transfrontier Pollution in OECD Member Countries" in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 54.

OECD Secretariat, "Study of Some Principles for Solving Problems of Transfrontier Pollution" in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 226.

OECD Secretary General, "Report on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution" in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 37.

OECD, *Multilateral Agreement on Investment: Draft Consolidated Text*, OECD Doc DAFFE/MAI(98)7/REV1 (1998).

OECD, *Recommendation of the Council for Strengthening International Co-operation on Environmental Protection in Frontier Regions*, OECD Doc C(78)77/FINAL (1978), 17:6 ILM 1530, reprinted in Organisation for Economic Co-operation and Development*, L'OCDE et l'environnement* (Paris: OECD, 1986) 175.

OECD, *Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*, OECD Doc C(77)28/FINAL (1977), 16:4 ILM 977, reprinted in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 29 & Organisation for Economic Co-operation and Development*, L'OCDE et l'environnement* (Paris: OECD, 1986) 171.

OECD, *Recommendation of the Council on Equal Right of Access in Relation to Transfrontier Pollution*, OECD Doc C(76)55/FINAL (1976), 15:5 ILM 1218, reprinted in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 19 & Organisation for Economic Co-operation and Development*, L'OCDE et l'environnement* (Paris: OECD, 1986) 169.

OECD, *Recommendation of the Council on Principles Concerning Transfrontier Pollution*, OECD Doc C(74)224 (1974), 15:1 ILM 242, reprinted in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 11 & Organisation for Economic Co-operation and Development*, L'OCDE et l'environnement* (Paris: OECD, 1986) 163.

OECD, *Rules of Procedure of the Organisation*, OECD Doc C(2007)14/FINAL (2013).

OECD, *Transfrontier Pollution and the Role of States* (Paris: OECD, 1981).

International Law Association

International Law Association, "Committee on International Civil and Commercial Litigation: Third Interim Report—Declining and Referring Jurisdiction in International Litigation" (2000) 69 Intl L Assn Rep Conf 137, as considered and adopted by International Law Association, "Resolution No 1/2000: International Civil and Commercial Litigation" (2000) 69 Intl L Ass'n Rep Conf 13.

International Law Association, "Committee on Transnational Enforcement of Environmental Law: First Report" (2002) 70 Intl L Assn Rep Conf 824.

International Law Association, "Committee on Transnational Enforcement of Environmental Law: Working Session" (2006) 72 Intl L Assn Rep Conf 680.

International Law Association, "Constitution of the Association adopted at the 77th Conference, 2016" (2016) 77 Intl L Assn Rep Conf 70.

International Law Association, "International Civil Litigation and the Interests of the Public: Final Report" (2012) 75 Intl L Assn Rep Conf 321, as considered and adopted by International Law Association, "Resolution No 2/2012: International Civil Litigation and the Interests of the Public" (2012) 75 Intl L Assn Rep Conf 19.

International Law Association, "International Committee on Transnational Recognition and Enforcement of Foreign Public Laws" (1988) 63 Intl L Assn Rep Conf 719, as considered and adopted by International Law Association, "Resolution: Transnational Recognition and Enforcement of Foreign Public Laws" (1988) 63 Intl L Assn Rep Conf 29.

International Law Association, "International Water Resources Law: Report of the Committee" (1982) 60 Intl L Assn Rep Conf 531, as considered and adopted by International Law Association, "Resolution No 12/1982: International Water Resources Law" (1982) 60 Intl L Assn Rep Conf 13.

International Law Association, "Legal Principles Relating to Climate Change" (2014) 76 Intl L Assn Rep Conf 330, as considered and adopted by International Law Association, "Resolution No 2/2014: Declaration of Legal Principles Relating to Climate Change" (2014) 76 Intl L Assn Rep Conf 21.

International Law Association, "Resolution No 2/2012: International Civil Litigation and the Interests of the Public" (2012) 75 Intl L Assn Rep Conf 19.

International Law Association, "Resolution No 3/2002: Sustainable Development. New Dehli Declaration of Principles of International Law Relating to Sustainable Development" (2002) 70 Intl L Assn Rep Conf 22, reprinted in (2002) 2:2 Intl Envtl Agreements: Pol, L & Econ 211 and circulated at the Rio+20 Summit in *Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations*, 6 August 2002, UN Doc A/Conf.199/8 (2002).

International Law Association, "Transnational Enforcement of Environmental Law: Final Report" (2006) 72 Intl L Assn Rep Conf 655, as considered and adopted by

International Law Association, "Resolution No 6/2006: Transnational Enforcement of Environmental Law" (2006) 72 Intl L Assn Rep Conf 48.
International Law Association, "Transnational Enforcement of Environmental Law: Second Report" (2004) 71 Intl L Assn Rep Conf 896.
International Law Association, "Water Resources Committee: Interim Report" (1996) 67 Intl L Assn Rep Conf 401, as considered and adopted by International Law Association, "Resolution No 12: Water Resources Law" (1996) 67 Intl L Assn Rep Conf 24.
International Law Association, "Water Resources Law: Fourth Report" (2004) 71 Intl L Assn Rep Conf 334, as considered and adopted by International Law Association, "Resolution No 2/2004: Water Resources" (2004) 71 Intl L Assn Rep Conf 15.

Institute of International Law

Institute of International Law, "Final Report" in *Yearbook of the Institute of International Law. Session of Strasbourg, 1997*, vol 67, part I: Travaux préparatoires (Paris: Pedone, 1998) 312, reprinted in (1998) 10:2 Geo Intl Envtl L Rev 279.
Institute of International Law, "Resolution on Responsibility and Liability under International Law for Environmental Damage" in *Yearbook of the Institute of International Law. Session of Strasbourg, 1997*, vol 67, part II*:* Deliberations of the Institute (Paris: Pedone, 1998) 486, reprinted in (1998) 37:6 ILM 1474 & (1998) 10:2 Geo Intl Envtl L Rev 269.
Institute of International Law, "Travaux de M Orrego Vicuña" in in *Yearbook of the Institute of International Law. Session of Strasbourg, 1997*, vol 67, part I: Travaux préparatoires (Paris: Pedone, 1998) 221.

Commission for Environmental Cooperation

Dermet SEM-01-003: Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte, CEC Doc A14/SEM/01-003/05/14(1) (2001), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/LQ2Y-HYLZ], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 9 (Cowansville: Yvon Blais, 2002) 267.
Devils Lake SEM-06-002: Secretariat Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation, CEC Doc A14/SEM/06-002/12/DETN (2006), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/R7MP-U8ZH], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 23 (Cowansville: Yvon Blais, 2007) 381.
Lake Memphremagog SEM-01-003: Secretariat Determination in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation, CEC Doc A14/SEM/19-003/06/DETN14(1) (2019), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/H3KM-6URK].
Logging Rider SEM-95-002: Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation, CEC Doc A14/SEM/95-

002/03/14(1) (1995), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/G4PE-YR7A], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 1 (Cowansville: Yvon Blais, 1998) 77.

Secretariat of the Commission for Environmental Cooperation, "Access to Courts and Administrative Agencies in Transboundary Pollution Matters" in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 4 (Cowansville: Yvon Blais, 2000) 205.

Tarahumara SEM-00-006: Determinación en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte, CEC Doc A14/SEM00-006/09/14(1)(2) (2001), online (pdf): *Commission for Environmental Cooperation* <www.cec.org> [perma.cc/864B-6FZA], reprinted in Commission for Environmental Cooperation, *North American Environmental Law and Policy*, vol 9 (Cowansville: Yvon Blais, 2002) 215.

International Union for Conservation of Nature

International Union for Conservation of Nature, "Request for an Advisory Opinion of the International Court of Justice on the Principle of Sustainable Development in View of the Needs of Future Generations", IUCN Res WCC-2016-Res-079-EN (2016), online: *International Union for Conservation of Nature* <www.iucn.org> [perma.cc/QLT6-QPP8].

International Union for Conservation of Nature, *Draft International Covenant on Environment and Development: Implementing Sustainability*, 5th ed (Gland: IUCN, 2015).

Other organizations

American Bar Association & Canadian Bar Association Working Group, "Report and Recommendations of the American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes" in American Bar Association & Canadian Bar Association, *Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association on 15 August 1979 and by the Canadian Bar Association on 30 August 1979, With Accompanying Reports and Recommendations* (Chicago: Section of International Law of the American Bar Association, 1979) li, reprinted in (2011) 35:1/2 Can-US LJ 9 at 40–121.

American Bar Association & Canadian Bar Association, "Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution" in American Bar Association & Canadian Bar Association, *Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association on 15 August 1979 and by the Canadian Bar Association on 30 August 1979, With Accompanying Reports and Recommendations* (Chicago: Section of International Law of the American Bar Association, 1979) xiii, reprinted in (2011) 35:1/2 Can-US LJ 9 at 16–20 & Paul R Muldoon, David A

Scriven & James M Olson, *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto: Carswell, 1986) at 365–67.

American Law Institute & UNIDROIT, "Principles of Transnational Civil Procedure" (2004) 9:4 Unif L Rev 758, reprinted in American Law Institute & UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006) at 16–50.

CropLife International/Global Industry Coalition, "Implementation Guide to the Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety" (April 2013), online (pdf): *CropLife* <www.croplife.org> [perma.cc/9RH2-5H2K].

Global Justice Program at Yale University, "Oslo Principles on Global Climate Change Obligations" (1 March 2015), online (pdf): *Global Justice Program* <http://globaljustice.yale.edu> [perma.cc/UY9B-9EDZ].

Global Pact for the Environment, "Draft Global Pact for the Environment" (2017), online (pdf): *Global Pact for the Environment* <https://globalpactenvironment.org> [perma.cc/35H7-9PSE].

International Institute for Sustainable Development Reporting Services, "Summary of the Third Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 20–22 May 2019", *Earth Negotiations Bulletin* 35:3 (25 May 2019), online (pdf): *International Institute for Sustainable Development* <https://enb.iisd.org> [perma.cc/LV66-5KTG].

International Task Force for Assessing the Baia Mare Accident, "Report of the International Task Force for Assessing the Baia Mare Accident" (December 2000), online (pdf): *European Union* <www.europa.eu> [perma.cc/RL8U-3GKU].

Smith, T Bradbrooke, "Report to the Executive and to the 1979 Annual Meeting of the Canadian Bar Association" in American Bar Association & Canadian Bar Association, *Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association on 15 August 1979 and by the Canadian Bar Association on 30 August 1979, With Accompanying Reports and Recommendations* (Chicago: Section of International Law of the American Bar Association, 1979) xxxiii, reprinted in (2011) 35:1/2 Can-US LJ 9 at 30–35.

Société française pour le droit de l'environnement & Gesellschaft für Umweltrecht [German Environmental Law Society], "Projet de convention entre la République française et la République fédérale d'Allemagne pour la limitation et la prévention des pollutions transfrontières" [1997] 1 RJE 99.

Yale Center for Environmental Law and Policy, "Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court" (2013), online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943>

LEGISLATION

Canada

Constitution

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

Statutes

Act respecting the Compilation of Québec Laws and Regulations, CQLR c R-2.2.0.0.2.
Act respecting the implementation of the reform of the Civil Code, SQ 1992, c 57.
Act respecting the preservation of agricultural land and agricultural activities, CQLR c P-41.1.
An Act Respecting the Civil Code of Lower Canada, S Prov C 1865 (29 Vict), c 41, as repealed by the CCQ, Final Provision.
An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof, SC 1976–77, c 35.
An Act to ensure better consistency between the French and English texts of the Civil Code, SQ 2016, c 4.
Antarctic Environmental Protection Act, SC 2003, c 20.
Business Corporations Act, RSA 2000, c B-9.
Canada Shipping Act, 2001, SC 2001, c 26.
Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52.
Canadian Environmental Protection Act, 1999, SC 1999, c 33.
Canadian Judgments Act, RSNB 2011, c 123.
Cap and Trade Cancellation Act, 2018, SO 2018, c 13, repealing *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c 7.
Citizenship Act, RSC 1985, c C-29.
Civil Code of Quebec, CQLR c CCQ-1991.
Class Actions Act, SNL 2001, c C-18.1
Class Proceedings Act, RSBC 1996, c 50
Class Proceedings Act, RSNB 2011, c 125.
Code of Civil Procedure, 14–15 Eliz II 1965, c 80, amended by *Act respecting the implementation of the reform of the Civil Code*, SQ 1992, c 57 and repealed by *An Act to establish the new Code of Civil Procedure*, SQ 2014, c 1, s 833.
Code of Civil Procedure, CQLR c C-25.01.
Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28.
Court Jurisdiction and Proceedings Transfer Act, SNS 2003 (2nd Sess), c 2.
Court Jurisdiction and Proceedings Transfer Act, SPEI 1997, c 61 (not yet in force).
Court Jurisdiction and Proceedings Transfer Act, SY 2000, c C-7 (not yet in force).
Criminal Code, RSC 1985, c C-46.
Enforcement of Canadian Judgments and Decrees Act, SBC 2003, c 29.

Environment Act, RSY 2002, c 76.
Environment Act, SNS 1994–95, c 1.
Environment Quality Act, CQLR c Q-2.
Environmental Bill of Rights, 1993, SO 1993, c 28.
Environmental Management Act, SBC 2003, c 53.
Environmental Protection Act, RSO 1990, c E.19.
Environmental Protection and Enhancement Act, RSA 2000, c E-12.
Environmental Rights Act, RSNWT (Nu) 1988, c 83 (Supp).
Environmental Rights Act, SNWT 1988, c 83 (Supp), as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.
Extra-Provincial Corporations Act, RSO 1990, c E.27.
Farm Practices Protection (Right to Farm) Act, RSBC 1996, c 131.
Farming and Food Production Protection Act, 1998, SO 1998, c 1.
Federal Courts Act, RSC 1985, c F-7.
Fisheries Act, RSC 1985, c F-14.
Foreign Judgments Act, RSNB 2011, c 162.
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186.
International Boundary Waters Treaty Act, RSC 1985, c I-17.
Interpretation Act, RSC 1985, c I-21.
Justice for Victims of Terrorism Act, SC 2012, c 1, s 2.
Marine Liability Act, SC 2001, c 6.
Migratory Birds Convention Act, 1994, SC 1994, c 22.
Nuclear Liability Act, RSC 1985, c N-28.
Nuclear Liability and Compensation Act, SC 2015, c 4, s 120.
Securities Act, RSO 1990, c S.5.
Species at Risk Act, SC 2002, c 29.
State Immunity Act, RSC 1985, c S-18.
The Class Actions Act, SS 2001, c C-12.01.
The Court Jurisdiction and Proceedings Transfer Act, SS 1997, c C-41.1.
The Enforcement of Canadian Judgments Act, 2002, SS 2002, c E-9.1001.
The Enforcement of Foreign Judgments Act, SS 2005, c E-9.121.
The Environmental Management and Protection Act, 2002, SS 2002, c E-10.21, as repealed by *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, s 100.
The Fishermen's Assistance and Polluter's Liability Act, RSM 1987, c F100, CCSM c F100.
The Fishermen's Assistance and Polluters' Liability Act, SM 1970, c 32.
The Transboundary Pollution Reciprocal Access Act, SM 1985–86, c 11, CCSM c T145.
Transboundary Pollution Act, SNS 1993, c 15, as repealed by *Environment Act*, SNS 1994–95, c 1, s 176(3).
Transboundary Pollution (Reciprocal Access) Act, RSPEI 1988, c T-5.
Transboundary Pollution Reciprocal Access Act, RSO 1990, c T.18.
Water Act, RSA 2000, c W-3.

Regulations

Fishery (General) Regulations, SOR/93-53.
International Joint Commission Immunity Order, CRC, c 1315 (2006).
Ontario Rules of Civil Procedure, RRO 1990, Reg 194.
Order Establishing a List of Foreign State Supporters of Terrorism, SOR/2012-170.
Reciprocating Jurisdictions, RRO 1990, Reg 1084.
On-Road Vehicle and Engine Emission Regulations, SOR/2003-2.

Bills

Avant-projet de loi portant réforme du Code civil du Québec

Avant-projet de loi portant réforme du Code civil du Québec du droit de la preuve et de la prescription et du droit international privé, 2nd sess, 33rd Leg, Quebec, 1988 (Report from Committee on Institutions filed 21 March 1989).

An Act to amend the Federal Courts Act (international promotion and protection of human rights)

Bill C-331, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2st sess, 42nd Parl, 2015 (first reading 14 December 2016).
Bill C-323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 1st Sess, 41st Parl, 2011 (first reading 5 October 2011), reinstated 2nd Sess, 41st Parl, 2013 (16 October 2013).
Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 40th Parl, 2009 (first reading 1 April 2009), reinstated 3rd Sess, 40th Parl, 2010 (3 March 2010).
Bill C-492, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 39th Parl, 2007 (first reading 10 December 2007).

An Act to amend the International Boundary Waters Treaty Act (water quality)

Bill C-444, *An Act to amend the International Boundary Waters Treaty Act (water quality)*, 1st sess, 42nd Parl, 2019 (first reading 1 May 2019).

An Act to establish a Canadian Environmental Bill of Rights

Bill C-438, *An Act to enact the Canadian Environmental Bill of Rights and to make related amendments to other Acts*, 1st sess, 42nd Parl, 2019 (second reading 6 June 2019).

Bill C-202, *An Act to establish a Canadian Environmental Bill of Rights and to make a related amendment to another Act*, 1st sess, 42nd Parl, 2015 (first reading 9 December 2015).

Bill C-634, *An Act to establish a Canadian Environmental Bill of Rights*, 2nd Sess, 41st Parl, 2011 (first reading 29 October 2014).

Bill C-469, *An Act to establish a Canadian Environmental Bill of Rights*, 2nd Sess, 40th Parl, 2009 (first reading 29 October 2009), reinstated 3rd Sess, 40th Parl, 2010 (3 March 2010) (adopted by the Standing Committee on Environment and Sustainable Development 15 February 2011).

An Act to Establish an Environmental Bill of Rights

Bill 28, *An Act to Establish an Environmental Bill of Rights*, 2nd Sess, 63th Leg, Nova Scotia, 2018 (first reading 13 September 2018).

Bill 26, *An Act to Establish an Environmental Bill of Rights*, 1st Sess, 63th Leg, Nova Scotia, 2017 (first reading 5 October 2017).

Bill 7, *An Act to Establish an Environmental Bill of Rights*, 3rd Sess, 62th Leg, Nova Scotia, 2016 (first reading 14 October 2016).

Bill 178, *An Act to Establish an Environmental Bill of Rights*, 2nd Sess, 62th Leg, Nova Scotia, 2016 (first reading 5 May 2016).

An Act respecting civil liability for climate-related harms

Bill 37, *An Act respecting civil liability for climate-related harms*, 1st Sess, 42nd Leg, Ontario, 2018 (defeated on second reading 25 October 2018).

Bill 21, *An Act respecting civil liability for climate-related harms*, 3rd Sess, 41st Leg, Ontario, 2018 (referred to Standing Committee on Regulations and Private Bills 12 April 2018).

Environmental Bill of Rights, 2016

Bill M236, *Environmental Bill of Rights, 2016*, 5th Sess, 40th Leg, British Columbia, 2016 (first reading 17 May 2016).

Species at Risk Act

Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, 2nd Sess, 37th Parl, 2000 (assented to 12 December 2002), SC 2002, c 29, relying on the approval of Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, 1st Sess, 37th Parl, 2002 (third reading in the House of Commons 11 June 2002; second reading in the Senate 13 June 2002).

Bill C-295, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 1st Sess, 37th Parl, 2001 (first reading 4 March 2001).

Bill C-33, *An Act respecting the protection of wildlife species at risk in Canada*, 2nd Sess, 36th Parl, 2000 (first reading 11 April 2000).

Bill C-300, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 2nd Sess, 36th Parl, 1998 (first reading 3 November 1998).

Bill C-445, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 1st Sess, 36th Parl, 1998 (first reading 8 October 1998).

Bill C-65, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 2nd Sess, 35th Parl, 1996, cl 60 (first reading 31 October 1996; referred to Committee on Environment and Sustainable Development 29 November 1996).

The Environmental Rights Act

Bill 220, *The Environmental Rights Act*, 2nd Sess, 41th Leg, Manitoba, 2017 (first reading 26 April 2017).

Bill 20, *The Environmental Rights Act*, 5th Sess, 40th Leg, Manitoba, 2016 (first reading 2 March 2016).

Uniform Legislation

Court Jurisdiction and Proceedings Transfer Act, (1982) 76 Unif L Conf Proc 140, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/GJ6J-LVX7], reprinted in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 4 (Cheltenham: Edward Elgar, 2017) 3058 & Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 264–287.

Enforcement of Canadian Judgments and Decrees Act, (1992) 74 Unif L Conf Proc 317, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/F2UG-6MZA] (as amended in 1997, 2004 and 2005).

Transboundary Pollution Reciprocal Access Act, (1982) 64 Unif L Conf Proc 498, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/4AQG-RJMY], reprinted in Paul R Muldoon, David A Scriven & James M Olson, *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto: Carswell, 1986) at 369–71.

Uniform Enforcement of Foreign Judgments Act, (2003) 85 Unif L Conf Proc 225, online: *Uniform Law Conference of Canada* <www.ulcc.ca> [perma.cc/TU56-L8FU].

United Kingdom

Statutes

Civil Jurisdiction and Judgments Act 1982 (UK), c 27.

Private International Law (Miscellaneous Provisions) Act 1995 (UK), c 42.
Statute of Westminster 1931 (UK), 22 & 23 Geo V, c 4.

Regulations

The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2018 (UK), s 11 (not yet in force).

United States

Constitution

US Const art III, § 2, cl 3.

Federal statutes

Alien Tort Statute, 28 USC § 1350 (2017).
Clean Air Act, Pub L No 88-206, 77 Stat 392 (1963) (codified as amended at 42 USC § 7415 (2017)).
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub L No 96-510, 94 Stat 2767 (1980) (codified as amended at 42 USC § 9601–9628 (2017)).
National Environmental Policy Act of 1969, Pub L No 91-190, 83 Stat 852 (1970) (codified as amended at 42 USC § 4321–4370 (2017)).
Trans-Alaska Pipeline Authorization Act, Pub L No 93-153, 87 Stat 584 (1973) (codified as amended at 43 USC § 1651–56 (2017)).
Trans-Alaska Pipeline System Reform Act of 1990, Pub L No 101-380, 104 Stat 564 (1990).

State statutes

Colo Rev Stat § 13-1.5-101–13.1.5-109 (2017).
Conn Gen Stat § 51-351b (2016).
Mich Comp Laws § 324.1801–324.1807 (2017).
Minn Stat § 116B.11 (2017).
Mont Code § 75-16-101–75-16-109 (2017).
NJ Rev Stat § 2A:58A-1–2A:58A-8 (2017).
NY Real Property Actions Law § 121 (2017).
Or Rev Stat § 468.076–468.089 (2017).
Wis Stat § 299.33 (2017).

Executive orders

Executive Order 12114—Environmental Effects Abroad of Major Federal Actions, 44 Fed Reg 1957 (1979) (codified at 3 CFR 356 (1980)).

Restatements

See *Restatement (Fourth) of Foreign Relations Law of the United States* (2018), as commented by the American Law Institute, *Restatement of the Law, Fourth: Foreign Relations of the United States. Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* (St Paul: American Law Institute, 2018).

Restatement (Second) of Conflict of Laws (1969) as commented by the American Law Institute, *Restatement of the Law, Second: Conflict of Laws*, vol 1 (St Paul: American Law Institute, 1971).

Restatement (Third) of Foreign Relations Law of the United States (1987), as commented by the American Law Institute, *Restatement of the Law, Third: Foreign Relations Law of the United States*, vol 2 (St Paul: American Law Institute, 1987).

Australia

Jurisdiction of Courts (Foreign Land) Act 1989 (NSW), 1989/190.

Civil Law (Wrongs) Act 2002 (ACT), 2002/40.

Germany

Einführungsgesetz zum bürgerlichen gesetzbuche [Introductory Act to the Civil Code of 18 August 1896)], Bundesgesetzblatt (BGBI) [Federal Law Gazette] I 2494, translated in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 4 (Cheltenham: Edward Elgar, 2017) 3226 & online: *Federal Ministry of Justice and Consumer Protection* <www.bmjv.de> [perma.cc/ZV3C-CG6J], initial version translated in French in (1999) 88:4 Rev crit dr int privé 870.

Austria

Bundesgesetz über die zivilrechtliche haftung für schaden durch radioaktivität (Atomhaftungsgesetz 1999) [Federal Act on Civil Liability for Damage Caused by Radioactivity (Atomic Liability Act 1999)], Bundesgesetzblatt für die Republik Österreich (BGBI) [Federal Law Gazette for the Republic of Austria] I 170, translated in (1999) 63 Nuclear L Bull Supp 3 & Nuclear Energy Agency of the Organisation for Economic Co-operation and Development, "Austria: Nuclear Legislation", online (pdf): *OECD-NEA* <www.oecd-nea.org> [perma.cc/K8VW-JPXL].

Switzerland

Loi fédérale sur le droit international privé [Federal Statute on Private International Law], RS 291, RO 1988 1776, 29:5 ILM 1254 (Switzerland), translated in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 4 (Cheltenham: Edward Elgar, 2017) 3836.

Montenegro

International Private Law Act (Montenegro), translated in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 4 (Cheltenham: Edward Elgar, 2017) 3513 & Toma Rajcevic, "La Loi sur le droit international privé de la République de Monténégro du 23 décembre 2013" (2015) 104:1 Rev crit dr int privé 261.

Singapore

Transboundary Haze Pollution Act 2014 (No 24 of 2014, Sing).

Japan

Act on the General Rules of Application of Laws (No 78 of 2006, Japan), translated in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 4 (Cheltenham: Edward Elgar, 2017) 3334 and Kent Anderson & Yasuhiro Okuda, "Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsokuhō], Law No 10 of 1898 (As Newly Titled and Amended 21 June 2006)" (2006) 8:1 Asian Pac L & Pol'y J 136 & (2006) 8 YB Priv Intl L 427.

European Union

Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ, C 115/01.

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 30 October 2007, [2007] OJ, L 339/3 (entered into force 1 January 2010).

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, 1659 UNTS 13, OJ, L 319/9, 28:3 ILM 620 (entered into force 1 January 1991).

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 1262 UNTS 153, [1972], OJ L 299/32, 8:2 ILM 229 (entered into force 1 February 1973).

Convention on the Law Applicable to Contractual Obligations, 19 June 1980, 1605 UNTS 59, [1980], OJ L 266/1, 19:6 ILM 1492 (entered into force 1 April 1991).

EC, *Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] OJ, L 12/1.

EC, *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage*, [2004] OJ, L 143/56.

EC, *Regulation (EC) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L 351/1.

EC, *Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40.

Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, 22 January 1972, 1375 UNTS 2, [1972] OJ, L 73/5 (entered into force 1 January 1973).

JURISPRUDENCE

Canada

Judgments

1068754 Alberta Ltd v Québec (Agence du revenu), 2019 SCC 37, 434 DLR (4th) 469.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241.

2249659 Ontario Ltd v Sparkasse Siegen, 2013 ONCA 354, 115 OR (3d) 241.

A Côté et Frères Ltée c Laboratoires Sagi Inc (1983), [1984] CS 255, 1983 CarswellQue 400 (WL Can).

AAA Entertainment v Cinemavault Releasing International, 2017 ONSC 100, [2017] OJ No 836 (QL).

Abbott-Smith v Governors of University of Toronto (1964), 45 DLR (2d) 672, 1964 CanLII 596 (NSSC).

Addams v Worden (1856), 6 LCR 237 (Qc BR).

Ahern v Booth (1903), 2 OWR 696, 1903 CarswellOnt 481 (WL Can), aff'd (1904), 2 OWR 852, [1904] OJ No 763 (QL) (CA), aff'd 1904 CarswellOnt 787 (WL Can) (SCC).

Air Canada v Mcdonnell Douglas Corp, [1989] 1 SCR 1554, 1989 CanLII 54.

Airia Brands Inc v Air Canada, 2017 ONCA 792, 417 DLR (4th) 467, leave to appeal to SCC refused, [2018] 3 SCR v.

Albert v Fraser Companies Ltd (1936), [1937] 1 DLR 39, 1936 CanLII 268 (NBSC (AD)).

Alteen v Informix Corp (1998), 164 Nfld & PEIR 301, 1998 CanLII 18652 (NLSC (TD)).

Ambrosi v British Columbia (Attorney General), 2012 BCSC 720, 263 CRR (2d) 232.

Amchem Products Incorporated v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897, 1993 CanLII 124.

Anderson v Nobels Explosive Co (1906), 12 OLR 644, [1906] OJ No 165 (Div Ct).

Anvil Mining Ltd c Association canadienne contre l'impunité, 2012 QCCA 117, [2012] RJQ 153, leave to appeal to SCC refused, [2012] 3 SCR v.

Arab Monetary Fund c 1954933 Nova Scotia Limited, 2004 CanLII 76390, [2004] JQ no 3903 (QL) (Sup Ct).

Araya v Nevsun Resources Ltd, 2016 BCSC 1856, 408 DLR (4th) 383, aff'd 2017 BCCA 401, 419 DLR (4th) 631, aff'd 2020 SCC 5, [2020] SCJ No 5 (QL).

Araya v Nevsun Resources Ltd, 2017 BCCA 401, 419 DLR (4th) 631, aff'd 2020 SCC 5, [2020] SCJ No 5 (QL).

Brereton v Canadian Pacific Railway Co (1898), 29 OR 57, 18 CLT 63 (H Ct J Ch Div).
Brill v Korpaach Estate, 1997 ABCA 205, 148 DLR (4th) 467.
British Columbia v Canadian Forest Products Ltd, 2004 SCC 38, [2004] 2 SCR 74.
British Columbia v Imperial Tobacco Canada Ltd, 2006 BCCA 398, 273 DLR (4th) 711, leave to appeal to SCC refused, [2007] 1 SCR xiii.
British Columbia v Imperial Tobacco Canada Ltd, 2005 SCC 49, [2005] 2 SCR 473.
British Columbia v Imperial Tobacco Canada Ltd, 2004 BCCA 269, 239 DLR (4th) 412, aff'd 2005 SCC 49, [2005] 2 SCR 473.
Britton v O'Callaghan (2002), 62 OR (3d) 95, 2002 CanLII 41471 (CA).
Bryson v Canada (Attorney General), 2009 NBQB 204, 353 NBR (2d) 1, leave to appeal to NBCA adjourned *sine die*, 2009 CanLII 50509, [2009] NBJ No 309 (QL) (CA).
Burnell v International Joint Commission (1976), [1977] 1 FC 269, 71 DLR (3d) 725.
Burns Foods Ltd v Manitoba (Attorney General) (1973), [1975] SCR 494, 1973 CanLII 194.
Caisse populaire Desjardins de l'Est de Drummond v Canada, 2009 SCC 29, [2009] 2 SCR 94.
Calvé c Gestion Serge Lafrenière Inc, [1999] RJQ 1313, 1999 CanLII 13814 (CA).
Campbell v McGregor (1889), 29 NBR 644, [1889] NBJ No 3 (QL) (SC).
Canada (Attorney General) v MacQueen, 2013 NSCA 143, (*sub nom MacQueen v Sydney Steel Corp*) 338 NSR (2d) 133, rehearing denied, 2014 NSCA 73, 348 NSR (2d) 221, leave to appeal to SCC refused, [2015] 1 SCR ix.
Canada (Attorney General) v Thouin, 2017 SCC 46, [2017] 2 SCR 184.
Canada (Human Rights Commission) v Canadian Liberty Net, [1998] 1 SCR 626, 1998 CanLII 818.
Canada Post Corp v Lépine, 2009 SCC 16, [2009] 1 SCR 549.
Canadian Broadcasting Corporation v Morrison, 2017 MBCA 36, [2017] 7 WWR 486.
Canadian National Railway Co v SSAB Alabama Inc, 2018 SKQB 272, [2018] SJ No 398 (QL).
Carrier c Québec (Procureur général), 2011 QCCA 1231, [2011] RJQ 1346.
Castillo v Castillo, 2005 SCC 83, [2005] 3 SCR 870.
Castonguay Blasting Ltd v Ontario (Environment), 2013 SCC 52, [2013] 3 SCR 323.
Catania v Giannattasio (1999), 174 DLR (4th) 170, 1999 CanLII 1930
Central Sun Mining Inc v Vector Engineering Inc, 2013 ONCA 601, 117 OR (3d) 313, leave to appeal to SCC refused, [2014] 1 SCR xiii.
Centre québécois du droit de l'environnement c Oléoduc Énergie Est Lté, 2014 QCCS 4147, [2014] JQ no 9245 (QL).
CGAO c Groupe Anderson Inc, 2017 QCCA 923, [2017] JQ no 7686 (QL).
Chevron Corp v Yaiguaje, 2015 SCC 42, [2015] 3 SCR 69.
Choc v Hudbay Minerals Inc, 2013 ONSC 1414, 116 OR (3d) 674.
Chomos v Economical Mutual Insurance Co (2002), 61 OR (3d) 28, 2002 CanLII 45021 (CA).
CIMA Plastics Corporation v Sandid Enterprises Ltd, 2011 ONCA 589, 341 DLR (4th) 442.
Club Resorts Ltd v Van Breda, 2012 SCC 17, [2012] 1 SCR 572.
Coady v Quadrangle Holdings Ltd, 2015 NSCA 13, 355 NSR (2d) 324, leave to appeal to SCC refused, [2015] 2 SCR vi.

Energy Probe v Canada (Attorney General) (1994), 17 OR (3d) 717, 1994 CanLII 7247 (Gen Div).
Englobe Corp c 9299-2742 Québec Inc (Gestion OFA Environnement), 2017 QCCS 598, [2017] JQ no 1253 (QL), aff'd 2019 QCCA 533, [2019] JQ no 2298 (QL), leave to appeal to SCC refused, 38612 (29 August 2019).
Entreprises BCP Ltée c Bourassa (1984), 14 CELR 144, 1984 CarswellQue 254 (WL Can) (CA).
Environnement Jeunesse c Procureur général du Canada, 2019 QCCS 2885, [2019] JQ no 5940 (QL), notice of appeal to Qc CA filed, 500-09-028523-199 (19 September 2019).
Ernst v EnCana Corp, 2014 ABQB 672, [2015] 1 WWR 719.
Facebook Inc c Guerbuez, 2010 QCCS 4649, [2010] RJQ 2373, leave to appeal to Qc CA refused, 2011 QCCA 268, [2011] JQ no 1052 (QL).
Fernandes v Wal-Mart Canada Corp, 2017 MBCA 96, 417 DLR (4th) 444.
Friends of the Earth v Canada (Governor in Council), 2008 FC 1183, [2009] 3 FCR 201, aff'd 2009 FCA 297, 313 DLR (4th) 767, leave to appeal to SCC refused, [2010] 1 SCR ix.
Frischke v Royal Bank of Canada (1977), 17 OR (2d) 388, 1977 CanLII 1069 (CA).
Furlan v Shell Oil Co, 2000 BCCA 404, [2000] 7 WWR 433, leave to appeal to SCC refused, [2001] 1 SCR xii.
Gagnier v Canadian Forest Products Ltd (1990), 51 BCLR (2d) 218, 1990 CanLII 538 (SC).
Gagnier v Canadian Forest Products Ltd, 1991 CanLII 143, [1991] BCJ No 2634 (QL) (SC).
Galaxy Dragon Limited v Top Water Exclusive Fund IV LLC, 2012 ONCA 382, [2012] OJ No 2522 (QL).
Garcia v Tahoe Resources Inc, 2017 BCCA 39, 407 DLR (4th) 651, leave to appeal to SCC refused, [2017] 1 SCR xviii.
Gariepy v Shell Oil Co (2000), 51 OR (3d) 181, 2000 CanLII 22706 (Sup Ct).
General Motors of Canada Ltd v City National Leasing, [1989] 1 SCR 641, 1989 CanLII 133.
Geophysical Service Incorporated v Arcis Seismic Solutions Corp, 2015 ABQB 88, 610 AR 225.
Gestion Logistique AC Inc c Baffin Snowmobile Repair Shop Limited, 2017 QCCS 4517, [2017] JQ no 13800 (QL), leave to appeal to Qc CA granted, 2017 QCCA 1356, [2017] JQ no 12306 (QL), notice of settlement, 200-09-009570-174 (4 December 2017).
Giesbrecht c Succession de Nadeau, 2017 QCCA 386, [2017] JQ no 2163 (QL), leave to appeal to SCC refused, [2017] 3 SCR vii.
Gillespie Management Corp v Terrace Properties (1989), 62 DLR (4th) 221, 1989 CanLII 2813 (BC CA).
Gladstone c Dankoff, [2003] RJQ 1534, 2003 CanLII 75184 (Sup Ct), leave to appeal to Qc CA refused, 2003 CanLII 71920, [2003] QJ no 6647 (QL) (CA), leave to appeal to SCC refused, [2003] 2 SCR vii.
Global Securities Corp v British Columbia (Securities Commission), 2000 SCC 21, [2000] 1 SCR 494.

Montana v Les développements du Saguenay Ltée (1975), [1977] 1 SCR 32, 1975 CanLII 178.
Moradkhan v Mofidi, 2013 BCCA 132, 360 DLR (4th) 622.
Moran v Pyle National (Canada) Ltd (1973), [1975] SCR 393, 1973 CanLII 192.
Morguard Investments Ltd v De Savoye, [1990] 3 SCR 1077, 1990 CanLII 29.
Morin v Blais (1975), [1977] 1 SCR 570, 1975 CanLII 3.
Mutual Trust Co c St-Cyr, [1996] RDJ 623, 1996 CanLII 6010 (CA), leave to appeal to SCC refused, [1997] 2 SCR xv.
Nadon c Anjou (Ville), [1994] RJQ 1823, 1994 CanLII 5900 (CA).
National Bank of Canada v Weir, 2010 QCCS 402, [2010] RJQ 823.
Neumann v Loeppky, 2018 ABQB 307, [2018] AJ No 1475 (QL).
Nevsun Resources Ltd v Araya, 2020 SCC 5, [2020] SCJ No 5 (QL).
Newfoundland and Labrador (Attorney General) v Rothmans Inc, 2013 NLTD(G) 180, 345 Nfld & PEIR 40 (NLSC (TD)).
Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4, [2020] SCJ No 4 (QL).
Nissho Corp v Bank of British Columbia (1987), 39 DLR (4th) 453, [1987] AJ No 1343 (QL) (QB).
Nord Iron Mines Inc c Specogna, 2013 QCCS 230, [2013] JQ no 486 (QL).
Northwest Falling Contractors Ltd v The Queen, [1980] 2 SCR 292, 1980 CanLII 210.
Nosseir c Sea Pro Divers sa, 2009 QCCA 2182, [2009] JQ no 13825 (QL).
O'Connor v Wray, [1930] SCR 231, 1930 CanLII 51.
Omega Laboratories Ltd c Claris Lifesciences Ltd, 2018 QCCS 2596, [2018] JQ no 5344 (QL), leave to appeal to Qc CA refused, 2018 QCCA 1356, [2018] QJ No 7982 (QL).
Ontario (Attorney General) v Rothmans Inc, 2013 ONCA 353, 115 OR (3d) 561, leave to appeal to SCC refused, [2013] 3 SCR vi.
Ontario v Canadian Pacific Ltd, [1995] 2 SCR 1031, 1995 CanLII 112.
Opron Inc c Aero System Engineering Inc, [1999] RJQ 757, 1999 CanLII 11072 (Sup Ct).
Orphan Well Association v Grant Thornton Ltd, 2019 SCC 5, 430 DLR (4th) 1.
Ortega Figueroa c Jenckel, 2015 QCCA 1393, [2015] JQ no 8137 (QL), leave to appeal to SCC refused, [2016] 1 SCR vi.
Ostroski v Global Upholstery Co, [1995] OJ No 4211 (QL), 1995 CarswellOnt 874 (WL Can) (Gen Div).
Ouimette c Canada (Procureur général), [2002] RJQ 1228, 2002 CanLII 30452 (CA), leave to appeal to SCC refused, [2003] 1 SCR xv.
Paniccia v MDC Partners Inc, 2017 ONSC 7298, [2017] OJ No 6389 (QL).
Paradis Honey Ltd v Canada, 2015 FCA 89, [2016] 1 FCR 446, leave to appeal to SCC refused, [2015] 3 SCR vi.
Parry Sound (District) Social Services Administration Board v OPSEU, Local 324, 2003 SCC 42, [2003] 2 SCR 157.
Partner Reinsurance Company Ltd c Optimum Réassurance Inc, 2020 QCCA 490, [2020] JQ no 2211 (QL).
Paul v Chandler & Fisher Ltd (1923), [1924] 2 DLR 479, 1923 CanLII 464 (Ont SC).

Peace River (Town) v British Columbia Hydro & Power Authority (1972), 29 DLR (3d) 769, Johnson JA, concurring, 1972 ALTASCAD 40 (CanLII) (Alta SC (AD)), leave to appeal to SCC refused, [1972] SCR ix.
Pearson v Boliden Ltd, 2002 BCCA 624, 64, 222 DLR (4th) 453, leave to appeal to SCC refused, [2003] 2 SCR ix.
Pearson v Inco Ltd (2001), 16 CPC (5th) 151, [2001] OTC 919 (Sup Ct).
Pearson v Inco Ltd (2002), 33 CPC (5th) 264, [2002] OTC 515 (Sup Ct), aff'd (2004), 44 CPC (5th) 276, 2004 CanLII 34446 (Div Ct), rev'd (2006), 78 OR (3d) 641, 2006 CanLII 913 (Ont CA), leave to appeal to SCC refused, [2006] 2 SCR viii.
Pembina County Water Resource District v Manitoba, 2019 FC 82, [2019] FCJ No 321 (QL).
Pembina County Water Resource District v Manitoba, 2017 FCA 92, 409 DLR (4th) 719, leave to appeal to SCC refused, [2017] 2 SCR ix.
Pembina County Water Resource District v Manitoba, 2011 FC 1118, 397 FTR 262.
Pembina County Water Resource District v Manitoba, 2008 FC 1390, 63 CCLT (3d) 28.
Pembina County Water Resource District v Manitoba, 2005 FC 1226, [2005] FCJ No 1492 (QL).
Pembina Institute for Appropriate Development v Canada (Attorney General), 2008 FC 302, 35 CELR (3d) 254.
Pettkus v Becker, [1980] 2 SCR 834, 1980 CanLII 22.
Piedra v Copper Mesa Mining Corporation, 2011 ONCA 191, 332 DLR (4th) 118.
Podolsky v Cadillac Fairview Corp, 2013 ONCJ 65, 75 CELR (3d) 1.
Poiré c Sévère, 2012 QCCS 1619, [2012] JQ no 3511 (QL).
Poppy Industries Canada Inc v Diva Delights Ltd, 2018 QCCA 163, [2018] QJ No 622 (QL).
Prince v ACE Aviation Holdings Ltd, 2014 ONCA 285, 110 OR (3d) 140, leave to appeal to SCC refused, [2014] 3 SCR ix.
Pro Swing Inc v Elta Golf Inc, 2006 SCC 52, [2006] 2 SCR 612.
Province du Nouveau-Brunswick c Les produits métalliques AT Inc, 2017 QCCA 453, [2017] JQ no 2850 (QL).
Prud'homme v Prud'homme, 2002 SCC 85, [2002] 4 SCR 663.
PS Knight Co Ltd v Canadian Standards Association, 2018 FCA 222, 161 CPR (4th) 243, leave to appeal to SCC refused, 38506 (23 May 2019).
Québec (Procureur général) c Imperial Tobacco Canada Ltd, 2013 QCCS 2994, [2013] JQ no 7014 (QL), leave to appeal to Qc CA refused, 2013 QCCA 1702, [2013] JQ no 13088 (QL).
Quebecor World Inc c Union Capital Corporation, 2006 QCCS 3820, [2006] JQ no 7048 (QL).
R v Ackerman, 2018 MBCA 75, [2018] MJ No 202 (QL).
R v Anderson, 2014 SCC 41, [2014] 2 SCR 167.
R v Brooks, 2009 SKQB 509, [2010] 6 WWR 81, leave to appeal to Sask CA refused, 2010 SKCA 55, [2010] 6 WWR 149.
R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401, 1988 CanLII 63.
R v Ellis, 2009 ONCA 483, 95 OR (3d) 481.
R v Finta (1992), 92 DLR (4th) 1, 1992 CanLII 2783 (Ont CA), aff'd [1994] 1 SCR 701, 1994 CanLII 129.

R v Friesen (2008), 229 CCC (3d) 97, 2008 CanLII 12493 (Ont Sup Ct).
R v Gashikanyi, 2017 ABCA 194, [2017] 11 WWR 228.
R v Hape, 2007 SCC 26, [2007] 2 SCR 292.
R v Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 SCR 45.
R v Kingston (Corp of the City) (2004), 70 OR (3d) 577, 2004 CanLII 39042 (CA), leave to appeal to SCC refused, [2005] 1 SCR viii.
R v Larche, 2006 SCC 56, [2006] 2 SCR 762.
R v Lee, 2012 ABCA 17, [2012] 6 WWR 699.
R v Libman, [1985] 2 SCR 178, 1985 CanLII 51.
R v McHale, 2010 ONCA 361, 256 CCC (3d) 26, leave to appeal to SCC refused, [2010] 3 SCR vi.
R v Neves, 2005 MBCA 112, [2006] 4 WWR 464.
R v Nixon, 2011 SCC 34, [2011] 2 SCR 566.
R v Parkinson, 2008 CanLII 68177, [2008] OJ No 5340 (QL) (Sup Ct).
R v Resolute FP Canada Inc, 2019 SCC 60, 29 CELR (4th) 1.
R v Rothmans Inc, 2010 NBQB 381, 373 NBR (2d) 157, leave to appeal to NBCA refused, 2011 CanLII 20626, [2011] NBJ No 116 (QL), leave to appeal to SCC refused, [2011] 4 SCR vi.
R v Salituro, [1991] 3 SCR 654, 1991 CanLII 17.
R v Shallow, [2009] OJ No 3204 (QL), 2009 WL 7755524 (WL Can) (Sup Ct).
R v Spencer (1983), 145 DLR (3d) 344, 1983 CanLII 3111 (Ont CA), aff'd [1985] 2 SCR 278, 1985 CanLII 4.
R v Syncrude Canada Ltd, 2010 ABPC 229, [2010] 12 WWR 524.
R v Terry, [1996] 2 SCR 207, 1996 CanLII 199.
R v Thomas Equipment Ltd, [1979] 2 SCR 529, 1979 CanLII 226.
R v Turpin, [1989] 1 SCR 1296, 1989 CanLII 98.
Re Bradley and The Queen (1975), 9 OR (2d) 161, 1975 CanLII 766 (CA).
Recherches internationales Québec c Cambior Inc, 1999 CanLII 12022, [1999] JQ no 1581 (QL) (Sup Ct).
Recherches internationales Québec v Cambior Inc, 1998 CanLII 9780, [1998] QJ No 2554 (QL) (Sup Ct).
Rees c Convergia, 2005 QCCA 353, [2005] JQ No 3248 (QL), leave to appeal to SCC refused, [2005] 2 SCR vii.
Reference Re Environmental Management Act (British Columbia), 2019 BCCA 181, 434 DLR (4th) 213, appeal filed to the SCC as of right, 38682 (14 June 2019).
Reference Re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74, [2020] AJ No 234 (QL).
Reference Re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40, [2019] 9 WWR 377, appeal filed to the SCC as of right, 38663 (31 May 2019).
Reference Re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544, 146 OR (3d) 65, appeal to the SCC filed as of right, 38781 (28 August 2019).
Reference Re Newfoundland Continental Shelf, [1984] 1 SCR 86, 1984 CanLII 132.
Reference Re Offshore Mineral Rights, [1967] SCR 792, 1967 CanLII 71.
Reference Re Upper Churchill Water Rights Reversion Act, [1984] 1 SCR 297, 1984 CanLII 17.

United States Securities and Exchange Commission v Cosby, 2000 BCSC 338, [2000] BCTC 219.
Van Breda v Village Resorts Limited, 2010 ONCA 84, 98 OR (3d) 721, aff'd 2012 SCC 17, [2012] 1 SCR 572.
Voisins du train de banlieue de Blainville Inc c Agence métropolitaine de transport, 2004 CanLII 9803, [2004] JQ no 6601 (QL) (Sup Ct), aff'd 2007 QCCA 236, [2007] JQ no 1202 (QL).
Voters Taking Action on Climate Change v British Columbia (Energy and Mines), 2015 BCSC 471, 94 CELR (3d) 35.
Wabasso Ltd v National Drying Machinery Co, [1981] 1 SCR 578, 1981 CanLII 16.
Waldman v Waldman, 2017 QCCA 1398, [2017] QJ No 12748 (QL).
Ward v Canada (Attorney General), 2007 MBCA 123, 286 DLR (4th) 684.
Weir v Lohr (1967), 65 DLR (2d) 717, 1967 CanLII 674 (Man QB).
Welsh v Welsh, 2011 ABQB 686, 9 RFL (7th) 409.
West Van Inc v Daisley, 2014 ONCA 232, 119 OR (3d) 481, leave to appeal to SCC refused, [2014] 2 SCR x.
Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46, [2001] 2 SCR 534.
Western Surety Co v Elk Valley Logging Ltd (1985), 23 DLR (4th) 464, 1985 CanLII 780 (BCSC).
Widdrington (Estate of) v Wightman, 2011 QCCS 1788, 83 CCLT (3d) 1, aff'd in part 2013 QCCA 1187, [2013] RJQ 1054, leave to appeal to SCC refused, [2014] 1 SCR xiii.
Wightman c Widdrington (Succession de), 2013 QCCA 1187, [2013] RJQ 1054, leave to appeal to SCC refused, [2014] 1 SCR xiii.
Windsor (City) v Canadian Transit Co, 2016 SCC 54, [2016] 2 SCR 617.
Winnipeg Oil Co v Canadian Northern Railway, [1911] 18 WLR 424, 21 Man R 274 (CA).
Wolf v The Queen (1974), [1975] 2 SCR 107, 1974 CanLII 161.
Wong v Lee (2002), 58 OR (3d) 398, 2002 CanLII 44916 (CA).
Yaiguaje v Chevron Corporation, 2018 ONCA 472, 141 OR (3d) 1, leave to appeal to SCC refused, 38183 (4 April 2019).
Yaiguaje v Chevron Corporation, 2017 ONSC 135, 136 OR (3d) 261, leave to appeal to Div Ct refused, 2017 ONSC 2251, [2017] OJ No 1765 (QL).
Yassin v Green Park International Inc, 2010 QCCA 1455, 322 DLR (4th) 232, leave to appeal to SCC refused, [2011] 1 SCR vi.
Yip v HSBC Holdings plc, 2018 ONCA 626, 141 OR (3d) 641, leave to appeal to SCC refused, 38331 (28 March 2019).
Yip v HSBC Holdings plc, 2017 ONSC 5332, [2017] OJ No 4729 (QL), aff'd 2018 ONCA 626, 141 OR (3d) 641, leave to appeal to SCC refused, 38331 (28 March 2019).
Zimmermann Inc v Barer, 2016 QCCA 260, [2016] QJ No 893 (QL).

Arguments

Burgess v Ontario (Minister of Natural Resources and Forestry) (14 September 2016), Barrie 16-1325CP (Ont Sup Ct) (Statement of Claim) (notice of discontinuance, 7 August 2018).
Edwards v DTE Energy Co, [2008] OJ No 4433 (QL) (Sup Ct) (Applicant's Factum).
La Rose v Her Majesty the Queen (25 October 2019), Vancouver T-1750-19 (FC) (Statement of Claim to the Defendants).
Mathur v Her Majesty the Queen in Right of Ontario (25 November 2019), Toronto CV-19-00631627 (Ont Sup Ct) (Notice of Application).
Pembina County Water Resource District v Manitoba (Government), 2017 FCA 92, 409 DLR (4th) 719, leave to appeal to SCC refused, [2017] 2 SCR ix ((Memorandum of Fact and Law of the Appellant & Memorandum of Fact and Law of the Respondent Rural Municipality of Rhineland).

United Kingdom

AAA v Unilever plc, [2018] EWCA Civ 1532, [2018] All ER (D) 87.
Amin v Brown, [2005] EWHC (Ch) 1670, [2006] ILPr 67.
Attorney-General of New Zealand v Ortiz (1982), [1984] AC 1, [1982] 3 All ER 432 (CA), aff'd (1983), [1984] AC 1 HL 35, [1983] 2 All ER 93 (HL).
Austin v Miller Argent (South Wales) Ltd, [2014] EWCA Civ 1012, [2015] 2 All ER 524.
Banco de Vizcaya v Don Alfonso de Borbon y Austria, [1935] 1 KB 140, [1934] All ER Rep 555.
Boys v Chaplin, [1971] AC 356, [1969] 3 WLR 322 (HL).
British Coal Corp v The King, [1935] AC 500, 1935 CanLII 308 (PC).
British Columbia Electric Railway Co Ltd v R, [1946] AC 527, 1946 CanLII 352 (PC).
British South Africa Co v Companhia de Moçambique, [1893] AC 602, [1891–94] All ER 640 (HL).
Brownlie v Four Seasons Holdings Incorporated, [2017] UKSC 80, [2018] 2 All ER 91.
Bulwer's Case (1584), 7 Co Rep 1a, 77 ER 411 (KB).
Chandler v Cape plc, [2012] EWCA Civ 525, [2012] 3 All ER 640.
Co-operative Committee on Japanese Canadians v Canada (Attorney General) (1946), [1947] AC 87, 1946 CanLII 361 (PC).
Croft v Dunphy (1932), [1933] AC 156, 1932 CanLII 317 (PC).
Distillers Co (Biochemicals) Ltd v Thompson, [1971] UKPC 3, [1971] AC 458 (PC).
Doulson v Matthews, [1775–1802] All ER Rep 144, 100 ER 1143 (KB).
Fitzgerald v Williams, [1996] QB 657, [1996] 2 All ER 171 (CA).
George Monro Ltd v American Cyanamid and Chemical Corporation, [1944] KB 432, [1944] 1 All ER 386 (CA).
Government of India v Taylor, [1955] AC 491, [1955] 1 All ER 292 (HL).
Hamed v Stevens, [2013] EWCA Civ 911, [2013] ILPr 623.
Hesperides Hotels v Aegean Holidays Ltd (1978), [1979] AC 508, [1978] 2 All ER 1168 (HL).
Holman v Johnson (1775), 1 Cowp 341, 98 ER 1120 (KB).
Huntington v Attrill, [1892] UKPC 7, [1893] AC 150.

Islamic Republic of Iran v The Barakat Galleries Ltd, [2007] EWCA Civ 1374, [2009] QB 22.
Johnstone v Pedlar, [1921] 2 AC 262, [1921] All ER Rep 176 (HL).
Ladore v Bennett, [1939] AC 468, 1939 CanLII 270 (PC).
Lucasfilm v Ainsworth, [2011] UKSC 39, [2012] 1 AC 208.
Mbasogo v Logo Ltd, [2006] EWCA Civ 1370, [2007] QB 846.
Morgan v Hinton Organics (Wessex) Ltd, [2009] EWCA Civ 107, [2009] Env LR 30.
Nasser v United Bank of Kuwait, [2001] EWCA Civ 556, [2002] 1 All ER 401.
Okpabi v Royal Dutch Shell plc, [2018] EWCA Civ 191, [2018] Bus LR 1022.
Ontario (Attorney General) v Canada (Attorney General), [1947] AC 127, 1947 CanLII 301 (PC).
Ontario (Attorney General) v Reciprocal Insurers, [1924] AC 328, (*sub nom R v Craigon*) 1924 CanLII 460 (PC).
Phillips v Eyre (1870), LR 6 QB 1, 22 TLR 869 (Ex Ch).
Pocket Kings Ltd v Safenames Ltd, [2009] EWHC 2529 (Ch), [2010] Ch 438.
Porter v Freudenberg, [1915] 1 KB 857, [1914–15] All ER Rep 918 (CA).
R v Governor of Pentonville Prison, Ex parte Budlong (1979), [1980] 1 All ER 701, [1980] 1 WLR 1110 (QB).
Raulin v Fischer, [1911] 2 KB 93, 80 LJKB 811.
Re Polly Peck International plc (No 2) (Marangos Hotel Company Ltd v Stone), [1998] 3 All ER 812, [1998] 2 BCLC 185 (CA).
Re State of Norway's Application (No 2) (1989), [1990] 1 AC 723 HL 783, [1989] 1 All ER 745 (HL).
Rodriguez v Speyer Brothers (1918), [1919] AC 59, [1918–19] All ER Rep 884 (HL).
Royal Bank of Canada v The King, [1913] AC 283, 1913 CanLII 401 (PC).
Rylands v Fletcher, [1868] UKHL 1, LR 3 HL 330.
Sovfracht v Van Udens Scheepvaart En Agentuur Maatschappij (1942), [1943] AC 203, [1943] 1 All ER 76 (HL).
The Tolten, [1946] 2 All ER 372, [1946] P 135 (CA).
Thomson v Renwick Group plc, [2014] EWCA Civ 635, [2014] 2 BCLC 97.
United States of America v Inkley (1988), [1989] QB 255, [1988] 3 All ER 144 (CA).
United States Securities and Exchange Commission v Manterfield, [2009] EWCA Civ 27, [2009] 2 All ER 1009.
Vedanta Resources plc v Lungowe, [2019] UKSC 20, [2019] 3 All ER 1013.

United States

Judgments

American Electric Power Co v Connecticut, 564 US 410, 131 S Ct 2527 (2012).
Amlon Metals Inc v FMC Corp, 775 F Supp 668, 1991 US Dist Lexis 14571 (SD NY 1991).
Anderson v Teck Metals Inc, 2015 US Dist Lexis 1035, 2015 WL 59100 (WL Int) (ED Wash 2015).
Arc Ecology v United States Department of the Air Force, 411 F (3d) 1092, 2005 US App Lexis 11242 (9th Cir 2005).

Cooper v Tokyo Electric Power Company, 860 F (3d) 1193, 2017 US App Lexis 11075 (9th Cir 2017).
Corrosion Proof Fittings v Environmental Protection Agency, 947 F (2d) 1201, 1991 US App Lexis 24922 (5th Cir 1991).
County of San Mateo v Chevron Corp, 294 F Supp (3d) 934, 2018 US Dist Lexis 49197 (ND Cal 2018), appeal to 9th Cir pending, 18-15499, 18-15502 & 18-15503.
Daimler AG v Bauman, 571 US 117, 134 S Ct 746 (2014).
Defenders of Wildlife v Norton, 257 F Supp (2d) 53, 2003 US Dist Lexis 5031 (DDC 2003).
DiLaura v Power Authority of the State of New York, 786 F Supp 241, 1991 US App Lexis 20442 (WD NY 1991), aff'd 982 F (2d) 73, 1992 US App Lexis 33834 (2nd Cir 1992).
Dow Chemical Co v Alfaro, 786 SW (2d) 674, 1990 Tex Lexis 44 (Tex Sup Ct 1990), certiorari denied, 498 US 1024, 111 S Ct 671.
Ducktown Sulphur, Copper & Iron Co v Barnes, 60 SW 593, 1900 Tenn Lexis 201 (Sup Ct 1900).
Edison Sault Electric Company v United States, 552 F (2d) 326, 1977 US Ct Cl Lexis 27 (Ct Cl 1977).
Environmental Defense Fund Inc v Massey, 986 F (2d) 528, 1993 US App Lexis 1380 (DC Cir 1993).
Friends of the Earth Inc v Mosbacher Jr, 488 F Supp (2d) 889, 2007 US Dist Lexis 24268 (ND Cal 2007).
Georgia v Tennessee Copper Co, 227 US 678, 35 S Ct 752 (1915).
Georgia v Tennessee Copper Co, 237 US 474, 35 S Ct 631 (1915).
Georgia v Tennessee Copper Co, 206 US 230, 27 S Ct 618 (1907).
Goodyear Dunlop Tires Operations, SA v Brown, 564 US 915, 131 S Ct 2846 (2011).
Greenpeace USA v Stone, 748 F Supp 749, 1990 US Dist Lexis 13261 (D Hawaii 1990).
Haudenosaunee Six Nations of Iroquois (Confederacy) of North America v Canada, 1998 US Dist Lexis 16265, 1998 WL 748351 (WL Int) (WD NY 1998).
Her Majesty the Queen in Right of the Province of British Columbia v Gilbertson, 597 F (2d) 1161, 1979 US App Lexis 15993 (9th Cir 1979).
Her Majesty the Queen in Right of the Province of Ontario v City of Detroit, 874 F (2d) 332, 1989 US App Lexis 5877 (6th Cir 1989), rev'g 696 F Supp 249, 1988 US Dist Lexis 12270 (ED Mich 1988).
Her Majesty the Queen in Right of the Province of Ontario v United States Environmental Protection Agency, 912 F (2d) 1525, 1990 US App Lexis 15262 (DC Cir 1990).
Hernández v Mesa, 140 S Ct 735, 206 L Ed (2d) 29 (2020).
Hirt v Richardson, 127 F Supp (2d) 833, 1999 US Dist Lexis 19403 (WD Mich 1999).
Illinois v City of Milwaukee, 406 US 91, 92 S Ct 1385 (1972).
Indigenous Environmental Network v United States Department of State, 347 F Supp (3d) 561, 2018 US Dist Lexis 191510 (D Mont 2018), rev'd as moot, 2019 US App Lexis 17095, 2019 WL 2542756 (WL Int) (9th Cir 2019).
J McIntyre Machinery v Nicastro, 564 US 873, 131 S Ct 2780 (2011).
Jacobus v Colgate, 217 NY 235, 1916 NY Lexis 1306 (Ct App 1916).
Jesner v Arab Bank plc, 138 S Ct 1386, 200 L Ed (2d) 612 (2018).

King County v BP plc, 2018 US Dist Lexis 178873, 2018 WL 9440497 (WL Int) (WD Wash 2019).
Kiobel v Royal Dutch Petroleum Co, 569 US 108, 133 S Ct 1659 (2013).
Kivalina v ExxonMobil Corp, 696 F (3d) 849, 2012 US App Lexis 19870 (9th Cir 2012), certiorari denied, 569 US 1000, 133 S Ct 2390.
Little v Chicago, St-Paul, Minneapolis & Omaha Railway Company, 65 Minn 48, 1896 Minn Lexis 207 (Sup Ct 1896).
Livingston v Jefferson, 15 Fed Cas 660, 1811 US App Lexis 263 (Va Dist Cir Ct 1811).
Lujan v Defenders of Wildlife, 504 US 555, 112 S Ct 2130 (1992).
Manitoba v Norton, 398 F Supp (2d) 41, 2005 US Dist Lexis 5142 (DDC 2005), aff'd 2006 US App Lexis 10193 (DC Cir 2006).
Manitoba v Salazar, 691 F Supp (2d) 37, 2010 US Dist Lexis 19982 (DDC 2010).
Manitoba v Zinke, 273 F Supp (3d) 145, 2017 US Dist Lexis 127212 (DDC 2017).
Manitoba v Zinke, 49 F (3d) 1111, 2017 US App Lexis 3829 (DC Cir 2017).
Mayaguezanos por la Salud y el Ambiante v United States of America, 198 F (3d) 297, 1999 US App Lexis 33416 (1st Cir 1999).
Mayor & City Council of Baltimore v BP plc, 2019 US Dist Lexis 97438, 49 ELR 20102 (D Md 2019), appeal to 4th Cir pending, 19-1644.
Michie v Great Lakes Steel Division, National Steel Corp, 495 F (2d) 213, 1974 US App Lexis 9324 (6th Cir 1974), certiorari denied, 419 US 997, 95 S Ct 310 (1974).
Miller v United States of America, 583 F (2d) 857, 1978 US App Lexis 9282 (6th Cir 1978).
Missouri v Illinois, 200 US 496, 26 S Ct 268 (1906).
Missouri v Illinois, 180 US 208, 21 S Ct 331 (1901).
Moore v Mitchell, 30 F (2d) 600, 1929 US App Lexis 2467 (2nd Cir 1929).
Morrison v National Australia Bank, 561 US 247, 130 S Ct 2869 (2010).
National Organization for the Reform of Marijuana Laws v United States, 452 F Supp 1226, 1978 US Dist Lexis 17299 (DDC 1978), aff'd No 78-1669 (DC Cir 1979).
Natural Resource Defense Council v United States Department of the Navy, 2002 US Dist Lexis 26360, 2002 WL 32095131 (WL Int) (CD Cal 2002).
Natural Resources Defense Council v Nuclear Regulatory Commission, 647 F (2d) 1345, 1993 US App Lexis 1380 (DC Cir 1981).
NEPA Coalition of Japan v Aspin, 837 F Supp 466, 1993 US Dist Lexis 17090 (DC Cir 1993).
NL Industries Inc v Commercial Union Insurance Co, 938 F Supp 248, 1996 US Dist Lexis 11940 (D NJ 1996), remanded 154 F (3d) 155, 1998 US App Lexis 21549 (3rd Cir 1998).
Ohio v BASF Wyandotte Corp, 67 Ohio Op (2d) 239 (Cuyahoga Co Ct Com Pl 1974, aff'd 1975 Ohio App Lexis 6311, 1975 WL 182459 (WL Int) (Ohio 8th Dist Ct App 1975).
Ohio v Wyandotte Chemicals Corp, 401 US 493, 91 S Ct 1005 (1971).
Okinawa Dugong v Gates, 543 F Supp (2d) 1082, 2008 US Dist Lexis 5234 (ND Cal 2008).

Pakootas v Teck Cominco Metals Ltd, 905 F (3d) 565, 2018 US App Lexis 26098 (9th Cir 2018), rehearing denied, 2018 US App Lexis 34173 (9th Cir 2018), certiorari denied, 2019 US Lexis 3928 (USSC).
Pakootas v Teck Cominco Metals Ltd, 830 F (3d) 975, 2016 US App Lexis 13662 (9th Cir 2016).
Pakootas v Teck Cominco Metals Ltd, 646 F (3d) 1214, 2011 US App Lexis 15885 (9th Cir 2011).
Pakootas v Teck Cominco Metals Ltd, 452 F (3d) 1066, 2006 US App Lexis 13662 (9th Cir 2006), certiorari denied, 552 US 1095, 128 S Ct 858 (2008).
Pakootas v Teck Cominco Metals, 2004 US Dist Lexis 23041, 2004 WL 2578982 (WL Int) (ED Wash 2004), aff'd 452 F (3d) 1066, 2006 US App Lexis 13662 (9th Cir 2006), certiorari denied, 552 US 1095, 128 S Ct 858 (2008).
Pasquantino v United States, 544 US 349, 125 S Ct 1766 (2005).
People of Enewetak v Laird, 353 F Supp 811, 1973 US Dist Lexis 15300 (D Hawaii 1973).
People of Saipan, ex rel Guerrero v United States Department of the Interior, 356 F Supp 645, 1973 US Dist Lexis 14420 (D Hawaii 1973), rev'd 502 F (2d) 90, 1974 US App Lexis 7637 (9th Cir 1974), certiorari denied, 420 US 1003, 95 S Ct 1445 (1975).
People of the State of California v General Motors Corporation, 2007 US Dist Lexis 68547, 2007 WL 2726871 (WL Int) (ND Cal 2007).
People to Save the Sheyenne River Inc v North Dakota Department of Health, 744 NW (2d) 748, 2008 ND Lexis 19 (ND Sup Ct 2008).
Re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F (2d) 1279, 1992 US App Lexis 833 (7th Cir 1992), rehearing denied, 1992 US App Lexis 2217 (7th Cir 1992).
Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in December 1984, 809 F (2d) 195, 1987 US App Lexis 1186 (2nd Cir 1987), certiorari denied, 484 US 871, 108 S Ct 199 (1987).
Reasor-Hill Corp v Harrison, 220 Ark 521, 1952 Ark Lexis 744 (Sup Ct 1952).
Rhode Island v Chevron Corp, 2019 US Dist Lexis 121349, 49 ELR 20126 (D RI 2019), appeal to 1st Cir pending, 19-1818.
RJR Nabisco Inc v European Community, 136 S Ct 2090, 195 L Ed (2d) 476 (2016).
Sierra Club v Adams, 578 F (2d) 389, 1978 US App Lexis 1218 (DC Circ 1978).
Smith v Southern Railway Co, 136 Ky 162, 1909 Ky Lexis 465 (Ct App 1909).
Sosa v Álvarez-Machaín, 542 US 692, 124 S Ct 2739 (2004).
Soucheray v Corps of Engineers of the United States Army, 483 F Supp 352, 1979 US Dist Lexis 8708 (WD Wis 1979).
Stark v Howe Sound Co, 148 Misc 686 at 690–91, 1933 NY Misc Lexis 1870 (NY Sup Ct 1933), aff'd 269 NYS 936, 1934 NY App Div Lexis 8525 (NY Sup Ct App Div 1934), amended 271 NYS 1097, 1934 NY App Div Lexis 6641 (NY Sup Ct App Div 1934).
Swinomish Tribal Community v Federal Energy Regulatory Commission, 627 F (2d) 499, 1980 US App Lexis 16447 (DC Circ 1980).
Thomas v New York, 802 F (2d) 1443, 1986 US App Lexis 31067 (DC Cir 1986), certiorari denied, 482 US 918, 107 S Ct 3196.

Arguments

Support of Petitioner), online (pdf): *SCOTUS Blog* <www.scotusblog.com> [perma.cc/A9TB-RR4V].

France

Cass civ 1re, 16 March 1999, *Pordea c Times Newspapers Ltd*, [1999] Bull civ I 61, No 92, [2000] ILPr 763.

Trib gr inst Bastia, 8 December 1976, *La Prud'hommie des pêcheurs de Bastia c Société Montedison*, (1977) D Jur 427, aff'd Cass civ 2e, 3 April 1978, *Société Montedison c Préfet du département de la Haute Corse*, (1978) Bull civ II 86, No 106, (1978) D Jur 367 (note Bernard Audit), [1979] 1 RJE 20 (note Martine Remond-Gouilloud).

Australia

Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd, [1988] HCA 25, 165 CLR 30.

Dow Jones & Company Inc v Gutnick, [2002] HCA 56, 210 CLR 575.

Dagi v Broken Hill Pty Co Ltd (No 2) (1995), [1997] 1 VR 428 (VSC).

Evans v European Bank Ltd, [2004] NSWCA 82, 61 NSWLR 75

Moti v The Queen, [2011] HCA 50, 245 CLR 456.

Potter v Broken Hill Pty Co Ltd, [1906] HCA 88, 3 CLR 479.

Régie nationale des usines Renault SA v Zhang, [2002] HCA 10, 210 CLR 491.

New Zealand

Attorney-General for the United Kingdom v Wellington Newspapers Ltd, [1988] 1 NZLR 129, [1988] NZCA 18 (WorldLII) (CA).

Christie v Foster, [2019] NZCA 623, [2019] NZFLR 365.

South Africa

Atlantic Islands Development Corp Ltd v Buchan, [1971] 1 All SA 234(C), 55 ILR 1 (S Afr SC).

Germany

Amtsgericht Bonn [Local Court], 29 September 1987, (1988) 8:6 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 351 (Germany), aff'd Landgericht Bonn [Regional Court], 14 December 1987, (1988) 8:6 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 354 (Germany).

Landgericht Bonn [Regional Court], 11 February 1987, (1987) 7:4 Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 231 (Germany), aff'd Oberlandesgericht Köln [Regional Court of Appeal], 23 March 1987, (1987) 7:4

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) [The Practice of International Private and Procedural Law] 233 (Germany).

Landgericht Saarbrücken [Regional Court], 4 July 1961, (1961) Die deutsche Rechtsprechung auf dem Gebiete des International Privatrechts (IPRspr) [German Court Rulings in Private International Law] No 38, 125 (Germany), aff'd Oberlandesgericht Saarbrücken [Regional Court of Appeal], 5 March 1963, No 2 U 191/61 (unreported) (Germany).

Oberlandesgericht Hamm [Regional Court of Appeal], 30 November 2017 (Germany), translated in Columbia Law School Sabin Center for Climate Change Law, "Climate Change Litigation Database", online: *Climate Change Litigation Database* <www.climatecasechart.com> [perma.cc/U334-XFJG].

Oberlandesgericht Karlsruhe [Regional Court of Appeal], 4 August 1977, (1977) 23:11 Recht der Internationalen Wirtschaft (RIW/AWD) [Law of International Business] 718 (Germany), aff'g Landgericht Freiburg [Regional Court], 10 June 1975, No 2076/74 (unreported) (Germany), summarized in French in [1976] 2 RJE 73.

Oberlandesgericht Saarbrücken [Regional Court of Appeal], 22 October 1957, (1958) 11:20 Neue Juristische Wochenschrift (NJW) [New Law Weekly] 752 (Germany).

Austria

Oberster Gerichtshof [Supreme Court], 14 April 1988, (1989) 39:4 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (ZÖR) [Austrian Journal of Public and International Law] 364 (Austria).

Oberster Gerichtshof [Supreme Court], 13 January 1988, (1988) 110:5 Juristische Blätter (JBL) [Legal Journal] 323 (Austria).

Switzerland

Bundesgericht [Federal Supreme Court], 21 June 1990, Bundesgerichtsentscheid (BGE) 116 II 480 (Switzerland).

Netherlands

Hoge Raad der Nederlanden [Supreme Court], 23 September 1988, (1988) Rechtspraak van de Week (RvdW) [Dutch Weekly Law Reports] No 150 (Netherlands), reprinted in (1990) 21 Nethl YB Intl L 434 at 439 & in part in Alice Palmer & Cairo AR Robb, eds, *International Environmental Law Reports*, vol 4: International Environmental Law in National Courts (Cambridge: Cambridge University Press, 2005) 340, aff'g Gerechtshof Den Haag [Court of Appeal], 10 September 1986 (Netherlands), reprinted in (1988) 19 Nethl YB Intl L 497 & in part in Alice Palmer & Cairo AR Robb, eds, *International Environmental Law Reports*, vol 4: International Environmental Law in National Courts (Cambridge: Cambridge University Press, 2005) 340; Rechtbank Rotterdam [District Court], 16 December 1983, (1984) Nederlandse Jurisprudentie (NJ) [Dutch Cases] No 341 (Netherlands), reprinted in (1984) 15 Nethl YB Intl L 471.

European Union

AB FlyLAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS, C-27/17, CLI:EU:C:2018:533, [2019] 1 WLR 669.
AB FlyLAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS, C-302/13, ECLI:EU:C:2014:2319, [2014] 5 CMLR 1277.
Bolagsupplysningen OÜ v Svensk Handel AB, C-194/16, ECLI:EU:C:2017:766, [2018] QB 963.
Danmarks Rederiforening (on behalf of DFDS Torline A/S) v O Landsorganisationen i Sverige (on behalf of SEKO Sjöfolk Facket för Service och Kommunikation), C-18/02, [2004] ECR I-1417, [2004] All ER (EC) 845.
Delecta Aktiebolag v MSL Dynamics Ltd, C-43/95, [1996] ECR I-4661, [1996] 3 CMLR 741.
Dumez France SA v Hessiche Landesbank, C-220/88, [1990] ECR I-49, [1990] ILPr 299.
Handelskwekeriz GJ Bier BV v Mines de Potasse d'Alsace SA, C-21/76, [1976] ECR I-1735, [1977] 1 CMLR 284.
Hayes v Kronenberger GmBH, C-323/95, [1997] ECR I-1711, [1997] ILPr 361.
Land Oberösterreich v ČEZ as, C-115/08, [2009] ECR I-10265, [2010] All ER (EC) 901.
Land Oberösterreich v ČEZ as, C-343/04, [2006] ECR I–4557, [2006] 2 All ER (Comm) 665.
Lechouritou v Dimosio tis Omospondiakis Dimokratias tis Germanias, C-292/05, [2007] ECR I-1519, [2007] 2 All ER (Comm) 57.
Löber v Barclays Bank plc, C-304/17, ECLI:EU:C:2018:701, [2019] 4 WLR 5.
LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol, C-29/76, [1976] ECR 1541, [1977] 1 CMLR 88.
Marinari v Lloyds Bank plc, C-364/93, [1995] ECR 1-2719, [1996] QB 217.
Netherlands State v Rüffer, C-814/79, [1980] ECR 3807, [1981] 3 CMLR 293.
Universal Music International Holding BV v Schilling, C-12/15, ECLI:EU:C:2016:449, [2016] QB 967.
Verein für Konsumenteninformation v Henkel, C-167/00, [2002] ECR I-8111, [2003] 1 All ER (Comm) 606.

GOVERNMENT DOCUMENTS

Canada

Legislative debates

"Bill 125, Civil Code of Quebec", Quebec, National Assembly, Subcommittee on Institutions, *Journal des débats*, 34-1, vol 31, No 32 (9 December 1991) at 1310–11 (Louise Harel, Jean Pineau & Gil Rémillard).
"Bill 125, Civil Code of Quebec", Quebec, National Assembly, Subcommittee on Institutions, *Journal des débats*, 34-1, vol 31, No 28 (3 December 1991) at 1143–44 (Louise Harel, Jean Pineau & Gil Rémillard).

"Bill 158, *Loi modifiant le Code civil et le Code de procédure civile*", Quebec, National Assembly, *Journal des débats*, 33-2, vol 30, No 134 (21 June 1989) at 6970–73 (Gil Rémillard & Claude Filion).

"Bill 3, An Act respecting Actions arising from Transboundary Pollution between Ontario and Reciprocating Jurisdictions", 2nd reading, Ontario, Legislative Assembly, *Official Reports of Debates*, 33-1, No 113 (10 February 1986) at 3964 (Ruth Anna Grier).

"Bill 36, International Waterways Treaty", 2nd reading, *House of Commons Debates*, 11-3, vol 5 (16 May 1911) at 9095–9100, 9130–9132, 9213–9215 (John Allister Currie, Angus Claude Macdonell, John Dowsley Reid, Henry Emmerson, Charles Joseph Doherty & William Pugsley).

"Bill 36, Waterways Treaty", 1st reading, *House of Commons Debates*, 11-3, vol 1 (6 December 1910) at 885–86 (Angus Claude Macdonell, William Pugsley, Oswald Smith Crocket & Martin Burrell).

"Bill 37, An Act respecting civil liability for climate-related harms", 2nd reading, Ontario, Legislative Assembly, *Official Reports of Debates*, 42-1, No 41 (25 October 2018) at 1898–1903, 1915–16 (Jessica Bell, Bhutila Karpoche, Jeremy Roberts, Donna Skelly, Dave Smith & Peter Tabuns).

"Bill 5, Transboundary Pollution Act", 2nd reading, Nova Scotia, House of Assembly, *Debates and Proceedings*, 56-1, Vol 93, No 8 (21 September 1993) at 388 (John Leefe).

"Bill C-220, Environmental Rights Act", 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings: Official Report*, 41-2, vol 70, No 82A (9 November 2017) at 3585–3594 (James Allum, Nahanni Fontaine, Brad Michalesk, Alan Lagimodiere, Greg Selinger, Rick Wowchuk & Blair Yakimoski).

"Bill C-38, An Act to amend the Fisheries Act and to amend the Criminal Code in consequence thereof", House of Commons, Standing Committee on Fisheries and Forestry, *Minutes of Proceedings and Evidence*, 30-2, No 34 (21 June 1977) at 44–45 (JC Carton, Director of Legal Services of the Department of Fisheries and the Environment).

House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 36-2 (19 September 2000) at 1655 (David Anderson), online: *House of Commons* <www.ourcommons.ca> [perma.cc/ZCG5-JE28].

"Statement on Cherry Point Oil Spill and Representations to United States Government Arising Therefrom", *House of Commons Debates*, 28-4, vol 4 (8 June 1972) at 2955 (Mitchell Sharp), reprinted in ALC de Mestral, "Practice in International Law During 1972 as Reflected in Resolutions of the House of Commons and in Government Statements in the House of Commons" (1973) 11 Can YB Intl L 314 at 333–34.

Law reform publications

Alberta Law Reform Institute, *Enforcement of Judgments*, Final Report 94 (2008).

Manitoba Law Reform Commission, *Private International Law*, Report 119 (2009).

Walker, Janet, in association with the Law Commission of Ontario, *Reforming the Law of Crossborder Litigation: Judicial Jurisdiction* (Toronto: Law Commission of Ontario, 2009).

Other documents

Berner, Sargent H, *Private Prosecution and Environmental Control Legislation: A Study* (Ottawa: Department of the Environment, 1972).

Canadian Delegation (OECD), "Transfrontier Pollution (TFP): Liability and Compensation" in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 283.

City of Victoria, "Minutes of Victoria Municipal Council" (17 January 2019) at 22–23, online (pdf): *City of Victoria* <www.victoria.ca> [perma.cc/4HUW-ZN8R].

Government of Canada, "Compendium of Canada's Engagement in International Environmental Agreements and Instruments: *UNECE Convention on Environmental Impact Assessment in Transboundary Context (Espoo Convention)*", online (pdf): *Government of Canada* <www.canada.ca> [perma.cc/YGR6-J6MW].

Government of Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2014), online (pdf): *Global Affairs Canada* <www.international.gc.ca> [perma.cc/548W-4JL6].

Government of Canada, "Foreign Investment Protection Agreement" (May 2004), online (pdf): *Italaw* <www.italaw.com> [perma.cc/A8NP-3P62], reprinted in Céline Lévesque & Andrew Newcombe, "Canada" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 53.

Quebec, Ministère de la Justice, *Commentaires du ministre de la justice: le Code civil du Québec, un mouvement de société*, vol 3 (Quebec: Publications du Québec, 1993).

United Kingdom

UK Law Comission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict* (UK Report No 193, Scottish Report No 129) (London: Her Majesty's Stationery Office, 1990).

United States

"Statement by President Trump on the Paris Climate Accord" (1 June 2017), online: *White House* <www.whitehouse.gov> [perma.cc/ET8B-PJY9].

Council on Environmental Quality, "Memorandum to U.S. Agencies on Applying the Environmental Impact Statement Requirement to Environmental Impacts Abroad" (24 September 1976), 15:6 ILM 1426.

United States Department of State, *Compensation for American-owned Lands Expropriated in Mexico: Full Text of Official Notes, July 21, 1938 to November 12, 1938* (Washington, DC: United States Government Printing Office, 1939).

United States Trade Representative & United States Department of State, "2012 U.S. Model Bilateral Investment Treaty" (April 2012), online (pdf): *Office of the United States Trade Representative* <www.ustr.gov> [perma.cc/D5Q7-ZCL5], reprinted in Lee M Caplan & Jeremy K Sharpe, "United States" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 755 at 763–850.

France

France, *JO*, Sénat, Débats parlementaires, Compte rendu intégral, Session of 27 April 2017 at 1537 (Jean-Yves Le Drian), reprinted in (2017) 106:3 Rev crit dr int privé 499.

European Union

EC, *Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II)*, 21 February 2006, COM(2006) 83 final, [2006] OJ, C 67/38.

EC, *Commission Opinion in accordance with point (c) of the third subparagraph of Article 251(2) of the EC Treaty on the European Parliament's amendments to the Council Common Position on the proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) amending the proposal of the Commission pursuant to Article 250(2) of the EC Treaty*, 14 March 2007, COM(2007) 126 final, [2007] OJ, C 181/2.

EC, *Common Position (EC) 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, [2006] OJ, C 289 E/68.

EC, *Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, 27 September 2006, COM(2006) 566 final, [2006] OJ, C 303/92.

EC, *European Parliament legislative resolution of 10 July 2007 on the joint text approved by the Conciliation Committee for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ C 175 E/130.

EC, *European Parliament legislative resolution on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, [2006] OJ, C 244 E/194.

EC, *Notifications under Article 29(1) of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II)*, [2010] OJ, C 343/7.

EC, *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II)*, [2004] OJ, C 241/1.
EC, *Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations*, [2006] OJ, C 157/370.
EC, *Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations of May 3, 2002*, reprinted in Hamburg Group for Private International Law, "Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations" (2003) 67:1 Rabel J Comp & Intl Priv L 1.
EC, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II)*, 22 July 2003, COM(2003) 427 final, [2004] OJ, C 96/5, reprinted in (2003) 5 YB Priv Intl L 345.
EC, *Recommendation on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, EP Doc A6-0481/2006 (2006).
EC, *Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*, EC Doc A6-0211/2005 (2005).
European Parliament, *Report on the joint text approved by the Conciliation Committee for a regulation of the European Parliament and of the Council on the law applicable to noncontractual obligations (Rome II)*, EP Doc A6-0257/2007 (2007).
European Union, "European Union's Proposal for Investment Protection and Resolution of Investment Disputes. Transatlantic Trade and Investment Partnership. Trade in Services, Investment and e-Commerce" (12 November 2015), online (pdf): *European Commission* <www.ec.europa.eu> [perma.cc/7KUM-SNNZ].

SECONDARY MATERIALS

Monographs

Aftab, Yousuf & Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (Toronto: LexisNexis, 2019).
Anton, AE, *Private International Law*, 3rd ed by Paul R Baumont & Peter E McEleavy (Edinburgh: W Green, 2011)
Arbour, Jean-Maurice et al, *Droit international de l'environnement*, 3rd ed (Cowansville: Yvon Blais, 2016).
Baber, Walter F & Robert V Bartlett, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law* (Cambridge, Mass: MIT Press, 2009).
Banu, Roxana, *Nineteenth Century Perspectives in Private International Law* (Oxford: Oxford University Press, 2018).
Barboza, Julio, *The Environment, Risk and Liability in International Law* (Leiden: Martinus Nijhoff, 2011).

Basedow, Jürgen, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Leiden: Brill Nijhoff, 2015).
Benidickson, Jamie, *Environmental Law*, 5th ed (Toronto: Irwin Law, 2019).
Bergkamp, Lucas, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (The Hague: Kluwer Law International, 2001).
Birnie, Patricia W & Alan E Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992).
Birnie, Patricia, Alan Boyle & Catherine Redgewell, *International Law and the Environment*, 3rd ed (Oxford: Oxford University Press, 2009).
Black, Vaughan, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012).
Bodansky, Daniel, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017).
Bodansky, Daniel, *The Art and Craft of International Environmental Law* (Cambridge, Mass: Harvard University Press, 2010).
Boyd, David R, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015).
———, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).
Boyle, Alan E & Michael Bowman, eds, *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford: Oxford University Press, 2002).
Branch, Ward, *Class Actions in Canada*, 2nd ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2019).
Brand, Ronald A & Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford: Oxford University Press, 2007).
Briggs, Adrian, *The Conflict of Laws*, 4th ed (Oxford: Oxford University Press, 2019).
———, *Private International Law in English Courts* (Oxford: Oxford University Press, 2014).
Castel, Jean-Gabriel, *Droit international privé québécois* (Toronto: Butterworths, 1980).
Castrilli, Joseph F, *Annotated Guide to the Canadian Environmental Protection Act*, vol 1 (Aurora: Canada Law Book, 2009) (loose-leaf updated 2019, release 43).
Chevrette, François & Herbert Marx, *Droit constitutionnel: notes et jurisprudence* (Montreal: Presses de l'Université de Montréal, 1982).
Collins, Lord of Mapesbury et al, eds, *Dicey, Morris & Collins on the Conflict of Laws*, vol 1, 15th ed (London: Sweet & Maxwell, 2012).
Collins, Lynda & Heather McLeod Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014).
Coughlan, Steve et al, *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* (Toronto: Irwin Law, 2014).
Cox, Johanne M, *Expropriation in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2019).

De Oliveira, Carina Costa, *La réparation des dommages environnementaux en droit international: contribution à l'étude de la complémentarité entre le droit international public et le droit international privé* (Saarbrüken: Éditions universitaires européennes, 2012).
Desai, Bharat H, *International Environmental Governance: Towards UNEPO* (Leiden: Brill Nijhoff, 2014).
Dickinson, Andrew, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford: Oxford University Press, 2010).
Doelle, Meinhard & Chris Tollefson, *Environmental Law: Cases and Materials*, 2nd ed (Toronto: Carswell, 2013).
Dumberry, Patrick, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016).
Dupuy, Pierre-Marie & Jorge E Viñuales, *International Environmental Law*, 2nd ed (Cambridge: Cambridge University Press, 2018).
Dupuy, Pierre-Marie, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle* (Paris: Pedone, 1976).
Durocher, André. *Environnement et actions collectives au Québec* (Cowansville: Yvon Blais, 2019).
———, *Environmental Class Actions in Canada* (Toronto: Thomson Reuters, 2018).
Duvic-Paoli, Leslie-Anne, *The Prevention Principle in International Environmental Law* (Cambridge: Cambridge University Press, 2018).
Emanuelli, Claude, *Étude comparative sur le droit international privé au Canada* (Montreal: Wilson & Lafleur, 2019).
———, *Droit international privé québécois*, 3rd ed (Montreal: Wilson & Lafleur, 2011).
Emerich, Yaël, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (Cheltenham: Edward Elgar, 2018).
———, *Droit commun des biens: perspective transsystémique* (Cowansville: Yvon Blais, 2017).
Estrela Borges, Leonardo, *Les obligations de prévention dans le droit international de l'environnement et ses conséquences dans la responsabilité internationale des États* (Paris: L'Harmattan, 2016).
Faieta, Mario D et al, *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996).
Falconbridge, John Delatre, *Essays on the Conflict of Laws*, 2nd ed (Toronto: Canada Law Book, 1954).
Farrow, Trevor CW, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014).
Fawcett, James J & Paul Torremans, *Intellectual Property and Private International Law*, 2nd ed (Oxford: Oxford University Press, 2011).
Fawcett, James, Máire Ní Shúilleabháin & Sangeeta Shah, *Human Rights and Private International Law* (Oxford: Oxford University Press, 2016).
Fentiman, Richard, *International Commercial Litigation*, 2nd ed (Oxford: Oxford University Press, 2015).
Finkelstein, Neil, *Laskin's Constitutional Law*, vol 1, 5th ed (Toronto: Carswell, 1986).

Garnett, Richard, *Substance and Procedure in Private International Law* (Oxford: Oxford University Press, 2012).
Goldstein, Gérald & Ethel Groffier, *Droit international privé*, vol 2: règles spécifiques (Cowansville: Yvon Blais, 2003).
———, *Droit international privé*, vol 1: théorie générale (Cowansville: Yvon Blais, 1998).
Goldstein, Gérald, *Droit international privé*, vol 2: Compétence internationale des autorités québécoises et effets des décisions étrangères (Cowansville: Yvon Blais, 2013).
———, *Droit international privé*, vol 1: Conflits de lois: dispositions générales et spécifiques (Cowansville: Yvon Blais, 2011).
Graziano, Thomas Kadner, *La responsabilité délictuelle en droit international privé européen* (Basel: Helbing & Lichtenhahn, 2004).
Groffier, Éthel, *La réforme du droit international privé québécois: supplément au Précis de droit international privé québécois* (Cowansville: Yvon Blais, 1993).
Hartley, Trevor C, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 2nd ed (Cambridge: Cambridge University Press, 2015).
Healy, Robert G, Debora L VanNijnatten & Marcela López-Vallejo, *Environmental Policy in North America: Approaches, Capacity and the Management of Transboundary Issues* (Toronto: University of Toronto Press, 2014).
Hill, Jonathan & Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, 4th ed (Oxford: Hart, 2010).
Hill, Jonathan & Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws*, 5th ed (Oxford: Oxford Univesity Press, 2016).
Hogg, Peter W, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2018, release 1).
Hogg, Peter W, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011).
Horsman, Karen & Gareth Morley, eds, *Government Liability: Law and Practice* (Aurora: Canada Law Book, 2007) (loose-leaf updated 2019, release 32).
Hughes, Elaine L, Alastair R Lucas & William A Tilleman, *Environmental Law and Policy*, 3rd ed (Toronto: Emond Montgomery, 2003).
Hunter, David, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, 5th ed (St Paul: Foundation Press, 2015).
Jayakumar, S et al, eds, *Transboundary Pollution: Evolving Issues of Law and Policy* (Cheltenham: Edward Elgar, 2015).
Juenger, Friedrich K, *Choice of Law and Multistate Justice* (Dordrecht: Martinus Nijhoff, 1993).
Johnson, Walter S, *Conflict of Laws*, 2nd ed (Montreal: Wilson & Lafleur, 1962)
Karavias, Markos, *Corporate Obligations Under International Law* (Oxford: Oxford University Press, 2013).
Karayanni, Michael, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (Oxford: Oxford University Press, 2014).
Kiestra, Louwrens R, *The Impact of the European Convention on Human Rights on Private International Law* (The Hague: TMC Asser, 2014)

La Forest, Gérard V, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Department of Regional Economic Expansion, 1973).
Lafleur, Eugène, *The Conflict of Laws in the Province of Quebec* (Montreal: Theoret, 1898).
Lammers, JG, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (The Hague: Martinus Nijhoff, 1984).
Lamontagne, Denys-Claude, *Biens et propriété*, 8th ed (Cowansville: Yvon Blais, 2018).
Larocque, François, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010).
Larsson, Marie-Louise, *The Law of Environmental Damage: Liability and Reparation* (The Hague: Kluwer Law International, 1999).
Lefeber, René, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague: Kluwer Law International, 1996).
Levi-Fleur, David, ed, *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012).
Mallet, James S, *Enforcing Environmental Law: A Guide to Private Prosecution*, 2nd ed (Edmonton: Environmental Law Centre, 2004).
Manirabona, Amissi Melchiade, *Entreprises multinationales et criminalité environnementale transfrontalière: applicabilité du droit pénal canadien* (Cowansville: Yvon Blais, 2010).
Marboe, Irmgard, *Calculation of Compensation and Damages in International Investment Law*, 2nd ed (Oxford: Oxford University Press, 2017).
Marchadier, Fabien, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 2007).
Martha, Rutsel Silvestre J, *The Financial Obligation in International Law* (Oxford: Oxford University Press, 2015).
Marx, Axel & Jan Wouters, eds, *Global Governance* (Cheltenham: Edward Elgar, 2018).
Mayer, Benoit, *The International Law of Climate Change* (Cambridge: Cambridge University Press, 2018).
McCaffrey, Stephen C, *The Law of International Watercourses*, 3rd ed (Oxford: Oxford University Press, 2019).
———, *Private Remedies for Transfrontier Environmental Disturbances* (Morges: International Union for Conservation of Nature and Natural Resources, 1975).
McClean, David & Verónica Ruiz Abou-Nigm, *Morris: The Conflict of Laws*, 9th ed (London: Sweet & Maxwell, 2016).
McIntyre, Owen, *Environmental Protection of International Watercourses Under International Law* (Farnham: Ashgate, 2007).
McLeod, James G, *The Conflict of Laws* (Calgary: Carswell, 1983).
McNamara, Philip, *The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution* (Frankfurt: Alfred Metzner, 1981).
Mekki, Mustapha & Eric Naïm-Gesbert, eds, *Droit public et droit privé de l'environnement: unité dans la diversité? Actes du colloque international organisé à Paris le 12 juin 2015 par l'Université Paris 13—Sorbonne Paris Cité* (Issy-les-Moulineaux: Librairie générale de droit et de jurisprudence, 2016).

Mills, Alex, *Party Autonomy in Private International Law* (Cambridge: Cambridge University Press, 2018).
———, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge: Cambridge University Press, 2009).
Muir Watt, Horatia & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014).
Muir Watt, Horatia et al, eds, *Global Private International Law: Adjudication Without Frontiers* (Cheltenham: Edward Elgar, 2019).
Muir Watt, Horatia, ed, *Private International Law and Public Law* (Cheltenham: Edward Elgar, 2015).
Muldoon, Paul R, David A Scriven & James M Olson, *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto: Carswell, 1986).
Okowa, Phoebe, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: Oxford University Press, 2000).
Peters, Anne, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016).
Piché, Catherine, *L'action collective: ses succès et ses défis* (Montreal: Themis, 2019).
———, *Le règlement à l'amiable de l'action collective* (Cowansville: Yvon Blais, 2014).
———, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011).
Piri Damagh, Mehdi, *Prevention and Compensation of Trans-Boundary Damage in Relation to Cross-Border Oil and Gas Pipelines* (Cambridge: Intersentia, 2015).
Pitel, Stephen GA & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016).
Pitel, Stephen GA et al, *Private International Law in Common Law Canada: Cases, Text and Materials*, 4th ed (Toronto: Emond, 2016).
Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville: Yvon Blais, 2003).
Read, Horas Emerson, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Cambridge, Mass: Harvard University Press, 1938).
Rest, Alfred, *The More Favourable Law Principle in Transfrontier Environmental Law: A Means of Strengthening the Protection of the Individual?* (Berlin: Erich Schmidt, 1980).
———, *International Protection of the Environment and Liability: The Responsibility of States and Individuals in Cases of Transfrontier Pollution* (Berlin: Erich Schmidt, 1978).
———, *Convention on Compensation for Transfrontier Environmental Injuries: Draft with Explanatory Notes* (Berlin: Erich Schmidt, 1976).
Robb, Cairo AR, ed, *International Environmental Law Reports*, vol 1: Early Decisions (Cambridge: Cambridge University Press, 1999).
Rogerson, Pippa, *Collier's Conflict of Laws*, 4th ed (Cambridge: Cambridge University Press, 2013).
Sabahi, Borzu, *Compensation and Restitution in Investor-State Arbitration* (Oxford: Oxford University Press, 2011).

Sands, Philippe & Jacqueline Peel with Adriana Fabra & Ruth MacKenzie, *Principles of International Environmental Law*, 4th ed (Cambridge: Cambridge University Press, 2018).
Saul, Ben & Tim Stephens, eds, *Antarctica in International Law* (Oxford: Hart, 2015).
Schrijver, Nico, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).
Scott, Craig, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001).
Segerson, Kathleen, ed, *Economics and Liability for Environmental Problems* (Burlington: Ashgate, 2002).
Simons, Penelope & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (London: Routledge, 2014).
Springer, Allen L, *Cases of Conflict: Transboundary Disputes and the Development of International Environmental Law* (Toronto: University of Toronto Press, 2016).
Stephens, Tim, *International Courts and Environmental Protection* (Cambridge: Cambridge University Press, 2009).
Stubbe, Peter, *State Accountability for Space Debris: A Legal Study of Responsibility for Polluting the Space Environment and Liability for Damage Caused by Space Debris* (Leiden: Brill Nijhoff, 2017).
Symeonides, Symeon C, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford: Oxford University Press, 2014).
Talpis, Jeffrey, *"If I Am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (Montreal: Thémis, 2001).
Theall, Lawrence G et al, *Product Liability: Canadian Law and Practice* (Aurora: Canada Law Book, 2001) (loose-leaf updated 2018, release 23).
Torremans, Paul et al, eds, *Cheshire, North & Fawcett: Private International Law*, 15th ed (Oxford: Oxford University Press, 2017).
Van Calster, Geert, *European Private International Law* (Oxford: Hart, 2013).
Van Lier, Irene H, *Acid Rain and International Law* (Toronto: Bunsel Environmental Consultants, 1981).
Walker, Janet, *Castel & Walker: Canadian Conflict of Laws*, 6th ed (Markham: LexisNexis, 2005) (loose-leaf updated 2019, release 75).
———, *Class Actions in Canada: Cases, Notes, and Materials*, 2nd ed (Toronto: Emond, 2018).
White, Gillian, *Nationalisation of Foreign Property* (London: Steven & Sons, 1961).
Wilde, Mark, *Civil Liability for Environmental Damage: Comparative Analysis of Law and Policy in Europe and the US*, 2nd ed (Alphen on the Rhine: Kluwer Law International, 2013).
Wilderspin, Michael & Richard Plender, *The European Private International Law of Obligations*, 4th ed by Michael Wilderspin (London: Sweet & Maxwell, 2015).
Wirth, John D, *Smelter Smoke in North America: The Politics of Transborder Pollution* (Lawrence: University Press of Kansas, 2000).
Wolfrum, Rüdiger, Christine Langenfeld & Petra Minnerop, *Environmental Liability in International Law: Towards a Coherent Conception* (Berlin: Erich Schmidt, 2005).

Xue, Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003).
Zerk, Jennifer A, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006).

Articles

"Developments in the Law: International Environmental Law" (1991) 104:7 Harv L Rev 1484.
"Mexico–United-States: Expropriation by Mexico of Agrarian Properties Owned by American Citizens" (1938) 32:4 AJIL Supp 181.
"Ohio v Wyandotte Chemicals Corp: Forum Non Conveniens in the Supreme Court" (1972) 67:1 Nw UL Rev 59.
"Original Jurisdiction—Interstate Water Pollution: Alternatives to the Original Jurisdiction of the United States Supreme Court—*Ohio v. Wyandotte Chemicals Corp*., 401 U.S. 493 (1971)" (1972) 47:3 Wash L Rev 533.
Abello-Galvis, Ricardo & Walter Arevalo-Ramirez, "Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection" (2019) 28:2 RECIEL 217.
Addis, Jennifer S, "A Missed Opportunity: *How Pakootas v Teck Cominco Metals, Ltd* Could Have Clarified the Extraterritoriality Doctrine" (2009) 32:4 Seattle UL Rev 1011.
Adelman, Sam, "Human Rights in the Paris Agreement: Too Little, Too Late?" (2018) 7:1 Transnatl Envtl L 17
Affolder, Natasha A, "Square Pegs and Round Holes? Environmental Rights and the Private Sector" in Ben Boer, ed, *Environmental Law Dimensions of Human Rights* (Oxford: Oxford University Press, 2015) 11.
———, "The Market for Treaties" (2010) 11:1 Chicago J Intl L 160.
———, "The Private Life of Environmental Treaties" (2009) 103:3 AJIL 510.
Alford, Laura & Sarah Berger Richardson, "Right-to-Farm Legislation in Canada: Exceptional Protection for Standard Farm Practices" (2019) 50:1 Ottawa L Rev 131.
Allen, José R, "Points of Law" in Cymie Payne & Peter H Sand, eds, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford: Oxford University Press, 2011) 141.
Allum, James R, ""An Outcrop of Hell": History, Environment, and the Politics of the *Trail Smelter* Dispute" in Rebecca M Bratspies & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 13.
Anderson, Michael, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" (2002) 41:3 Washburn LJ 399.
Anton, Donald K, The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on

Responsibility and Liability for International Seabed Mining (ITLOS Case No 17)" (2012) 7:2 JSDLP 241.
Arbitblit, Donald Carl, "The Plight of American Citizens Injured by Transboundary River Pollution" (1979) 8:2 Ecology LQ 339.
Arbour, Marie-Ève & Véronique Racine, "Itinéraires du trouble de voisinage dans l'espace normatif" (2009) 50:2 C de D 327.
Arbour, Marie-Ève, "Liability Law and Nuisance in the Civil Law Tradition" in LeRoy Paddock, David L Markell & Nicholas S Bryner, eds, *Elgar Encyclopedia of Environmental Law*, vol 4: Compliance and Enforcement of Environmental Law (Cheltenham: Edward Elgar, 2017) 74.
Armas, Eduardo Álvares, "(Lack of) International Jurisdiction over Third-Country Polluters: A Trojan Horse to the EU's Environmental Policy?" in Jean-Sylvestre Bergé, Stéphanie Francq & Miguel Gardenez Santiago, eds, *Boundaries of European Private International Law* (Brussels: Bruylant, 2015) 283.
Arzandeh, Ardavan, "The Origins of the Scottish *Forum Non Conveniens* Doctrine" (2017) 13:1 J Priv Intl L 130.
Baade, Hans W, "The Operation of Foreign Public Law" (1995) 30:3 Tex Intl LJ 429.
———, "Codes of Conduct for Multinational Enterprises: An Introductory Survey" in Norbert Horn, ed, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer: Kluwer, 1980) 407.
Baert, Kirk & Janeta Zurakowski, "The Past, the Present and the Future: Environmental Class Actions in Canada" in *Colloque national sur l'action collective: développements récents au Québec, au Canada et aux États-Unis* (Cowansville: Yvon Blais, 2019) 71.
Ballarino, Tito, "Le droit international privé de l'environnement: questions de procédure civile et de loi applicable dans les États de l'Europe occidentale" in Christian von Bar, ed, *Internationales umwelthaftungsrecht* [International Environmental Liability Law], vol 1 (Köln: Heymann, 1995) 111.
———, "Questions de droit international privé et dommages catastrophiques" (1990) 220 Rec des Cours 289.
Banda, Maria L, "Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm" (2019) 103:4 Minn L Rev 1879.
Banu, Roxana, "Conflicting Justice in Conflict-of-Laws" (2020) Vand J Transnatl L [forthcoming, available on SSRN].
———, "A Relational Feminist Approach to Conflict of Laws" (2017) 24:1 Mich J Gender & L 1.
———, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013) 31:1 Windsor YB Access Just 197.
Basedow, Jürgen, "The Hague Conference and the Future of Private International Law: A Jubilee Speech" (Lecture delivered at the Hague Conference of Private International Law's 125th Anniversary Conference, Hong Kong, China, 18 April 2018), (2018) 82:4 Rabel J Comp & Intl Priv L 922.
Battista, Gregory J & Hilary R Stedwill, "Choosing Pragmatic Over Polite: Should International Transboundary Pollution Be a Matter for Courts or Consul? The Case of *Pakootas v Teck Cominco Metals, Ltd*" (2008) 16:2 Envtl Liability 35.

Baxi, Upendra, “Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law” (2016) 23:1 Ind J Global Leg Stud 15.
———, “Geographies of Injustice: Human Rights at the Altar of Convenience” in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) 197.
———, “Mass Torts, Multinational Enterprise Liability and Private International Law” (1999) 276 Rec des Cours 297.
Beaumont, Paul R, “Private International Law of the Environment” [1995] Jurid Rev 28.
Benedict, Bret, “Transnational Pollution and the Efficacy of International and Domestic Dispute Resolutions Among the NAFTA Countries” (2009) 15:4 L & Bus Rev Americas 863.
Berman, Paul Schiff, “*Yahoo! v LICRA*, Private International Law and the Deterritorialisation of Data” in Horatia Muir Watt et al, eds, *Global Private International Law: Adjudication Without Frontiers* (Cheltenham: Edward Elgar, 2019) 393.
———, “The Globalization of Jurisdiction” (2002) 151:2 U Pa L Rev 311.
Bernasconi, Christophe, “Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?” (1999) 12 Hague YB Intl L 35.
Berwick, Teresa A, “Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes” (1998) 10:2 Geo Intl Envtl L Rev 257.
Betlem, Gerrit & Christophe Bernasconi, “European Private International Law, the Environment and Obstacles for Public Authorities” (2006) 122:1 Law Q Rev 124.
Betlem, Gerrit, “Trail Smelter II: Transnational Application of CERCLA” (2007) 19:3 J Envtl L 389.
Binnie, The Honourable Ian, “Foreword” in Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* xi (London: Routledge, 2014) xi.
———, “Judging the Judges: “May They Boldly Go Where Ivan Rand Went Before”” (4th Coxford Lecture delivered at the Faculty of Law, University of Western Ontario, London (Ont), Canada, 16 February 2012), (2013) 26:1 Can JL & Jur 5.
———, “An Interview with the Honourable Justice Ian Binnie” (2012) 44:3 Ottawa L Rev 571.
———, “Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report” (2009) 38:4 Brief 44.
Bisson, Alain-François, “La disposition préliminaire du *Code civil du Québec*” (1999) 44:3 McGill LJ 539.
Black, Vaughan & John Swan, “Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment? *Lloyd’s Underwriters v Cominco Ltd*” (2008) 46:2 Can Bus LJ 292.
Black, Vaughan, Joost Blom & Janet Walker, “Current Jurisdictional and Recognitial Issues in the Conflict of Laws” (2011) 50 Can Bus LJ 499.
Black, Vaughan & Stephen GA Pitel, “Reform of Ontario’s Law of Jurisdiction” (2009) 47:3 Can Bus LJ 469.
Black, Vaughan, “A Canada-United States Full Faith and Credit Clause” (2012) 18:2 Sw J Intl L 595.

———, “Old and in the Way? The Revenue Rule and Big Tobacco” (2003) 38:1 Can Bus LJ 1.
———, “Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention” (2000) 38:2 Osgoode Hall LJ 237.
Blackwell, Alan T, “Acid Rain: Corrosive Problem in Canadian-American Relations” (1982) 47:1 Sask L Rev 1.
Blanchard, Nicolas, “The Role of Conflicts of Laws Regarding the Transboundary Pollution of Water” in Amos Shapira & Mala Tabory, eds, *New Political Entities in Public and Private International Law with Special Reference to the Palestinian Entity* (The Hague: Kluwer Law International, 1999) 387.
Blom, Joost & Elizabeth Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38:2 UBC L Rev 373.
Blom, Joost, “Canada” in Catherine Kessedjian & Humberto Cantú Rivera, eds, *Private International Law Aspects of Corporate Social Responsibility* (Cham: Springer, 2020) 183.
———, “The *Court Jurisdiction and Proceedings Transfer Act* and the Hague Conference’s Judgments and Jurisdiction Projects” (2018) 55:1 Osgoode Hall LJ 257.
———, “Constitutionalizing Canadian Private International Law—25 Years Since *Morguard*” (2017) 13:2 J Priv Intl L 259.
———, “Public Policy in Private International Law and Its Evolution in Time” (2003) 50:3 Nethl Intl L Rev 373.
———, “The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World” (1997) 28:3 Can Bus LJ 373.
———, “Conflict of Laws and Constitutional Law—Extraterritorial Provincial Legislation—The Queen v Thomas Equipment Ltd” (1982) 16:2 UBC L Rev 357.
———, “The Conflict of Laws and the Constitution: Interprovincial Co-Operatives Ltd v The Queen” (1977) 11:1 UBC L Rev 144.
———, “Service out of the Jurisdiction—Tort Committed Within the Jurisdiction—Negligent Manufacture—*Moran v Pyle (National) Canada Ltd*” (1974) 9:2 UBC L Rev 389.
Bodansky, Daniel, “The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections” (2017) 49:2 Ariz St LJ 689.
———, “The Paris Climate Change Agreement: A New Hope?” (2016) 110:2 AJIL 288.
———, “Customary (And Not So) Customary International Environmental Law” (1995) 3:1 Ind J Global Leg Stud 105, reprinted in Paula M Pevato, ed, *International Environmental Law*, vol 1 (London: Routledge, 2018) 105.
Bogdan, Michael, “On the So-Called Deficit of Social Values in Private International Law” in Ch Pampoukis, ed, *In Search for Justice: Essays in Honour of Professor Emeritus Spyridon Vrellis* (Athens: Nomiki, 2014) 31.
———, “Private International Law as Component of the Law of the Forum: General Course on Private International Law” (2011) 348 Rec des Cours 9, reprinted as vol 13 of the *Procket Books of the Hague Academy of International Law* (The Hague: Hague Academy of International Law, 2012).
———, “The Treatment of Environmental Damage in Regulation Rome II” in John Ahern & William Binchy, eds, *The Rome II Regulation on the Law Applicable to*

Non-Contractual Obligations: A New International Litigation Regime (Leiden: Martinus Nijhoff, 2009) 219.

———, "Some Reflections Regarding Environmental Damage and the Rome II Regulation" in Gabriella Venturini & Stefania Bariatti, eds, *Liber Fausto Pocar*, vol 2: New Instruments of Private International Law (Milan: Giuffrè, 2009) 95.

Bonomi, Andrea, "New Challenges in the Context of Recognition and Enforcement of Judgments" in in Franco Ferrari & Diego P Fernández Arroyo, eds, *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham: Edward Elgar, 2019) 390.

Bookman, Pamela K, "Litigation Isolationism" (2015) 67:5 Stan L Rev 1081.

———, "Once and Future U.S. Litigation" in Paul B Stephan, ed, *Foreign Court Judgments and the United States Legal System* (Leiden: Brill Nijhoff, 2014) 35.

Boskovic, Olivera, "Le contexte transnational en matière de responsabilité climatique" in Mathilde Hautereau-Boutonnet & Stéphanie Porchy-Simon, eds, *Le changement climatique, quel rôle pour le droit privé?* (Paris: Dalloz, 2019) 193.

———, "L'efficacité du droit international privé en matière environnementale" in Olivera Boskovic, ed, *L'efficacité du droit de l'environnement : mise en œuvre et sanctions* (Paris: Dalloz, 2010) 53.

———, "The Law Applicable to Violations of the Environment—Regulatory Strategies" in Horatia Muir Watt & Fabrizio Cafaggi, eds, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009) 188.

———, "Les atteintes à l'environnement" in Mathias Audit, Horatia Muir Watt & Étienne Pataut, eds, *Conflits de lois et regulation économique: l'expérience du marché intérieur* (Paris: Librairie générale de droit et de jurisprudence, 2008) 195.

Bourel, Pierre, "Un nouveau champ d'exploration pour le droit international privé conventionnel: les dommages causés à l'environnement" in *L'internationalisation du droit: mélanges en l'honneur de Yvon Loussouarn* (Paris: Dalloz, 1994) 93.

———, "Du rattachement de quelques délits spéciaux en droit international privé" (1989) 214 Rec des Cours 251.

Boyd, David R, "Elements of an Effective Environmental Bill of Rights" (2015) 27:3 J Envtl L & Prac 201.

Boyd, James, "A Statutory Solution to Ontario's Environmental Class Action Problem: Section 99(2) of the *Environmental Protection Act*" (2019) 14:2 Can Class Action Rev 421.

Boyle, Alan et al, "International Law and the Liability for Catastrophic Environmental Damage" (2011) 105 Am Soc'y Intl L Proc 423.

Boyle, Alan E, "Transboundary Air Pollution: A Tale of Two Paradigms" in S Jayakumar et al, eds, *Transboundary Pollution: Evolving Issues of Law and Policy* (Cheltenham: Edward Elgar, 2015) 233.

———, "Human Rights and the Environment: Where Next?" (2012) 23:3 Eur J Intl L 613.

———, "Liability for Injurious Consequences of Acts Not Prohibited by International Law" in James Crawford, Alain Pellet & Simon Olleson with the assistance of Kate Parlett, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 803.

———, “Human Rights or Environmental Rights? A Reassessment” (2007) 18:3 Fordham Envtl LJ 471.
———, “Globalising Environmental Liability: The Interplay of National and International Law” (2005) 17:1 J Envtl L 3.
———, “Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs” in Francesco Francioni & Tullio Scovazzi, eds, *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991) 363.
———, “State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?” (1990) 39:1 ICLQ 1.
Bradley, Curtis A, “The Costs of International Human Rights Litigation” (2001) 2:2 Chicago J Intl L 457.
Brand, Ronald A, “Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments” (2002) 37:3 Tex Intl LJ 467.
Brearley, Andrew, “Reflections upon the Notion of Liability: The Instances of *Kosmos 954* and Space Debris” (2008) 34:2 J Space L 291.
Briggs, Adrian, “Private International Law” in Andrew Burrows, ed, *English Private Law*, 3rd ed (Oxford: Oxford University Press, 2013) 1183.
———, “The Revenue Rule in the Conflict of Laws: Time for a Makeover” [2001] 2 Sing JLS 280.
Broms, Bengt, “The Nordic Convention on the Protection of the Environment” in Cees Flinterman, Barbara Kwiatkowska & Johan G Lammers, eds, *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: Martinus Nijhoff, 1986) 141.
Brown Weiss, Edith, “Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths” (1999) 32:5 U Rich L Rev 1555, reprinted in Peter H Sand, ed, *International Environmental Agreements* (Cheltenham: Edward Elgar, 2019).
Brown, Craig & Sara Seck, “Insurance Law Principles in an International Context: Compensating Losses Caused by Climate Change” (2013) 50:3 Alta L Rev 541.
Brun, Pierre, “La pollution du partage des compétences par le droit de l’environnement” (1993) 24:2 RGD 191.
Brunnée, Jutta & Stephen J Toope, “The Sovereignty of International Law?” (2017) 67:4 UTLJ 496.
Brunnée, Jutta et al, “Overview of Legal Issues Relevant to Climate Change” in Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2011) 23.
Brunnée, Jutta, “International Legal Accountability Through the Lens of the Law of State Responsibility” (2005) 36 Nethl YB Intl L 3.
———, “Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection” (2004) 53:2 ICLQ 351.
———, “The United States and International Environmental Law: Living with an Elephant” (2004) 15:4 Eur J Intl L 617.
———, “From a Black Hole into a Greener Future? Comparative Perspectives on Environmental Liability Law in Quebec and its Reform” in John EC Brierley et

al, eds, *Mélanges Presented by McGill Colleagues to Paul-André Crépeau* (Cowansville: Yvon Blais, 1997) 155.

———, "The Responsibility of States for Environmental Harm in a Multinational Context: Problems and Trends" (1993) 34:3 C de D 827.

Budde, Nathan L, "*Pakootas v Teck Cominco Metals, Ltd*: When Outside the Borders Isn't Extraterritorial, Or, Canada Is in Washington, Right?" (2007) 15:2 Tul J Intl & Comp L 675.

Bucher, Andreas, "La dimension sociale du droit international privé" (2009) 330 Rec des Cours 9, reprinted as vol 9 of the *Procket Books of the Hague Academy of International Law* (The Hague: Hague Academy of International Law, 2011).

Burgers, Laura, "Should Judges Make Climate Change Law?" (2020) 9:1 Transnatl Envtl L 55.

Burke, Joseph A, "Convention on International Liability for Damage Caused by Space Objects: Definition and Determination of Damages After the Cosmos 954 Incident" (1984) 8:2 Fordham Intl LJ 255.

Burns, Wil, "Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change" (2015) 22:2 ILSA J Intl & Comp L 415.

Byers, Michael, Kelsey Franks & Andrew Gage, "The Internationalization of Climate Damages Litigation" (2017) 7:2 Wash J Envtl L & Pol'y 264.

Cahalan, Lynn Theresa, "Compensating Private Parties for Transnational Pollution Injury" (1984) 58:3 St John's L Rev 528.

Calliari, Elisa, Swenja Surminski & Jaroslav Mysiak, "The Politics of (and Behind) the UNFCCC's Loss and Damage Mechanism" in Reinhard Mechler et al, eds, *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Cham: Springer, 2019) 155.

Campbell, Richard S et al, "Water Management in Ontario: An Economic Evaluation of Public Policy" (1974) 12:3 Osgoode Hall LJ 475.

Campos, Julio D González, "Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé" (2000) 287 Rec des Cours 9.

Cantin Cumyn, Madeleine, "La disposition préliminaire du *Code civil du Québec*" (2005) 46:1/2 C de D 463.

Caputo, James A, "Equal Right of Access in Matters of Transboundary Pollution: Its Prospects in Industrial and Developing Countries" (1984) 14:1 Cal W Intl LJ 192.

Carballo Piñeiro, Laura & Xandra Kramer, "The Role of Private International Law in Contemporary Society: Global Governance as a Challenge" (2014) 7:3 Erasmus L Rev 109.

Carlarne, Cinnamon & JD Colavecchio, "Balancing Equity and Effectiveness: The Paris Agreement and the Future of International Climate Change Law" (2019) 27:2 NYU Envtl LJ 107.

Carlarne, Cinnamon, "Delinking International Environmental Law and Climate Change" (2014) 4:1 Mich J Envtl & Adm L 1.

Carruthers, Janeen M & Elizabeth B Crawford, "Variations on a Theme of Rome II. Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations: Part I" (2005) 9:1 Ed L Rev 65.

Carter, Arthur T, "The Boundary Waters Treaty of 1909: Does It Provide an Environmental Cause of Action?" (1975) 20:1 SDL Rev 147.
Carwright, Ian, "A Private Prosecution in Alberta: A Painful Process" (1990) 1:1 J Envtl L & Prac 110.
Castel, Jean-Gabriel, "Should the Protection of the Justified Expectations of the Parties Become an Exception to or a Major Consideration When Applying the Principle of Proximity in Litigation Involving Conflict of Laws Issues?" (2019) 49:4 Adv Q 481.
———, "The Uncertainty Factor in Canadian Private International Law" (2007) 52:3 McGill LJ 555.
———, "The Erosion of the Foreign Public Law Exception: Recent Canadian Developments" in James AR Nafziger & Symeon C Symeonides, eds *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (Ardsley: Transnational Publishers, 2002) 243.
———, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33:1 Osgoode Hall LJ 35
———, "Commentaire sur certaines dispositions du Code civil du Québec se rapportant au droit international privé" (1992) 119:3 JDI 625.
———, "Exemption from the Jurisdiction of Canadian Courts" (1971) 9 Can YB Intl L 159.
———, "Foreign Tax Claims and Judgments in Canadian Courts" (1964) 42:2 Can Bar Rev 277.
———, "Les conflits de lois en matière d'impôts au Canada et le nouvel alinéa de l'article 79 du Code de procédure civile" (1964) 24:8 R du B 483.
Castel, Matthew, "Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet" (2013) 51:1 Alta L Rev 153.
Chalifour, Nathalie J, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36:2 NJCL 331.
Chester, Simon, "Remedies in Canadian Courts" (1982) 5 Can-US LJ 85.
Chiarolla, Claudio, "The Role of Private International Law Under the Nagoya Protocol" in Elisa Morgera, Matthias Buck & Elsa Tsioumanihe, eds, *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation* (Leiden: Martinus Nijhoff, 2012) 423.
Christol, Carl Q, "International Liability for Damage Caused by Space Objects" (1980) 74:2 AJIL 346.
Churchill, Robin R, "Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects" (2001) 12:1 YB Intl Envtl L 3.
Cohen, Alexander F, "Cosmos 954 and the International Law of Satellite Accidents" (1984) 10:1 Yale J Intl L 78.
Collins, Lynda & Heather McLeod Kilmurray, "Common Law Tools to Protect the Environment" in LeRoy Paddock, David L Markell & Nicholas S Bryner, eds, *Elgar Encyclopedia of Environmental Law*, vol 4: Compliance and Enforcement of Environmental Law (Cheltenham: Edward Elgar, 2017) 85.

Colón-Ríos, Joel, "Constituent Power, the Rights of Nature, and Universal Jurisdiction" (2014) 60:1 McGill LJ 127.
Connell, Jessie, "Trans-National Environmental Disputes: Are Civil Remedies More Effective for Victims of Environmental Harm?" (2007) 10:1 Asia Pac J Envtl L 39.
Conway, Madeleine, "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40:2 Queen's LJ 741.
Cooper, Catherine A, "The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms" (1986) 24 Can YB Intl L 247.
Coplan, Karl S, "Citizen Enforcement" in LeRoy C Paddock, Robert L Glicksman & Nicholas S Bryner, eds, *Elgar Encyclopedia of Environmental* Law, vol 2: Decision Making in Environmental Law (Cheltenham: Edward Elgar, 2016) 416.
Cordonier Segger, Marie-Claire, "Advancing the Paris Agreement on Climate Change for Sustainable Development" (2016) 5:2 Cambridge J Intl & Comp L 202.
Coughlan, Stephen et al, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) 6:1 CJLT 29.
Craik, Neil, "Transboundary Pollution, Unilateralism and the Limits of Extraterritorial Jurisdiction: The Second *Trail Smelter* Dispute" in Rebecca M Bratspies & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 109.
———, "*Trail Smelter* Redux: Transboundary Pollution and Extraterritorial Jurisdiction" (2004) 14:2 J Envtl L & Prac 139.
Crépeau, Paul-André, "De la responsabilité civile extracontractuelle en droit international privé québécois" (1961) 39:1 Can Bar Rev 3.
Crerar, David A, "A Proposal for a Principled Public Policy Doctrine Post-*Tolofson*" (1998) 8 Windsor Rev Legal Soc Issues 23.
Cudahy, The Honourable Richard D, "Clouds on the Horizon: Acid Rain in Domestic Courts" in Canadian Bar Association, Environmental Law Section & Canadian Bar Association, Standing Committee on Environmental Law, eds, *Common Boundary/Common Problems: The Environmental Consequences of Energy Production. Proceedings of a Conference Held at Banff, Alberta, Canada, March 19-21, 1981* (Washington, DC: Committee on Environmental Law, 1982) 82.
Cunningham, Brandon D, "Border Petrol: U.S. Challenges to Canadian Tar Sands Development" (2012) 19:3 NYU Envtl LJ 489.
Curran, Deborah, "Climate Change Backgrounder" in Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 2nd ed (Toronto: Carswell, 2013) 747.
D'Avout, Louis, "L'entreprise et les conflits internationaux de lois" (2018) 397 Rec des Cours 9, reprinted in vol 38 of the *Procket Books of the Hague Academy of International Law* (Leiden: Koninklijke Brill).
D'Oliveira, HU Jesserun, "La pollution du Rhin et le droit international privé" in Roefie Hueting et al, eds, *Rhine Pollution: Legal, Economic and Technical Aspects* (Zwolle: Tjeenk Willink, 1978) 81.

Daniel, Anne, “Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?” (2003) 12:3 RECIEL 225

Danov, Mihail & Paul Beaumont, “Effective Remedies in Cross-Border Civil and Commercial Law Disputes: A Case for an Institutional Reform at the EU Level” in Paul Beaumont et al, eds, *Cross-Border Litigation in Europe* (Oxford: Hart, 2016) 603.

Daskal, Jennifer, “The Un-Territoriality of Data” (2015) 125:2 Yale LJ 326.

Davidson, Caroline, “Tort au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law” (2005) 38:5 Vand J Transnatl L 1403.

Dawson, Frank G & Burns H Weston, ““Prompt Adequate and Effective”: A Universal Standard of Compensation?” (1962) 30:4 Fordham L Rev 727.

De Boer, TM, “Party Autonomy and Its Limitations in the Rome II Regulation” (2007) 9 YB Priv Intl L 19.

———, “Forum Preferences in Contemporary European Conflicts Law: The Myth of a “Neutral Choice”” in Heinz-Peter Mansel, ed, *Festschrift für Erik Jayme*, vol 1 (Munich: Sellier, 2004) 39.

De La Fayette, Angélique, “International Liability for Damage to the Environment” in Malgosia Fitzmaurice, David M Ong & Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010) 320.

De Lassus St-Geniès, Géraud, “L’*Accord de Paris* sur le climat: quelques éléments de décryptage” (2015) 28:2 RQDI 27.

De Medeiros, João CJG, “How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel” (2007) 92:2 Minn L Rev 529.

Debenham, David Bishop, “From the Revenue Rule to the Rule of the “Revenuer”: A Tale of Two Davids and Two Goliaths” (2008) 56:1 Can Tax J 1.

Dellinger, Myanna, “See You in Court: Around the World in Eight Climate Change Lawsuits” (2018) 42:2 Wm & Mary Envtl L & Pol’y Rev 525.

DeMarco, Elisabeth, Robert Routliffe & Heather Landymor, “Canadian Challenges in Implementing the *Kyoto Protocol*: A Cause for Harmonization” (2004) 42:1 Alta L Rev 209.

Dembling, Paul G, “Cosmos 954 and the Space Treaties” (1978) 6:2 J Space L 129.

Desjardins, Marie-Claude & Hélène Mayrand, “Recours des citoyens en vertu du droit commun” in Dominique Amyot-Bilodeau et al, eds, *Recours en droit de l’environnement* (Montreal: LexisNexis, 2014).

DeWitt, Daniel K, “Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909” (1993) 69:1 Ind LJ 299.

Diamond, Jordan, “How CERCLA’s Ambiguities Muddled the Question of Extraterritoriality in *Pakootas v Teck Cominco Metals, Ltd*” (2007) 34:3 Ecology LQ 1013.

Dickinson, Andrew, “Acts of State and the Frontiers of Private (International) Law” (2018) 14:1 J Priv Intl L 1.

———, “Cross-Border Torts in EC Courts: A Response to the Proposed “Rome II” Regulation” (2002) 13:5 Eur Bus L Rev 369.
DiMento, Joseph F & Pamela M Doughman, “Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented” (1998) 10:3 Geo Intl Envtl L Rev 651.
Dodge, William S, “The New Presumption Against Extraterritoriality” (2020) 133:5 Harv L Rev 1582.
———, “Misusing the Presumption Against Extraterritoriality in Climate Change Litigation” (2019) 1:2 Cts & Just LJ 118.
———, “The Presumption Against Extraterritoriality in the U.S. Supreme Court Today” in Andrea Bonomi and Krista Nadakavukaren Schefer, eds, *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?* (Zurich: Schulthess, 2018) 187.
———, “The Public-Private Distinction in the Conflict of Laws” (2008) 18:2 Duke J Comp & Intl L 371.
———, “Breaking the Public Law Taboo” (2002) 43:1 Harv Intl LJ 161.
Doeker, Günther & Thomas Gehring, “Private or International Liability for Transnational Environmental Damage: The Precedent of Conventional Liability Regimes” (1990) 2:1 J Envtl L 1.
Doelle, Meinhard, Dennis Mahony & Alex Smith, “Canada” in Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2011) 525.
Doelle, Meinhard & Sara Seck, “Loss & Damage from Climate Change: From Concept to Remedy?” (2020) Climate Pol’y [forthcoming, available online].
Droz, Georges AL, “Regards sur le droit international privé comparé: cours général de droit international privé” (1991) 229 Rec des Cours 9.
Du Bey, Richard A et al, “CERCLA and Transboundary Contamination in the Columbia River” (2006) 21:1 Nat Resources & Envt 11.
Duplé, Nicole, “La difficile application de la notion d’extraterritorialité” (1975) 16:4 C de D 961.
Dupuy, Pierre-Marie, “La contribution du principe de non-discrimination à l’élaboration du droit international de l’environnement” (1991) 7:2 RQDI 135.
———, “Sur des tendances récentes dans le droit international de l’environnement” (1974) 20 AFDI 815.
Duvic-Paoli, Leslie-Anne & Jorge E Viñuales, “Principle 2: Prevention” in Jorge Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 107.
Dwyer, Eric, “Insurance Coverage in a Climate Changed Canada: How Can Canada Pay for Loss and Damage from Anthropogenic Climate Change” (2019) 28 Dal J Leg Stud 61.
Ebbesson, Jonas, “Principle 10: Public Participation” in Jorge Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 287.
———, “Piercing the State Veil in Pursuit of Environmental Justice” in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009) 270.

———, “Public Participation” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008) 682.
———, “The Notion of Public Participation in International Environmental Law” (1997) 8 YB Intl Entl L 51.
———, “Reflections on the 1974 Nordic Environment Protection Convention Two Decades after its Signing” in Tuula Tervashonka, ed, *The Legal Status of the Individual in Nordic Environmental Law* (Rovaniemi: Northern Institute for Environmental and Minority Law, University of Lapland 1994) 63, reprinted in Erkki J Hollo & Kari Marttinen, eds, *North European Environmental Law* (Helsinki: Finnish Society of Environmental Law, 1995) 39.
Eckert, Andrew R, Todd Smith & Henry van Egteren, “Environmental Liability in Transboundary Harms: Law and Forum Choice” (2008) 24:2 JL Econ & Org 434.
Edinger, Elizabeth & Vaughan Black, “A New Approach to Extraterritoriality: *Unifund Assurance Co v CIBC*” (2004) 40:2 Can Bus LJ 161.
Edinger, Elizabeth, “*Club Resorts Ltd v Van Breda*: Extraterritoriality Revisited” (2014) 55:2 Can Bus LJ 263.
———, “Is *Duke v Andler* Still Good Law in Common Law Canada?” (2011) 51:1 Can Bus LJ 52.
———, “*British Columbia v Imperial Tobacco Canada Ltd*: Extraterritoriality and Fundamental Principles” (2006) 43:2 Can Bus LJ 301.
———, “*British Columbia v Imperial Tobacco Canada Ltd*: Extraterritoriality Post *Unifund*” (2005) 41 Can Bus LJ 359.
———, “The Constitutional Validity of Provincial Mutual Assistance Legislation: *Global Securities v British Columbia (Securities Commission)*” (1999) 33:1 UBC L Rev 169.
———, “Constitutional Law—The Doctrines of Colourability and Extraterritoriality” (1985) 63:1 Can Bar Rev 203.
———, “Territorial Limitations on Provincial Powers” (1982) 14:1 Ottawa L Rev 57.
Eisenstein, Frederick C, “Economic Implications of European Transfrontier Pollution: National Prerogative and Attribution of Responsibility” (1981) 11:3 Ga J Intl & Comp L 519.
Eisenstein, Laurence Jay, “Choice of Law Regarding Private Activities in Outer Space: A Suggested Approach” (1986) 16:2 Cal W Intl LJ 282.
Elder, PS, “Sustainability” (1991) 36:3 McGill LJ 831.
Elgie, Stewart, “Kyoto, the Constitution, and Carbon Trading: Waking a Sleeping *BNA* Bear (or Two)” (2007) 13:1 Rev Const Stud 67.
Ellis, Jaye, “Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns” (2012) 25:2 Leiden J Intl L 397.
———, “Has International Law Outgrown *Trail Smelter*?” in Rebecca M Bratspies & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 56.
Emanuelli, Claude, “Recognition and Enforcement of Foreign Judgments in Quebec” (2007) 9 YB Priv Intl L 343.
Enneking, Liesbeth FH, “The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the *Rome II Regulation*: An Essay on the

Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations Through Tort Law" (2008) 16:2 Eur Rev Priv L 283.
Entman, June F. "Abolishing Local Action Rules: A First Step Towards Modernizing Jurisdiction and Venue in Tennessee" (2004) 34:2 U Mem L Rev 251.
Erwin Jr, Chesley P, "Resolving Transboundary Air Pollution Disputes in North America: The Case for a Quasi-Judicial Remedy" [1984] Wis Intl LJ 203.
Etemire, Uzuazo, "Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights" (2016) 28:3 J Envtl L 393.
Gómez, Katia Fach, "Environmental Liability" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 657.
———, "The Law Applicable to Cross-Border Environmental Damage: From the European National Systems to Rome II" (2004) 6 YB Priv Intl L 291.
Faieta, Mario D, "Civil Liability for Environmental Torts" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2004* (Toronto: Carswell, 2005) 21.
Fairhurst, Sean ED & Zoë Thoms, "Post-*Kiobel v Royal Dutch Petroleum Co*: Is Canada Poised to Become an Alternative Jurisdiction for Extraterritorial Human Rights Litigation?" (2014) 52:2 Alta L Rev 389.
Fairley, H Scott, "Private Remedies for Transboundary Injury in Canada and the United States: Constraints Upon Having to Sue Where You Can Collect" (1978) 10:2 Ottawa L Rev 253.
Fallon, Marc, Bénédicte Fauvarque-Cosson & Stéphanie Francq, "Le régime du risque transfrontière de la responsabilité environnementale: en marche vers un droit spécial des conflits de lois?" in Geneviève Viney & Bernard Dubuisson, eds, *Les responsabilités environnementales dans l'espace européen: point de vue franco-belge* (Brussels: Bruylant, 2006) 547.
Farand, André, "L'apport du Canada en matière de responsabilité internationale pour les dommages d'origine spatiale: *l'affaire du satellite Cosmos 954*" (1980) 11:3 Études int 467.
Farkas, E Samuel, "*Araya v Nevsun* and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law" (2018) 76:1 UT Fac L Rev 130.
Farrow, Trevor CW, "Globalization, International Human Rights and Civil Procedure" (2003) 41:3 Alta L Rev 671.
Fast, Heather & Patricia Fitzpatrick, "Modernizing Environmental Protection in Manitoba: *The Environmental Rights Act* as One Component of Environmental Reform" (2017) 30:3 J Envtl L & Prac 295.
Faure, Michael G & André Nollkaemper, "International Liability as an Instrument to Prevent and Compensate for Climate Change" (2007) 43:A Stan J Intl L 123.
Faure, Michael G, "In the Aftermath of Disaster: Liability and Compensation Mechanisms as Tools to Reduce Disaster Risks" (2016) 52:1 Stan J Intl L 95.
———, "Liability and Compensation as Instruments of Disaster Risk Reduction?" in Jacqueline Peel & David Fischer, eds, *The Role of International Environmental Law in Disaster Risk Reduction* (Leiden: Brill Nijhoff, 2016) 266.

———, “Regulatory Strategies in Environmental Liability” in Horatia Muir Watt & Fabrizio Cafaggi, eds, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009) 129.
Fawcett, JJ, “The Impact of Article 6(1) of the ECHR on Private International Law” (2007) 56:1 ICLQ 1.
Feldman, Eric A, “Compensating the Victims of Japan’s 3-11 Fukushima Disaster” (2015) 16:2 Asian Pac L & Pol’y J 127.
———, “Fukushima: Catastrophe, Compensation and Justice in Japan” (2013) 62:2 DePaul L Rev 335.
Ferguson, Keith, “Challenging the Intervention and Stay of an Environmental Private Prosecution” (2004) 13:2 J Envtl L & Prac 153.
Ficken, Bruce W, “Wyandotte and Its Progeny: The Quest for Environmental Protection through the Original Jurisdiction of the Supreme Court” (1974) 78:3 Dick L Rev 429.
Fischer, James M, “The Availability of Private Remedies for Acid Rain Damage” (1981) 9:3 Ecology LQ 429.
Fitzgerald, Gerald F, “The Proposed Canada-United States Transboundary Air Pollution Agreement: The Legal Background” (1982) 20 Can YB Intl L 219
Fitzmaurice, Malgosia. “Principle 13: Liability and Compensation” in Jorge Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 351.
———, “International Responsibility and Liability” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008) 1011.
Fleischer, Victor, “Regulatory Arbitrage” (2010) 89:2 Tex L Rev 227.
Forcese, Craig, “Deterring “Militarized Commerce”: The Prospect of Liability for Privatized Human Rights Abuses” (2000) 31:2 Ottawa L Rev 171.
Fornasier, Matteo, “Employment Contracts, Jurisdiction” in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 624.
———, “Employment Contracts, Applicable Law” in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 615.
Foster, Caroline E, “Diminished Ambitions? Public International Legal Authority in the Transnational Economic Era” (2014) 17:2 J Intl Econ L 355.
———, “The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?” (2005) 14:3 RECIEL 265.
Francioni, Francesco, “Access to Justice, Denial of Justice and International Investment Law” (2009) 20:3 Eur J Intl L 729.
Frank, Will, Christoph Bals & Julia Grimm, “The Case of Huaraz: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts” in Reinhard Mechler et al, eds, *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Cham: Springer, 2019) 475.
Fréchette, Jean-Guy, Guy Minette & Danielle Codère, “Des conflits de lois en matière de délit et de quasi-délit en droit international privé québécois” (1973) 4:1 RDUS 55.

French, Duncan & Louis J Kotzé, "'Towards a Global Pact for the Environment': International Environmental Law's Factual, Technical and (Unmentionable) Normative Gaps" (2019) 28:1 RECIEL 25.
Fresnedo de Aguirre, Cecilia, "Public Policy in Private International Law: Guardian or Barrier?" in Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela, eds, *Diversity and Integration in Private International Law* (Oxford: Oxford University Press, 2019) 341.
Fridman, GHL, "Where is a Tort Committed?" (1974) 24:3 UTLJ 247.
Fuchs, Angelika, "Article 7: Environmental Damage" in Peter Huber, ed, *Rome II Regulation: Pocket Commentary* (Munich: Sellier, 2011) 202.
Gage, Andrew & Margaretha Wewerinke, "Taking Climate Justice into Our Own Hands: A Model Climate Compensation Act" (1 December 2015), online (pdf): *West Coast Environmental Law* <www.wcel.org> [perma.cc/WQ6A-8J6T].
Gage, Andrew & Michael Byers, "Payback Time? What the Internationalization of Climate Litigation Could Mean for Canadian Oil and Gas Companies" (1 October 2014), online (pdf): *West Coast Environmental Law* <www.wcel.org> [perma.cc/C4JX-XUHP].
Gaines, Sanford E, "International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?" (1989) 30:2 Harv Intl LJ 311.
Gallob, Joel A, "Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy" (1991) 15:1 Harv Envtl L Rev 85.
Galloway, Eilene, "Nuclear Power Satellites: The U.S.S.R. Cosmos 954 and the Canadian Claim" (1979) 12:3 Akron L Rev 401.
García-Castrillón, Carmen Otero, "International Litigation Trends in Environmental Liability: A European Union-United States Comparative Perspective" (2011) 7:3 J Priv Intl L 551.
Gardner, Maggie, "Retiring Forum Non Conveniens" (2017) 92:2 NYU L Rev 390.
Garnett, Richard, "Substance and Procedure" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 2 (Cheltenham: Edward Elgar, 2017) 1667.
Gattini, Andrea, "The UN Compensation Commission: Old Rules, New Procedures on War Reparations" (2002) 13:1 Eur J Intl L 161.
Gaudet, Serge, "Le Livre X du Code civil du Québec: bilan et enjeux" (2010) 88:2 Can Bar Rev 313.
Gehring, Thomas & Markus Jachtenfuchs, "Liability for Transboundary Environmental Damage: Towards a General Liability Regime?" (1993) 4:1 Eur J Intl L 92.
George, Gerald F, "Environmental Enforcement Across National Borders" (2006) 21:1 Nat Resources & Envt 3.
———, "Over the Lie: Transboundary Application of CERCLA" (2004) 34:3 Envtl L Rep 10275.
Giansetto, Fanny, "Le droit international privé à l'épreuve des nouveaux contentieux en matière de responsabilité climatique" (2018) 145:2 JDI 507.
Gibson, Dale, "The Constitutional Context of Canadian Water Planning" (1968) 7:1 Alta L Rev 71.

Glenn, H Patrick, "Justice Louis LeBel and the Private International Law of a Diverse Federation" (2015) 70 SCLR (2d) 47, reprinted in Dwight Newman & Malcolm Thorburn, eds, *The Dignity of Law: The Legacy of Justice Louis LeBel* (Markham: LexisNexis, 2015) 47.
———, "Recognition of Foreign Judgments in Quebec" (1997) 28:3 Can Bus LJ 404.
———, "Codification of Private International Law in Quebec" (1996) 60:2 Rabel J Comp & Intl Priv L 231.
———, "Divided Justice? Judicial Structures in Federal and Confederal States" (1995) 46:5 SCL Rev 819.
———, "Droit international privé" in Barreau du Québec & Chambre des notaires, eds, *La réforme du Code civil*, vol 3*:* Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires (Quebec: Presses de l'Université Laval, 1993) 669.
———, "La guerre de l'amiante" (1991) 80:1 Rev crit dr int privé 41.
Glickman, Nina, "Keep Your Pollution to Yourself: Institutions for Regulating Transboundary Pollution and the United States-Mexico Approach" (1984) 25:3 Va J Intl L 693.
Godin, Robert P, "Short Essay on the Notion of *General Interest* in Article 982 of the *Civil Code of Québec* or *Je puise mais n'épuise*" (2010) 34:4 Vt L Rev 869.
Goldberg, Silke & Richard Lord, "England" in Richard Lord et al, eds, *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2011) 445.
Goldie, LFE, "International Principles of Responsibility for Pollution" (1970) 9:2 Colum J Transnatl L 283.
Goldsmith, Barbara J & Edward Lockhart-Mummery, "The ELD's National Transposition" in Lucas Bergkamp & Barbara J Goldsmith, eds, *The EU Environmental Liability Directive: A Commentary* (Oxford: Oxford University Press, 2013) 139.
Goldsmith, Jack L & Curtis A Bradley, "The Current Illegitimacy of International Human Rights Litigation" (1997) 66:2 Fordham L Rev 319.
Goldsmith, Jack L, "Against Cyberanarchy" (1998) 65:4 U Chicago L Rev 1199.
Goldstein, Gérald & Jeffrey Talpis, "Les perspectives en droit civil québécois de la réforme des règles relatives à l'effet des décisions étrangères au Canada (1ère partie)" (1995) 74:4 Can Bar Rev 641.
Goldstein, Gérald, "Le caractère "exceptionnel" frappe encore! Une nouvelle victime par ricochet: la clause d'exception de l'art 3082 CCQ" (2018) 96:2 Can Bar Rev 402.
———, "De la pertinence et de la localisation du préjudice économique ou continu aux fins de la compétence internationale des tribunaux québécois" (2010) 69 R du B 169.
———, "La condition incertaine des lois de police étrangères et du secret bancaire en droit international privé québécois" (1997) 76:3 Can Bar Rev 449.
———, "L'interprétation du domaine d'application international du nouveau Code civil du Québec" in *Le nouveau Code civil: interprétation et application. Les journées Maximilien-Caron 1992* (Montreal: Themis, 1992) 81.

Gómez, Manuel A, "A Sour Battle in Lago Agrio and Beyond: The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador" (2015) 46:2 U Miami Inter-Am L Rev 153.

———, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429.

Gorove, Stephen, "Cosmos 954: Issues of Law and Policy" (1978) 6:2 J Space L 137.

Gracer, Jeffrey, Dennis Mahony & Tyson Dyck, "Cross-Border Litigation Gains Traction in U.S. and Canadian Courts" (2008) 20:2 Envtl Cl J 181.

Granger, C, "Conflict of Laws—Jurisdiction—Place of Commission of Tort—*Moran v Pyle*" (1975) 7:1 Ottawa L Rev 240.

Gray, Kevin R, "Transboundary Environmental Disputes Along the Canada-US Frontier: Revisiting the Efficacy of Applying the Rules of State Responsibility" (2005) 43 Can YB Intl L 333.

Graziano, Thomas Kadner, "Torts" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 2 (Cheltenham: Edward Elgar, 2017) 1709.

———, "Products Liability" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 2 (Cheltenham: Edward Elgar, 2017) 1413.

———, "Freedom to Choose the Applicable Law in Tort—Articles 14 and 4(3) of the Rome II Regulation" in John Ahern & William Binchy, eds, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Leiden: Martinus Nijhoff, 2009) 113.

———, "Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle" (2008) 97:4 Rev crit dr int privé 445.

———, "The Law Applicable to Cross-Border Damage to the Environment: A Commentary on Article 7 of the Rome II Regulation" (2007) 9 YB Priv Intl L 71.

Greco, Roberta, "Access to Procedures and the Principle of Non-Discrimination (Article 32)" in Laurence Boisson de Chazournes et al, eds, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary* (Oxford: Oxford University Press, 2018) 325.

Greenfield, Erin F, "CERCLA's Applicability Abroad: Examining the Reach of a U.S. Environmental Statute in the Face of a Cross-Border Pollution Dispute" (2005) 19:3 Emory Intl L Rev 1697.

Grinlinton, David, "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62:3 McGill LJ 633.

Grisel, Florian, "Analyse critique de l'article 7 du Règlement du 11 juillet 2007 sur la loi applicable aux obligations non-contractuelles (« Rome II »)" (2011) 88:1 Rev DI & DC 148.

Grušić, Uglješa, "International Environmental Litigation in EU Courts: A Regulatory Perspective" (2016) 35 YB Eur L 180.

Guillemard, Sylvette & Marjorie Tête, "Le *forum non conveniens* une vingtaine d'années plus tard: encore quelques questions non résolues" (2012) 25:1 RQDI 175.

Guillemard, Sylvette & Van Anh Ly, "Commentaire sur la décision *Giesbrecht c Nadeau (Succession de)*: une interprétation surprenante de l'article 3082 C.c.Q." in *Repères* (March 2018), EYB2018REP2432 (Référence).

Guillemard, Sylvette, Alain Prujiner & Frédérique Sabourin, “Les difficultés de l’introduction du *forum non conveniens* en droit québécois” (1995) 36:4 C de D 913.
Guinchard, Emmanuel & Simone Lamont-Black, “Environmental Law, the Black Sheep in Rome II’s Drive for Legal Certainty? Article 7 of Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations” (2009) 11:3 Envtl L Rev 161.
Guzman, Andrew T, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38:4 Va J Intl L 639.
Haanappel, Peter PC, “Some Observations on the Crash of Cosmos 954” (1978) 6:2 J Space L 147.
Hafner, Gerhard & Isabelle Buffart, “The Work of the International Law Commission: From Liability to Damage Prevention” in Yann Kerbrat & Sandrine Maljean-Dubois, eds, *The Transformation of International Environmental Law* (Paris: Pedone, 2011) 233.
Haibo, Gou, “ILC Proposal on the Role of Origin State in Transboundary Damage” in Michael G Faure & Song Ying, eds, *China and International Environmental Liability: Legal Remedies for Transboundary Pollution* (Cheltenham: Edward Elgar, 2008).
Hall, Noah et al, “Great Lakes Emerging Legal Issues Regarding the International Boundary Waters Treaty and the Great Lakes Water Quality Agreement” (2010) 34:2 Can-US LJ 193.
Hall, Noah D, “Oil and Freshwater Don’t Mix: Transnational Regulation of Drilling in the Great Lakes” (2011) 38:2 Boston College Envtl Aff L Rev 305.
———, “Introduction: Canada-United States Transboundary Environmental Protection” (2009) 26 Windsor Rev Legal Soc Issues 1.
———, “Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy” (2008) 32:1 Harv Envtl L Rev 49.
———, “The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance” (2007) 24:1 Pace Envtl L Rev 131.
———, “Transboundary Pollution: Harmonizing International and Domestic Law” (2007) 40:4 Mich JL Reform 681.
———, “Bilateral Breakdown: U.S.-Canada Pollution Disputes” (2006) 21:1 Nat Resources & Envt 18.
Halley, Paule, “L’accès à la justice en matière d’environnement en droit québécois et canadien” in Julien Bétaille, ed, *Le droit d’accès à la justice en matière d’environnement* (Toulouse: Presses de l’Université de Toulouse 1 Capitole, 2016) 341.
Handl, Günther, “Preventing Transboundary Nuclear Pollution: A Post-Fukushima Legal Perspective” in S Jayakumar et al, eds, *Transboundary Pollution: Evolving Issues of Law and Policy* (Cheltenham: Edward Elgar, 2015) 190.
———, “International Accountability for Transboundary Environmental Harm Revisited: What Role for State Liability?” (2007) 37:2/3 Envtl Pol’y & L 116.
———, “State Liability for Accidental Transnational Environmental Damage by Private Persons” (1980) 74:3 AJIL 525.

Hanson, Paul N, Paul E Hagen & Kathleen Rogers, "The Application of the United States Hazardous Waste Cleanup Laws in the Canada-U.S. Context" (1992) 18 Can-US LJ 137.

Hausrath, Katherine, "Crossing Borders: The Extraterritorial Application of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)" (2005) 13:1 U Balt J Envtl L 1.

Hay, Peter, "Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation" (2007) 7:4 Eur Leg F 135.

———, "Environmental Protection and Civil Liability in the United States" in Christian von Bar, ed, *Internationales umwelthaftungsrecht* [International Environmental Liability Law], vol 1 (Köln: Heymann, 1995) 129.

Heiss, Helmut, "Insurance Contracts" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 2 (Cheltenham: Edward Elgar, 2017) 954.

Herbert, Jason, "The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of *Tolofson v Jensen*" (1998) 56:1 UTLJ 3.

Hertz, Michael Terry, "'Interprovincial,' the Constitution, and the Conflict of Laws" (1976) 26:1 UTLJ 84.

Herzberg, Peter, "Remedies in American Courts" (1982) 5 Can-US LJ 91.

Hess, Burkhard & Cristian Oro Martinez, "Civil and Commercial Matters" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 346.

Hess, Gerald F, "The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA" (2005) 18:1 Geo Intl Envtl L Rev 1.

Hinteregger, Monika, "Environmental Liability" in Emma Lees & Jorge E Viñuales, eds, *The Oxford Handbook of Comparative Environmental Law* (Oxford: Oxford University Press, 2019) 1025.

———, "Civil Liability and the Challenges of Climate Change: A Functional Analysis" (2017) 8:2 J Eur Tort L 238.

———, "The New Austrian Act on Third-Party Liability for Nuclear Damage" (1998) 62 Nuclear L Bull 27, reprinted in (2006) 35:1 Denv J Intl L & Pol'y 193.

Hoffman, Kenneth B, "State Responsibility in International Law and Transboundary Pollution Injuries" (1976) 25:3 ICLQ 709.

Hoffman, Nadine, "Species at Risk Act: A Comprehensive Inventory of Legislative Documents 1973-2017" (Paper delivered at the Symposium on Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection, Faculty of Law, University of Calgary, Canada, 2–3 March 2018), online (pdf): *Canadian Institute of Resources Law* <www.cirl.ca> [perma.cc/LJF6-LYCA].

Holly, Gabrielle, "Transnational Tort and Access to Remedy Under the *UN Guiding Principles on Business and Human Rights*: *Kamasaee v Commonwealth*" (2018) 19:1 Melbourne J Intl L 52.

Hong, Ryan Nicholas, "Singapore's Transboundary Haze Pollution Act and the Shield of Sovereignty in Southeast Asia" (2016) 34 Sing L Rev 103.

Hook, Maria, "The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes" in Michael Douglas et al, eds, *Commercial Issues in Private International Law: A Common Law Perspective* (Oxford: Hart, 2019) 175.

Horbach, NLJT, "The Confusion About State Responsibility and International Liability" (1991) 4:1 Leiden J Intl L 47.
Horlick, Jonathan et al, "American and Canadian Civil Actions Alleging Human Rights Violations Abroad by Oil and Gas Companies" (2008) 45:3 Alta L Rev 653.
Howarth, David, "Environmental Law and Private Law" in Emma Lees & Jorge E Viñuales, eds, *The Oxford Handbook of Comparative Environmental Law* (Oxford: Oxford University Press, 2019) 1091.
Hsu, Shi-Ling & Austen L Parrish, "Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity" (2007) 48:1 Va J Intl L 1.
Hsu, Shi-Ling, "A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit" (2008) 79:3 U Colo L Rev 701.
Huglo, Christian, "Justice climatique: vers un nouveau droit international de l'environnement", *Environnement et technique* 378 (March 2018) 56, also online: *Actu-Environnement* <www.actu-environnement.com> [perma.cc/5N45-U5AY].
———, "International Law and Environmental Stakes: The Influence of International Law on the Development of Personal Liability of Private Individuals in the Case of Environmental Damage" in Yann Kerbrat & Sandrine Maljean-Dubois, eds, *The Transformation of International Environmental Law* (Paris: Pedone, 2011) 269.
Hugues, Elaine L & David Iyalomhe, "Substantive Environmental Rights in Canada" (1999) 30:2 Ottawa L Rev 229.
Hunt, Constance D, "Implementation: Joint Institutional Management and Remedies in Domestic Tribunals (Articles 26–28 and 30–32)" (1992) 3:1 Colo J Intl Envtl L & Pol'y 281.
Hurlburt, William H, "Conflict of Laws—Choice of Law—Place of Tort" (1976) 54:1 Can Bar Rev 173.
———, "Conflict of Laws—Jurisdiction—Service Ex Juris—Place of Tort" (1974) 52:3 Can Bar Rev 470.
Ianni, Ronald W, "International and Private Actions in Transboundary Pollution" (1973) 11 Can YB Intl L 258.
Ivaldi, Paola, "European Union, Environmental Protection and Private International Law: Article 7 of Rome II Regulation" (2013) 13:5/6 Eur Leg F 137.
Jabbari-Gharabagh, Mansour, "Type of State Responsibility for Environmental Damage" (2001) 33:1 RJT 59.
James, Stephen B & Kate Mary Kell, "Private Enterprise in Outer Space: A Selected Bibliography" (1979) 2:1 Hous J Intl L 159.
Jefferies, Cameron SG, Sara L Seck & Tim Stephens, "International Law, Innovation, and Environmental Change in the Anthropocene" in Neil Craik et al, eds, *Global Environmental Change and Innovation in International Law* (Cambridge: Cambridge University Press, 2018) 1.
Jefferies, Cameron, "Filling the Gaps in Canada's Climate Change Strategy: "All Litigation, All the Time...?"" (2015) 38:5 Fordham Intl LJ 1371.
Jeffery, Michael I, "Seeking Redress for Environmental Harm in the Context of Transboundary Pollution: Remedies, Access, and Choice of Law Considerations"

in Seymour J Rubin & Dean C Alexander, eds, *NAFTA and the Environment* (The Hague: Kluwer Law International, 1996) 463.

———, "Transboundary Pollution and Cross-Border Remedies" (1992) 18 Can-US LJ 173.

Jenks, C Wilfred, "Liability for Ultra-Hazardous Activities in International Law" (1966) 117 Rec des Cours 99.

Jesserun D'Oliveira, Hans Ulrich, "The Sandoz Blaze: The Damage and the Public and Private Liabilities" in Francesco Francioni & Tullio Scovazzi, eds, *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991) 429.

Jianing, Zheng & Gerald Goldstein, "Analyse comparative de la loi chinoise de 2011 portant sur les conflits de lois à la lueur du droit international privé québécois" (2014) 48:2 RJTUM 329.

Johnson, W Rupert, "The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land" (2003) 31:2 UWA L Rev 266.

Johnston, David R & David Post, "Law and Borders—The Rise of Law in Cyberspace" (1996) 48:5 Stan L Rev 1367.

Juenger, Friedrich K, "Environmental Damage" in Campbell McLachlan & Peter Nygh, eds, *Transnational Tort Litigation: Jurisdictional Principles* (Oxford: Clarendon Press, 1996) 201.

Juste-Ruiz, José, "The International Court of Justice and International Environmental Law" in Nerina Boschiero et al, eds, *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: TMC Asser, 2013) 383.

Kain, Brandon & Byron Shaw, "Mapping the Serbonian Bog: The Territorial Limits of Secondary Market Securities Act Claims Under the Canadian Constitution" (2012) 53:1 Can Bus LJ 63 & (2012) 53:2 Can Bus LJ 233.

Kain, Brandon, Elder C Marques & Byron Shaw, "Developments in Private International Law: The 2011-2012 Term—The Unfinished Project of the *Van Breda* Trilogy" (2012) 59 SCLR (2d) 277.

Kalavrouziotis, Tim A, "U.S.-Canadian Relations Regarding Diversions from an International Basin: An Analysis of Article II of the Boundary Waters Treaty" (1989) 12:4 Fordham Intl LJ 658.

Kalmakoff, Jonathan J, ""The Right to Farm": A Survey of Farm Practices Protection Legislation in Canada" (1999) 62:1 Sask L Rev 225.

Kansky, Marilyn, "Private Prosecutions from the Public's Perspective" in Linda F Duncan, ed, *Environmental Enforcement: Proceedings of the National Conference on the Enforcement of Environmental Law* (Edmonton: Environmental Law Centre, 1985) 108.

Karayanni, Michael M, "The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 211.

Kastenberg, Rachel, "Closing the Liability Gap in the International Transboundary Water Pollution Regime Using Domestic Law to Hold Polluters Accountable: A Case Study of *Pakootas v Teck Cominco Ltd*" (2005) 7 Or Rev Intl L 322.

Kellman, Barr, "Space: The Foulded Frontier. Adjudicating Space Debris as an International Environmental Nuisance" (2014) 39:2 J Space L 227.
Kempf, Bart, "Draining Devils Lake: The International Lawmaking Problems Created by the Devils Lake Outlet" (2006) 19:2 Geo Intl Envtl L Rev 239.
Kennedy, Gerard, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79.
Kenney, Cortelyou C, "Measuring Transnational Human Rights" (2015) 84:3 Fordham L Rev 1053.
Kessedjian, Catherine, "Questions de droit international privé de la responsabilité sociétale des entreprises: rapport général" in Catherine Kessedjian & Humberto Cantú Rivera, eds, *Private International Law Aspects of Corporate Social Responsibility* (Cham: Springer, 2020).
King, William K, "Transboundary Pollution: Canadian Jurisdiction" (1982) 1:1 Can-Am LJ 1.
Kinna, Rémy, "Non-Discrimination and Liability for Transboundary Acid Mine Drainage Pollution of South Africa's Rivers: Could the UN Watercourses Convention Open Pandora's Mine?" (2016) 41:3 Water Intl 371.
Kiss, Alexandre & Dinah Shelton, "Strict Liability in International Environmental Law" in Tafsir Malick Ndiaye & Rüdiger Wolfrum, eds, *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Leiden: Martinus Nijhoff, 2007) 1131.
Kiss, Charles-Alexandre, "Tchernobâle ou la pollution accidentelle du Rhin par des produits chimiques" (1987) 33 AFDI 719.
———, "La convention sur la pollution atmosphérique transfrontière à longue distance" [1981] 1 RJE 30.
———, "Un cas de pollution internationale: l'affaire des boues rouges" (1975) 102 JDI 207.
———, "La Convention nordique sur l'environnement" (1974) 20 AFDI 808.
Kinsch, Patrick, "Human Rights and Private International Law" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 880.
———, "Droits de l'homme, droits fondamentaux et droit international privé" (2014) 318 Rec des Cours 9.
Klaudt, Dustin W, "Can Canada's "Living Tree" Constitution and Lessons from Foreign Climate Change Litigation Seed Justice and Remedy Climate Change?" (2018) 31:3 J Envtl L & Prac 185.
Klee, Ann R, Chet M Thompson & Ashley Riveira, "The Extraterritorial Application of U.S. Law: Is What's Sauce for the Goose Good for the Gander?" in Rocky Mountain Mineral Law Institute, *Proceedings of the 53rd Annual Conference of the Rocky Mountain Mineral Law Institute* (Westminster: Rocky Mountain Mineral Law Foundation, 2007).
Kneteman, Christie, "Revitalizing Environmental Class Actions: Quebecois Lessons for English Canada" (2010) 6:2 Can Class Action Rev 261.
Knop, Karen, "Citizenship, Public and Private" (2008) 71:3 Law & Contemp Probs 309.
Knox, John H, "The Neglected Lessons of the NAFTA Environmental Regime" (2010) 45:2 Wake Forest L Rev 391.

———, “The Flawed *Trail Smelter* Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law” in Rebecca M Bratspies & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 66.

———, “The CEC and Transboundary Pollution” in David L Merkell & John H Knox, eds, *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford: Stanford University Press, 2003) 80.

Koh, Harold Hongju, “Transnational Legal Process” (1994 Roscoe Pound Lecture delivered at the University of Nebraska College of Law, Lincoln (Neb), United States, 28 October 1994), (1996) 75:1 Neb L Rev 181.

Koivurova, Timo, “The Future of the Nordic Environment Protection Convention” (1997) 66:4 Nordic J Intl L 505.

Kono, Toshiyuki, “Comparative Analysis of Recent Developments in Private International Law in Japan and Europe from a Japanese Perspective” (2008) 51 Japanese YB Intl L 217.

Kotzé, Louis J & Duncan French, “A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for *Lex Anthropocenae*?” (2018) 18:6 Intl Envtl Agreements: Pol, L & Econ 811.

Kotzé, Louis, “A Global Environmental Constitution for the Anthropocene?” (2019) 8:1 Transnatl Envtl L 1.

Kreuzer, Karl, “Environmental Disturbance and Damage in the Context of Private International Law” (1992) 44:1 Rev esp der int 57.

Kruger, Toby, “Trail Smelter II: A Prudent Approach? From Extraterritoriality to Non-Discrimination” (2010) 43:1 UBC L Rev 109.

Kuh, Katrina Fischer, “The Legitimacy of Judicial Climate Engagement” (2019) 46:3 Ecology LQ 731.

Kunda, Ivana, “Policies Underlying Conflict of Law Choices in Environmental Law” in Vasilka Sancin, ed, *International Environmental Law: Contemporary Concerns and Challenges* (Ljubljana: Založba, 2012) 507.

Kysar, Douglas A, “The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism” (2018) 9:1 Envtl L 48.

Kysar, Douglas A & Conor Dwyer Reynolds, “Regulation Through Recourse: Rediscovering Tort Law as Regulation” (2019), online (pdf): *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449770>.

Laganière, Guillaume, “Dialogue des systèmes en droit international privé: l’application et la reconnaissance du droit public étranger au Québec” in Jérémie Torres-Ceyte, Gabriel-Arnaud Berthold & Charles-Antoine M Péladeau, eds, *Le dialogue en droit civil* (Montreal: Themis, 2018) 35.

———, “La loi applicable à la responsabilité du fabricant en droit international privé canadien et européen” (2016) 57:1 C de D 99.

Laitos, Jan G & Lauren Joseph Wolongevicz, “Why Environmental Laws Fail” (2014) 39:1 Wm & Mary Envtl L & Pol’y Rev 1.

Lamdan, Sarah, “Beyond FOIA: Improving Access to Environmental Information in the United States” (2017) 29:3 Geo Intl Envtl L Rev 481.

Landis, Henry, “Legal Controls of Pollution in the Great Lakes Basin” (1970) 48:1 Can Bar Rev 66.

Larocque, François, "Recent Developments in Transnational Human Rights Litigation: A Postscript to *Torture as Tort*" (2008) 46:3 Osgoode Hall LJ 605.
Larsen, Rasmus Klocker, "Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v Boliden Mineral AB*" (2014) 83:4 Nordic J Intl L 404.
Laskin, Bora, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow: Background Papers* (Ottawa: R Duhamel, Queen's Printer, 1961) 211.
Latham, Mark, Victor E Schwartz & Christopher E Appel, "The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart" (2011) 80:2 Fordham L Rev 737.
Lee, Edward G & DW Sproule, "Liability for Damage Caused by Space Debris: The Cosmos 954 Claim" (1988) 26 Can YB Intl L 273.
Lee, Ricky J, "The Liability Convention and Private Space Launch Services: Domestic Regulatory Responses" (2006) 31 Ann Air & Sp L 351.
Lee, Seokwoo & Lowell Bautista, "Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate against Climate Change: Making out a Claim, Causation, and Related Issues" (2018) 45:1 Ecology LQ 129.
Lee, Stephen, "Jurisdiction over Foreign Land: A Reappraisal" (1997) 26:3 Anglo-Am L Rev 273.
———, "Title to Foreign Real Property in Transnational Money Claims" (1995) 32:3 Colum J Transnatl L 607.
Lefeber, René, "The Legal Significance of the Supplementary Protocol: The Result of a Paradigm Evolution" in Akiho Shibata, ed, *International Liability Regime for Biodiversity Damage: The Nagoya–Kuala Lumpur Supplementary Protocol* (Abingdon: Routledge, 2014) 73.
Lehmann, Matthias & Florian Eichel, "Globaler Klimawandel und Internationales Privatrecht—Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden [Climate Change and Private International Law—Jurisdiction and Applicable Law in Transnational Litigation Concerning Individual Losses Caused by Global Warming]" (2019) 83:1 Rabel J Comp & Intl Priv L 77.
Lehmann, Matthias, "Regulation, Global Governance and Private International Law: Squaring the Triangle" (2020) 16:1 J Priv Intl L 1.
Lemieux, Charlotte, "La protection de l'eau en vertu de l'article 982 C.C.Q.: problèmes d'interprétation" (1992) 23:1 RDUS 191.
Lemieux, Denis, "Le rôle du *Code civil du Québec* en droit administratif" (2005) 18:2 Can J Admin L & Prac 119, reprinted in *Actes de la XVII^e Conférence des juristes de l'État* (Cowansville: Yvon Blais, 2006) 359.
Lequette, Yves, "Les mutations du droit international privé: vers un changement de paradigme? Cours général de droit international privé" (2017) 387 Rec des Cours 9.
Levy, Lauren, "Stretching Environmental Statutes to Include Private Causes of Action and Extraterritorial Application: Can It Be Done?" (1997) 6:1 Dick J Envtl L & Pol'y 65.
Levy, Tali, "NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard" (1995) 31:2 Stan J Intl L 423.

Lewis, Browne C, "It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act" (2004) 25:6 Cardozo L Rev 2143.

Linton, Jamie & Noah Hall, "The Great Lakes: A Model of Transboundary Cooperation" in Emma Norman, Alice Cohen & Karen Bakker, eds, *Water Without Borders? Canada, the United States, and Shared Waters* (Toronto: University of Toronto Press, 2013) 221.

Listiningrum, Prischa, "Transboundary Civil Litigation for Victims of Southeast Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle" (2019) 8:1 Transnatl Envtl L 119.

Lloyd, Don K, "Ohio v Wyandotte Chemicals Corp: Restatement of the Original Jurisdiction of the Supreme Court of the United States" (1972) 2:2 Envtl L 358.

Looper, Robert B, "Jurisdiction over Immovables: The *Little* Case Revisited After Sixty Years" (1956) 40:3 Minn L Rev 191.

Lucas, Cédric, "The Baia Mare and Baia Borsa Accidents: Cases of Severe Transboundary Water Pollution" (2001) 31:2 Envtl Pol'y & L 106.

Mace, MJ & Roda Verheyen, "Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement" (2016) 25:2 RECIEL 197.

MacLean, Jason, "*Chevron Corp v Yaiguaje*: Canadian Law and the New Global Economic and Environmental Realities" (2015) 57:3 Can Bus LJ 367.

Mahmoudi, Said, "Some Private International Law Aspects of Transboundary Environmental Disputes" (1990) 59:2 Nordic J Intl L 128.

Mahony, Dennis E & Tyson Dyck, "Cross-Border Environmental Litigation", *Lexpert* 9:7 (May 2008) 91, also online (pdf): *Lexology* <www.lexology.com> [perma.cc/GJF4-T7A7].

Maljean-Dubois, Sandrine, "La quête d'effectivité du droit international de l'environnement" in Delphine Misonne, *À quoi sert le droit de l'environnement? Réalité et spécificité de son apport au droit et à la société* (Brussels: Bruylant, 2019) 251.

———, "International Litigation and State Liability for Environmental Damages: Recent Evolutions and Perspectives" in Jiunn-Rong Yeh, ed, *Climate Change Liability and Beyond* (Taipei: National Taiwan University Press, 2017) 27.

Mankowski, Peter, "The New Japanese Private International Law Act from a European Perspective" (2008) 51 Japanese YB Intl L 241.

Mann, Bruce W, "The Liability Convention: Scrap It? Fix It? Or Work Around It?" in Ram Jahku, Kuan-Wei Chan & Yaw Nyampong, eds, *Global Space Governance* (Montreal: McGill Centre for Research in Air and Space Law, 2015) 633.

Mansell, Robert, "Civil Liability for Environmental Damage" in Alastair Lucas, ed, *Canadian Environmental Law*, vol 1, 3rd ed (Markham: LexisNexis, 2017) (loose-leaf updated 2019, release 171), ch 18.

Manirabona, Amissi Melchiade, "Toward Barrier Removal for Transnational Human Rights Litigation in Canadian Courts" in Amissi Melchiade Manirabona & Yenny Vega Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis, 2019) 39.

Martin, Jean-Christophe, "The United Nations Compensation Commission Practice with Regards to Environmental Claims" in Yann Kerbrat & Sandrine Maljean-Dubois, eds, *The Transformation of International Environmental Law* (Paris: Pedone, 2011) 251.
Mason, Michael, "Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law" (2006) 12:3 Global Gov 283.
Matscher, Franz, "Le droit international privé face à la Convention européenne des droits de l'homme" in *Travaux du Comité français de droit international privé 1995–1998* (Paris: Pedone, 2000) 211.
Mayer, Benoit, "Climate Assessment as an Emerging Obligation Under Customary International Law" (2019) 68:2 ICLQ 271.
———, "Construing International Climate Change Law as a Compliance Regime" (2018) 7:1 Transnatl Envtl L 115.
———, "Climate Change Reparations and the Law and Practice of State Responsibility" (2017) 7:1 Asian J Intl L 185.
———, "State Responsibility and Climate Change Governance: A Light Through the Storm" (2014) 13:3 Chinese J Intl L 539.
McAree, Marc & Joanna Vince, "When Complying with the Law in Your Own Backyard Is Not Enough: Cross-Border United States and Canada Environmental Litigation" (2013) 42:2 Brief 57.
McCaffrey, Stephen C & Mpazi Sinjela, "Current Developments: The 1997 United Nations Convention on International Watercourses" (1998) 92:1 AJIL 97.
McCaffrey, Stephen C, "Of Paradoxes, Precedents and Progeny: The *Trail Smelter* Arbitration 65 Years Later" in Rebecca M Bratspies & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 34.
———, "Liability for Transfrontier Environmental Harm: The Relationship Between Public and Private International Law" in Christian von Bar, ed, *Internationales umwelthaftungsrecht* [International Environmental Liability Law], vol 1 (Köln: Heymann, 1995) 81.
———, "Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Survey" (1981) 19:1 UWO L Rev 35.
———, "The OECD Principles Concerning Transfrontier Pollution: A Commentary" (1975) 1:1 Envtl Pol'y & L 2.
———, "Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States" (1973) 3:2 Cal W Intl LJ 191.
McConnaughey, Philip J, "Reviving the Public Law Taboo in International Conflict of Laws" (1999) 35:2 Stan J Intl L 255.
McCorquodale, Robert & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70:4 Mod L Rev 598.
McDonald, Kate, "*Pakootas v Teck Cominco Metals, Ltd*: Finding a Sustainable Solution to Transboundary Pollution" (2006) 41:1 Ga L Rev 311.
McGee, Henry & Timothy W Woolsey, "Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano's

The Peaceful Settlement of International Disputes: A Pragmatic Approach" (2002) 20:1 UCLA J Envtl L & Pol'y 109.

McIntyre, Owen & Mara Tignino, "Reconciling the UN Watercourses Convention with Recent Developments in Customary International Law" in Flavia Rocha Loures & Alistair Rieu-Clarke, eds, *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Abingdon: Routledge, 2013) 286.

McIntyre, Owen, "The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources" (2006) 46:1 Nat Resources J 157.

McLeod-Kilmurray, Heather, "*Hollick* and Environmental Class Actions: Putting the Substance into Class Action Procedure" (2002) 34:2 Ottawa L Rev 263.

Merrill, Thomas W, "Golden Rules for Transboundary Pollution" (1997) 46:5 Duke LJ 931.

Merrills, JG, "Trespass to Foreign Land" (1979) 28:3 ICLQ 523.

Meyer, Linda Ross, "Catastrophe: Plowing Up the Ground of Reason" in Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds, *Law and Catastrophe* (Stanford: Stanford University Press, 2007) 19.

Michaels, Ralf, "Private International Law and the Question of Universal Values" in Franco Ferrari & Diego P Fernández Arroyo, eds, *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham: Edward Elgar, 2019) 148.

———, "Towards a Private International Law for Regulatory Conflicts?" (2016) 59 Japanese YB Intl L 175.

———, "The New European Choice-of-Law Revolution" (2008) 82:5 Tul L Rev 1607.

———, "Two Economists, Three Opinions? Economic Models for Private International Law—Cross-Border Torts as Example" in Jürgen Basedow & Toshiyuki Kono, eds, *An Economic Analysis of Private International Law* (Tübingen: Mohr Siebeck, 2006) 143.

Mijares Peña, Susana C, "Human Rights Violations by Canadian Companies Abroad: *Choc v Hudbay Minerals Inc*" (2014) 5:1 UWO J Leg Stud 3.

Milestone, Nancy Hughes, "A Common Law Solution to the Acid Rain Problem" (1986) 20:2 Val UL Rev 277.

Mills, Alex, "Private Interests and Private Law Regulation in Public International Law Jurisdiction" in Stephen Allen et al, eds, *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press, 2019) 330.

———, "Connecting Public and Private International Law" in Duncan French, Kasey McCall-Smith & Verónica Ruiz Abou-Nigm, eds, *Linkages and Boundaries in Private and Public International Law* (Oxford: Hart, 2018) 13.

———, "Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?" (2016) 65:3 ICLQ 541.

———, "Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 34.

———, “The Identities of Private International Law: Lessons from the U.S. and EU Revolutions” (2013) 23:3 Duke J Comp & Intl L 445.
———, “Rediscovering the Public Dimension of Private International Law” (2011) 24 Hague YB Intl L 11.
———, “The Private History of International Law” (2006) 55:1 ICLQ 1.
Mingst, Karen A, “Evaluating Public and Private Approaches to International Solutions to Acid Rain Pollution” (1982) 22:1 Nat Resources J 5.
Mohan, Mahdev, “A Domestic Solution for Transboundary Harm: Singapore’s Haze Pollution Law” (2017) 2:2 Bus & HR 325.
Monestier, Tanya J, “You’re It! Tag Jurisdiction over Corporations in Canada” (2017) 50:3 Vand J Transnatl L 583.
———, “Is Canada the New Shangri-La of Global Securities Class Actions?” (2012) 32:2 Nw J Intl L & Bus 305.
Moon, William J, “Regulating Offshore Finance” (2019) 72:1 Vand L Rev 1.
Montjoie, Michel, “The Concept of Liability in the Absence of an Internationally Wrongful Act” in James Crawford, Alain Pellet & Simon Olleson with the assistance of Kate Parlett, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 503.
Morgera, Elisa & Lorna Gillies, “Realizing the Objectives of Public International Environmental Law Through Private Contracts: The Need for a Dialogue with Private International Law Scholars” in Duncan French, Kasey McCall-Smith & Veronica Ruiz Abou-Nigm, eds, *Linkages and Boundaries in Private and Public International Law* (Oxford: Hart, 2018) 175.
Morriss, Andrew, “Supporting Structures for Resolving Environmental Disputes Among Friendly Neighbors” in Jurgen Schmandt, Judith Clarkson & Hilliard Roderick, eds, *Acid Rain and Friendly Neighbors: The Policy Dispute Between Canada and the United States*, revised ed (Durham: Duke University Press, 1988) 217.
Mortensen, Reid, “Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches” (2006) 55:4 ICLQ 839.
Möstl, Markus, “Case C-115/08, *Land Oberösterreich v ČEZ*, Judgment of the Grand Chamber of 27 October 2008” (2010) 47:4 CML Rev 1221.
Mrema, Elisabeth, “UNEP GCSS-11/GMEF: Building Confidence in the Multilateral System” (2010) 40:4 Envtl Pol’y & L 136.
Muir Watt, Horatia, “Private International Law’s Shadow Contribution to the Question of Informal Transnational Authority” (2018) 25:1 Ind J Global Leg Stud 37.
———, “Discours sur les méthodes du droit international privé (des formes juridiques de l’inter-altérité)” (2018) 389 Rec des Cours 9, reprinted in vol 35 of the *Procket Books of the Hague Academy of International Law* (Leiden: Koninklijke Brill, 2019).
———, “Globalization and Private International Law” in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 845.
———, “Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference” (2017) 70:1 Current Leg Probs 111.

———, “Theorizing Private International Law” in Anne Orford & Florian Hoffmann, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 862.
———, “La globalisation et le droit international privé” in Vincent Heuzé, Rémy Libchaber & Pascal de Vareilles-Sommières, eds, *Mélanges en l’honneur du Professeur Pierre Mayer* (Issy-les-Moulineaux: LGDJ Lextenso, 2015) 591.
———, “The Relevance of Private International Law to the Global Governance Debate” in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 1.
———, “Politique du droit international privé: réflexion critique” in François Collart Dutilleul & Fabrice Riem, eds, *Droits fondamentaux, ordre public et libertés économiques* (Bayonne: Institut Universitaire Varenne, 2013) 245.
———, “Concurrence ou confluence? Droit international privé et droits fondamentaux dans la gouvernance globale” in Jacques Foyer et al, eds, *Le droit entre tradition et modernité: mélanges à la mémoire de Patrick Courbe* (Paris: Dalloz, 2012) 461, reprinted in (2013) 27:1/2 RIDE 59
———, “Further Terrains for Subversive Comparisons: The Field of Global Governance and the Public/Private Divide” in Pier Giuseppe Monateri, ed, *Methods of Comparative Law* (Cheltenham: Edward Elgar, 2012) 270.
———, “Private International Law Beyond the Schism” (2011) 2:3 Transnatl Leg Theory 347.
———, “La fonction économique du droit international privé” (2010) 24:1 RIDE 103.
———, Horatia Muir Watt & Fabrizio Cafaggi, “Introduction” in Horatia Muir Watt & Fabrizio Cafaggi, eds, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar, 2009) x.
———, “Rome II et les « intérêts gouvernementaux »: pour une lecture fonctionnaliste du nouveau règlement du conflit de lois en matière délictuelle” in Sabine Corneloup & Natalie Joubert, eds, *Le règlement communautaire « Rome II » sur la loi applicable aux obligations non contractuelles: actes du colloque du 20 septembre 2007, Dijon* (Paris: LexisNexis, 2008) 129.
———, “European Integration, Legal Diversity and the Conflict of Laws” (2005) 9:1 Ed L Rev 6.
———, “Aspects économiques du droit international privé: réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions” (2004) 307 Rec des Cours 25.
———, New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?” in Mark van Hoecke, ed, *Epistemology and Methodology of Comparative Law* (Oxford: Hart, 2004) 271.
———, “Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy” (2003) 9:3 Colum J Eur L 383.
———, “Droit public et droit privé dans les rapports internationaux (Vers la publicisation des conflits de lois?)” (1997) 41 Arch phil dr 207.
Mulvaney, J Neil, “Participation by Ontario in U.S. Administrative and Judicial Proceedings” (1983) 4:3 NYL Sch J Intl & Comp L 553.
Munari, Francesco & Lorenzo Schiano Di Pepe, “Liability for Environmental Torts in Europe: Choice of Law and the Case for Pursuing Effective Legal Uniformity”

(2005) 41:3 Riv dir int priv pr 607, reprinted in Alberto Malatesta, ed, *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe: The Rome II Proposal* (Padua: CEDAM, 2006) 173.

Murphy, Sean D, "Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste" (1994) 88:1 AJIL 24.

Mushkat, Roda, "The Daya Bay Nuclear Plant Project in the Light of International Environmental Law" (1990) 7:1/2 UCLA Pac Basin LJ 87.

Nadon, Odette, "Civil Liability Underlying Environmental Risk-Related Activities in Quebec" (1998) 24 CELR (NS) 141.

Nash, Jonathan Remy, "The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws" (2010) 50:4 Va J Intl L 997, revised and updated in Jonathan Remy Nash, "The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws" in Günther Handl, Joachim Zekoll & Peer Zumbansen, eds, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Martinus Nijhoff, 2012) 125.

Navajas, Teresa Parejo & Nathan Lobel, "Framing the Global Pact for the Environment: Why It's Needed, What It Does, and How It Does It" (2019) 30:1 Fordham Envtl LJ 32.

Nègre, Céline, "Responsibility and International Environmental Law" in James Crawford, Alain Pellet & Simon Olleson with the assistance of Kate Parlett, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 803.

Nelson, Timothy G, "Regulating the Void: In-Orbit Collisions and Space Debris" (2015/2016) 40:1/2 J Space L 105.

Nicita, Antonio & Matteo M Winkler, "The Cost of Transnational Accidents: Lessons from Bhopal and Amoco" (2009) 43:4 J World Trade 683.

Nishitani, Yuko, "La loi applicable à la responsabilité délictuelle: le règlement « Rome II » du point de vue japonais" (2008) 60:3 Rev DI & DC 639.

———, "The Rome II Regulation from a Japanese Point of View" (2007) 9 YB Priv Intl L 175.

Nollkaemper, André, "Cluster-Litigation in Cases of Transboundary Environmental Harm" in Michael G Faure & Song Ying, eds, *China and International Environmental Liability: Legal Remedies for Transboundary Pollution* (Cheltenham: Edward Elgar, 2008) 11.

———, "Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives" in Gerd Winter, ed, *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (Cambridge: Cambridge University Press, 2006) 179.

Nourissat, Cyril & Edouard Treppoz, "Quelques observations sur l'avant-projet de proposition de règlement du Conseil sur la loi applicable aux obligations non-contractuelles « Rome II »" (2003) 130:1 JDI 7.

Nwapi, Chilenye, "Accountability of Canadian Mining Corporations for Their Overseas Conduct: Can Extraterritorial Corporate Criminal Prosecution Come to the Rescue?" (2016) 54 Can YB Intl L 227.

———, “Resource Extraction in the Courtroom: The Significance of *Choc v Hudbay Minerals Inc* for the Future of Transnational Justice in Canada” (2014) 14 Asper Rev Intl Bus & Trade L 121.
———, “Re-Evaluating the Doctrine of *Forum Non Conveniens* in Canada” (2013) 34:1 Windsor Rev Legal Soc Issues 59.
Okowa, Phoebe, “Responsibility for Environmental Damage” in Malgosia Fitzmaurice, David M Ong & Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010) 303.
Olszynski, Martin, Sharon Mascher & Meinhard Doelle, “From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability” (2017) 30:1 Geo Envtl L Rev 1.
Orange, Jennifer A, “Torture, Tort Choice of Law, and *Tolofson*” in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart, 2001) 291.
Orlando, Emanuela, “Liability” in Ludwig Krämer & Emanuela Orlando, eds, *Elgar Encyclopedia of Environmental Law*, vol 6: Principles of Environmental Law (Cheltenham: Edward Elgar, 2018) 272.
———, “From Domestic to Global? Recent Trends in Environmental Liability from a Multi-Level Perspective and Comparative Law Perspective” (2015) 24:3 RECIEL 290.
———, “Public and Private in the International Law of Environmental Liability” in Frederico Lenzerini & Ana Filipa Vrdoljak, eds, *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Oxford: Hart, 2014) 395.
Osofsky, Hari M, “Is Climate Change “International”? Litigation’s Diagonal Regulatory Role” (2009) 49:3 Va J Intl L 585.
Paddeu, Federica I, “To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments” (2018) 21 Max Planck YB UN L 83.
Pallemaerts, Marc, “Judicial Recourse Against Foreign Air Polluters: A Case Study of Acid Rain in Europe” (1985) 9:1 Harv Envtl L Rev 143.
———, “International Legal Aspects of Long-Range Transboundary Air Pollution” (1988) 1 Hague YB Intl L 189.
Parker, Brandy, “Recent Developments in Environmental Law. Comprehensive Environmental Response, Compensation and Liability Act: *Pakootas v Teck Cominco Metals, Ltd*” (2007) 20:2 Tul Envtl LJ 468.
Parrish, Austen L, “Fading Extraterritoriality and Isolationism? Developments in the United States” (12th Earl A Snyder Lecture delivered at the Lauterpacht Centre for International Law, University of Cambridge, United Kingdom, 13 May 2016), (2017) 24:1 Ind J Global Leg Stud 207.
———, “*Kiobel*, Unilateralism, and the Retreat from Extraterritoriality” (2013) 28 Md J Intl L 208.
———, “State Court International Human Rights Litigation: A Concerning Trend” (2013) 3:1 UC Irvine L Rev 25.

———, “Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canada-U.S. Transboundary Water Pollution Disputes” (2005) 85:2 BUL Rev 363.
Paul, Joel R, “The Isolation of Private International Law” (1988) 7:1 Wis Intl LJ 149.
Pavlović, Marina, “Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts” (2016) 62:2 McGill LJ 389.
Payne, Cymie R, “Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990–1991 Gulf War” in Carl Bruch, Carroll Muffett & Sandra S Nichols, eds, *Governance, Natural Resources and Post-Conflict Peacebuilding* (Abingdon: Routledge, 2016) 719.
Peel, Jacqueline & David Fischer, “International Law at the Intersection of Environmental Protection and Disaster Risk Reduction” in Jacqueline Peel & David Fischer, eds, *The Role of International Environmental Law in Disaster Risk Reduction* (Leiden: Brill Nijhoff, 2016) 1.
Peel, Jacqueline, “International Environmental Law and Climate Disasters” in Rosemary Lyster & Robert RM Verchick, eds, *Research Handbook on Climate Disaster Law: Barriers and Opportunities* (Cheltenham: Edward Elgar, 2018) 77.
———, “Unpacking the Elements of a State Responsibility Claim for Transboundary Pollution” in S Jayakumar et al, eds, *Transboundary Pollution: Evolving Issues of Law and Policy* (Cheltenham: Edward Elgar, 2015) 51.
Pekkarinen, Veera, Patrick Toussaint & Harrovan Asselt Mayer, “Loss and Damage after Paris: Moving Beyond Rhetoric” (2019) 13:1 Carbon & Climate Rev 31.
Péloffy, Karine, “*Kivalina v Exxonmobil*: A Comparative Case Comment” (2013) 9:1 JSDLP 121.
Penney, Steven, “Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film” (2004) 30:1 Queen’s LJ 205.
Percival, Robert V, “International Responsibility and Liability for Environmental Harm” in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (London: Routledge, 2013) 681.
———, “Global Law and the Environment” (2011) 86:3 Wash L Rev 579.
———, “Liability for Environmental Harm and Emerging Global Environmental Law” (2010) 25:1 Md J Intl L 37.
Perron-Welch, Frederic & Olivier Rukundo, “Biosafety, Liability and Sustainable Development” in Marie-Claire Cordonier Segger, Frederic Perron-Welch & Christine Frison, eds, *Legal Aspects of Implementing the Cartagena Protocol on Biosafety* (Cambridge: Cambridge University Press, 2013) 188.
Phillips, Charles, “Nordic Co-operation for the Protection of the Environment Against Air Pollution and the Possibility of Transboundary Private Litigation” in Cees Flinterman, Barbara Kwiatkowska & Johan G Lammers, eds, *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: Martinus Nijhoff, 1986) 141.
Piché, Catherine, “Judging Fairness in Class Actions Settlements” (2010) 28:1 Windsor YB Access Just 111.
Pickering, John & Gina L Swets, “Who’ll Stop the Rain: Resolution Mechanisms for U.S.-Canadian Transboundary Pollution Disputes” (1982) 12:1 Denv J Intl L & Pol’y 51.

Pitel, Stephen GA & Jesse R Harper, "Choice of Law for Tort in Canada: Reasons for Change" (2013) 9:2 J Priv Intl L 289.
Pitel, Stephen GA & Vaughan Black, "Assumed Jurisdiction in Canada: Identifying and Interpreting Presumptive Connecting Factors" (2018) 14:2 J Priv Intl L 193.
Pitel, Stephen GA, "Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada" (2018) 55:1 Osgoode Hall LJ 63.
Plakokefalos, Ilias, "Liability for Transboundary Harm" in André Nollkaemper & Ilias Plakokefalos, eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017) 1051.
Popovici, Adrian, "Le « locus delicti » en droit international privé québécois" (1982–83) 17:3 RJT 463.
Porretta, Christina, "Assessing Tort Damages in the Conflict of Laws: *Loci*, *Fori*, *Illogical*" (2012) 91:1 Can Bar Rev 97.
Posch, Willibald, "Some Observations on the Law Applicable to Transfrontier Environmental Damage" in Monika Hinteregger, ed, *Environmental Liability and Ecological Damage in European Law* (Cambridge: Cambridge University Press, 2008) 33.
———, "The "Draft Regulation Rome II" in 2004: Its Past and Future Perspectives" (2004) 6 YB Priv Intl L 129.
Posner, Eric A, "Climate Change and International Human Rights Litigation: A Critical Appraisal" (2007) 155:6 U Pa L Rev 1925.
Post, David, "Against "Against Cyberanarchy"" (2002) 17:4 BTLJ 1365.
Pribetic, Antonin I, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdiction Issues Arising from the In Personam Exception to the Moçambique Rule for Foreign Immovables" (2009) 35:2 Adv Q 230.
Proctor, Robert W, "Individual Enforcement of Canada's Environmental Protection Laws: The Weak-Spirited Need Not Try. An Alberta Example" (1991) 14:1 Dal LJ 112.
Purcell Jr, Edward A, "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992) 40:2 UCLA L Rev 423.
Quintanilla, Marcus S & Christopher A Whytock, "The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law" (2011) 18:1 Sw J Intl L 31.
Ragno, Francesca, "Certainty Versus Flexibility in the EU Choice of Law System" in Franco Ferrari & Diego P Fernández Arroyo, eds, *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham: Edward Elgar, 2019) 27.
Ranger, Vincent, "Les dissonances du dialogue entre le droit privé et le droit public au Québec" in Jérémie Torres-Ceyte, Gabriel-Arnaud Berthold & Charles-Antoine M Péladeau, eds, *Le dialogue en droit civil* (Montreal: Themis, 2018) 109.
Read, John E, "The *Trail Smelter* Dispute" (1963) 1 Can YB Intl L 213.
Rehbinder, Eckard, "Extra-Territoriality of Pollution Control Laws from a European Perspective" in Günther Handl, Joachim Zekoll & Peer Zumbansen, eds, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Martinus Nijhoff, 2012) 127.

———, “Transboundary Nuclear Risk: The Litigation on the Temelín Nuclear Power Plant” (2010) 40:1 Envtl Pol’y & L 32.
Rendell, James, “*Urgenda Foundation v The State of the Netherlands*: Precedents and Pitfalls of an Innovative Approach to State Liability for Climate Change” in Stanley D Berger, ed, *Key Developments in Environmental Law 2017* (Toronto: Thomson Reuters, 2017) 139.
Rest, Alfred, “International Environmental Law in German Courts” (1997) 27:5 Envtl Pol’y & L 409.
———, “Need for an International Court for the Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation” (1994) 24:4 Envtl Pol’y & L 173.
Riles, Annelise, “Managing Regulatory Arbitrage: A Conflict of Laws Approach” (2014) 47:1 Cornell Intl LJ 63.
Robertson, David W, “Forum Non Conveniens in America and England: “A Rather Fantastic Fiction’” (1987) 103:3 Law Q Rev 398.
Robinson-Dorn, Michael J, “The Trail Smelter: Is What’s Past Prologue? EPA Blazes a New Trial for CERCLA” (2006) 14:2 NYU Envtl LJ 233.
Rosas, Allan, “Issues of State Liability for Transboundary Environmental Damage” (1991) 60:1 Nordic J Intl L 29.
Rosencranz, Armin, “The Uniform Transboundary Pollution Reciprocal Access Act” (1985) 15:3/4 Envtl Pol’y & L 105.
Roy, Stéphanie, “Le projet de loi nº 49 et la responsabilité civile en cas de déversement d’hydrocarbures extracôtiers dans le golfe du Saint-Laurent” (2016) 57:3 C de D 355, reprinted in Christophe Krolik, ed, *Le droit des ressources naturelles et de l’énergie: où en sommes-nous? Où allons-nous?* (Montreal: LexisNexis, 2017) 65.
———, *La responsabilité civile pour déversements d’hydrocarbures: l’exemple d’Old Harry* (Cowansville: Yvon Blais, 2016).
Rühl, Giesela, “Consumer Protection in Choice of Law” (2011) 44:3 Cornell Intl LJ 571.
Rushworth, Adam & Andrew Scott, “Rome II: Choice of Law for Non-Contractual Obligations” [2008] LMCLQ 274.
Sacerdoti, Giorgio, “Bilateral Treaties and Multilateral Instruments on Investment Protection” (1997) 269 Rec des Cours 251.
Sachs, Noah M, “The Paris Agreement in the 2020s: Breakdown or Breakup?” (2019) 46:3 Ecology LQ 865.
———, “Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law” (2008) 55:4 UCLA L Rev 837.
Samson, Rémi, “Appréciation critique de la doctrine du *forum non conveniens* en droit québécois: si nous étions partis du bon pied…” (1999) 11 RJEUL 111.
Sand, Peter H & Jonathan B Wiener, “Towards a New International Law of the Atmosphere?” (2016) 7:2 Goettingen J Intl L 195.
Sand, Peter H, “Transboundary Air Pollution” in André Nollkaemper & Ilias Plakokefalos, eds, *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017) 962.
———, “The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective” (2012) 1:1 Transnatl Envtl L 183.

———, “Catastrophic Environmental Damage and the Gulf War Reparation Awards: The Experience of the UN Compensation Commission” (2011) 105 Am Soc’y Intl L Proc 430.
———, “Environmental Principles Applied” in Cymie Payne & Peter H Sand, eds, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford: Oxford University Press, 2011) 170.
———, “The Role of Domestic Procedures in Transnational Environmental Disputes” in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) 146, reprinted in Peter H Sand, ed, *Transnational Environmental Law: Lessons in Global Change* (The Hague: Kluwer Law International, 1999) 87.
Sands, Philippe, “Climate Change and the Rule of Law: Adjudicating the Future in International Law” (2016) 28:1 J Envtl L 19.
———, “Environment, Community and International Law” (1989) 30:2 Harv Intl LJ 393.
Saumier, Geneviève, “L’ouverture récente des tribunaux canadiens aux poursuites dirigées contre les sociétés mères pour les préjudices causés par leurs filiales à l’étranger” (2018) 107:4 Rev crit dr int privé 775.
———, “Commentaire sur Anvil Mining” (2013) 9:1 JSDLP 145.
———, “PILAGG in Practice: Two Examples of Concrete Steps” (September 2013), online (pdf): *Private International Law as Global Governance eSeries* <blogs.sciences-po.fr/pilagg> [perma.cc/ZDA6-8QCD].
———, “Le *forum non conveniens* au Québec: bilan d’une transplantation” in Sylvette Guillemard, ed, *Mélanges en l’honneur du professeur Alain Prujiner* (Cowansville: Yvon Blais, 2011) 345.
———, “La sphère d’application de l’article 3149 CcQ et le consommateur québécois” (2007) 37:2 RGD 463.
———, “The Recognition of Foreign Judgments in Quebec—The Mirror Crack’d?” (2002) 81:3 Can Bar Rev 677.
Schärf, Wolf-Georg, “The Temelín-Judgement of the European Court of Justice” (2010) 85 Nuclear L Bull 79.
Schatz, Julia, “Climate Change Litigation in Canada and the USA” (2009) 18:2 RECIEL 129.
Schwartz, Bryan & Mark L Berlin, “After the Fall: An Analysis of Canadian Legal Claims for Damage Caused by Cosmos 954” (1982) 27:4 McGill LJ 676.
Schwartz, Bryan P, “The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals” (2018) 41:1 Man LJ 211.
Schwartz, Julia A, “International Nuclear Third Party Liability Law: The Response to Chernobyl” in International Atomic Energy Agency & OECD Nuclear Energy Agency, *International Nuclear Law in the Post-Chernobyl Period* (Paris: OECD, 2006) 37.
Schwartz, Priscilla, “Principle 16: The Polluter-Pays Principle” in Jorge Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 429.
Schwebel, Stephen M, “The Story of the U.N.’s Declaration on Permanent Sovereignty over Natural Resources” (1963) 49:5 ABA J 463, reprinted in Stephen M

Schwebel, *Justice in International Law: Selected Writings of Judge Stephen M Schwebel* (Cambridge: Cambridge University Press, 2008) 401.
Scott, Craig & Robert Wai, "Transnational Governance of Corporate Conduct Through the Migration of Human Rights Norms: The Potential Contribution of Transnational "Private" Litigation" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism: International Studies in the Theory of Private Law* (Oxford: Hart, 2004) 287.
Scott, Robert Day, "The Canadian-American Boundary Waters Treaty: Why Article II?" (1958) 36:4 Can Bar Rev 511.
Scovazzi, Tullio, "The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage That Can Be Compensated" (2009) 13 Max Planck YB UN L 183.
———, "State Responsibility for Environmental Harm" (2002) 12 YB Intl Envtl L 43.
Seck, Sara L, "Moving Beyond the E-Word in the Anthropocene" in Daniel S Margolies et al, eds, *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon: Routledge, 2019) 49.
———, "Transnational Judicial and Non-Judicial Remedies for Corporate Human Rights Harms: Challenges of and for Law" (2013) 31:1 Windsor YB Access Just 177.
———, "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance" (2012) 13:12 German LJ 1363.
———, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rts & Dev LJ 177.
———, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46:3 Osgoode Hall LJ 565.
———, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can YB Intl L 139.
Seidl-Hohenveldern, Ignaz, "Alternative Approaches to Transfrontier Environmental Injuries" (1976) 2:1 Envtl Pol'y & L 6.
———, "À propos des nuisances dues aux aéroports limitrophes: le cas de Salzbourg et le traité austro-allemand du 19 décembre 1967" (1973) 19 AFDI 890.
Shaw, Byron & Scott Robinson, "Goldhar v Hareetz.com: A Product of the Supreme Court's Unfinished Project to Reform Canadian Private International Law" (2019) 49:2 Adv Q 143.
Sherratt, Dean & Marcus Davies, "Going with the Flow: Sovereignty, Cooperation and Governance of US-Canada Transboundary and Boundary Waters" in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law* (Waterloo: Centre for International Governance Innovation, 2018) 317.
Shoesmith, Thomas M, "Transfrontier Pollution—*OECD Council Recommendation on Implementing a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*" (1978) 19:1 Harv Intl LJ 407.
Siegele, Linda, "Loss & Damage (Article 8)" in Daniel Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: Oxford University Press, 2017) 224

Signorelli, Andrea, "Devils Lake Outlet and the Need for Canada and the United States to Pursue a New Bilateral Understanding in the Management of Transboundary Waters" (2011) 34:3 Man LJ 183.
Simons, Penelope, "Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses" (2015) 56:2 Can Bus LJ 167.
Singh Nijar, Gurdial, "Civil Liability in the Supplementary Protocol" in Akiho Shibata, ed, *International Liability Regime for Biodiversity Damage: The Nagoya–Kuala Lumpur Supplementary Protocol* (Abingdon: Routledge, 2014) 111.
———, "The Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety: An Analysis and Implementation Challenges" (2013) 13:3 Intl Envtl Agreements: Pol, L & Econ 271.
Siros, Steven M, "Borders, Barriers, and Other Obstacles to a Holistic Environment" (1992) 13:3 N Ill UL Rev 633.
Slane, Andrea, "Tales, Techs and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet" (2008) 71:3 Law & Contemp Probs 129.
Slattery, Michael, "Pathways from Paris: Does *Urgenda* Lead to Canada?" (2017) 30:3 J Envtl L & Prac 241.
Slaughter, Anne-Marie & William Burke-White, "The Future of International Law Is Domestic (or, The European Way of Law)" (2006) 47:2 Harv Intl LJ 327.
Slaughter, Anne-Marie, "A Global Community of Courts" (2003) 44:1 Harv Intl LJ 191.
———, "Judicial Globalization" (2000) 40:4 Va J Intl L 1103.
Smets, Henri, "Le principe de non-discrimination en matière de protection de l'environnement" (2000) 4:1 REDE 3.
———, "Local Actions to Combat Transfrontier Pollution" (1976) 5:4 Ambio 164.
Smith, T Bradbrooke, "The Canadian Legislative Position" (1982) 5 Can-US LJ 66.
Springer, Allen L, "From Trail Smelter to Devils Lake: The Need for Effective Federal Involvement in Canadian-American Environmental Disputes" (2007) 37:1 Am Rev Can Stud 77.
St John, Dan, "The Trouble with Westphalia in Space: The State-Centric Liability Regime" (2012) 40:4 Denv J Intl L & Pol'y 686.
Staath, Claire & Benedict S Wray, "Corporations and Social Environmental Justice: The Role of Private International Law" in Antoine Duval & Marie-Angle Moreau, eds, *Towards Social Environmental Justice?* (Florence: European University Institute, 2012) 75.
Stec, Stephen et al, "Transboundary Environmental Governance and the Baia Mare Cyanide Spill" (2001) 27:4 Rev Cent & E Eur L 639.
Stein, Robert E, "The OECD Guiding Principles on Transfrontier Pollution" (1976) 6:1 Ga J Intl & Comp L 245.
Strebel, Felix D, "The Enforcement of Foreign Judgments and Foreign Public Law" (1999) 21:1 Loy LA Intl & Comp LJ 55.
Sullivan, RE, "Interpreting the Territorial Limitations on the Provinces" (1985) 7 SCLR 511.

Sum-Ping, Joanne, "New Approach to Extraterritorial Application of Environmental Statutes: Uncovering the Effects of Plan Colombia" (2006) 31:1 Colum J Envtl L 139.
Suttenberg, Jeremy, "Who Pays? The Consequences of State Versus Operator Liability Within the Context of Transboundary Environmental Nuclear Damage" (2016) 24:2 NYU Envtl LJ 201.
Swaigen, John, Alberta Koehl & Charles Hatt, "Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment" (2013) 26:1 J Envtl L & Prac 31.
Swan, John, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63:2 Can Bar Rev 271.
Symeonides, Symeon C, "Private International Law: Idealism, Pragmatism, Eclecticism" (2017) 384 Rec des Cours 9.
———, "Torts and Conflict of Laws" in Mauro Bussani & Anthony J Sebok, eds, *Comparative Tort Law: Global Perspectives* (Cheltenham: Edward Elgar, 2015) 39.
———, "Result-Selectivism in Conflicts Laws" (2009) 46:1 Willamette L Rev 1.
———, "Result-Selectivism in Private International Law" (2008) 3:1 Roman J Priv Intl L & Comp Priv L 1.
———, "Rome II and Tort Conflicts: A Missed Opportunity" (2008) 56:1 Am J Comp L 173.
———, "The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons" (2008) 82:5 Tul L Rev 1741.
———, "Rome II: A Centrist Critique" (2007) 9 YB Priv Intl L 149.
———, "Tort Conflicts and Rome II: A View from Across" in Heinz-Peter Mansel, ed, *Festschrift für Erik Jayme* (Munich: Sellier, 2004) 935.
———, "Material Justice and Conflicts Justice in Choice of Law" in Patrick J Borchers & Joachim Zekoll, eds, *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (Ardsley: Transnational Publishers, 2001) 125.
Szakats, Alexander, "Cross-Border Pollution—Private International Law Problems in Claiming Compensation" (2001) 32:3 VUWLR 609.
Takahashi, Koji, "A Major Reform of Japanese Private International Law" (2006) 2:2 J Priv Intl L 311.
Talpis, JA & JG Castel, "Le Code civil du Québec: Interprétation des règles du droit international privé" in Barreau du Québec & Chambre des notaires, eds, *La réforme du Code civil*, vol 3: Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires (Quebec: Presses de l'Université Laval, 1993).
Talpis, Jeffrey & Gérald Goldstein, "The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law" (2009) 11 YB Priv Intl L 339.
Talpis, Jeffrey & Shelley L Kath, "The Exceptional as Commonplace in Québec *Forum Non Conveniens* Law: *Cambior*, A Case in Point" (2000) 34:3 RJT 731.
Talpis, Jeffrey A, "The Civil Law Heritage in the Transformation of Quebec Private International Law" (1992) 84:1 Law Libr J 177.

———, “Analyse critique de l’Avant-projet de loi du Québec en droit international privé” (1989) 91:5/6 R du N 293, (1989) 91:7/8 R du N 456 & (1989) 91:9/10 R du N 606.

Tancelin, Maurice, “L’environnement et la responsabilité délictuelle en « common law » canadienne” (1977) 23:2 McGill LJ 163.

Telesetsky, Anastasia, “Introductory Note to the Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress” (2011) 50:1 ILM 105.

Terry, John, “Litigation” in Dennis Mahony, ed, *The Law of Climate Change in Canada* (Aurora: Canada Law Book, 2010) (loose-leaf updated 2019, release 23), ch 16.

Thomale, Chris, “The Forgotten Discipline of Private International Law: Lessons from *Kiobel v Royal Dutch Petroleum*—Part 2” (2016) 7:3 Transnatl Leg Theory 287.

Thomas, Elmo & Mahlet Teshome Kebede, “One Legally Binding Provision on Civil Liability: Why It Was So Important from the African Negotiators’ Perspective” in Akiho Shibata, ed, *International Liability Regime for Biodiversity Damage: The Nagoya–Kuala Lumpur Supplementary Protocol* (Abingdon: Routledge, 2014) 125.

Thomassin, Kim & Martin Boodman, “Choice of Law and Manufacturer’s Liability in Quebec” in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2012* (Toronto: Carswell, 2012) 209.

Tingle, Bryce C, “The Strange Case of the Crown Prerogative over Private Prosecutions or Who Killed Public Interest Law Enforcement?” (1994) 28:2 UBC L Rev 309.

Tladi, Dire, “Civil Liability in the Context of the Cartagena Protocol: To Be or Not to Be (Binding)?” (2010) 10:1 Intl Envtl Agreements: Pol, L & Econ 15.

Todd, Jeff, “Trade Treaties, Citizen Submissions, and Environmental Justice” (2017) 44:1 Ecology LQ 99.

———, “Ecospeak in Transnational Environmental Tort Proceedings” (2015) 63:2 Kan L Rev 335.

Trébulle, François Guy, “La transposition de la directive du 21 avril 2004 dans les droits internes: rapport de synthèse” in Patrice Jourdain, ed, *La responsabilité environnementale: recueil des travaux du Groupe de recherche européen sur la responsabilité civile et l’assurance (GRERCA)* (Brussels: Bruylant, 2018) 15.

Trudeau, Hélène & Suzanne Lalonde, “La mise en œuvre du *Protocole de Kyoto* au Canada: concertation ou coercition?” (2004) 34:1 RGD 141.

Valiante, Marcia, ““Welcomed Participants” or “Environmental Vigilantes”? The CEPA Environmental Protection Action and the Role of Citizen Suits in Federal Environmental Law” (2002) 25:1 Dal LJ 81.

Van Calster, Geert, “Environmental Law and Private International Law” in Emma Lees & Jorge E Viñuales, eds, *The Oxford Handbook of Comparative Environmental Law* (Oxford: Oxford University Press, 2019) 1139.

Van de Kerkhof, Martijn, “The Trail Smelter Case Re-Examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute” (2011) 27:73 Utrecht J Intl & Eur L 68.

Van Loon, Hans, “Embracing Diversity—The Role of the Hague Conference in the Creation of Universal Instruments” in Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela, eds, *Diversity and Integration in Private International Law* (Oxford: Oxford University Press, 2019) 31.

———, “The Present and Prospective Contribution of Global Private International Law Unification to Global Legal Ordering” in Franco Ferrari & Diego P Fernández Arroyo, eds, *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham: Edward Elgar, 2019) 214.

———, “Principles and Building Blocks for a Global Legal Framework for Transnational Civil Litigation in Environmental Matters” (2018) 23:2 Unif L Rev 298.

———, “The Global Horizon of Private International Law” (2016) 380 Rec des Cours 9.

Verheyen, Roda & Cathrin Zengerling, “International Dispute Settlement” in Cinnamon P Carlarne, Kevin R Gray & Richard Tarasofsky, eds, *The Oxford Handbook of International Climate Change Law* (Oxford: Oxford University Press, 2016) 417.

Vern Tan, Sue, “Private International Law: A Backdoor to Coherence in Climate Change Litigation?” (7 November 2015), online: *Centre for International Governance Innovation* <www.cigionline.org> [perma.cc/E96F-2RRD].

Vinogradov, Sergei V, “Observations on the International Law Commission’s Draft Rules on the Non-Navigational Uses of International Watercourses: Management and Domestic Remedies” (1992) 3:1 Colo J Intl Envtl L & Pol’y 235.

Viñuales, Jorge E, “The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment” (2008) 32:1 Fordham Intl LJ 232.

Voigt, Christina, “State Responsibility for Climate Change Damages” (2008) 77:1/2 Nordic J Intl L 1.

Von Bar, Christian, “Environmental Damage in Private International Law” (1997) 268 Rec des Cours 291.

———, “Les dix points d’Osnabrück” (1994) 83:4 Rev cr drt intl privé 853, reprinted in Hague Conference on Private International Law, *Proceedings of the Eighteenth Session: 30 September to 19 October 1996*, vol 1: Miscellaneous Matters (The Hague: SDU, 1999) 82.

Von Hein, Jan, “Article 7: Environmental Damage” in Gralf-Peter Calliess, ed, *Rome Regulations: Commentary*, 2nd ed (Alphen on the Rhine: Kluwer Law International, 2015) 603.

———, “Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution” (2008) 82:5 Tul L Rev 1663.

Vrellis, Spyridon, “The Law Applicable to Environmental Damage: Some Remarks on Rome II Regulation” in Joaquín J Forner Delaygua, Cristina González Beilfuss & Ramón Viñas Farré, eds, *Entre Bruselas y La Haya: estudios sobre la unificación internacional y regional del derecho internacional privado. Liber amicorum Alegría Borrás* (Madrid: Marcial Pons, 2013) 869.

Wai, Robert, “Private v Private: Transnational Private Law and Contestation in Global Economic Governance” in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) 34.

———, “The Interlegality of Transnational Private Law” (2008) 71:3 Law & Contemp Probs 107.

———, “Transnational Private Law and Private Ordering in a Contested Global Society” (2005) 46:2 Harv Intl LJ 471.

———, “Transnational Private Litigation and Transnational Governance” in Markus Lederer and Philipp S Müller, eds, *Criticizing Global Governance* (New York: Palgrave Macmillan, 2005) 243.
———, “Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age” (2002) 40:2 Colum J Transnatl L 209.
———, “In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law” (2001) 39 Can YB Intl L 117.
———, “Justice Gérard La Forest and the Internationalist Turn in Canadian Jurisprudence” in Rebecca Johnson and John P McEvoy, eds, *Gérard V La Forest at the Supreme Court of Canada: 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 421.
———, “Occupying the International: Liberal Internationalist Visions and Policy Argumentation in Private International Law” (2000) 13 Hague YB Intl L 65.
Walker, Janet, “Judicial Jurisdiction in Canada: The *CJPTA*—A Decade of Progress” (2018) 55:1 Osgoode Hall LJ 9.
———, “*Teck Cominco* and the Wisdom of Deferring to the Court First Seised, All Things Being Equal” (2009) 47:2 Can Bus LJ 192.
———, “Foreign Public Law and the Colour of Comity: What’s the Difference Between Friends?” (2003) 38:1 Can Bus LJ 36.
Walsh, Catherine, “General Jurisdiction over Corporate Defendants under the *CJPTA*: Consistent with International Standards?” (2018) 55:1 Osgoode Hall LJ 163.
———, “The International Jurisdiction of Québec Authorities in Personal Actions: An Overview” (2012) 71 R du B 249.
———, “The Uses and Abuses of Party Autonomy in International Contracts” (2010) 60 UNBLJ 12.
———, “Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims” (1997) 76:1 Can Bar Rev 91, reprinted in Jacob Ziegel & Shalom Lerner, eds, *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law* (Oxford: Hart, 1998) 237.
———, “Conflict of Laws—Enforcement of Extra Provincial Judgments and *In Personam* Jurisdiction of Canadian Courts: *Hunt v T&N plc*” (1994) 73:3 Can Bar Rev 394.
Ward, Christopher, “National and International Litigation: Partners or Competitors?” in Natalie Klein, ed, *Litigating International Law Disputes: Weighing the Options* (Cambridge: Cambridge University Press, 2014) 42.
Wasserstein Fassberg, Celia, “The Public in Private International Law” in Yaëll Emerich, ed, *Le public en droit privé* (Cowansville: Yvon Blais, 2019) 23.
Waters, Melissa A, “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law” (2005) 93:2 Geo LJ 487.
Weaver, R Henry & Douglas A Kyser, “Tort Law and Normative Rupture” in Rosemary Lyster & Robert RM Verchick, eds, *Research Handbook on Climate Disaster Law: Barriers and Opportunities* (Cheltenham: Edward Elgar, 2018) 315.

———, “Courting Disaster: Climate Change and the Adjudication of Catastrophe” (2017) 93:1 Notre Dame L Rev 295.
Webb, Kernaghan, “Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement” (1991) 36:3 McGill LJ 770.
Webb, PRH & PM North, “Thoughts on the Place of Commission of a Non-Statutory Tort” (1965) 14:4 ICLQ 1314.
Wegener, Lennart “Can the Paris Agreement Help Climate Change Litigation and Vice Versa?” (2020) 9:1 Transnatl Envtl L 17.
Welling, B & EA Heakes, “Torts and Foreign Immovables Jurisdiction in Conflict of Laws” (1979) 18:1 UWO L Rev 295.
Wennerås, Pål, “Permit Defences in Environmental Liability Regimes: Subsidizing Environmental Damage in the EC?” (2005) 4 YB Eur Env L 149.
Wetstone, Gregory & Armin Rosencranz, “Transboundary Air Pollution Between Canada and the United States” (1982) 1:2 UCLA Pac Basin LJ 197.
Wetterstein, Peter, “Current Trends in International Civil Liability for Environmental Damage” (1994) 1:1 Ann Surv Intl & Comp L 181.
———, “Recent Trends in the Development of International Civil Liability” (1991) 60:1 Nordic J Intl L 49.
Wewerinke-Singh, Margaretha & Curtis Doebbler, “The Paris Agreement: Some Critical Reflections on Process and Substance” (2016) 39:4 UNSWLJ 1486.
Whincop, Michael J, “Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law” (2000) 50:1 UTLJ 41.
Whytock, Christopher A, “Conflict of Laws, Global Governance, and Transnational Legal Order” (2016) 1 UC Irvine J Intl Transnatl & Comp L 117.
———, “Some Cautionary Notes on the “Chevronization” of Transnational Litigation” (2013) 1:2 Stan J Complex Litig 467.
———, “Transnational Judicial Governance” (2012) 2:1 St John’s J Intl & Comp L 55.
———, “Domestic Courts and Global Governance” (2011) 101 Am Soc’y Intl L Proc 166.
———, “Domestic Courts and Global Governance” (2009) 84:1 Tul L Rev 67.
———, “The Evolving Forum Shopping System” (2011) 96:3 Cornell L Rev 481.
Whytock, Christopher A & Cassandra Burke Robertson, “Forum Non Conveniens and the Enforcement of Foreign Judgments” (2011) 111:7 Colum L Rev 1444.
Wilderspin, Michael, “Consumer Contracts” in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 1 (Cheltenham: Edward Elgar, 2017) 464.
Wilhite, Jamie L, “International Pollution: Can We Really Just Blame Canada?” (2006) 21:2 J Nat Resources & Envtl L 159.
Wilkins, Hugh S, “The Justiciability of Climate Change: A Comparison of US and Canadian Approaches” (2011) 34:2 Dal LJ 529.
Wilkins, Lawrence P, “Substantive Bases for Recovery for Injuries Sustained by Private Individuals as a Result of Fallen Space Objects” (1978) 6:2 J Space L 161.
Willheim, E, “Private Remedies for Transfrontier Environmental Damage: A Critique of OECD’s Doctrine of Equal Right of Access” (1976) 7 Austl YB Intl L 174.
Willis, John, “Jurisdiction of Courts—Action to Recover Damages for Injury to Foreign Land” (1937) 15:2 Can Bar Rev 112.

Wilmarth, Catherine M, "Mining Megaliths in the Argentine Andes: Where Will Victims of Environmental Degradation Find Justice?" (2012) 36:3 Wm & Mary Envtl L & Pol'y Rev 959.
Wirth, John D, "The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927-1941" (1996) 1:2 Envtl Hist 34.
Wisner, Robert, "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt v T&N plc*" (1995) 40:3 McGill LJ 759.
Wolfrum, Rüdiger, "Means of Ensuring Compliance with and Enforcement of International Environmental Law" (1998) 272 Rec des Cours 9.
Wood, Stepan, "Canada" in Emma Lees & Jorge E Viñuales, eds, *The Oxford Handbook of Comparative Environmental Law* (Oxford: Oxford University Press, 2019) 108.
Wood, Tim, "Sticks and Carrots: *Rylands v Fletcher*, CSR, and Accountability for Environmental Harm in Common Law Jurisdictions" (2012) 91:2 Can Bar Rev 275.
Woods, Andrew Keane, "Against Data Exceptionalism" (2016) 68:4 Stan L Rev 729.
Woods Jr, Winton D & Kenneth R Reed, "The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case" (1970) 12:4 Ariz L Rev 691.
Wopat III, J William, "Supreme Court Declines Original Jurisdiction in Lake Erie Pollution Case" (1971) 25:4 U Miami L Rev 794.
Wurmnest, Wolfgang, "Nuclear Liability" in Jürgen Basedow et al, eds, *Encyclopedia of Private International Law*, vol 2 (Cheltenham: Edward Elgar, 2017) 1305.
Yang, Tseming & Robert V Percival, "The Emergence of Global Environmental Law" (2009) 36:3 Ecology LQ 615.
Yap, James, "Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from *Bil'in (Village Council) v Green Park International Ltd*" (2010) 8:2 J Intl Crim Justice 631.
Zasloff, Jonathan, "The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change" (2008) 55:6 UCLA L Rev 1827.
Zerk, Jennifer A, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas. A Report for the Harvard Corporate Social Responsibility Initiative to Help Inform the Mandate of the UNSG's Special Representative on Business and Human Rights" (2010) Harvard Corporate Social Responsibility Initiative Working Paper No 59, online (pdf): *Harvard Kennedy School Mossavar-Rahmani Center for Business and Government* <www.hks.harvard.edu> [perma.cc/4SKH-BTJ7].
Zhang, Libin, "*Pakootas v Teck Cominco Metals, Ltd*" (2007) 31:2 Harv Envtl L Rev 545.
Zhao, Huiyu & Robert Percival, "Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China" (2017) 6:3 Transnatl Envtl L 531.
Zilioli, Chiara, "Choice of Law" in Christian von Bar, ed, *Internationales umwelthaftungsrecht* [International Environmental Liability Law], vol 1 (Köln: Heymann, 1995) 177.

Zufall, Frederike, "Shifting Role of the "Place": From *Locus Delicti* to Online Ubiquity in EU, Japanese and U.S. Conflict of Tort Laws" (2019) 83:4 Rabel J Comp & Intl Priv L 760.

Special issues

"Special Issue: The Global Pact for the Environment and Gaps in International Environmental Law" (2019) 28:1 RECIEL 3–56.

Theses and dissertations

Ferrand-Desmars, Frédérique, *La non-discrimination dans le traitement des dommages causés aux personnes privées par les pollutions transfrontières* (Doctoral Thesis, Université Paris-II Panthéon-Assas Faculty of Law, 1998) [unpublished].

Nissen, Tamara, *Critique de l'article 7 du règlement Rome II: étude du dommage environnemental en droit international privé* (Master Thesis, Université catholique de Louvain Faculty of Law and Criminology, 2015) [unpublished].

Nwapi, Chilenye, *Litigating Extraterritorial Corporate Crimes in Canadian Courts* (D.Phil Thesis, University of British Columbia Faculty of Law, 2012) [unpublished].

Strebel, Felix D, *The Enforcement of Foreign Judgments and Foreign Public Law* (LL.M Thesis, University of British Columbia Faculty of Law, 1997) [unpublished].

Seminar proceedings

Proceedings of the Ahrens Advanced Torts Seminar held on 19–20 October 2001 at Washburn University School of Law, Topeka (Kan), United States, (2001) 41:3 Washburn LJ 379–628.

Case notes

McLeod, James G, Annotation of *Bachmann v Bachmann* (1984), 40 RFL (2d) 203, [1984] WDFL 985 (Man CA), leave to appeal to SCC refused, [1984] 1 SCR v.

Book reviews

Anderson, Michael, Book Review of *Liability and Environment: Private and Public Law Aspects of Liability for Environmental Harm in an International Context* by Lukas Bergkamp, (2002) 11:2 RECIEL 251.

Benidickson, Jamie, Book Review of *The Price of Pollution: Environmental Litigation in Canada* by Elizabeth Swanson & Elaine L Hughes, (1991) 23:2 Ottawa L Rev 475.

Black, Vaughan, Book Review of *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles* by Moffatt Hancock, (1985) 17:3 Ottawa L Rev 677.

Bone, Jeffrey, Book Review of *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* by Penelope Simons & Audrey Macklin, (2014) 11:2 JSDLP 357.

Brunnée, Jutta, Book Review of *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* edited by Rebecca M Bratspies & Russell A Miller, (2008) 102:2 AJIL 395.

Ellis, Jaye, Book Review of *The Environment, Risk and Liability in International Law* by Julio Barboza, (2012) 26 Ocean YB 685.

Lee, Maria, Book Review of *Liability and Environment: Private and Public Law Aspects of Liability for Environmental Harm in an International Context* by Lukas Bergkamp (2003) 12:3 Eur Envtl L Rev 92.

Lee, Robert G, Book Review of *Liability and Environment: Private and Public Law Aspects of Liability for Environmental Harm in an International Context* by Lukas Bergkamp, (2003) 15:3 J Envtl L 427.

Lozano, Pilar Dominguez, Book Review of *La responsabilidad civil derivada de la contaminación transfronteriza ante la jurisdicción estatal* by Ana Crespo Hernandez, (2002) 91:2 Rev crit dr int privé 395.

Pitel, Stephen GA, Book Review of *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* by Steve Coughlan et al, (2016) 58:1 Can Bus LJ 113.

Saumier, Geneviève, Book Review of *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* by Vaughan Black, Stephen GA Pitel & Michael Sobkin, (2013) 9:2 J Priv Intl L 349.

Sarfaty, Galit A, "Managing the Governance Gap", Book Review of Book Review of *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* by Penelope Simons & Audrey Macklin, (2017) 67:4 UTLJ 655.

Dictionaries

Allard, France & Madeleine Mailhot, *Les bons mots du civil et du pénal: dictionnaire français-anglais des expressions juridiques* (Montreal: Wilson & Lafleur, 2015).

Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville: Yvon Blais, 2003).

Encyclopedic digests

CED 4th (online), *Conflict of Laws* (2018).

CED 4th (online), *Environmental Law* (Ont) (2018).

CED 4th (online), *Environmental Law* (West) (2019).

Halsbury's Laws of Canada (online), *Conflict of Laws* (2016 Reissue).

Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)* (2015 Reissue).

Halsbury's Laws of Canada (online), *Environment* (2018 Reissue).

Juris-classeur environnement et développement durable (online), "Droit international privé et environnement", fasc 2030 by Olivera Boskovic.

Wolfrum, Rüdiger, ed, *Max Planck Encyclopedia of Public International Law*, online: *Oxford Public International Law* <opil.ouplaw.com>.

International law digests

Hackworth, Green Haywood, *Digest of International Law*, vol 3 (Washington, DC: United States Department of State, 1942).

Whiteman, Marjorie M, *Digest of International Law*, vol 8 (Washington, DC: United States Government Printing Office, 1967).

Course materials

Murphy, Ava & Shi-Ling Hsu, "Climate Change Litigation: Inuit v The U.S. Electricity Generation Industry", Educational Case Study (Faculty of Law, University of British Columbia, 2008), online (pdf): *University of British Columbia Faculty of Law* <www.allard.ubc.ca> [perma.cc/7ZF6-N2M5].

Swan, John & Vaughan Black, *Materials on Conflict of Laws*, vol II, Coursepack (University of Toronto Faculty of Law, February 1992).

News sources

"Edison Pays 300 Claims for Fallout", *Windsor Star* (7 September 1973) A3.

"Michigan Utility Sued Under Canada's Fisheries Act", *The Globe and Mail* (28 April 2008) A6.

Agence France-Presse, "German Court to Hear Peruvian Farmer's Climate Case Against RWE", *The Guardian* (30 November 2017), online: <www.theguardian.com> [perma.cc/KER6-XMFY].

Crête, Mylène, "Forages pétroliers en mer: Trudeau appelé à s'opposer à Trump", *La Presse* (19 January 2018), online: <www.lapresse.ca> [perma.cc/5RF7-CT3M].

Curry, Bill, "New Watchdog Can Probe Conduct of Firms Operating Abroad", *The Globe and Mail* (18 January 2018) A8, also online: <www.theglobeandmail.com> [perma.cc/2PWN-UBQ2].

Eilperin, Juliet & Brady Dennis, "EPA to Curtail California Air Rules", *The Washington Post* (18 September 2019) A1, also online: <www.washingtonpost.com> [perma.cc/XXA9-9XKS].

———, "EPA Rolls Back Rule on Carbon Emissions", *The Washington Post* (20 June 2019) A1, also online: <www.washingtonpost.com> [perma.cc/5ZBH-8ZZ7].

Francoeur, Louis-Gilles, "Pollution de la rivière St. Clair, en Ontario: un citoyen canadien poursuit l'américaine DTE Energy", *Le Devoir* (21 January 2008) A2, also online: <www.ledevoir.com> [perma.cc/259R-NS85].

Friedman, Lisa, "Trump Moves to Open Coasts for Oil Drilling", *The New York Times* (5 January 2018) A1, also online: <www.nytimes.com> [perma.cc/U6FL-RNWK].

Hennig, Clare, "B.C. Should Copy Ontario's New Climate Change Liability Bill, Says Environmental Lawyer", *CBC* (27 March 2018), online: <www.cbc.ca> [perma.cc/43DS-9LLS].

Lynch, Jim, "Border Battles: Canada, U.S. Increasingly at Odds over Pollution Issues", *The Detroit News* (27 June 2008) A1, also online: *Blue Fish* <www.bluefish.org> [perma.cc/GD4N-DWYP].

Maldonado, Melinda, "Mining for the Truth", *Maclean's* 127:27 (14 July 2014) 42, also online: <www.macleans.ca> [perma.cc/6PWS-7KB2].
McNish, Jacquie, "Long Arm of U.S. Law Reaches Across the Border", *The Globe and Mail* (9 January 2008) B8, also online: <www.theglobeandmail.com> [perma.cc/Y9AL-H7QP].
McQuigge, Michelle, "Canadian, U.S. Politicians Denounce Trump's Great Lakes Funding Cuts", *The Globe and Mail* (17 March 2017) A14, also online: <www.theglobeandmail.com> [perma.cc/7RXU-B9Q9].
Mittelstaedt, Martin, "Ruling Paves Way for Mercury Emissions Lawsuit", *The Globe and Mail* (16 January 2008), also online: <www.theglobeandmail.com> [perma.cc/3UEQ-N3KZ].
Nugent, Ciara, "Climate Change Could Destroy This Peruvian Farmer's Home: Now He's Suing a European Energy Company for Damages", *Time* (5 October 2018), online: <www.time.com> [perma.cc/J74D-4TMG].
Peritz, Ingrid, "Quebec Group Sues Ottawa over Climate Change: Lawsuit Launched on Behalf of 3.5 Million Young Quebeckers Argues They Will Face Most Dire Consequences of Global Warming", *The Globe and Mail* (27 November 2018) A7, also online: <www.theglobeandmail.com> [perma.cc/Z63Q-D3Y3].
Robertson, Dylan, "Court No Closer to Fording International Flood Dispute: U.S. Trying to Change Flow of Flooding Water", *Winnipeg Free Press* (31 January 2018) 4, also online: <www.winnipegfreepress.com> [perma.cc/ 4FYL-59KA].
Seneviratne, Kalinga, "Tuvalu Steps up Threat to Australia, U.S.", *Tuvalu News* (8 September 2002), online: <www.tuvaluislands.com> [perma.cc/NB72-5X75].
Seputyte, Milda, "This Lithuanian City Played Host to Filming for HBO' "Chernobyl." It's Now Preparing for Its Own Nuclear Radiation Leak", *Time* (4 September 2019), online: <www.time.com> [perma.cc/448N-K7VB].
Tanh Ha, Tu, "Muskoka Residents Seek $900-Million from Ontario in Water Damages", *The Globe and Mail* (16 September 2016) A15, also online: <www.theglobeandmail.com> [perma.cc/3X54-39PW].
Weber, Bob, "U.S. Officials Accuse Canadians of Delaying Report on Toxins in Transboundary River", *The Globe and Mail* (9 July 2018) A10, also online: <www.theglobeandmail.com> [perma.cc/TRP6-RXT3].
Weikle, Brandie, "Canada and California Sign Deal to Cut Vehicle Emissions", *CBC* (26 June 2019), online: <www.cbc.ca> [perma.cc/P5CM-SK6J].
Woo, Andrea, "Youths to File Climate Lawsuit, Saying Charter Rights Have Been Violated", *The Globe and Mail* (25 October 2019) A7, also online: <www.theglobeandmail.com> [perma.cc/4QTW-DAQF].
Zilio, Michelle, "Ottawa to Ship Tonnes of Garbage Back to Canada from Philippines by End of June", *The Globe and Mail* (23 May 2019) A3, also online: <www.theglobeandmail.com> [perma.cc/AWM2-CS53].

Opinion editorials

Gage, Andrew, "Fossil-Fuel Firms Must Be Held Accountable; B.C. Needs Law to Help Recover Costs of Climate Change, Says Andrew Gage", Letter to the Editor,

Vancouver Sun (26 July 2018) A13, online: <www.vancouversun.com> [perma.cc/8YQU-D378].

Podcasts

"Living at the Barricades—Edwards v DTE: Case Closed" (13 April 2010), online (podcast) (blog entry by Dylan Neild; podcast by Mark Mattson and Krystyn Tully): *Lake Ontario Waterkeeper* <www.waterkeeper.ca/blog/17193> [perma.cc/VK6K-PQ75].

Press releases

Firempong, Jesse, News Release, "Statement: Court Majority Agrees That Premier Ford's Actions Scrapping Cap-and-Trade Were Unlawful" (11 October 2019), online: *Greenpeace* <www.greenpeace.org> [perma.cc/KLZ4-GDWF].

United Nations, Press Conference, "Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change" (3 February 2012), online: *United Nations Meetings Coverage and Press Releases* <www.un.org/press/en> [perma.cc/RF8R-49GC].

Websites

Columbia Law School Sabin Center for Climate Change Law, "Climate Change Litigation Database", online: *Climate Change Litigation Database* <www.climatecasechart.com> [perma.cc/5G3B-QR6W].

GermanWatch, "Saúl Versus RWE—The Case of Huaraz", online: *GermanWatch* <www.germanwatch.org> [perma.cc/4LHP-SJ5P].

International Atomic Energy Agency, "Convention on Supplementary Compensation for Nuclear Damage: Latest Status", online (pdf): *IAEA* <www.iaea.org> [perma.cc/R2FX-435C].

International Atomic Energy Agency, "Vienna Convention on Civil Liability for Nuclear Damage: Latest Status", online (pdf): *IAEA* <www.iaea.org> [perma.cc/9ZPM-FVB4].

International Joint Commission, "Mission and Mandates", online: *International Joint Commission* <www.ijc.org> [perma.cc/2PQE-TMHV].

Supreme Court of Canada, "Summary: *Blair Coady v Quadrangle Holdings Limited*", online: *Supreme Court of Canada* <www.scc-csc.ca> [perma.cc/4J3R-KSWY].

United Nations, "Status of the Paris Agreement", online (pdf): *United Nations Treaty Collection* <www.treaties.un.org> [perma.cc/BE7E-BZRN].

Letters and public statements

Manley, The Honourable John P, Business Council of Canada, "Letter to the Prime Minister on President Trump's Economic Agenda and the Impact on Canadian Competitiveness" (14 February 2017), online (pdf): *Business Council of Canada* <www.thebusinesscouncil.ca> [perma.cc/HZU7-PDTK].

Union of Industrial and Employers' Confederations of Europe, "Comments on the Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligation" (7 October 2002), online (pdf): *BusinessEurope* <www.businesseurope.eu> [perma.cc/3V7E-4DZF].