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Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns

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Abstract

Teck v. *Pakootas* revisits the infamous Trail smelter, which made history in public international law. This more recent case should be set to make history as well, due to the manner in which the issue of extraterritorial exercise of jurisdiction was handled. The substantive result reached in the courts seems fair, reasonable, and appropriate: a notorious polluter, Teck Cominco Metals Inc., is called to account by the United States Environmental Protection Agency and required to study the feasibility of cleaning up a site it contaminated by dumping effluents in a transboundary river over the course of several decades. Yet, both courts that examined this case on the merits failed to understand the ramifications of this extension of the Environmental Protection Agency's jurisdiction across the Canada–United States border. This article begins with a doctrinal analysis of jurisdictional rules in private and public international law, and then proceeds to evaluate those rules with the help of insights from scholarship on global administrative law and international public authority.

Key words

extraterritoriality; global administrative law; international environmental law; international public authority; transboundary pollution; transnational law

1. Introduction

The storied Trail smelter in British Columbia, Canada, has been making history yet again. This time, the precedent-setting case is not an international arbitral award, but decisions handed down by courts in the United States to the effect that US environmental legislation is applicable extraterritorially – specifically, that the federal Environmental Protection Agency (EPA) has the capacity to issue an order to a Canadian firm in respect of pollution arising in Canada that was legal in Canada at the relevant time.[1] The US courts' conclusions regarding the EPA's extraterritorial reach has caused some controversy among the small number of jurists, journalists,

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1 *Teck Cominco Metals, Ltd. v. Pakootas et al.* (2007), Brief of Amicus Curiae Province of British Columbia in support of Petitioner in the case of *Teck Cominco Metals, Ltd. v. Pakootas et al.*, on petition from a Writ of Certiorari (Sup. Ct US 2007), at 5.

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and others who have turned their attention to them. But the case has garnered very little attention, despite its significant implications.

Part of the reason for this lack of attention may be due to the fact that the outcome of the case – a company that has deposited slag in a transboundary river over the course of several decades is required to initiate a process of cleaning up the debris – seems fair, reasonable, and appropriate. Concerns about fairness to the defendant or the integrity of Canadian sovereignty seem out of place, given the seriousness of the pollution, the apparent impunity with which it was carried out, and the lack of other readily available avenues for resolving the problem. Nevertheless, the case is deeply troubling, less for the substantive result reached than for the manner in which it was reached. Any time a state exercises its jurisdiction extraterritorially, the rights and interests of foreign defendants, the sovereign integrity of their state, and international relations between the states are at issue and, as a result, great care must be taken to ensure that jurisdiction is exercised reasonably and with due regard to considerations of fairness, democratic principles, and collective self-determination. The approach taken by the US Ninth Circuit Court of Appeals is particularly egregious: the extraterritorial dimension of the case was simply disregarded. The Washington District Court made a greater effort to work through the extraterritorial dimension of the case, but it, too, seemed unaware of the ramifications of its decision.

While there are always risks of unfairness and lack of legitimacy when one state seeks to project its authority beyond its borders, unilateral responses to transnational environmental harm in fact have much to recommend them. Given the relatively well-developed state of environmental-protection regimes and enforcement mechanisms in many countries, compared to international environmental regimes, it makes sense to encourage states to use their domestic institutions to address transboundary environmental incidents. However, this will be a reasonable option only if great care is taken to minimize the dangers inherent in such unilateral extensions of state authority, as the opportunities to fall foul of democratic principles, collective self-determination, and the rule of law are many. In this paper, scholarship on international public authority (IPA) and global administrative law (GAL) will be mined for insights on transboundary cases such as this. It is argued that the incursion into Canadian sovereignty is not what makes this case problematic, but rather the unreflecting manner in which it was done. It would be unfortunate if greater use could not be made of transboundary, as opposed to international, approaches to resolving cases such as this one. But it would be equally unfortunate if authority were exercised across borders without due regard to the perspectives and interests of affected governments and publics.

2. The *Teck* case

2.1. Background

This case begins in Trail, British Columbia, where the Trail smelter, owned by Teck Cominco Metals, Inc., dumped effluents into the Columbia River, causing pollution across the border in Washington state. Deposits of heavy metals, including arsenic,

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cadmium, copper, lead, mercury, and zinc,[2] accumulated on the bed and shore of Roosevelt Lake, which borders the lands of the Colville Tribes, and leached into its water. Members of the Colville Tribes, Joseph Pakootas and Donald Mitchell, along with the state of Washington, invoked a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to petition the EPA to exercise its powers under that statute to impose liability on the polluter.[3] After an attempt at negotiation, the EPA issued an order against Teck to study the feasibility of rehabilitating the contaminated site. Teck did not respect the order and the EPA did not seek to enforce it, prompting the plaintiffs to initiate a citizen suit under CERCLA to compel enforcement. Teck filed a motion for dismissal, which was rejected by the US District Court for Washington;[4] an appeal to the Ninth Circuit Court was also rejected.[5] Finally, a motion for certiorari before the Supreme Court was denied[6] on the ground that the case had become moot, given that, in the interim, Teck had reached a settlement with the Colville Tribes and the EPA had withdrawn its order.[7]

The District Court, in denying Teck's motion to dismiss, held that it had personal jurisdiction over Teck Cominco – a conclusion against which Teck did not appeal. This was probably a strategic error, as many issues related to the fairness and appropriateness of extraterritorial exercises of jurisdiction can be addressed through the lens of criteria regarding personal jurisdiction. These criteria, as enumerated by the District Court, include the presence of a reasonable expectation on the part of the defendant that it can be sued in the forum state:[8]

> (1) the extent of defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution to the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[9]

The District Court considered these factors – some, namely the impact on Canada's sovereignty, in very summary fashion – and determined that 'the maintenance of

2 In re Upper Columbia River Site, Docket No. CERCLA-10–2004-0018, at 2, available at http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement, §4.

3 Comprehensive Environmental Response, Compensation, and Liability Act amend. 42 CERCLA, 42 U.S.C., §9605.

4 *Pakootas v. Teck Cominco Metals, Ltd.*, CV-04–256-AAM, 2004 WL 2578982 (E.D. Wash., 8 November 2004).

5 *Pakootas v. Teck Cominco Metals, Ltd.*, CV-04–00256-AAM, 452 F.3d 2006 (US Court of Appeals – 9th Cir., 3 July 2006).

6 *Teck Cominco Metals, Ltd. v. Pakootas*, 06-1188 (USSC, 7 January 2008).

7 For an overview of the proceedings, see J. Gracer et al., 'Cross-Border Litigation Gains Traction in US and Canadian Courts', (2008) 20 *Environmental Claims Journal* 2, at 181; J. L. Wilhite, 'International Pollution: Can We Really Just Blame Canada?', (2006) 21 *Journal of Natural Resources and Environmental Law* 159; L. Zhang, 'Canadian Mine Owner Liable under CERCLA for Pollution of Columbia River in the US', (2007) 31 *Harvard Environmental Law Review* 545; M. J. Robinson-Dorn, 'The Trail Smelter, Is What's Past Prologue? EPA Blazes a New Trail for CERCLA', (2006) 14 *NYU Environmental Law Journal* 233.

8 See *Teck* (DC), *supra* note 4, at 9–10, citing with approval *Calder v. Jones*, 465 US 783, 790, 104 S.Ct. 1482, 79 L. Ed.2d 804 (1984).

9 *Core-Vent Corp. v. Nobel Indus.*, AB 11 F.3d 1482, 1486 (US Court of Appeal – 9th Cir., 16 December 1993), quoted with approval in *Teck* (DC), at 11–12.

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the suit does not offend traditional notions of fair play and substantial justice'.[10] As to the issue of subject-matter jurisdiction, the Court concluded that the normally applicable presumption against the extraterritorial application of legislation was deemed inapplicable based on the principle that actions that were intended to have and did have an impact in the United States give rise to jurisdiction.[11]

The Ninth Circuit, in upholding the District Court's conclusion, used dramatically different reasoning, concluding that the issue at stake was a purely domestic matter. This reasoning is partly a result of the convoluted language of CERCLA: the word 'facility' in that statute can include a site at which hazardous substances have been deposited:[12] in this case, Roosevelt Lake, a reservoir fed by the Columbia River in which the slag deposited upstream by Teck collected and formed deposits. The Ninth Circuit concluded that the release could refer not only to the initial deposit of slag into the Columbia River, but also to the leaching of toxic substances from the deposits of slag in Roosevelt Lake, and settled on the latter as the basis for CERCLA liability.[13]

2.2. Critiques of the Ninth Circuit

Many commentators on the case are uncomfortable with the reasoning of the Ninth Circuit and more or less in agreement with that of the District Court.[14] A small number are troubled by issues of fairness or reasonableness, including democratic principles (foreign defendants have had no influence over laws that are now being applied to them); procedural fairness (certain defences may be available only to domestic defendants); substantive issues relating to the compatibility of applicable US and Canadian legislation; the appearance of bias towards domestic parties; and issues relating to sovereignty and international relations, notably the possible infringement of the international principle of non-intervention, but also concerns about the potential harm to US–Canadian relations generally and to the institutions set up to address environmental and other disputes between the two states.[15] These

10 *International Shoe Co. v. Washington*, 326 US 310, 316, 66 S.Ct. 154, 90 L. Ed. 95 (1945), cited with approval in *Teck* (DC), at 5.

11 *Teck* (DC), *supra* note 4, at 18–19. Support for this proposition is drawn from *Environmental Defense Fund v. Massey*, 300 US App. D.C. 65, 986 F.2d 528, 530 (D.C. Cir. 1993) and the *Restatement (Third) of Foreign Relations Law of the United States*, §1 (1986).

12 See *Teck* (9th Cir.), *supra* note 5, at 7291–2. 'Facility' is defined broadly under CERCLA and includes 'any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located', CERCLA, §9601(9); CERCLA, §§9601(9), 9607(a). CERCLA similarly defines 'release' broadly; this term includes leaching: §9601(22).

13 *Teck* (9th Cir.), *supra* note 5, at 7293.

14 G. F. Hess, 'The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA', (2005–06) 18 GIELR 1, at 51; N. L. Budde, 'When Outside the Borders Isn't Extraterritorial, or, Canada Is in Washington, Right?', (2007) 15 *Tulane Journal of International and Comparative Law* 675; J. Diamond, 'How CERCLA's Ambiguities Muddled the Question of Extraterritoriality in Pakootas v. Teck Cominco Metals, Inc.', (2007) 34 *Ecology Law Quarterly* 1013, at 1034; L. Zhang, 'Pakootas v. Teck Cominco Metals, Ltd', (2007) 31 *Harvard Environmental Law Review* 551.

15 L. Zhang and K. McDonald, 'Pakootas v. Teck Cominco Metals, Ltd.: Finding a Sustainable Solution to Transboundary Pollution', (2006) 41 *Georgia Law Review* 311; A. Parrish, 'Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian–US Transboundary Water Pollution Disputes', (2005) 85 *Boston University Law Review* 363. Hess also expresses a desire to see issues of this nature aired, but believes that this task properly falls to legislative, executive, and diplomatic channels; Hess, *supra* note 14, at 55.

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issues could all potentially be addressed under rules and principles of US law on extraterritoriality, notably through the criteria for the establishment of personal jurisdiction, the presumption against extraterritoriality, and comity. But consideration and application of these rules and principles by US courts are haphazard, suggesting uncertainty about and/or deep divisions regarding the objectives that courts should be pursuing in ruling on extraterritorial applications of jurisdiction.

3. Extraterritorial jurisdiction in US law: a brief overview

The question of extraterritorial application of US law is an immensely complicated one. As Gerald Hess has noted:

> [t]he law and policy governing the extraterritorial application of U.S. statutes are in flux. Courts and commentators not only disagree about the proper analytical framework to resolve extraterritoriality issues, they do not have consensus about the underlying purposes and policies for this area of law.[16]

Two live issues in US law that have direct bearing on the *Teck* case are the doctrine of comity, to be discussed below, and the effects doctrine, to which I now turn.

Many commentators support the contention that the effects doctrine can be invoked to justify the exercise of jurisdiction by US courts.[17] This is problematic, for two reasons. First, the effects doctrine, though solidly anchored in US law, is a source of controversy in international law.[18] Second, a much better-recognized principle for the exercise of extraterritorial jurisdiction could have been relied upon: the objective-territoriality doctrine. While the effects doctrine, as generally understood in the United States, permits the extraterritorial application of legislation if an act committed abroad was intended to cause and did cause significant consequences on US territory,[19] objective territoriality restricts jurisdiction to cases in which an element of the prohibited act was carried out in the jurisdiction of the forum state. The classic example is the firing of a shot across an international border, killing someone on the other side.[20] In the *Teck* case, the pollutants, although released in Canada, caused damage in the United States. This is not a mere incidental effect of the illegal act, such as an increase in the price of a commodity in a foreign market that has an effect on domestic consumers of the commodity. It is an essential element for a finding of CERCLA liability. Therefore, US jurisdiction could potentially be supported by the objective-territoriality principle, even though its scope is much narrower than that of the effects doctrine. There is an important obstacle to be

16 Hess, *supra* note 14, at 25.

17 Budde, *supra* note 14.

18 M. N. Shaw, *International Law* (2008); see also F. A. Mann, 'The Doctrine of International Jurisdiction', (1964) 111 *Recueil des cours de l'Académie de droit international de la Haye* 1, at 104, for a critique of the effects test in the context of antitrust law. It has begun to attract some controversy in the United States as well; see A. Parrish, 'The Effects Test: Extraterritoriality's Fifth Business', (2008) 61 *Vanderbilt Law Review* 1455.

19 *United States v. Aluminum Company of America*, 148, F.2d 416 (1945) (*Alcoa*). Mann noted that it was difficult to find support for this doctrine outside the United States; Mann, *supra* note 18, at 102.

20 Shaw, *supra* note 18, at 654.

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overcome before this conclusion can be reached, regarding the nature of the EPA's exercise of authority over Teck: the issuing of an order to study the feasibility of remediation, rather than a demand for the payment of compensation. This will be discussed further below.

Objective territoriality seems to be largely unknown in the United States, where discussions of the public international rules governing the exercise of jurisdiction almost invariably begin and end with reference to the *Lotus* case, decided by the now-defunct Permanent Court of International Justice in 1927.[21] The majority in *Lotus* concluded that:

> [f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[22]

However, this position has been strongly criticized and many publicists argue that it is not sound law.[23]

References to international-law sources of any kind are rare in US discussions of extraterritorial jurisdiction. Instead, the point of departure is the presumption against extraterritoriality, articulated in *American Banana*[24] and reinforced, in strong terms, in *Aramco*.[25] William Dodge notes that the presumption has been applied fairly consistently with respect to a range of US statutes, with one important exception – the Sherman Act on antitrust law.[26] CERCLA now constitutes a second exception.[27] This presumption against extraterritoriality would seem to provide

21 The rich and detailed analyses of the question of extraterritoriality provided by Gerald F. Hess and Robert C. Reuland are weakened to some extent by the lack of discussion of applicable international rules. Both authors refer to international law, but the sources they cite in support are either US judgments or literature that addresses US, rather than international, law; see G. F. Hess and R. C. Reuland, 'Hartford Fire Insurance Co. "Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993)", Comity, and the Extraterritorial Reach of United States Antitrust Laws', (1994) 29 Texas ILJ 427. Reuland refers to various secondary international-law sources, such as the highly respected text by Ian Brownlie, but not with reference to the rules governing the extraterritorial exercise of jurisdiction. Hess invokes the *Lotus* case but refers to a citation of this case by W. S. Dodge, 'Understanding the Presumption against Extraterritoriality', (1998) 16 Berkeley JIL 85, at 114. The paragraph referred to is the widely criticized articulation of a rule regarding extraterritorial exercise of jurisdiction that would grant states wide latitude. Dodge then refers to the US Restatement (Third) of Foreign Relations Law for further support for this assertion.

22 *SS Lotus Case (France v. Turkey)*, Judgment, PCIJ Rep., (27 September 1927) Series A No. 10, at 46.

23 Shaw, *supra* note 18, at 656; F. A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', (1984) 186 RCADI 9, at 33; I. Brownlie, *Principles of Public International Law* (2008); J. L. Brierly, 'Règles générales du droit de la paix', (1936) 58 RCADI 1, at 146; J. Basdevant, 'Règles générales du droit de la paix', (1936) 58 RCADI 471, at 594; G. Fitzmaurice, 'The General Principles of International Law: Considered from the Standpoint of the Rule of Law', (1968) 92 RCADI 1, at 56.

24 *American Banana Co. v. United Fruit Co.*, 213 US 347, 53 L. Ed. 826, 29 S.Ct. 511 (1909).

25 *EEOC v. Arabian American Oil Co.*, 499 US 244, 248, 113 L. Ed. 2d 274, 111 S.Ct. 1227 (1991).

26 Dodge, *supra* note 21.

27 Parrish, *supra* note 15, at 393. Kate McDonald notes that the presumption against the extraterritoriality approach is generally favoured when environmental statutes are being construed; K. McDonald, '*Pakootas v. Teck Cominco Metals, Ltd.*: Finding a Sustainable Solution to Transboundary Pollution', (2006) 41 Georgia Law Review 311, at 321. *Teck* seems to indicate a new direction. Previous decisions regarding CERCLA's extraterritorial application have limited its reach 'to foreign defendants whose operations are located in the United States [*United States v. Ivey*, [1995] 26 OR3d 533 (Ont. Gen. Div)] and to environmental damage within

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a point of connection with international law; an international jurist would conclude that it is grounded in the international principles of sovereignty and non-intervention. However, as F. A. Mann has pointed out, the presumption tends to be understood in constitutional rather than international terms.[28] Dodge, for example, raises but rejects the argument that the presumption can be justified with reference to international law, arguing that its only proper basis is 'the notion that Congress generally legislates with domestic concerns in mind'.[29] A different approach is described by Michael Ramsey, taking as its starting point the *Charming Betsey* case,[30] the 1804 case that articulated the canon of statutory construction according to which a statute must be interpreted so as to avoid incompatibility with international law. If such an interpretation cannot be arrived at without doing violence to the wording of the statute – in other words, if Congress clearly intended the violation – then the courts will give effect to that interpretation. According to Ramsey, this is the manner in which the legality of extraterritorial exercises of jurisdiction should be evaluated by the courts.[31] Following this approach, violations of international law are not altogether avoided but, at the very least, international sources are explicitly referred to, with the result, one would hope, that the concerns that lie behind international rules on extraterritorial jurisdiction would also be borne in mind.

Regardless of whether the effects doctrine or the objective-territoriality principle is adopted, there remains a further set of issues regarding the appropriateness of exercising jurisdiction. In both US and international law, it is acknowledged that a finding of jurisdiction may not conclude the inquiry, as there may be further legal and policy reasons for not exercising jurisdiction. In both bodies of law, such reasons find expression in the doctrine of comity. Comity has a potentially significant role to play in this case. On one hand, the case for US jurisdiction seems very strong, based on objective territoriality. On the other hand, the nature of the EPA's order gives cause for concern. Arguably, the EPA, in issuing an order apparently designed to trigger a process of remediation of the contaminated site, is reaching much farther into Canada's jurisdictional space than either international public or private law can sanction. Furthermore, this order, which could have the impact of drawing a Canadian company into an elaborate regulatory regime in the United States, gives rise to more concerns regarding fair treatment and respect for democratic principles than would, say, an order to pay compensation. Yet, it hardly seems reasonable that Teck should bear no responsibility for remediating the contaminated site.

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the territorial boundaries of the United States [*Arc Ecology v. US Dept of the Air Force*, 249 F. Supp. 2d 1152 (N.D. Calif. 2003)]', McDonald, *supra* this note, at 325.

28 Mann, *supra* note 23, at 72.

29 Dodge, *supra* note 21, at 90.

30 *Murray v. Schooner Charming Betsey*, 6 US (2 Cranch) 64, 118 (1804), Marshall, CJ: 'An act of Congress should never be construed to violate the law of nations if any other possible construction remains'; see M. D. Ramsey, 'Escaping International Comity', (1998) 83 *Iowa Law Review* 893.

31 Ramsey, *supra* note 30, at 919.

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3.1. Comity

The US doctrine of comity has received a good deal of attention from scholars[32] and enjoys a prominent place in the US Restatement (Third) on Foreign Law, but is the object of immense controversy and confusion. In international law, comity is not a legal doctrine, but rather a political or diplomatic concept that seeks to ensure the smooth functioning of international relations. It is very often referred to in cases in which more than one state has a claim to exercise jurisdiction in a particular case: comity does not operate to defeat one or the other claim, but can be invoked by the state with a stronger claim to argue that the other state should not exercise its legal right.[33] In the United States, it is sometimes understood in this manner – as a non-binding rule that helps courts to determine whether it would be appropriate to assert extraterritorial application of legislation in a given case. Other commentators, however, assert that it has the status of law – that assertions of jurisdiction that fall afoul of comity are not merely inappropriate, but illegal. While Joel R. Paul argues that the open-endedness of the doctrine of comity has given it a flexibility that permits its adaptation to very different circumstances,[34] there is a convincing counterargument to the effect that the uncertainty attendant on the meaning to be given to the doctrine reflects flaws within it and results in insufficient attention being paid to the expectations of the parties.[35] 'If other nations believe that American policy unfairly disadvantages their citizens or that it proceeds from fiat rather than principle, they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own.'[36] The problem is not merely uncertainty, but a sense that the rules are being applied in an instrumental rather than a principled fashion.

A further problem is that comity is often not attended to at all: it was not mentioned by either of the courts in the *Teck* case and has been interpreted in an extremely narrow fashion in other cases, such as the much-discussed *Hartford Fire* case, in which the majority stated that jurisdiction could be declined if it were found that there is a 'true conflict' between US law and the law applicable to the foreign defendants – that is, if US law required *x* and foreign law required *not x*.[37] This interpretation is supported by the Restatement (Third) of Foreign Relations Law of the United States,

32 See, e.g., J. R. Paul, 'The Transformation of International Comity', (2008) 71 *Law and Contemporary Problems* 3, at 19, for a discussion of the historical evolution of the interpretation of comity in the United States. Paul writes: 'Scholars and courts have characterized international comity inconsistently as a choice-of-law principle, a synonym for private international law, a rule of public international law, a moral obligation, expediency, courtesy, reciprocity, utility, or diplomacy. Authorities disagree as to whether comity is a rule of natural law, custom, treaty, or domestic law. Indeed, there is not even agreement that comity is a rule of law at all', at 19–20. M. Ramsey has concluded, rightly in my view, that reference to international comity should be abandoned due to the difficulties that courts and scholars encounter in defining and applying the concept. In the context of the extraterritorial application of statutes, Ramsey argues that three principles should govern: first, the presumption against extraterritorial effect; second, the act of state doctrine; and, third, reference to customary international-law principles governing extraterritorial exercises of jurisdiction; Ramsey, *supra* note 30, at 908–9.

33 Brownlie, *supra* note 23, at 28–9.

34 Paul, *supra* note 32, at 20.

35 'Predictability and Comity: Toward Common Principles of Extraterritorial Jursidiction', (1985) 98 *Harvard Law Review* 1310, at 1319.

36 Ibid., at 1321.

37 *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891 (1993), at 2910.

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which states that prescriptive jurisdiction obtains when conduct outside state territory 'has or is intended to have substantial effect within its territory' but only when the exercise of jurisdiction would be reasonable.[38] However, the indicative list of factors presented in the Restatement to be considered in determining reasonableness goes much further, as the minority was aware. The Restatement goes on to require consideration of whether the activity 'has substantial, direct, and foreseeable effects upon or in the territory;[39] whether another state has an interest in regulating the activity;[40] and the likelihood of conflict with another state's regulation.[41] Other factors are:

> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system.[42]

A further principle states that, even if the exercise of jurisdiction is reasonable, a court may decline to exercise it if the interests of another state also having jurisdiction are greater.[43] The minority in *Hartford* invoked *Charming Betsey*[44] and referred to international comity,[45] rejecting the narrow 'true conflicts' approach taken by the majority and invoking sections of the Restatement that were passed over by the majority.

The Restatement is not altogether consonant with international law; in particular, it affirms the effects doctrine. Nevertheless, its provisions lay adequate groundwork for consideration of a wide range of issues that arise when jurisdiction is exercised extraterritorially. The Restatement does not limit itself to a consideration of the rights and interests of the forum, but also takes into account the rights and interests of other states and potential impacts on international relations. The Restatement and the underlying notion of comity to which it seeks to give expression both suffer from a lack of clarity, as *Hartford* demonstrates: two groups of judges relied on it to support quite different conclusions. Still, had the concerns over various versions of the doctrine of comity been taken into account by the courts in *Teck*, the analysis – if

38 Restatement (Third).
39 Ibid., §2(a) (1987).2(a).
40 Ibid., §2(g).
41 Ibid., §2(h).
42 Ibid., §403.
43 Ibid., §403, para. 3.
44 *Hartford Fire* case, *supra* note 37, at 2919.
45 The minority refers to the comity it invokes as 'prescriptive comity', distinct from the 'comity of courts'. Prescriptive comity is described as a concept whose object is respect for the sovereignty of other states, which courts must assume legislatures have taken into account; ibid., at 2920.

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not the result itself – might have been different. The grounds upon which courts, administrative agencies, and legislatures rest their extraterritorial actions can be as important as the actions themselves: the matter of *how* authority is exercised is, as administrative jurists know, of fundamental importance.

How important is it, in a case such as this, to protect Canadian sovereignty against the incursions of US administrative authority? It is likely that nothing would have been done about the pollution damage suffered by the Colville Tribes had this 'incursion' into Canadian sovereign space not taken place. What is really at stake? In order to answer these questions, we must look behind the rules of private and public international law to seek to understand what types of goal they seek to achieve, and whether other legal institutions or structures might be better able to protect the interests at stake while not throwing up obstacles to the resolution of transboundary environmental disputes.

4. Disciplining transnational exercises of public authority

The *Teck* case is problematic because it involves the exercise of public authority in a manner that overshoots the context in which that authority was granted. The US authorities may argue that the framers of CERCLA contemplated its extraterritorial application but it is obvious that this regime was crafted by and for Americans. Canadians, and others to whom the legislation may be deemed to apply, may have good reason to welcome this extension of jurisdiction due to the relatively high environmental standards it contains. But there are other considerations beyond this, admittedly important, substantive one. If domestic institutions in one locale are to have impacts on the lives of individuals, corporations, and states elsewhere, the exercise of their authority must be subject to norms designed to ensure the legitimacy of their decision-making processes and of the outcomes that flow from them.

Two related bodies of scholarship – GAL and literature on the exercise of IPA – help us to understand what is at stake in cases like this. Both are concerned with the implications of increasingly influential international bodies having the capacity to reach down into the state and make decisions with ramifications for individuals and groups, as well as governments, and note that this type of international authority is too often exercised in a way that pays too little respect to democratic principles, collective self-determination, and rule of law.[46]

GAL scholars argue that we are witnessing the emergence of a new global administrative space governed by a nascent body of global administrative law.[47] This body of law is concerned with ensuring that global administrative bodies 'meet adequate standards of transparency, participation, reasoned decision, and legality,

46 B. Kingsbury et al., 'The Emergence of Global Administrative Law', (2005) 68 *New York University Journal of Law and Contemporary Problems* 15, at 26; A. v. Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', (2008) 9 *German Law Journal* 1909, at 1913.

47 Kingsbury et al., *supra* note 46, at 18–25.

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. . . by providing effective review of the rules and decisions they make'.[48] Global administrative bodies, whether domestic or international, are distinguished by their participation in regulatory functions of a transnational or global character.[49] This can include 'national regulatory bodies operating with reference to an international intergovernmental regime',[50] which make 'decisions . . . [that] adversely affect other states, designated categories of individuals, or organizations, and are challenged as contrary to that government's obligations under an international regime to which it is a party'.[51] The present case does not fit well within this definition, as it did not involve a decision taken pursuant to US obligations under an international regime, and the US authorities involved can be considered international actors only in a very loose sense of the term. Nevertheless, the objectives of GAL seem to apply here: if such decision-making processes could be made subject to a set of norms at the supranational level that ensured transparency, participation, reasoned decision, legality, and effective review, concerns about the unilateral nature of such exercises of authority might be allayed.

Literature on IPA examines a broader phenomenon. The objective of this scholarship is not to identify a distinct space governed by a distinct body of law, but rather to foster the development of principles that would govern the exercise of IPA wherever it takes place. Despite this greater openness, the definition of IPA provided by the main proponent of this approach, Armin von Bogdandy, seems once again to exclude the authorities at work in the *Teck* case: 'any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest.'[52] One context in which Bogdandy sees international public authority being exercised comes close to the *Teck* case, involving domestic administrative activity. Where such activity is in furtherance of an internationally established goal, Bogdandy identifies a need for rule-of-law standards, for principles that compel domestic actors to consider the extraterritorial ramifications of their actions, and for principles that foster co-operation of domestic administrations with other implicated public authorities.[53] While the EPA's actions and the courts' decisions in the *Teck* case probably do not qualify, on Bogdandy's terms, as an exercise of *international* public authority, because they were not carried out in furtherance of competence granted by an international act, the goals of this body of scholarship are highly relevant for the *Teck* case: to make the unilateral exercise of authority more responsive to the transnational and international context.

Both GAL and IPA scholarships share an interest in the decisions and decision-making processes of domestic authorities, including courts and regulatory agencies. Both are focused on those instances in which domestic authorities are acting

48 Ibid., at 17.
49 Ibid., at 25.
50 Ibid., at 17.
51 Ibid., at 16.
52 A. v. Bogdandy et al., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', (2008) 9 *German Law Journal* 1375, at 1383.
53 Bogdandy, *supra* note 46, at 1909.

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pursuant to a norm, standard, regime, or objective located at the international level. Scholars associated with these approaches no doubt assumed that instances of unilateral exercises of authority across borders *not* pursuant to international norms would be illegal under rules of public international law, or would be managed by the relevant rules of private international law. But unilateral action for environmental protection, though hardly routine, is not altogether exceptional.[54] US courts and lawmakers have been quite comfortable pursuing unilateral action in many domains, quite aggressively in some, such as competition law. The precedent set by the Ninth Circuit in the *Teck* case may well be taken up by the EPA, not to mention individuals and groups on both sides of the border. The citizen-suit provisions of CERCLA mean that decisions to act unilaterally will not always be made by the EPA; environmental non-governmental organizations (NGOs) as well as individual citizens have significant capacity to force the EPA's hand. In short, there are reasons to believe that unilateral exercises of extraterritorial authority may become more common. One possible response would be for affected states to assert the illegality of such exercises of authority. Another would be to seek to identify principles guiding its exercise. GAL and IPA scholarships can help us to determine whether the former response – asserting state sovereignty – is warranted, as well as whether the second response, with its greater openness to transnational logic, may provide adequate guarantees of procedural and substantive fairness to the parties and the wider publics involved.

4.1. Principles guiding the exercise of public authority

In this section, I will consider a number of principles identified in GAL literature on the exercise of global administrative authority that I believe are of particular interest in the *Teck* case: accountability, legality, and availability of judicial review.

4.1.1. Accountability

GAL scholars are particularly concerned with the accountability of global administrative bodies, and therefore focus on administrative structures, transparency, participation, reasoned decision-making, and review mechanisms.[55] In these respects, as noted above, the decision-making procedures to which Teck was subject in the United States come out rather well. This is hardly surprising. The administrative procedures through which the EPA made its decision and the judicial procedures through which the courts made theirs have, after all, been carefully crafted and honed over the years. However, because of the structure and orientation of the various processes, almost no regard was had to constituencies beyond the US border, despite the obvious transnational and international ramifications of the case. In other words, the problem lies not in the robustness of the procedures, but rather in their orientation. As Nico Krisch points out, many of the administrative bodies with

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54 D. Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?', (2000) 11 EJIL 2, at 339; R. Bilder, 'The Role of Unilateral Action in Preventing International Environmental Injury', (1981) 14 Vand. JTL 1, at 51.

55 Kingsbury et al., *supra* note 46, at 28.

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which GAL is concerned are in fact subject to extensive accountability measures. But the question remains 'to *whom* global governance should be accountable'.[56]

For their part, IPA scholars acknowledge the relevance of accountability but doubt whether concepts like accountability and participation can operate as legal concepts, permitting questions of the legitimacy of international (and in our case domestic) institutions to be phrased in terms of the legality of their decisions.[57] It is highly unlikely that they could. What they can perhaps accomplish, nevertheless, is to remind implicated actors and observers of what is at stake. The unilateral extension of authority across borders is a fraught issue in municipal and international law because, in large part, of concerns about accountability. This does not necessarily make such action illegal, but it should serve to remind authorities of the importance of protecting the interests of those affected who do not have ready access to accountability mechanisms.

4.1.2. Legality

Problems relating to the legality of the US authorities' actions are so closely tied up with problems of accountability that it is hard to pick them apart. Here, however, our focus is more squarely on the rules that the courts referred to in denying certiorari – and on those to which they did not refer. The issues relating to accountability discussed above are clearly implicated in the rebuttable presumption in US law that the legislator does not intend statutes to apply extraterritorially. But the basis of this presumption, as mentioned above, is disputed: some authors argue that it is based in the observation that governments are generally concerned with domestic matters, while others conclude that it is based on principles of respect for sovereignty and non-intervention. The difference is significant: under the latter interpretation, the presumption is grounded in concerns about impacts on other states and on international relations generally; under the former, it is grounded in a commonplace about what governments are likely to be particularly interested in.

US courts also evaluate the legality of extraterritoriality in light of comity, although, as discussed above, comity is interpreted in various ways and is sometimes not invoked at all. In one article on the *Teck* case, the 'true conflicts' approach was taken, and the authors concluded that extraterritorial jurisdiction did not offend comity because the polluter-pays principle is applied in both the United States and Canada. This claim was supported by a cursory glance at Canadian and British Columbian legislation.[58] The Restatement attends to the transnational and international implications of unilateral extraterritorial action, and this list of principles could provide the basis for a fairly robust examination of these implications. The problem is that such a robust examination, whether based on the Restatement

56 N. Krisch, 'The Pluralism of Global Administrative Law', (2006) 17 EJIL 247, at 248 (emphasis in original).

57 Bogdandy et al., *supra* note 52, at 1389.

58 R. Du Bey et al., 'CERCLA and Transboundary Contamination in the Columbia River', (2006) 21 *Natural Resources and Environment* 11; E. F. Greenfield, 'CERCLA's Applicability Abroad: Examining the Reach of a US Environmental Statute in the Face of a Cross-Border Pollution Dispute', (2005) 19 Emory ILR 1721. This reasoning is based on the Restatement (Third) and is broadly applied in the area of competition law; see, e.g., Hess and Reuland, *supra* note 21.

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or on some other set of principles, has not taken place here. Because the Ninth Circuit concluded that there was no extraterritorial exercise of jurisdiction in this case, it naturally did not enquire into the reasonableness of extraterritoriality. If it had, the approach outlined in the Restatement could have permitted the court to go some way towards addressing the concerns outlined by GAL and IPA scholarship and provided some guidance as to the appropriateness of permitting the enforcement of the order against Teck. However, as one US author notes:

> One obstacle to achieving a sound doctrine of extraterritoriality is our tendency to focus first on *our* nation's interests when framing regulations for foreign conduct. Although disagreement may arise over what constitutes a legitimate interest of the United States, or which method of pursuing a given interest will minimize friction with other nations, discussion is typically limited to determining the means of satisfying American interests most effectively. This entire approach rests on a fallacy: even if we assume that the United States' interests are legitimate, it does not necessarily follow that the United States is justified in acting unilaterally to achieve them.[59]

In other words, the problem may lie in the inadequate attention paid to transnational, international, and global facets of a dispute and the context in which it arose. While courts cannot be expected to carry out an exhaustive analysis of the direct and indirect transboundary implications of their rulings, much may be accomplished simply by encouraging them to adopt a different orientation – thinking of themselves as participating in the exercise of international public authority.

4.1.3. Review

A third problem posed by this case relates to review of the decision by the public authorities. There were many opportunities for review internal to the American system. However, if one wants to analyse this case in light of principles articulated at the transnational, international, or global level, few outlets are available. It is theoretically possible – though the practical likelihood is low – for Canada to seek to pursue the United States for breaches of public international-law principles on extraterritorial jurisdiction. As noted above, there is no international regime here that would have the legal or political authority to review or even evaluate the decision. The most likely avenue is a more indirect one, described by Nico Krisch as 'mutual observation and gradual and pragmatic approximation'.[60] Krisch, discussing decision-making on genetically modified organisms at the supranational level, points to the fact that many different regimes and decision-making instances are implicated, and that these regimes and instances are not arrayed in a hierarchical fashion in relation to one another. Moreover, their respective areas of competence overlap and intersect.[61] Accountability, therefore, would be provided not through formal processes of review, but through a more ad hoc approach in which different bodies observe one another's decisions and either take on board the principles and approaches used or push back by articulating alternatives.

59 See 'Predictability and Comity', *supra* note 35, at 1320 (emphasis in original).
60 Krisch, *supra* note 56, at 260.
61 Ibid., at 257.

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While the decision of the US court may not be subject to formal review at the international level, this does not mean that there are no institutions or authorities that could push back against the US authorities. As will be discussed below, the Canadian and British Columbian governments were in an excellent position to weigh in with their own proposed solutions to the impasse. They have no legal authority over the US courts, of course, but they need not – and did not – sit passively by as the case made its way through the courts.

5. US COURTS AS INTERNATIONAL PUBLIC AUTHORITIES?

Scholarship on GAL and IPA points the way to solutions that would not necessarily require the creation of new, or the further development of existing, regimes and structures. Perhaps the greatest shortcoming of the decision-making process in the *Teck* case was its blindness to the supranational implications of that process. If the relevant public authorities were prepared to assume the role of *international* public authorities when exercising jurisdiction extraterritorially, much could be done to improve the decision-making process and to make it more responsive to constituencies beyond US borders and to transnational and international concerns.[62] The US authorities would not be accountable to the Canadian governments or the Canadian public, but should nevertheless see themselves as speaking to a regional and not merely a national audience. We could go further and say that the US authorities are, indeed, accountable to this wider audience and these other constituencies. As Krisch has argued, other authorities may find and seize opportunities to hold the US authorities to account, not in the formal legal sense of reviewing their decision, but in a sense that holds in a fragmented legal system, namely by accepting or rejecting the arguments put forth and the approach taken, by giving effect to decisions or refusing to do so. The United States is no stranger to controversy when it comes to extraterritorial exercises of jurisdiction. Other states, and authorities in various locales, may not have the ability to quash decisions or overturn legislation but they do react in various ways.[63]

As noted above, US law governing the extraterritorial exercise of jurisdiction is not without its problems – the hothouse environment in which it has developed, leading to disjuncture between it and international law, excessive complexity, and uncertainty as to the status and content of rules. But this body of law also contains many provisions that guide the attention of public authorities to a wide range of issues surrounding extraterritorial exercises of jurisdiction. New or revised rules may well be needed, but what is required in particular is an acknowledgement of the relevance of concerns of foreign parties and governments in extraterritorial cases. In the meantime, international public authorities, notably domestic courts and legislatures, in other jurisdictions must be prepared to assert their own point of view,

62 This approach may be terribly ambitious, given the distance that would have to be travelled not only by American courts, but also by legal scholars, who, even when referring to the rules of public international law, cite American jurisprudence.

63 An infamous example is the reaction of various states to the Helms-Burton legislation in the United States; see the discussion in P. Daillier and A. Pellet, *Droit international public* (2002), 510.

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such as by refusing to recognize exercises of administrative authority or judgments that are based on weak analyses of the international dimensions of disputes. In this case, the Canadian federal government missed an opportunity to do just that. Instead, it presented two arguments of limited helpfulness: first, that the dispute should be handled through 'state-to-state bilateral cooperation', such as through the International Joint Commission (IJC);[64] and, second, that the court should have applied the doctrine of comity – chiefly as understood in the United States.[65] As to the first argument, although I would not deny the need for bilateral co-operation and regional regimes, the reference to the IJC is rather disingenuous; the Canadian and US governments have not been generous towards that organization and have not permitted it to play a significant role in recent decades.[66] As to the second argument, the Canadian government missed an opportunity to engage in a broader discussion of comity as understood in other jurisdictions and in international law. The brief refers to procedural disadvantages that foreign defendants may face, but its comity arguments turn mainly on an assertion that the Ninth Circuit decision 'subjects Canadian companies . . . to conflicting regulatory schemes and infringes Canada's strong sovereign interest in regulating its own corporate citizens'.[67] No conflict in the applicable regulatory schemes is pointed out, however, and no argument to support the assertion of interference with Canada's exercise of sovereignty is presented. Such arguments could be found. The federal government could have referred, for example, to the nature of the EPA's order and argued that it represented an incursion into Canadian jurisdiction of an altogether different order than would a demand for compensation. The Canadian brief rightly points out the flaws in the Ninth Circuit Court's reasoning, but does not succeed in presenting clear arguments as to where, exactly, the problem with this extension of jurisdiction lies. No mention whatever is made of international rules on extraterritorial exercises of jurisdiction; the effects test is passed over. Little effort is made to distinguish this case from that of a transboundary tort.

The brief submitted by the government of British Columbia does a better job of identifying and explaining the issues at stake and setting out a cogent argument for why the EPA should not be permitted to issue the clean-up order. The British Columbian government notes that applying a domestic regulatory regime to a non-national for actions outside the country is unfair if the international dimensions of

64 Government of Canada, Brief as Amicus Curiae in support of Petitioner before the United States Supreme Court on petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the case of *Teck Cominco Metals Ltd. v. Pakootas et al.* (2 May 2007), at 7.

65 Ibid., at 11.

66 D. Lemarquand, 'The International Joint Commission and Changing Canada–United States Boundary Relations', (1993) 33 *Natural Resources Journal* 1, at 33; A. Parrish, 'Mixed Blessings: The Great Lakes Compact and Agreement, the IJC, and International Dispute Resolution', (2006) 2006 *Michigan State Law Review* 1299. It should be noted, however, that the Canadian government did indicate its willingness to submit the matter to the IJC 'for an independent, scientific assessment'; BC Amicus Brief, Appendix 1: Letter dated 23 November 2004 from Bruce Levy, Director, United States Relations Division, Department of Foreign Affairs and International Trade to Terry A. Breese, Director, Office of Canadian Affairs, United States Department of State.

67 Canadian Amicus Brief, *supra* note 64, at 12.

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the issue are not properly addressed,[68] which it notes they were not, given the Ninth Circuit Court's exclusively domestic approach.[69] Unlike Canada, British Columbia invoked a collective self-determination argument[70] and presented a plausible argument regarding both the differences in the US and British Columbian approaches to environmental regulations and the reasons why British Columbia took the path it did:

> [I]t has long been the province's statutory and administrative policy to use formal enforcement actions as a last resort, preferring to devote the resources that would be consumed in litigation to voluntary cleanup agreements and other remedial mechanisms. For that reason, a citizen suit provision is antithetical to the province's environmental policy, because it substitutes time-intensive and costly formal litigation for other enforcement mechanisms that, in the province's considered judgment, are more cost effective.[71]

The British Columbian brief notes that the US Congress did not turn its mind to the Canadian or international context in adopting CERCLA.[72] It also draws attention to certain procedural protections granted to US companies targeted by citizen suits under CERCLA that are not available to foreign companies.[73] Whether, at the end of the day, one accepts these arguments or not, they are not unreasonable, and serve to draw the Court's attention to a range of pertinent issues. However, British Columbia takes the same narrow approach in the end, arguing that the proper avenue is state-to-state diplomacy and co-operation and not lawsuits before domestic courts.[74]

6. Conclusion

The substantive result in the *Teck* case is far from unsatisfactory. While Teck may not have enjoyed all the advantages of a domestic litigant, the unfairness is probably mitigated, given that the harm was substantial and Teck was well aware of it. However, if the approach taken by the Ninth Circuit is to be followed in similar cases, serious problems could arise. While there is always a degree of unfairness involved in applying rules to subjects who did not have an opportunity to participate in their formation and whose interests were not taken into account at the time of the rules' adoption, this can be mitigated in various ways. However, the Court's approach and the broader context of US law on extraterritorial exercise of jurisdiction make it very likely that unilateral action could cause serious harm to other states, private individuals, and inter-state relations.

When domestic regulatory agencies and courts contemplate unilateral action, they have an obligation to consider seriously the implications of such action, not just within their own jurisdiction, but much more broadly. This will involve an

68 BC Amicus Brief, *supra* note 66, at 4.
69 Ibid., at 8.
70 Ibid., at 7.
71 Ibid., at 18.
72 Ibid., at 11.
73 Ibid., at 18–19.
74 Ibid., at 6–7, 12.

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examination of legal norms applicable in other jurisdictions, not for the narrow purpose of identifying so-called 'true conflicts' in which an actor must breach one norm to respect another, but to understand, as best they can, why different approaches are taken elsewhere and whether the impacts of interfering with those approaches are compensated by benefits to be won, not just domestically, but more widely. The understandings developed by public authorities in one jurisdiction of the law and policy in another jurisdiction will inevitably diverge from local understandings and, in any event, to the extent that foreign law is called in aid to resolve a problem, that law will be transformed, as it is worked out within a context different from that in which it was developed. But, as Krisch points out, while, in a fragmented system, there may not be formal processes of review to verify the correctness of interpretations and applications of rules, there will be multiple opportunities for observing, adopting, rejecting, or modifying the approach taken by a given public authority.

This approach seeks to address the problems associated with unilateral extraterritorial applications of jurisdiction. At the same time, it seeks to avoid excessive deference to sovereignty and to demonstrate sensitivity to the interdependence of states, particularly apparent in cases of transboundary environmental degradation. The United States is capable of being quite assertive in its extraterritorial exercise of jurisdiction. But it has significantly more clout than most states: it wields more influence than most other states, and can better resist attempts by other states to pressure it. This problem may be attenuated to some extent in that states that do have the capacity to exercise some influence over states that are abusing their capacity to reach beyond borders will see it as being in their interests to take action; smaller states that are feeling the pinch may benefit from these checks.

The further development of regional and international environmental co-operation is essential. But I cannot agree with the positions taken by Canada and the United States 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. If domestic courts and regulatory agencies, in the United States and elsewhere, become more assertive about their jurisdictional reach, care must be taken to ensure that concerns about the legitimacy and appropriateness of such exercises of jurisdiction are properly addressed.

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