Bilateral Breakdown: U.S.–Canada Pollution Disputes

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In October 1941, many of the nations in Europe and Asia were at war with each other for freedom, conquest, and human rights. Canada was already sending troops overseas and the United States would soon follow after the attack on Pearl Harbor. World War II was one of the most horrible failures of diplomacy and international law in human history. But against this violent backdrop, the United States and Canada were quietly concluding a model process for more peaceful and legal international dispute resolution.

For several decades, a large smelting plant in Trail, British Columbia, had been spewing massive quantities of sulfur dioxide emissions. The emissions inevitably drifted a few miles south across the U.S. border and harmed crops, woodlands, and fisheries in the state of Washington. A series of diplomatic efforts culminated in the establishment of a three-member arbitration panel, composed of an American, a Canadian, and a Belgian national. The panel concluded that Canada had a duty to prevent its southern neighbor from being harmed by pollution originating within Canada's border. The legal principle of responsibility for "transboundary pollution"—pollution originating in one country that harms another country—became a cornerstone of international environmental law. Trail Smelter Arbitration (U.S. v. Canada), 3 U.N.R.I.A.A. 1965 (1941). Equally important, the Trail Smelter Arbitration became a model for transboundary dispute resolution, demonstrating that neutral bodies applying customary international law could justly resolve international pollution disputes.

Building on this success story, the United States and Canada continued to rely on such mechanisms as bilateral treaties, conventions, arbitration panels, and impartial commissions to resolve their many transboundary pollution disputes throughout the twentieth century. From the Boundary Waters Treaty of 1909 to the North American Agreement on Environmental Cooperation signed in 1993, the United States and Canada have a long and successful history of bilateral cooperation on environmental issues. Many other countries have looked to these bilateral diplomatic mechanisms as models for preventing and resolving environmental disputes in their region. However, in recent years the United States has undermined these bilateral dispute resolution mechanisms. Instead, the United States has taken a unilateral approach to international pollution disputes, which has inevitably lead to litigation in federal courts.

The environmental and economic stakes for this bilateral relationship are of global significance. The two countries share a five thousand-mile border that includes approximately 150 rivers and lakes containing over 90 percent of North America's fresh surface water, and over 20 percent of the total fresh surface water in the world. The United States and Canada also have the largest bilateral trade relationship in the world, with over $1 billion (U.S.) in goods crossing the border on a daily basis. The quality of life for millions of Americans and Canadians depends on protection of their shared water resources and maintaining trade between their mutually dependent economies.

Despite the tremendous importance of the U.S.–Canadian relationship, all three branches of the United States federal government are playing a role in the current bilateral breakdown on transboundary pollution. As evidenced in the recent cases discussed below, Congress, federal environmental agencies, and courts have directed or at least allowed a unilateral approach to addressing transboundary pollution disputes. It is not yet clear if these decisions by the U.S. federal government are isolated cases of unilateralism and disregard for diplomatic mechanisms or a part of a larger effort to retreat from international environmental obligations. Further, we do not yet know if domestic litigation can fairly resolve international transboundary pollution disputes equitably and efficiently, without disrupting other aspects of this important bilateral relationship.

To begin to explore this trend (and it is only a beginning in this short article), I first provide some background on the diplomatic mechanisms for pollution dispute resolution developed by the United States and Canada over the past century. These diplomatic mechanisms have become part of the foundation for one of the world's strongest bilateral relationships. I then look at two recent examples of high-profile transboundary pollution disputes between the United States and Canada in which the United States federal government has made strategic decisions to unilaterally address international transboundary pollution disputes. These decisions have either encouraged or inevitably lead to the filing of claims under U.S. federal environmental laws in U.S. district courts. The resulting claims have (at least for now) survived procedural defenses based on lack of personal jurisdiction and

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extraterritorial enforcement of U.S. environmental laws. With the procedural obstacles overcome, both cases may lead to a fair and lawful resolution of the dispute at issue, perhaps indicating that this approach should be institutionalized and used more widely.

A History of Environmental Diplomacy

Transboundary pollution disputes between the United States and Canada are not new, and each country long ago established diplomatic mechanisms for addressing this issue. Beginning nearly a century ago, the two countries established the foundation for their bilateral relationship on environmental matters with the Boundary Waters Treaty of 1909 (executed between the United States and Great Britain on behalf of Canada), 36 Stat. 2448. The Boundary Waters Treaty provides legal obligations and a dispute resolution mechanism between the United States and Canada for the two countries' shared boundary waters.

"Boundary waters" are defined as "[t]he waters from main shore to main shore of the lakes and rivers and connecting waterways . . . along which the international boundary between the United States and . . . Canada passes . . . , but not including tributary waters which . . . flow into such lakes, rivers, and waterways . . . ." 36 Stat. 2448, 2449. While tributary rivers and streams, as well as tributary groundwaters, are excluded from coverage, the Boundary Waters Treaty does govern four of the five Great Lakes (Superior, Huron, Erie, and Ontario, as only Lake Michigan sits entirely within the United States), and hundreds of other rivers and lakes along the U.S.–Canadian border.

The United States and Canada have a long and successful history of bilateral cooperation on environmental issues.

The Boundary Waters Treaty imposes a strict obligation on both countries to not pollute boundary waters, providing "[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." 36 Stat. at 2450. The treaty also protects water quantity as well as water quality, restricting the ability of either party to use or divert boundary waters "affecting the natural level or flow of boundary waters on the other side of the [border]line . . ." 36 Stat. at 2449–50.

In addition to these ongoing legal obligations, the Boundary Waters Treaty created the International Joint Commission, a six-member adjudicative body with the United States and Canada equally represented by political appointees. The International Joint Commission can be used for both binding arbitral adjudication and for nonbinding investigative reports and studies. Both countries must issue a reference to the International Joint Commission before there can be a binding arbitral decision. The Boundary Waters Treaty specifies that such a reference would require consent of the U.S. Senate. As may be expected, the Senate has never consented (nor even been formally requested) to refer a matter for a binding decision to the International Joint commission in the history of the Boundary Waters Treaty, although the International Joint Commission's nonbinding recommendations were used as part of the Trail Smelter Arbitration discussed below.

While binding dispute resolution under the Boundary Waters Treaty has never occurred, scores of issues have been referred to the International Joint Commission for nonbinding investigative reports and studies. The Boundary Waters Treaty only requires a reference from one of the countries to invoke this process, although as a matter of custom this has always been done bilaterally with the support of both countries (consent of the U.S. Senate is not required; the U.S. Secretary of State has this authority). This bilateral approach has strengthened the credibility of International Joint Commission reports and recommendations, and ensured sufficient funding for its efforts. These nonbinding reports and studies, along with the objective recommendations that are often requested, have proven valuable in diplomatically resolving dozens of transboundary pollution disputes and crafting new policies in both countries to prevent transboundary environmental harms from occurring. The International Joint Commission continues to enjoy a well-deserved reputation for objective work supported by the best available science and free of political biases.

The definitive example of the International Joint Commission's role in arbitration and dispute resolution is the Trail Smelter Arbitration. In this classic transboundary pollution dispute, a privately owned metal smelter in Trail, British Columbia, produced sulfur dioxide emissions that caused damage to private property a few miles away (and across the international border) in Washington State. The United States agreed to intervene on behalf of the Washington State landowners under the legal construct of espousal, in which the nation state takes on an international claim on behalf of its private citizens. The countries referred the matter to the International Joint Commission for a factual study of the liabilities and damages. In 1931, the International Joint Commission determined that the United States had suffered $350,000 (U.S.) in accrued damages, but also made a finding that further harm would not occur.

Canada accepted the International Joint Commission report and paid the United States $350,000, but the United States disputed the finding regarding lack of continuing and future harm. The dispute led the United States and Canada to sign and ratify a convention in 1935, agreeing to refer the matter to a three-member arbitration panel composed of an American, a Canadian, and a Belgian national. The arbitration tribunal was charged with deciding whether damages caused by Trail Smelter continued to accrue after the 1931 International Joint Commission finding, and if so, what damages or remedies should be awarded or ordered. The arbitration panel was directed to apply United States and international law as it relates to transboundary pollution liability and remedies.

In its now famous 1941 decision, the Trail Smelter Arbitration tribunal relied on U.S. Supreme Court cases regarding interstate transboundary pollution to determine the appropriate liability and remedy rules for international transboundary pollution. The tribunal held that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence." The tribunal further held that Canada was responsible under international law for the conduct of Trail Smelter, essentially an extension of the espousal concept noted above.

The liability rule of the Trail Smelter Arbitration has become a defining principle of international environmental law, expressly reinforced in the two major United Nations conferences, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, 11 I.L.M. 1426 (1972) and the Rio Declaration on Environment and Development of 1992, 31 I.L.M. 874 (1992). For purposes of this discussion, however, it is the process that produced the ruling that is important. Both countries assumed the claims and liabilities of their private citizens and corporations, and sought to resolve the dispute through a diplomatic process that culminated in formal international tribunal arbitration. While binding arbitration is somewhat analogous to domestic litigation, the decision to engage in binding arbitration is made bilaterally with the express consent of both parties. This commitment to environmental diplomacy is especially noteworthy given the other pressing international priorities surrounding World War II.

The commitments to environmental diplomacy evidenced by both the Boundary Waters Treaty and the Trail Smelter Arbitration are even more remarkable because they occurred several decades before either country addressed pollution problems domestically. The federal governments of the United States and Canada did not engage in meaningful environmental protection and enforcement until the late 1960s and 1970s. Perhaps the political will to relinquish some measure of national sovereignty for the sake of preventing and resolving international transboundary pollution disputes came before the political will to relinquish some measure of state sovereignty for the sake of preventing and resolving domestic pollution disputes.

Diplomatic efforts and the creation of new international mechanisms to address transboundary pollution between the United States and Canada did not slow down after the rise of domestic federal environmental law in the 1970s. On the contrary, the international processes became even more advanced as both scientific knowledge and public concern regarding environmental problems grew in the decade after the first Earth Day. For example, the United States and Canada negotiated the Great Lakes Water Quality Agreement in 1972, which utilized the pollution control approaches that were just emerging in the federal laws of both countries. In 1978 and again in 1987, the Great Lakes Water Quality Agreement was revised to incorporate evolving pollution control strategies and to advance the goal of integrated ecosystem management throughout the Great Lakes Basin.

In 1993, the United States, Canada, and Mexico entered into the North American Agreement on Environmental Cooperation (NAAEC), 32 I.L.M. 1480 (1993), as a side agreement to the North American Free Trade Agreement (NAFTA), 32 I.L.M. 296 (1993). The NAAEC established a trilateral Commission for Environmental Cooperation headed by a council composed of the environment ministers of the three NAFTA nations. The Commission for Environmental Cooperation is serviced by a professional secretariat in Montreal and advised by a fifteen-member Joint Public Advisory Committee with equal representation from each country. The NAAEC empowers the Commission for Environmental Cooperation to receive and process citizen submissions alleging that one of the NAFTA nations has failed to effectively enforce its domestic environmental laws. While it lacks binding adjudicative authority, the Commission for Environmental Cooperation can prepare a public factual record documenting the nation's failure to effectively enforce its environmental law. Since 1995, the commission has received fifty-four citizen submissions (eighteen concerning Canada, ten concerning the United States, and the balance, twenty-six, concerning Mexico), and published eleven factual records (four for both Canada and one for the United States). *See* www.cec.org/citizen/status.

This short summary allows only a brief discussion of the decades of bilateral diplomatic efforts between the United States and Canada to address international transboundary pollution. Historically, both countries have demonstrated a commitment to fairly resolve transboundary pollution disputes. In many ways, the two countries' shared commitment to protecting the transboundary environment has equaled or even exceeded their commitment at the domestic level. Admittedly, many of the efforts lack the binding enforceability typically seen in domestic environmental law. However, these diplomatic efforts can often lead to a binding result when necessary, as seen in the Trail Smelter

arbitration. Against this backdrop of a long and successful history of bilateral approaches to resolving international transboundary pollution problems and a tremendously important U.S.–Canadian relationship, a new trend is emerging of going to court in the United States to resolve controversial transboundary pollution disputes.

The New Trend: Going to Court

Two relatively high-profile cases are evidence of a new trend by the United States to approach transboundary pollution problems unilaterally. In both cases, the decisions by various branches of the United States federal government are not blatantly unilateral. The decisions, however, clearly set the parties on a path of conflict and dispute that leads to domestic litigation in U.S. courts. In the end, U.S. environmental laws enforced by federal courts may prove up to the task of international transboundary pollution dispute resolution, raising the possibility that this approach be formalized and used more widely.

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The first case, *Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 (D.D.C. 2005), involves a dispute over the U.S. Bureau of Reclamation's proposed Northwest Area Water Supply (NAWS) project in North Dakota. The NAWS project was authorized by Congress in the Dakota Water Resources Act of 2000, Pub. L. No. 106-554, app. D., tit. VI (Dec. 21, 2000). It would be the first federal project to transfer Missouri River water across the north–south continental basin divide. The project would divert over 3.5 billion gallons of Missouri River water annually (approximately 10 million gallons per day) through a series of pipelines to eight counties in North Dakota for municipal, rural, and industrial water supply. If completed, this $145 million (U.S.) project would serve about eighty-one thousand people. The communities receiving water are north of the Continental Divide, and the water would drain into the Hudson Bay Basin, which includes large portions of North Dakota, as well as Lake Winnipeg and Hudson Bay in Canada.

Canada and the province of Manitoba have consistently objected to the project because it would biologically pollute Canadian waters by introducing nonnative invasive species from the Missouri River Basin into Lake Winnipeg and the Hudson Bay. Introduced pathogenic bacteria and viruses could devastate Canadian fisheries. Canada and Manitoba have argued that this amounts to a violation of the Boundary Waters Treaty's prohibition against polluting waters flowing across the international boundary.

The U.S. Congress was clearly aware of Canada's concerns and recognized the potential Boundary Waters Treaty implications of authorizing the project. Instead of referring the matter to the International Joint Commission for a study and potential ideas for resolution, Congress directed the Secretary of the Interior, in consultation with the Secretary of State and the Administrator of the Environmental Protection Agency, to determine whether adequate treatment could be provided to meet the requirements of the Boundary Waters Treaty. By taking this approach, Congress made the question of treaty compliance a unilateral determination, ignoring nearly a century of bilateral environmental cooperation guided by the objective work of the International Joint Commission.

The Secretary of the Interior determined that the project would not result in a violation of the Boundary Waters Treaty. Canada and Manitoba disagreed with both the substance of the determination and the unilateral determination process. Canada could have responded with its own unilateral reference to the International Joint Commission for a study or report pursuant to the Boundary Waters Treaty. While such a reference can be made unilaterally, customarily even nonbinding references to the International Joint Commission have always been bilateral. Respectful of this custom, Canada declined to make a unilateral reference. Without any other diplomatic options, Manitoba was left to challenge the project in U.S. court under the National Environmental Policy Act (NEPA).

NEPA requires U.S. federal agencies to prepare an environmental impact statement (EIS) for major federal actions with the potential for significant environmental impacts. This procedural requirement ensures that federal agencies adequately consider a project's environmental consequences and potential alternatives. Despite the magnitude of the project and the potentially devastating harm from invasive species, the U.S. Department of the Interior and Bureau of Reclamation (the Bureau is an agency within the Department of the Interior) declined to prepare an EIS, instead making a Finding of No Significant Impact. The substance of the federal defendants' argument regarding the need for an EIS is not relevant to this discussion, although the court eventually rejected the federal defendants' arguments on the merits. In effect, the Department of the Interior simply made the same determination regarding lack of potential environmental impacts under NEPA as it had done unilaterally under the Boundary Waters Treaty.

The civil action was brought by Manitoba against

Secretary of the Interior Gale Norton and other U.S. officials (referred to as federal defendants) pursuant to NEPA in U.S. district court. The federal government of Canada filed an amicus brief on behalf of Manitoba. The state of North Dakota intervened on behalf of the Bureau of Reclamation. Underlying the case is clear disagreement between the federal governments of the two countries as to the potential for transboundary pollution harm as a result of a project. Putting aside the merits of the dispute (which favor Canada according to the district court's ruling), the case raised two important legal issues regarding the ability of Manitoba to pursue this strategy.

First, the United States sought to dismiss the suit by claiming that the issue was a nonjusticiable political question because it involved obligations under the Boundary Waters Treaty with Canada. While the district court recognized that the NAWS project may involve consideration of treaty obligations, it rejected the Bureau's argument that the existence of treaty obligations makes the issue nonjusticiable. The court recognized that the parties may have multiple legal avenues available to secure rights and enforce obligations. According to the court, the existence of treaty obligations in no way precludes seeking redress under domestic law.

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Second, the United States argued that NEPA does not apply extraterritorially (outside the borders of the United States). There is a presumption against extraterritoriality for U.S. laws, in part to preserve the sovereignty of other nations—an ironic argument to use when it is another nation seeking to enforce the U.S. law. In this case, however, the alleged procedural NEPA violation actually occurred in the United States when the federal defendants decided not to prepare an EIS. Furthermore, as is the case with most transboundary pollution issues, much of the harm would actually occur in both countries, albeit disproportionally in Canada. Thus, the court dismissed the extraterritoriality argument, instead deciding the case under a traditional NEPA analysis.

The case is on appeal before the D.C. Circuit Court but for now it appears that using domestic litigation worked, at least as it relates to this specific project. The federal defendants' legal arguments were rejected, allowing the case to be presented on the merits of the NEPA claim. Citing the potentially devastating impacts of biological pollution, the district court eventually ordered an injunction against further construction of the project until additional studies are performed pursuant to NEPA.

The second case brings us back to the same Trail Smelter plant discussed above. The current dispute is over the hundreds of thousands of tons of slag (the waste material that comes from the metal smelting and refining process) that the Trail Smelter plant dumped into the Columbia River annually from the early 1900s until 1995, when it discontinued the dumping. The dumping occurred about ten river miles north of the international border and Washington State. The plant is owned by Teck Cominco Metals, Ltd., a Canadian corporation. It is one of the world's largest zinc and lead refining facilities. It is also a tremendous source of toxic pollution and waste. According to one report, in 1994 and 1995 the copper and zinc discharges from Trail Smelter exceeded the cumulative total for all U.S. companies, and in recent years its annual mercury discharges were equivalent to as much as 57 percent of all U.S. releases into water.

Not surprisingly, these toxic releases have made their way ten miles down the Columbia River and into the United States. The upper Columbia River and connected Lake Roosevelt are now seriously contaminated. Even the beaches contain toxic sediments that can blow in the wind and migrate throughout the area. The area is home to the Confederated Tribes of the Colville Reservation, a federally recognized Native American tribe. The Confederated Tribes petitioned the U.S. Environmental Protection Agency (EPA) to study the area, and the EPA's investigation led to the site's placement on the National Priorities List for cleanup. EPA determined that Teck Cominco was responsible for the contamination under the U.S. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). After negotiations between EPA and Teck Cominco broke down, EPA issued a unilateral administrative order to Teck Cominco for remedial investigation in December 2003.

Teck Cominco quickly responded to EPA's order by disputing EPA's jurisdiction to assert U.S. law on a Canadian corporation. The next month, two members of the Confederated Tribes of the Colville Reservation sued Teck Cominco in U.S. district court pursuant to CERCLA's citizen suit provision, seeking to enforce the EPA order. *See Pakootas v. Teck Cominco Metals, Ltd.*, 59 Env't Rep. Cas. (BNA) 1870, 35 Envtl. L. Rep. (Envtl. Law Inst.) 20,083 (E.D. Wash. Nov. 8, 2004). The state of Washington intervened on behalf of the plaintiff tribal members.

The merits of the CERCLA case are not relevant to this discussion (they are discussed in detail in two other articles in this issue), although the magnitude of the trans-

boundary pollution at issue is staggering. Regardless of the environmental merits of the case, the United States federal government encouraged a unilateral approach to addressing the dispute. The United States could have coordinated the work of EPA with the State Department, referring the matter to the International Joint Commission. Perhaps another binding arbitration process could have been created to determine liability and damages. Instead, EPA paved the way for private litigation against Teck Cominco to enforce EPA's aptly named unilateral administrative order.

Teck Cominco moved to dismiss the claim for lack of jurisdiction and failure to state a claim upon which relief can be granted, essentially arguing that CERCLA does not apply to a Canadian corporation for actions that occur in Canada. The district court first addressed its personal jurisdiction over Teck Cominco. The court found that Teck Cominco's intentional dumping of slag, which it knew would migrate and cause significant harm to Washington State and its citizens, was sufficient to establish specific, limited personal jurisdiction for purposes of the CERCLA claim.

The district court then addressed the extraterritorial application of CERCLA. The court acknowledged the plaintiffs' argument that the case did not even require an extraterritorial application of CERCLA because the toxic contamination occurred in the United States. The court chose, however, not to rely on this "legal fiction," and instead treated the matter as an extraterritorial application. The court recognized the presumption against extraterritorial application of U.S. laws, qualified by the principle that the presumption does not apply where conduct in a foreign country produces an adverse effect within the United States. Further, the court found that Congress clearly intended CERCLA to provide for cleanup of hazardous substances at sites within the United States, with no mention of the source of the contamination. On these bases, the court determined that application of CERCLA to Teck Cominco was warranted.

The court recognized the significance of the underlying legal issue, and certified the case for immediate appeal before the Ninth Circuit. As of this writing, a ruling from the Ninth Circuit is expected in 2006. While the United States has not been a party to the case, EPA has already made clear its position that it has the authority to enforce CERCLA on a Canadian corporation. Whether the United States will take this position in the upcoming appeals is not known. [As this issue was going to press, EPA reached a settlement with Teck Cominco on issues regarding investigation, and the Ninth Circuit Court of Appeals affirmed the district court and held that CERCLA applies in this dispute to Teck Cominco.]

The United States appears to be increasingly turning its back on bilateral cooperation and instead taking a unilateral approach to transboundary pollution disputes with Canada. While this approach may undermine future diplomatic efforts, it seems to be a fair and efficient way of resolving the disputes at hand. As the two cases demonstrate, U.S. courts are willing to exercise jurisdiction, apply U.S. environmental laws extraterritorially, and wade into disputes that could be resolved through negotiation and arbitration under international treaties. Further, where the merits of the case favor the transboundary pollution plaintiff, U.S. environmental laws provide relatively strong mechanisms for protection and third-party enforcement.

The ability of a Canadian province to put a stop to a potentially harmful U.S. project, and of U.S. tribal members to force a Canadian corporation to clean up its transboundary toxic mess, could be fairly viewed as a triumph of U.S. environmental law, third-party enforcement, and the effectiveness of the American judicial system in resolving contentious disputes. In these cases, the U.S. environmental statutes are working just as Congress intended, opening the doors to the courthouse to any plaintiff seeking to enforce environmental protections through informed decision-making and the polluter-pays principle. Further, as a substantive matter, the U.S. laws at issue in these cases are clearly consistent with customary international environmental law. Both NEPA's environmental impact statement requirement and CERCLA's polluter-pays liability scheme were expressly adopted as guiding principles in the Rio Declaration on Environment and Development of 1992.

Ideally, we could allow domestic litigation to resolve these disputes in a way that strengthens, not undermines, the United States–Canada relationship. The countries could take a more systematic and structured approach to resolving transboundary pollution disputes. At a minimum, the decision to use domestic courts to resolve international transboundary pollution disputes should be made consciously by the two federal governments. One option is for the United States and Canada to revisit the proposed Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution, which was prepared by a joint working group of the American and Canadian Bar Associations and recommended to both national governments in 1979. This would create a level playing field for judicial access to resolve transboundary pollution disputes. Similarly, the governments could request that the International Joint Commission study this new trend and its implications for transboundary environmental protection. If going to court efficiently resolves disputes, and effectively protects the shared environment, then the federal governments may wish to formally encourage it.

These issues are just beginning to develop, and even the cases discussed above are far from over. The disputes discussed above are very significant, but the stakes are even greater. One of the world's most important bilateral relationships and some of the world's most precious natural resources depend on fairly and effectively resolving these disputes and the many others that will continue to occur.