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International Joint Commission and Changing Canada-United States Boundary Relations, The

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INTRODUCTION

The Boundary Waters Treaty[1] and the International Joint Commission (IJC) were the product of conditions along the Canada–United States boundary in the late nineteenth and early twentieth centuries. In response to changing bilateral issues and concerns, the IJC has evolved and established an international reputation as an innovative model for dealing with transboundary water and environmental problems. As the twentieth century comes to an end, environmental issues are climbing to the top of the political agenda and with them demands for political and institutional change. For example, the Great Lakes Water Quality Agreement[2] calls for ecosystem management for the jurisdictionally complex international basin. Governments at both the domestic and international level are having to respond institutionally to concepts like "sustainable development," and problems such as ozone depletion, biodiversity and global warming. What can the IJC contribute? Has it got what it takes to be useful in the twenty-first century? To prepare, should we leave the IJC and the Boundary Waters Treaty as is, tinker a little with them, propose a major overhaul, or should we junk them and start afresh with new institutions and arrangements?

Much has been written on the IJC and how it might be reformed to fulfill its potential.[3] This paper does not detail the various reform pro-

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1. Treaty Relating to Boundary Waters between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2449.

2. Great Lakes Water Quality Agreement of 1978, Nov. 22, 1978, U.S.-Can., 30 U.S.T. 1384 [hereinafter Agreement of 1978]; Protocol to Amend the Great Lakes Water Quality Agreement of 1978, Nov. 18, 1987, Can.-U.S., 1987 Can. T.S. No. 32 [hereinafter Protocol of 1987]. The consolidated version with the 1987 Protocol can be found in Revised Great Lakes Water Quality Agreement of 1978 (IJC ed., 1978) (consolidated by the IJC).

3. For a good, succinct discussion of various reforms, see D. Munton, *Paradoxes and Prospects, in* The International Joint Commission Seventy Years On 64–81 (R. Spencer et al. eds., 1981).

posals or assess their merits. Instead, it sets a framework for discussion to outline the role the IJC has had in bilateral relations, factors limiting that role, new opportunities, and other considerations for reform. The objective is good bilateral resource management, which encompasses environmental quality and good bilateral relations. In this context, international institutions are of interest to the extent that they facilitate boundary water management. Any examination, however, of a single institution, like the IJC, must be seen within the total array of domestic and international institutional arrangements that delivers good transboundary resource management.

What are we looking for in good transboundary resource management apart from nondegradation of shared resources and maintenance of good bilateral relations? Criteria for assessing boundary management include *efficiency.* The governments should be able to solve in a timely and efficient manner transboundary resource and environmental problems. Ideally, the artificial line dividing the countries should not hinder the achievement of outcomes that could be attained within a single jurisdiction. Realistically, ideal technical solutions will be compromised by political considerations. Efficiency will be tempered by issues of international and domestic *equity.* There is a growing body of international law to suggest how equity can be defined for international water and environmental issues.[4] For democratic countries, domestic equity requires accommodation of contending political, economic and other interests. Institutional arrangements must therefore be *responsive to public* concerns and interests. They must also be *politically accountable* to the public that will be affected by actions taken. An underlying consideration for both efficiency and equity concerns will be the provision of good *information* to inform governments and the public of emerging problems and opportunities, the nature of the problems, the options for solving them, the costs and benefits and how they will be distributed between and within the countries and, where there is agreement on international action, evaluation of the progress being made and the problems encountered.

Two further criteria are central in any discussion of international arrangements: sovereignty and territorial integrity. Common institutional arrangements must lead to some lessening of both. National governments concede erosion of sovereignty and territorial integrity only reluctantly. On the other hand, there is a growing constituency impatient with governments and boundary lines. This constituency emphasizes criteria that take the environment and the maintenance of its quality as the organizational

4. *See, e.g., International Law Commission's Draft Treaty on Non-navigational Uses of International Watercourses, in* International Law Commission: Report on the Work of Its Forty-Third Session, Apr. 29–July 19, 1991, U.N. GAOR, 43d Sess., Supp. No. 10, at 46, U.N. DOC. A/46/10 (1991).

and political imperative. For example, Greenpeace demanded in 1989 that the "two federal governments restructure the IJC and invest in it the sole authority responsible for ecosystem management of the Great Lakes basin."[5] Calls for supranational institutions reflect the more radical end of a functionalist tradition in international relations and in interjurisdictional water and other environmental issues that seeks to depoliticize many international problems by treating them as technical issues. This tradition, stressing effectiveness and efficiency, sees transboundary resource problems in the context of natural systems–river basins, watersheds, hydrologic systems, airsheds, ecosystems. Solutions to these problems are seen to require the application of the technical analysis of engineers, lawyers, economists and other specialists. Organizationally, form should follow function. Prior rules and constitutions interfere with creation of the appropriate form and "embarrass the working of these arrangements."[6] The political dimension is neglected. However, when political leaders fail to accept the recommended technical solutions, they will be accused of lacking the "political will" to accept them.

Without question, technical matters are critical and the commitment of political leaders to put aside sovereignty, territorial integrity, and other political preoccupations to support cooperative endeavors is essential. But if new functional arrangements are to be effective they will have major distributive and redistributive impacts.[7] Moreover, they can alter the relative power relationships among the participating states by making one dependent on another and by benefiting one disproportionately to the other. Therefore, discussions on better management techniques and capabilities should be situated in a political context to engage the legitimate concerns of national governments and the interests they represent. To be relevant, attention must be paid to the "low politics" of reconciling technical possibility with political realities of how governments work with their citizens and their neighbors.

Although there are demands for the commission to take on existing and new challenges, this paper shows that the IJC operates best within a fairly narrow range of issues, including boundary water project supervision, fact finding, and evaluation. Going beyond this range would likely result in failure. Nevertheless, as boundary environmental relations change from conflictual to more managerial, the IJC could productively take on an expanded role in evaluation and the provision of necessary information. The governments, however, are failing to make use of this potential.

5. Greenpeace, Water for Life: The Greenpeace Report on the State of the Great Lakes 4 (1989).

6. D. Mitrany, Working Peace System 35 (1943).

7. R. Harrison & M. Hodge, *Integration Theory, in* Approaches and Theory in International Relations 240 (T. Taylor ed., 1978).

THE BOUNDARY WATERS TREATY AND THE INTERNATIONAL JOINT COMMISSION

The Boundary Waters Treaty of 1909[8] and the IJC are rooted in the boundary water issues arising from a period of rapid economic and population growth and government preoccupations of the late nineteenth and early twentieth centuries.[9] Despite the fact that the Treaty and the IJC are designed for conditions far removed from present concerns, the IJC has endured and has evolved as a result of building on certain provisions of the Treaty, the uses the governments have found for it, and the reputation it has earned for itself.

In the early years of this century both governments saw the need for a permanent arrangement to replace the existing *ad hoc* commissions.[10] Great Britain still retained control over Canadian foreign policy and boundary issues were settled through an awkward Ottawa-London-Washington triangle. While Canadian politicians sought more direct and unfettered contact with Washington, they were unpracticed in diplomacy and uncertain whether they could deal on "an equal footing" with the United States. They wanted equal treatment and thought a judicial-style tribunal would be the best means to achieve it.[11] In the start of discussions on a boundary waters treaty, Canadian negotiators argued for creation of a commission with jurisdiction over all the waters potentially subject to international attention, that is boundary waters and tributary rivers and lakes flowing into them (including Lake Michigan).[12]

The American negotiators wanted a body to investigate boundary problems as they arose,[13] much like the International Waterways Com-

8. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1.

9. The two countries faced a number of transboundary problems: apportionment of the St. Mary River in the west for irrigation, power schemes affecting the flow over Niagara Falls, water level issues along the Minnesota-Ontario boundary and Lake Champlain, the Chicago diversion, and power proposals on the St. Mary River between Lake Superior and Lake Huron.

10. *See generally* L. Bloomfield & G. Fitzgerald, Boundary Waters Problems of Canada and the United States 10 (1958). For a compendium of documents on the history of the Treaty see S. Doc. 118, 85th Congress, 2d Sess., 6-62 (1958). For discussions of the negotiations and issues of the period see P. Neary, *Grey, Bryce, and the Settlement of Canadian-American Differences, 1905–1911*, 49 Can. Hist. Rev. 357–80 (1968); A. Gibbons, *Sir George Gibbons and the Boundary Waters Treaty of 1909*, 35 Can. Hist. Rev. 126 (1953); N. Dreisziger, *Dreams and Disappointment, in* The International Commission Seventy Years On, *supra* note 3.

11. Prime Minister Laurier argued for an impartial commission directed by agreed upon legal principles. *See* Gibbons, *supra* note 10, at 126.

12. See the first draft of the Treaty completed on September 24, 1907, in S. Doc. 118, *supra* note 10, at 15–21 (1958) (reflecting Canadian objectives). Prime Minister Laurier called this draft a "very happy solution of a very dangerous subject." *See* Neary, *supra* note 10, at 366.

13. The American view in favor of a strictly investigative body can be seen in the American draft of the Treaty completed January 25, 1908, and written by Clinton Anderson. *See* S. Doc. 118, *supra* note 10, at 21–22.

mission established in 1905, which preceded the IJC.[14] They opposed arrangements that might limit American sovereignty. The Harmon Doctrine[15] was prevalent in American thinking at that time. It advocated absolute territorial sovereignty to give the upstream country the right to use the water of a transboundary river in its territory without regard for downstream claims. The American government could be comfortable with the doctrine in its dealings with Mexico, where the United States is upstream on both the Rio Grande and Colorado rivers, but the doctrine was not so advantageous along the length of the Canada–United States border, where the United States was both upstream and downstream, sometimes on the same river.[16] The perceived reciprocal vulnerability worked against full application of the doctrine and provided the basis for the treaty.

Canada compromised by accepting in large part the territorial sovereignty argument, a narrowly construed definition of boundary waters, and the limited jurisdiction of the IJC. The United States compromised by accepting water use principles and authority for the IJC over certain boundary waters issues, and by accepting an arbitration function. Both countries agreed that each had a responsibility to account for the interests of the other when deciding upon some action that could affect the other. Little controversy surrounded the investigative functions of the IJC or the antipollution provision of the treaty. In domestic politics, the treaty was barely acceptable to both Canada and the United States.[17]

The Treaty

Navigation: The treaty states that "navigation of all navigable boundary waters shall forever continue free and open for the purposes of

14. See reports of the International Waterways Commission abstracted in S. Doc. 118, *supra* note 10, at 6–62.

15. In response to Mexican protests against diversions from the Rio Grande, Judson Harmon, U.S. Attorney General, said that "[t]he fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own Territory." 21 Op. Att'y Gen. 281–282 (1895). Much has been written on the Harmon Doctrine; for its application in Canada–United States relations see generally J. Austin, *Canadian–United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine*, 37 Can. B. Rev. 393–443 (1959).

16. Secretary of State Elihu Root did not feel that the issues being raised along the boundary gave the United States any particular advantage. See S. Doc. 118, *supra* note 10, at 7; *see also id.* at 15–21 (documenting criticisms by the United States of the first draft of the Treaty that reflected Canadian objectives).

17. To pass the Senate, the American side added a rider to the Treaty to protect "existing territorial and riparian rights." Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1; Prime Minister Laurier was moved to defend the Treaty in Parliament as the only practical solution since "the U.S. views were fixed and would not be persuaded of other interpretation." Parl. Deb., H.C. (Vol. 1) 911–12 (1910–1911); *see also* Dreisziger, *supra* note 10, at 19–20 (summarizing the compromises and difficulties in winning acceptance of the Treaty).

commerce to the inhabitants and to the ships, vessels, and boats of both countries equally. . . ."[18] Lake Michigan, though not defined as a boundary water, is open to navigation by Canadian vessels. Regulations and tolls for use of canals may be imposed, but they are to apply without discrimination to either country's vessels.[19]

Until power production and irrigation became important uses of water near the turn of the century, the principal focus of international water law had been on navigation rights. A strong impetus for a treaty was to secure navigation rights. Although during the negotiations the navigation issues were of less concern than other boundary water uses, navigation rights retain prominence in the treaty.

Boundary Waters: Boundary waters are defined as those "waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary . . . passes, including all bays, arms and inlets thereof. . . ."[20] Excluded are "tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or water flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."[21]

Canadian negotiators thought tributary waters, such as Lake Michigan, and transboundary rivers should be included in the definition of boundary waters.[22] Since that view did not prevail, the longest standing bilateral water issue, the Chicago Diversion, has been excluded from application of the Treaty.

The Great Lakes Water Quality Agreement retains the Treaty definition of boundary waters,[23] but it does provide in some circumstances for a much broader jurisdiction by including the concepts "Great Lakes Basin Ecosystem"[24] and "Great Lakes System."[25] These concepts include Lake Michigan.

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18. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. 1.

19. *Id.* at art. 1.

20. *Id.* at Preliminary Article.

21. *Id.*

22. *See* S. Doc. 118, *supra* note 10, at 13 (art. IV) (setting out the 1907 draft of the treaty favored by Canada).

23. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. I.

24. Agreement of 1978, *supra* note 2. The purpose of the Agreement is to "restore and maintain the chemical, physical and biological integrity of the waters of the Great Lakes Basin Ecosystem." *Id.* at art. II. The Great Lakes Basin Ecosystem is defined as meaning "the interacting components of air, land, water and living organisms, including humans, with the drainage basin of the St. Lawrence at or upstream from the point at which this river becomes the international boundary between Canada and the United States. . . ." *Id.* at art. I.

25. *Id.* at art. III (outlining general objectives for the Great Lakes Basin System). The Great Lakes Basin System is defined as meaning "all of the streams, rivers, lakes and other bodies of water that are within the drainage basin on the St. Lawrence River at or upstream from the point at which this river becomes the international boundary between Canada and the United States" *Id.* at art. I.

Territorial Sovereignty: The first part of Article II expresses in effect the Harmon Doctrine. It reserves for each party "the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters. . . ."[26]

Canadians found this the hardest clause to accept. It raised all their fears and suspicions about American intentions and exposed a large area of potential conflict without benefit of legal principles or an impartial arbitrator to restrain American water exploitation. To palliate Canadian fears, the right to unrestrained use by an upstream country on a transboundary river was qualified. First, it made upstream diversions open to redress from individuals or groups injured in the downstream country:

> but it is agreed that any interference with or diversion from their channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs. . . .[27]

Second, in keeping with the emphasis on navigation rights, the article adds that it is not intended that either state "surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary, the effect of which would be productive material injury to the navigation interests on its own side of the boundary."[28]

In practice Canada has come the closest to invoking the right. In the 1950s Canada as the upstream state on the Kootenay and Columbia rivers raised the possibility of unilateral diversion.[29] However, neither side has exercised the right and, as Bourne says, the right "is still alive to some extent in Canada, surviving but largely ignored when the time for making decisions is at hand."[30] The modifying provisions, however, do provide the right which Canada has used to protest the Chicago Diversion.[31]

The International Joint Commission: Article VII establishes the IJC with six Commissioners, three from each country and appointed by

26. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. II.

27. *Id.*

28. *Id.*

29. For a summary of the legal arguments see L. Johnson, *The Columbia Basin, in* The Law of International Drainage Basins 203–209 (A. Garretson et al. eds., 1967).

30. C. Bourne, International Law on Shared Fresh Water Resources (unpublished manuscript) (Professor Bourne is member of the University of British Columbia Faculty of Law).

31. M. Cohen, *The Regime of Boundary Waters—The Canadian–United States Experience*, 146(3) Recueil des Cours de Droit Int'l 251 (1975).

the Governor in Council (in effect the Prime Minister) and the President. Its jurisdiction covers all cases involving the use or obstruction or diversions for which approval is required, as set out in Articles III and IV.[32] A majority of the IJC can make decisions; where the vote is equally divided the governments will settle the issue themselves.[33]

Articles III and IV give the IJC its quasi-judicial function. Article III requires IJC approval and agreement of both governments for works causing obstructions or diversions affecting the natural level or flow of boundary waters. Exempted are joint government actions, navigation improvements undertaken by one country but not materially affecting the level or flow on the opposite side of the border, and ordinary use of boundary water for domestic and sanitary purposes.[34] Article IV extends the IJC approval requirement to obstructions downstream that raise the natural level of waters at the boundary.[35]

The principles upon which the IJC is to base its approvals are set out in Article VIII. Each side will have "equal and similar rights" in the use of boundary waters.[36] An order of precedence is set out for new water uses (existing uses not to be disturbed): domestic and sanitary purposes; navigation; and power and irrigation.[37] They reflect the interests of the time and thus are dated since they do not reflect more current interests in fisheries, recreation, wildlife, and environment generally.

The important investigative duties were accorded the IJC under Article IX. It is "authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect there to by the terms of reference."[38]

In line with the legal approach Canada favored, an arbitration function was given to the IJC. The United States was not enthusiastic but, to be conciliatory, Secretary of State Elihu Root accepted it while protecting United States' interests by making American participation in any submission subject to the "advice and consent of the Senate."[39] The IJC has never been called upon by the governments to arbitrate an issue; however, the 1991 Agreement on Air Quality does make provisions for use of the Article IX reference function or the Article X arbitration function as options for the settlement of disputes under the Agreement.[40]

32. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. VII.
33. *Id.* at art. VIII.
34. *Id.* at art. III.
35. *Id.* at art. IV.
36. *Id.* at art. VIII.
37. *Id.*
38. *Id.* at art. IX.
39. *Id.* at art. X.
40. Agreement on Air Quality, Mar. 13, 1991, U.S.-Can., 1991 Can. T.S. No. 3; Int'l Envt. Rep. (BNA) No. 31, at 701 (May 1991).

Special Arrangements: The Treaty also contains two special agreements. Article V permits the United States to divert 20,000 cubic feet per second of water at Niagara, and Canada may divert 36,000 cubic feet per second for power production.[41] The provisions remained in effect until a separate treaty was signed for the Niagara in 1950.[42] Article VI apportions the Milk and St. Mary rivers flowing between Alberta and Montana.[43] The IJC is to administer the apportionment.

Prohibition against Pollution: Article IV contains the pollution clause: "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."[44] The principle follows directly from the first draft of the treaty. The American negotiator, George Clinton, explained to Secretary of State Root that "it was inserted to take care of cases which are likely to arise in the future when the Northwest becomes more densely populated." He added: "perhaps the language is too strong." [45]

The article has proven to be important as a principle that establishes and promotes transboundary and environmental responsibilities. It has not, however, prevented serious pollution problems, particularly cumulative damage arising from innumerable incremental waste discharges. It has been more successful in influencing proposed projects that may have a transboundary pollution impact, or where there is a recognized pollution problem and a willingness to take remedial action. As "injury of health and property" is not defined, the IJC has often been called upon by the governments through the reference function to determine what constitutes pollution in the specific circumstances. For example, the IJC was called upon in 1975 to recommend measures that might be taken to ensure the Garrison Diversion Unit in North Dakota would not cause injury to health or property in Canada contrary to the provisions of Article IV.[46] In 1977 the IJC was asked to look at the transboundary water quality implications of the Saskatchewan Power Corporation's thermal power project and related coal mining.[47] Similarly in 1985 the IJC was asked to look at the proposed coal development on Cabin Creek in the Flathead basin of British Columbia for the possible water quality impacts downstream in the United States.[48]

41. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. V.

42. Treaty Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, U.S.-Can., 1 U.S.T. 694.

43. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. VI.

44. *Id.* at art. IV.

45. Letter from G. Clinton to E. Root, Sec. of State (Sept. 25, 1907), *reprinted in* S. Doc. 118, *supra* note 10, at 11.

46. Garrison Diversion Project, IJC Docket No. 101 (1975).

47. Poplar River Water Quality, IJC Docket No. 107 (1977).

48. Flathead River, IJC Docket No. 110 (1985).

The IJC

In practice, the IJC's independent quasi-judicial role for approvals give it an ongoing regulatory and surveillance function for works affecting boundary water levels. For investigations or references, the IJC is entirely at the service of the governments. The governments have, however, called upon the IJC to follow up its investigations with ongoing responsibilities for apportionment, monitoring, and evaluation.

The governments have given the IJC new responsibilities largely on the basis of the legitimacy it has acquired in the performance of its duties and on its impartiality. Its reputation for impartiality arises because the six commissioners seek consensus in making decisions and rarely split along national lines.[49] Unlike most boundary commissions, the IJC commissioners do not act under instruction of or as representatives of their governments. Of course, as citizens of their own countries, and often as former politicians or senior public servants, they bring to their tasks national prejudices and may caucus along national lines. Nevertheless, they are free from government control and meet as one body, which encourages a collegial approach to problem solving, as opposed to the negotiation approach characteristic of commissioners acting as agents of their governments.

Problem solving with no follow-up implementation authority makes the IJC's role largely advisory. As an adviser to governments the IJC must be politically astute. The governments can easily lose confidence if they receive politically unacceptable advice. Success therefore depends on appointment of qualified, capable, and politically perceptive commissioners. Over the years the governments have had a decidedly mixed record in appointing commissioners with those qualities and must take much of the responsibility where the performance of the IJC has been lackluster.

Approvals: When the IJC receives an Article III or IV application, it normally appoints a technical advisory board, usually of equal numbers of federal officials from both governments, but sometimes officials from state and provincial agencies. The boards act in a similar collegial manner as the IJC. Even though the members are officials of their governments, they are expected to act independently. This wearing of "two hats" applies to all IJC boards. The board's report forms the basis for the IJC's deliberations on the application. The IJC may hold public hearings before deciding to issue an order of approval and attached conditions. To follow up, the IJC will often appoint a control board (there are 10 currently)[50] to monitor

49. The IJC split on a 1948 reference regarding water use and apportionment of the Waterton and Belly rivers. *See* IJC Docket No. 57 (1948).

50. For a list of all IJC boards, see IJC, International Joint Commission Activities 1987–88 at App. 2 (1988).

the approved activity and to advise it on progress and on any needed changes.

To 1988, 61 of the IJC's 111 dockets, or issue files, concerned orders of approval.[51] They were for 32 different developments to construct and maintain dams, change water levels, divert or obstruct flows, and to improve existing works. Many of the orders build on or are amendments to previous applications. Of the 32 different developments, 20 are for dams, of which 14 are for hydroelectric power. There are, in addition, three references concerning hydro projects for a total of 17 hydro dams that have been or are still in operation in transboundary waters.[52] Many of the projects are small-scale or changes and extensions to previous applications. Orders of approval, however, do apply to major projects, like the 1952 St. Lawrence power application, and regulate many of the largest water bodies.[53] Lakes Ontario, Superior, Kootenay, and Rainy Lake all have dams at their outlets, which are regulated by IJC orders and supervised by IJC boards. Nevertheless, most of the applications are for small, single-use projects.

In the 1970s, under Canadian Chairman Maxwell Cohen, there were some efforts to define more fully the IJC's authority and to see how it might take on a more active role.[54] For example, since the St. Lawrence power application[55] in 1952, the IJC has reserved its jurisdiction in broad terms. The reservation gives the IJC jurisdiction to revise orders if the need arises and thus potential managerial power over the control of water levels. A number of orders of approval could be reconsidered in the light of new circumstances, such as changing requirements for hydroelectric power generation or unanticipated high or low water levels.

Revisions, however, open up the IJC to possible legal and political challenges. Revised orders could impose new costs on operators and could create a new pattern of benefits and costs among other riparians. In lake levels issues, particularly for the Great Lakes, the costs could be staggering. The IJC would need the governments' support and backing for any possible legal, political, and financial fallout.

References: References can in theory be submitted to the IJC by only one government,[56] but in practice they are submitted jointly. The IJC

51. *Id.* at App. 1.

52. *Id.*

53. St. Lawrence Power, IJC Docket No. 68 (1952).

54. The IJC hired legal consultants like Charles Bourne and M. H. Wershof to conduct reviews of the jurisprudence of the IJC. For a flavor of the range of discussions see IJC, Summary of the International Joint Commission Seminar on the International Joint Commission: Its Achievements, Needs and Potential (June 1974) (unpublished manuscript).

55. The Order of Approval states that "the Commission retains jurisdiction over the subject matter of the Application, and may . . . make such further Order or Orders relating thereto as may be necessary in the judgment of the Commission." IJC Docket No. 68, *supra* note 53.

56. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. IX.

has been given 49 references for such issues as regulation of levels and flows, water pollution, air pollution, river basin development studies, water apportionments, and other issues such as the problems of Point Roberts, Washington.[57] About two-thirds of the references are for either regulation of flows and levels or water pollution. References are more complex, time consuming, and require greater financial and manpower resources than orders of approval. They are dealt with in much the same manner as orders in that the IJC appoints an investigative board, made up mostly of officials from both countries, to conduct the studies. In recent decades, the IJC has investigated a number of multiple-use issues that have required consideration of a wide range of factual, technical, and policy issues.

Reference investigations may lead to ongoing follow-up by the IJC and its boards. The IJC has ongoing apportionment responsibilities in the prairies as a result of a 1948 reference, water surveillance responsibilities from water quality references for the St. Croix,[58] Rainy,[59] and Red rivers,[60] monitoring from air quality references in 1966[61] and 1975,[62] and monitoring and evaluation responsibilities under the Great Lakes Quality Agreement.[63]

Great Lakes: In recent decades the IJC has become increasingly drawn into Great Lakes issues: levels regulation and management, and air and water pollution. The Great Lakes focus of the IJC illustrates the increasingly complex nature of boundary issues and the institutional response necessary to deal with them.

Lake levels issues have led to a semipermanent investigative role beyond ongoing regulation of Lakes Superior and Ontario. The 1964 lake

57. Point Roberts: Socio-Economic Considerations, IJC Docket No. 92 (1972).

58. St. Croix River Use, Conservation, and Regulation, IJC Docket No. 71 (1955). The International Advisory Board of Control of Water Pollution—St. Croix River maintains continuing surveillance over boundary waters.

59. Rainy River and Lake of the Woods Pollution, IJC Docket No. 73 (1959). The International Rainy River Water Pollution Board carries out surveillance activities and reports on compliance with recommended objectives.

60. Red River Pollution, IJC Docket No. 81 (1964). The International Red River Pollution Board provides continuous surveillance of the water quality of the Red River at the international boundary.

61. Air Quality, IJC Docket No. 85 (1966). The International Air Quality Advisory Board reports to the IJC on air pollution problems from coast to coast.

62. Air Quality–Michigan and Ontario, IJC Docket No. 99 (1975). The International Michigan-Ontario Air Pollution Board was disbanded in 1983, but in 1988 the governments asked the Commission to recommence its work under the July 1975 reference to deal with the Detroit municipal solid waste combustion facility and other proposals to burn hazardous wastes. *See* Letter from J. Clark, Sec. of State for External Affairs to R. Koop, A/Sec. of the Canadian Section of the IJC (Sept. 30, 1988); Letter from R. Homme, A/Dep. Ass. Sec. European and Canadian Affairs to D. Chance, U.S. Sec. of the IJC (Sept. 30, 1988), *reprinted in* IJC Docket No. 57, *supra* note 49, at 60–63.

63. Great Lakes Water Quality Agreement, IJC Docket No. 200 (1972). *See also* Great Lakes Water Quality Agreement of 1972, Apr. 15, 1972, U.S.-Can., 23 U.S.T. 301, at art. IV (describing the duties of the IJC) [hereinafter Agreement of 1972].

levels reference, completed in 1976,[64] was followed by a 1977 reference to study Great Lakes Diversion and Consumptive Uses and Lake Erie Regulation.[65] In 1986 the IJC was once again asked to study high lake levels. Its interim report was submitted in 1988.[66]

The Commission's investigations into Great Lakes water quality have given it new responsibilities. The 1964 Great Lakes water quality reference[67] led to the 1972[68] and 1978[69] Great Lakes Water Quality Agreements and a 1987 Protocol to the 1978 Agreement.[70] The agreements greatly expanded responsibilities for the IJC. In fact, the IJC has become so focused on Great Lakes issues that there is a danger of its becoming thought of as a Great Lakes, rather than boundarywide, institution.

The Great Lakes Water Quality Agreements build on the obligation not to pollute boundary waters.[71] They define pollution in terms of general and specific water quality objectives[72] and call for specific remedial measures,[73] but allow each side–federal, provincial, and state authorities–to formulate its own program using its best efforts to meet the objectives.[74] For example, to meet phosphorous objectives, Canada restricted phosphorus in detergents while the United States favored phosphorus removal in treatment plants.

The agreements gave the IJC a central role in Great Lakes issues. It took on responsibilities for collecting, analyzing, and disseminating information supplied by the federal, state, and provincial governments on water quality and on the objectives and programs established under the agreements; providing advice and recommendations to those governments on water quality problems; and assisting in the coordination of the joint efforts to control pollution of boundary waters. To assist the IJC, the

64. IJC, Further Regulation of the Great Lakes (1976).

65. IJC, Diversions and Consumptive Uses (1985).

66. IJC, Interim Report, 1985–86 High Water Levels in the Great Lakes–St. Lawrence Basin (1988).

67. IJC, Report: Pollution of Lake Erie, Lake Ontario, and the International Section of the St. Lawrence River (1970).

68. Agreement of 1972, *supra* note 63.

69. Agreement of 1978, *supra* note 2.

70. *Id.*

71. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. IV. For a discussion of the provisions of the Agreements see National Research Council of the United States & the Royal Society of Canada, The Great Lakes Water Quality Agreement: An Evolving Instrument for Ecosystem Management 77–95 (1985); G. Francis, *Binational Cooperation for Great Lakes Water Quality: A Framework for the Groundwater Connection*, 65 Chi.-Kent L. Rev. 361–63 (1989).

72. Agreement of 1972, *supra* note 63, at art. II (stating general objectives of the Agreement of 1972) and art. III (stating specific objectives). *See also* Agreement of 1978, *supra* note 2, at art. III (stating general objectives of the Agreement of 1978) and art. IV (stating specific objectives).

73. *See* Agreement of 1972, *supra* note 63, at art. V; Agreement of 1978, *supra* note 2, at art. VI.

74. Agreement of 1972, *supra* note 63, at art. V; Agreement of 1978, *supra* note 2, at art. v. *See also* Francis, *supra* note 71, at 362.

Great Lakes Water Quality Board and the Science Advisory Board and a regional office in Windsor were established.[75]

The 1978 Agreement adopts a radical approach to boundary water quality, an approach the two governments are still trying to define in practice. Canada and the United States agreed to "restore and maintain the chemical, physical and biological integrity of the water of the Great Lakes Basin Ecosystem."[76] The governments also adopted a philosophy of zero discharge of toxic substances or a policy of "virtual elimination" of toxic wastes and the cleanup of conventional pollutants.[77]

The IJC is responsible for evaluating progress made in meeting the general and specific objectives of the Agreement.[78] The IJC is also charged with reporting every two years on the status of the quality of the water in the lakes.[79] In this role, the IJC can question the usefulness of the objectives using the latest information. It becomes the central mechanism for promoting the dynamism built into the Agreement.[80] The Agreement, however, restricts the IJC's control over the Regional Office in Windsor, a restriction that has prevented the IJC from developing an independent technical capability.[81] The 1987 Protocol to the 1978 Agreement[82] adopted the IJC's remedial action plan concept for improving water quality in polluted areas, or Areas of Concern, along with lakewide management plans for critical pollutants.[83] The Protocol added programs for abatement and reduction of nonpoint sources of pollution (Annex 13), pollution from contaminated sediment (Annex 14), airborne toxic substances (Annex 15), pollution from contaminated groundwater (Annex 16).[84]

The 1987 Protocol clarified the governments' views as to the growing and complex array of IJC Great Lakes responsibilities. It limited

75. The 1972 Agreement establishes the Great Lakes Water Quality Board, a Research Advisory Board and a regional office. *See* Agreement of 1972, *supra* note 63, at art. VIII. The 1978 Agreement establishes the Great Lakes Water Quality Board as the principal adviser to the IJC; the Great Lakes Science Advisory Board to replace the Research Advisory Board; and the Great Lakes Regional Office to support the boards and provide a public information service for the boards and the IJC. *See* Agreement of 1978, *supra* note 2, at art. VIII.

76. Agreement of 1978, *supra* note 2, at art. II.

77. *Id.* at art. III.

78. *Id.* at art. VII.

79. *Id.*

80. R. Robinson, International Environmental Diplomacy: The United States–Canadian Experience 12–14, Presented at the New Hampshire International Seminar (Sept. 18, 1987) (unpublished manuscript).

81. The Agreement of 1972 permits the IJC to establish a regional office to assist in the discharge of its functions under the Agreement. *See* Agreement of 1972, *supra* note 63, at art. VII. The Agreement of 1978 specifies the establishment of a regional office but restricts it to providing administrative support and technical assistance to the two Great Lakes Boards and a public information service for the programs and the IJC. *See* Agreement of 1978, *supra* note 2, at art. VIII. *See also* D. Munton, *Great Lakes Water Quality: A Study in Environmental Politics and Diplomacy, in* Resources and the Environment 171–172 (O. Dwivedi ed., 1980); Munton *supra* note 3, at 80–81.

82. Protocol of 1987, *supra* note 2.

83. *Id.* at Annex 2.

84. *Id.* at Annexes 13–16.

the IJC's task by reducing its coordination role in the management of day-to-day operation of projects. Instead, it must focus on its role as evaluator of the progress being made by the governments in implementing remedial action plans.[85]

Changing Role of the IJC: The nature of the IJC's work has changed greatly in the last 25 years. In the period from its inception to about 1950, the IJC dealt with many small and some major works affecting boundary water levels and flows. It also handled a number of apportionment issues and the important Trail Smelter air pollution case.[86] Many of the boundary waters have control works and, as a result, these types of issues have become less important, though the IJC retains an important continuing supervisory and surveillance role through its boards. For example, the IJC was engaged in five apportionment references in the West, but the last such reference was in 1948.[87] From the 1948 Souris-Red River reference the IJC has a standing invitation to investigate and apportion transboundary streams east of the Milk River drainage basin in Alberta up to and including the Red River. Apportionment studies of the Poplar River in the late 1970s were carried out under this standing invitation.[88]

For a time the two governments were interested in cooperative development of transboundary resources. The IJC made about nine investigations ranging from Passamaquoddy tidal power to integrated development of the Pembina River.[89] The most notable reference of this kind was for the Columbia River, completed in 1959;[90] it was also the only one

85. The IJC interpreted its role as defined in the Protocol by stating that it "expects the Parties . . . will assume greater responsibility for some tasks which previously fell to the Commission, due either to the Protocol itself or to the maturation of such functions as data coordination to a degree that the Commission neither needs to nor has sufficient resources to undertake." The IJC said it and its boards would reduce effort in the (1) development of objectives, including ecosystem objectives; (2) data quality assessment and its coordination; (3) ongoing coordination of monitoring and surveillance activities; and (4) adaptation and verification of discharge data from point and nonpoint sources to the extent that they are provided in a more suitable format by the jurisdictions. IJC Policy Statement on Its Approach to the Revised Great Lakes Water Quality Agreement (Sept. 14, 1988), *reprinted in*, IJC, Fourth Biennial Report under the Great Lakes Water Quality Agreement app. A at 57–59 (1989).

86. Trail Smelter Fumes, IJC Docket No. 25 (1928).

87. *See* Souris and Red River Apportionment, IJC Docket No. 58 (1948).

88. *See id. See also* IJC, Water Apportionment in the Poplar River Basin (1978).

89. St. Lawrence River Navigation and Power, IJC Docket No. 17 (1920); 1929 Roseau River Drainage, IJC Docket No. 26 (1929); Champlain Waterway, IJC Docket No. 37 (1936) and IJC Docket No. 77 (1962); 1944 Columbia River Development, IJC Docket No. 51 (1944); Passamaquoddy Tidal Power, IJC Docket No. 60 (1948) and IJC Docket No. 72 (1956); St. John River Development, IJC Docket No. 63 (1956); Pembina River Development, IJC Docket No. 76 (1962).

90. *See* Columbia River, IJC Docket No. 51 (1944). *See also* IJC, Report of the IJC on Principles for Determining and Apportioning Benefits from Cooperative Use of Storage of Waters and Electrical Interconnection within the Columbia River System (1959), *reprinted in* The Columbia River Treaty Protocol and Related Documents (Dep't of External Affairs et al. eds., 1964); Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Sept. 16, 1961, U.S.-Can., 15 U.S.T. 1555.

that culminated in any actual development. The era of "great works" peaked in the 1950s, and since 1962 there have been no further development references. There are, however, cooperative projects without direct IJC involvement, such as the Rafferty-Alameda dams in the Souris basin in Saskatchewan, which provide flood protection to North Dakota,[91] and similar dams on the St. Mary River in Alberta may be developed in coming years.

The prohibition against pollution in the Boundary Waters Treaty has a positive effect on the planning of projects located near the boundary. All levels of government recognize the obligation not to permit projects that cause transboundary pollution. They may disagree, however, on what constitutes pollution and on what the impacts of a project located near the boundary might be. For example, the Flathead case contrasted the American desire for pristine water quality in this wilderness area, in effect demanding no development upstream, against the Canadian insistence on its right to develop its upstream coal resources subject to meeting reasonable quality standards at the border.[92] The IJC was asked to determine in 1985 the environmental impacts from such proposed projects.[93] The impacts are described in physical, biological, and social terms. References on similar projects related to pollution include in 1975, the reference to study the Garrison project in North Dakota[94] and in 1977 the reference to study the [Bipolar River] thermal power plant in Saskatchewan.[95]

In line with popular and government concerns and current boundary water issues, the IJC has developed an environmental orientation that contrasts with the largely engineering and legal outlook of the early years. Some environmental groups would like the IJC to evolve further into a role as the guardian of the transboundary environment.[96] The governments, however, have shown only limited enthusiasm. The 1987 Great Lakes Agreement Protocol limited the role of the IJC to monitoring and evaluating through its biennial reports.[97] More explicit management roles through coordination were withdrawn. Apart from the Great Lakes the governments have not been turning to the IJC to investigate common problems. From 1977 to 1991 the governments, acting on American initiatives, have asked the IJC to conduct only two investigations: the 1985 ref-

91. Agreement on Water Supply and Flood Control in the Souris Basin (with Annexes and Canada/Saskatchewan Agreement), Oct. 26, 1989, Can.-U.S., 1989 Can. T.S. No. 36.

92. *See* D. LeMarquand, *Preconditions to Cooperation in Canada-U.S. Boundary Waters*, 26 Nat. Res. J. 221, 226 (1986); *see also* J. Carroll, Environmental Diplomacy: An Examination and a Perspective of Canadian-U.S. Transboundary Environmental Relations 163–68 (1983).

93. *See* IJC, Impacts of a Proposed Coal Mine in the Flathead River Basin 15–16 (1988) (*Terms of Reference*).

94. Garrison Diversion Project, IJC Docket No. 101 (1975).

95. Poplar River Water Quality, IJC Docket No. 107 (1977).

96. *See* Munton, *supra* note 3.

97. Protocol of 1987, *supra* note 2, at art. VII.

erence for the Flathead River coal developments[98] and the 1986 Great Lakes Levels reference.[99]

In 1991 the IJC was given a reference under the 1991 Agreement on Air Quality.[100] Its role is much more limited than under the 1978 Great Lakes Water Quality Agreement. A bilateral Air Quality Committee, established under the Agreement, is to report on the progress in meeting the general and specific objectives of the Agreement, but, unlike the Great Lakes Water Quality Board, this Committee is totally independent of the IJC. It reports directly to the federal governments. The IJC is instructed only to invite comments on the Air Quality Committee report and submit a synthesis or record of those comments to the governments.[101]

The general government disinterest in further expanding the role of the IJC can be traced to the mid and late 1970s when an activist IJC attempted to have its responsibilities increased and its jurisdiction broadened through direct proposals and interpretation of the Boundary Waters Treaty.[102] In 1976 the IJC, in looking at construction of an ice boom on the St. Marys River entirely within the United States, claimed a right under Article III to be consulted on matters it thought fell within its jurisdiction under the Boundary Waters Treaty. The IJC did not want to be dependent on one country's interpretation of whether the impact of the work was such that the IJC should be consulted.[103] The governments responded that "no state may be subjected to the jurisdiction of an international organization without its consent."[104]

In the same year, the IJC, in response to the late stage at which it was given a role to investigate the Garrison Diversion Project in North Dakota and the Poplar River thermal power plant in Saskatchewan, recommended to the government more formal provisions for "prior notice and consultation," in line with the 1972 Stockholm Principles.[105] The governments bridled at the presumption and responded that the principle was well accepted in Canada–United States relations; the governments would "call upon the Commission for assistance on appropriate occasions."[106]

98. Flathead River, IJC Docket No. 110 (1985).

99. Great Lakes Levels, IJC Docket No. 111 (1986).

100. Agreement on Air Quality, *supra* note 40.

101. *Id.* at art. IX.

102. Munton, *supra* note 3, at 76–81.

103. *See* Letter from D. Chance, Sec. of the Canadian Section of the IJC, to A. MacEachen, Sec. of State for External Affairs (Jan. 20, 1976), *reprinted in* IJC, 1976 Annual Report 45–47 (1977).

104. *See* Letter from Acting Under-Sec. of State for External Affairs to D. Chance, Sec. of the Canadian Section of the IJC (July 20, 1976), *reprinted in* IJC, *supra* note 103, at 47–49.

105. *See* Letter from D. Chance, Sec. of the Canadian Section of the IJC, to A. MacEachen, Sec. of State for External Affairs (Feb. 13, 1976), *reprinted in* IJC, *supra* note 103, at 39–41.

106. *See* Letter from A. MacEachen, Sec. of State for External Affairs, to D. Chance, Sec. of the Canadian Section of the IJC (July 12, 1976), *reprinted in* IJC, *supra* note 103, at 41–43.

The IJC also received a beating on its plans for its Windsor Regional Office. The office had been set up under the 1972 Water Quality Agreement to support the work of the IJC and its Great Lakes boards.[107] The IJC saw the office as giving it the backup for engaging in independent surveillance and monitoring.[108] The American side, in particular, took offense at this and recommended that the office be "disestablished."[109] In the end, the office was removed from direct authority of the IJC, retaining only public relations matters. One Canadian Commissioner, Keith Henry, saw this as "a disguised but effective emasculation of the IJC." [110] The ability of the IJC to free itself, through use of the Regional Office resources, from dependence on its boards for technical advice was lost.[111]

These activist initiatives along with governments' frustration at the length of time the IJC took to complete its investigations shook the governments' confidence in the IJC. The United States had never given the IJC as much consideration as Canada had done in terms of the resources or using it strategically to solve bilateral problems to domestic advantage. Indicative of the limited view of IJC is the comment of an American diplomat that the IJC plays a small but significant role in bilateral relations; in short, a fine institution whose usefulness should not be exaggerated.[112] Although Canada, as the smaller power, had traditionally found the IJC a useful balancing mechanism, the Canadian government confidence in the IJC was on increasingly shaky ground as Canada lost confidence in bilateral institutional mechanisms as the best means of dealing with the United States. In the postwar period, External Affairs became increasingly preoccupied with Canada's relations with the United States. Former Canadian Ambassador to the United States, Allan Gotlieb, describes the view:

> the best method for getting along with our sprawling, unpredictable and sometimes insensitive neighbor was to follow the diplomatic way. In other words, the relationship was best managed by utilizing diplomatic skills, maintaining maximum control over our own negotiating position and, above all, not relying on intermediation in any form other than in the most exceptionable circumstances.[113]

107. Agreement of 1972, *supra* note 63, at art. VII.
108. Munton, *supra* note 3, at 80; *see also* Munton, *supra* note 81, at 171–72.
109. Munton, *supra* note 3, at 80.
110. Munton, *supra* note 3, at 89 (quoting K. Henry).
111. *Id.* at 80.
112. LeMarquand, *supra* note 92, at 238.
113. A. Gotlieb, The United States in Canadian Foreign Policy, Presented at the O. D. Skelton Memorial Lecture 12 (Dec. 10, 1991) (unpublished manuscript, on file with the Dep't of External Affairs, Ottawa).

Gotlieb also noted the External Affairs prejudice against international lawyers and law, saying few Canadian diplomats "thought international law of much use when the task was to be flexible and seek compromises, build bridges, or find middle ground toward which others could move."[114] As a result "virtually all attempts to create bilateral institutions in the North American context were stillborn or aborted or faded after some initial use. Even recourse to the historic International Joint Commission declined significantly."[115] In the negotiations for the Boundary Waters Treaty, Canada sought to achieve "equal footing" with the United States. Gotlieb, however, observed that in the last 30 years "the failure of successive Canadian diplomats to warm to the idea that Canadian interests could be protected by an equal voice in a bilateral institution."[116] He quoted Canadian diplomat John Holmes: "The assumption was not questioned that joint mechanisms tend towards integration.'"[117]

The lack of government attention given to the IJC in recent years with its consequent perceived malaise raises the question of whether governments will restore it to a more favored role. As is apparent from the 1991 Air Quality Agreement, the governments still have little interest in seeing the IJC regain the profile it used to have in bilateral relations or take on any of the new environmental challenges facing the two countries.

Strengths and Weakness: The strengths of the IJC flow from the collegial, independent approach and the reputation it has achieved. First, it performs useful administrative and quasi-judicial tasks in dealing with both minor and major boundary level issues. Of less importance now than when boundary water resources were being developed, the IJC relieves the governments of issues not well suited to normal bilateral negotiations.

Second, it has developed a reputation for impartiality that has earned it respect. Third, its impartiality serves it well in its fact-finding tasks, allowing it to serve as an *arbiter of fact*. The IJC provides a means of obtaining agreed upon and trusted technical and social data. Technical boards, usually composed of officials from both sides of the border, sort out the technical issues and come to an agreed upon basis of fact. In international environmental and resource issues, agreed upon facts are the essential first step in reaching agreement. The IJC studies give each side the confidence to deal with the other's proposals without being sidetracked by endless debates about facts, effects, and opportunities. It establishes a common factual and technical base between the governments, the essential first step in successful negotiations. Fourth, its impartiality helps it serve as a mediator of policy, bringing an international and, increasingly,

114. *Id.* at 13.
115. *Id.*
116. *Id.* at 13–14.
117. *Id.* at 14.

an environmental perspective to consideration of national policies and practices. Its impartiality, fact finding, and policy development strengths give the IJC an important information generation role.

Fifth, in the process of mediation, the IJC serves to facilitate consensus among governments. The informal network spawned by the IJC through its reference boards, boards of control, and other institutional mechanisms (called in the Great Lakes context the "invisible college")[118] creates among senior water managers a shared experience in dealing with boundary problems and a basis for governments subsequently to accept the advice of the IJC.

Sixth, the IJC is adaptable and flexible, being able to put its energies to issues as diverse as Passamaquoddy tidal power and Great Lakes ecosystem management. Seventh, the IJC has proven itself as an independent and successful problem-solving facilitator. The most noteworthy instance was in bringing together the City of Seattle and the Province of British Columbia to negotiate the 1984 settlement to the long-standing political problem of Seattle's right under a 1942 order of approval to raise the High Ross Dam and thus flood valued recreation land in British Columbia.[119]

The IJC's weakness is more problematic and depends on one's point of view on what it should be accomplishing. Generally we can say, however, that its major problem is the fragility of its advisory role. The effectiveness of this role depends on the governments' confidence in the IJC. The governments are its clients and if it cannot serve the clients through provision of good, timely, and cost-effective advice, it will not be used. Unwelcome recommendations or impolitic actions can easily undermine the governments' confidence in the IJC. Just as critical, an effective role also depends on the governments' agendas and where they see a use for it. If for political or other reasons the governments would rather deal with issues without the aid of a third party, the IJC will not be called upon.

Advocates of a stronger role for the IJC see weakness in a number of areas largely resulting from its dependence on governments. First, the IJC is dependent on the governments for secondment of technical personnel to serve on its boards and to provide technical advice. Secondment has advantages, mentioned above, but it also makes the IJC a victim of the government agencies' priorities in permitting the double duty of their officials and it gives the IJC no independent outside advice or expertise. Second, the IJC is dependent on the governments for budget and staff resources. The resources available are generally inadequate for it to buy or staff its own expertise. Third, it has little latitude in interpreting its own jurisdiction and responsibilities. Fourth, it cannot suggest references, that

118. T. Colborn et al., Great Lakes Great Legacy, 199 (1989).

119. J. Kirn & M. Marts, *The Skagit-High Ross Controversy: Negotiations and Settlement*, 26 Nat. Res. J. 261, 289 (1986).

is develop a "watchdog" role, or even negotiate the terms of reference for investigations. Fifth, the governments are under no obligation to accept IJC advice or even respond to the IJC on the advice rendered.[120] Sixth, the caliber of the Commissioners, and thus the IJC's reputation, is subject to rather hit-or-miss patronage appointments.

NICHE IN BOUNDARY RELATIONS

The focus of this discussion has been on the IJC. It has participated in many of the most critical transboundary issues of the last eighty years. In often complex and politically charged issues the IJC has sought out technical information and suggested solutions to achieve bilateral agreements. In 1975, the Canadian Senate report on relations with the United States commented: "the IJC is the oldest, is the most important, has the broadest mandate and the most notable record of achievement"[121] of any of the bilateral institutions. Nevertheless, it is evident the IJC's mandate is limited. It does not have an automatic role in every issue. For many of the most troublesome issues, the governments make use of the IJC's fact-finding talents at their discretion. In approaching issues like Niagara River toxic pollution and acid rain, which are issues riddled with the type of technical uncertainty the IJC handles well, the governments have turned away from the reference approach. For most bilateral issues, the IJC is not the vehicle of choice for the governments; they prefer to settle the issues through diplomatic means and *ad hoc* working group arrangements.

At any one time the bilateral agenda may be occupied with water quality problems such as groundwater contamination, seepage from toxic waste sites, acid precipitation, and the other myriad of point and nonpoint sources that affect water quality. Air quality issues may include sulfur dioxide, nitrogen oxides, ground level ozone, and long-range transportation of atmospheric pollution. Typically, a number of projects or proposed projects with possible boundary impacts will be on the agenda. Bilateral discussions may be under way for transboundary movements of hazardous wastes and contingency planning for environmental emergencies, such as oil spills and toxic releases. The siting for nuclear waste repositories and the construction and operation of nuclear power stations can cause concern across the border. Migratory fish and wildlife present another set of transboundary environmental issues, as does the manage-

120. GAO, GAO/NSTAD-89-164, Report to the Chairman, Comm. on Gov't Affairs, U.S. Senate, State Dep't Need to Reassess U.S. Participation in the International Joint Commission (June 1989).

121. Standing Senate (Canada) Comm. on Foreign Affairs, Canada–United States Relations: The Institutional Framework for the Relationship 40 (1975).

ment of marine resources such as fishing on Georges Banks. Trade-related environmental issues in the negotiation and implementation of free trade arrangements or for specific issues such as trade in lobsters, power and softwood lumber are another newer set.

Transboundary issues lie on a spectrum of international political interaction that ranges from outright opposition to common interest. Geopolitical characteristics of an issue produce incentives for one type of government policy. Domestic political issues and the general political milieu produce other pressures. In sum, they express each government's desire for cooperation and the constraints they face–that is, their political will. At most places along the spectrum contending pressures shape policy and influence if, when, and how the IJC will be used. Few issues are at the extreme opposition end of the spectrum, though issues in which damage or threat of damage is unidirectional fall toward this end of the spectrum. Nevertheless, when there is strong opposition from one country to actions being taken in the other, IJC advice will not be sought. If the IJC has been asked for advice in unidirectional damage issues, like the 1971 Skagit reference[122] and the Flathead case,[123] it is to assess impacts and propose mitigation measures. The governments restrict the scope of the IJC's investigations so that it cannot recommend that the offending project or source of damage be eliminated. The governments retained that right for themselves.

At the opposite end of the spectrum are issues of common interest, such as lake levels or integrated development. Here the IJC is permitted a broader mandate. Governments seek arrangements in which they can develop joint or compatible programs and policies for a common problem. In this search IJC advice can be invaluable. With general governmental agreement on what direction needs to be taken, the IJC has served as a forum and a catalyst for devising joint programs, development schemes, or patterns of regulation.

Transboundary issues often lie more toward the center of the spectrum than the geopolitical incentives suggest they would. Political opposition from interest groups, recognition of legal and environmental responsibilities, the work of transnational interest groups, the precedent-

122. IJC, Environmental and Ecological Consequences in Canada of Raising the Ross Dam in the Skagit Valley to Elevation 1725 (1971).

123. The IJC, however, in its 1988 report did recommend that the proposed Cabin Creek coal mining project not proceed as defined and be approved only if the potential impacts identified constituted a level of risk acceptable to both governments, if the impact on fish were fully mitigated, and if the government consider compatible, equitable, sustainable development activities in the upper Flathead River Basin. Economic conditions have put plans for the coal development on hold. The IJC recommendations raised issues of defining art. IV anti-pollution provisions of the Boundary Waters Treaty to include the effect on fish, of dealing with differing standards of environmental quality between countries and of proposing approaches for reaching accommodation. The report was received by the governments with silence. *See* IJC, Impacts of a Proposed Coal Mine in the Flathead River Basin (1988).

setting effect of policy in one issue for existing or potential issues along the boundary, and other factors work to exaggerate or modify the grounds for agreement on any one issue.

The decision to use the IJC comes about only when both sides have a reciprocal interest in the IJC doing a study. The governments use the IJC in a number of different ways. First, it is used to provide recommendations for implementation or further negotiation of a joint policy, program or regulation scheme. For the most part, these references are for issues in which the two countries share a common interest, such as lake level regulation, pollution abatement in a shared resource, or integrated development.

Second, the IJC is used to work out the details of an implicit prior bilateral agreement. These references are for issues where there has been considerable bilateral opposition, such as projects concerning one directional damages. A major concession is made by the offending government in agreeing to a reference in the first place. The concession, however, does not permit an open-ended inquiry by the IJC. The terms of reference limit what the IJC can investigate and give some indication of what the IJC is expected to recommend. The terms of reference are in essence the tacit agreement. The governments, with agreement on the reference, can be fairly certain that the recommendations will be in line with what both sides are willing to accept. Unlike the first use in which the IJC sketches out an agreement for the governments to negotiate, the second uses the IJC to fill in the details of a prior agreement.

Third, the governments use the IJC to conduct studies when they have little interest in an issue but recognize some action should be taken. The IJC generates the ideas on what to do. Passamaquoddy tidal power, the plight of residents in Point Roberts, Washington, or perhaps the development of the Pembina are references of this kind. The issues are of regional concern and sufficiently low key so they raise little concern or enthusiasm in either national government. Thus, if the recommendations in the IJC's report are difficult to accept, there will be little political support to see them through to agreement and implementation. The reports are put aside and neglected.

Fourth, the governments may use the IJC to stall for time. For certain issues where there is a strong demand for action, the governments may not really be interested in the IJC making recommendations that would change the status quo. Thus, the terms of reference, as in the 1971 Skagit reference, will be so restrictive that the IJC cannot come up with much anyway. The intent of the reference is to put off the issue for a time to allow the government to consolidate its policy or await further developments; or, for issues like high lake levels, to buy time until the levels return to normal and the political pressure for action eases.

Fifth, the governments use the IJC to perform certain housekeeping duties. The approval function is foremost. It provides a process for dealing with works that change boundary water levels and an ongoing mechanism for supervising those works. But also, as discussed, the governments have, through references, given the IJC ongoing responsibilities for water apportionment and air and water quality monitoring. Monitoring provides needed ongoing collation of data. Monitoring of air quality along the boundary would seem to give the IJC an embryonic "watchdog" role, but the governments' rejection of a role for the IJC in "prior notice and consultation" has ensured that the function does not expand.

Sixth, the governments are using the IJC under the Great Lakes Water Quality Agreement, and in a much more restrictive sense under the 1991 Air Quality Agreement, as a program evaluator. The evaluation role provides an accountability mechanism for governments to indicate to the public the progress, or lack of it, being made under the bilateral agreements.

Conflict to Management in Relations

Bilateral boundary relations are changing along with new priorities on the environmental agenda. Once dominated by disputes and conflict resolution efforts, the agenda can now be more characterized as issue management. As complementary domestic regulatory regimes come into place, conflicts over differing objectives and perceptions of the problems are giving way to efforts to establish coordinated management approaches. The November 1990 United States Clean Air Act Amendments call for a 10 million ton reduction in sulfur dioxide emissions and a permanent cap at that reduced level of 14.6 million tons.[124] It is expected that these American efforts will cut transboundary flows into Canada by more than 50 percent by the year 2000.[125] The major irritant on the bilateral agenda for the last decade is now on the road to solution,[126] at least from the point of view of the two governments who signaled their common purpose by signing on March 13, 1991 an Air Quality Agreement.[127]

The Agreement formalizes each country's commitment to reducing acid rain pollutants. It provides a dispute settlement mechanism and a framework for developing initiatives to deal with other transboundary air

124. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title IV, 104 Stat. 2584.

125. Announced in 1985, the Canadian Acid Rain Control Program calls for the reduction of sulfur dioxide emissions to 2.3 million tonnes (2.6 million tons) in the seven easternmost provinces by 1994. This figure constitutes 50 percent of the 1980 levels. The Canadian federal Green Plan sets a domestic target of achieving agreement with the provinces to permanently cap national sulfur dioxide emissions from all provinces at no more than 3.2 million tonnes by the year 2000. *See* Gov't of Canada, Canada's Green Plan 120–121 (1990) (unpublished manuscript, available from Dep't of Supply and Services).

126. Canada complains that more than half the acid deposition in eastern Canada comes from the United States, and in some areas near the border U.S. contribution is over 75 percent.

127. Agreement on Air Quality, *supra* note 40.

pollution problems, such as ground level ozone, smog, and airborne toxic substances. Typically, it does not call for reduction in air pollution beyond what the governments have committed themselves to under domestic programs. The cap on sulfur dioxide goes no farther than that already set by the 1990 changes in the Clean Air Act (14.6 million tones) and in the 1985 Canadian Acid Rain Control program (3.2 million tonnes). The costs are estimated at $4.5 million annually in the United States or $18 per capita and $425 million or about $17 per capita in Canada.[128]

In the area of environmental assessments, recent court decisions in Canada[129] have greatly strengthened the federal environmental assessment review process for projects, and the government has introduced new legislation[130] to create a legal formal review process. Although the Canadian federal government has always had jurisdiction in assessing Canadian projects that have transboundary impacts, the changes will mean that American governments and citizens will have legal access to a Canadian domestic assessment process. More significantly, the Canadian legislation contains provisions for eventually institutionalizing some joint assessments.

Under the legislation, the Minister of the Environment and the Secretary of State for External Affairs may refer projects that may cause significant adverse environmental effects outside Canada to a review panel, or more creatively to a mediator. A foreign state may also may request the Minister of the Environment to refer the project to a mediator or a review panel.[131] Assessment of those effects must include examination of the environmental effects, including those from accidents and from cumulative damage, the significance of the effects, feasible mitigative measures, alternatives to the project, follow-up measures, and the capacity of the renewable resources affected to meet the needs of the present and those of the future.[132] There must be an opportunity for public involvement and the report must be published.[133] The remedy for foreign

128. Acid Rain: The Facts (unpublished Environment Canada pamphlet included in press package for the Acid Rain Agreement).

129. The courts ruled that the 1984 Environmental Assessment Review Process Guidelines Order-in-Council (SOR/84-467) is a regulation—not a nonbinding guideline as the government had contended. Therefore, the government is required to conduct assessments according to the Guidelines Order. *See* Can. Wildlife Fed'n v. Can. (Minister of the Env't), 3 F.C. 309 (T.D. 1989). *See also* Friends of the Oldman River Soc'y v. Can. (Minister of Transport), in [1992] 1 S.C.R. 3 decision from the Supreme Court of Canada, Jan. 23, 1991 (further clarifying federal assessment responsibilities by limiting government assessment responsibilities in cases of regulation to only those where "an affirmative regulatory duty" exists and by limiting the scope of assessments to areas of federal responsibility). This case was heard on appeal from a judgment of the Canadian federal Court of Appeal, Friends of the Oldman River Soc'y v. Can. (Minister of Transport), 2 F.C. 18 (C.A. 1990), *rev'g*, 1 F.C. 248 (T.D. 1989).

130. *E.g.*, Bill C-13, An Act to Establish a Federal Environmental Assessment Process, 3d Sess., 34th Parl. (1991), as passed by the House of Commons, Mar. 19, 1992.

131. *Id.* at art. 47(3.b).

132. *Id.* at art. 16.

133. Acid Rain: The Facts, *supra* note 128.

jurisdictions would give them a hearing but leave their concerns totally subject to the deliberations of a domestic Canadian process.

The Bill, however, does allow for international environmental impact assessments. Where a foreign government (including subsidiary levels of government and institutions) or an international organization of states has a responsibility or an authority to conduct an assessment of the environmental impact of a project, the Minister of the Environment and the Secretary of State for External Affairs may enter into an agreement for a joint panel review.[134] The IJC presumably could conduct an environmental assessment of projects within its jurisdiction, that is, projects in boundary waters that affect water levels.[135] The provision would not, however, appear to extend to transboundary impacts from projects located in Canada.

The Bill, nevertheless, should lead to earlier consideration of transboundary impacts for projects and some limited provision for environmental assessment of boundary water projects and projects that fall within the responsibilities or authorities of governments in both Canada and the United States. The Canadian government, however, has held back from taking the next step to provide a process for dealing automatically with projects that have a transboundary impact.

Despite the reticence of Canada to take the extra step to provide an international environmental assessment process, the political focus has shifted from one government's forcing recognition from the other that there is a problem. Now, more often, the governments recognize the problems and agree on the approach to deal with them. As in the Great Lakes or for acid rain, this does not mean a quick solution to environmental problems; it means only that the governments have an agreed framework for action. The interested public on both sides of the border may still question the framework objectives or the pace of the action. When this happens the governments join in defending their agreement and their actions under it. The result for transboundary environmental problems: people versus government conflicts are becoming more common than government versus government conflicts.

The Great Lakes have led the way. Traditionally interest groups work to influence one government to defend their interests against another. The creation of binational groups, like Great Lakes United and the Center for the Great Lakes, however, indicates a growing regionalization of public concern. Environmental groups criticize all governments–Canadian, American, provincial, state–for the slow pace of environmental remediation and achievement of bilateral ecosystem management goals.

134. Bill C-13, *supra* note 130, at art. 40

135. Treaty Relating to Boundary Waters between the United States and Canada, *supra* note 1, at art. III.

On the scientific and technical side, there has been a recognition of the value of bilateral approaches to common problems. The most notable examples include the studies of The National Research Council of the United States and the Royal Society of Canada: *The Great Lakes Water Quality Agreement: An Evolving Instrument for Ecosystem Management* (1985), the Conservation Foundation and the Institute for Research on Public Policy work published as *Great Lakes Great Legacy?* (1990)[136] and the National Wildlife Federation and the Canadian Institute for Environmental Law and Policy Report on the Great Lakes.[137]

Coalitions are also building at the state and provincial level in the form of voluntary agreements. The 1985 Great Lakes Charter was signed by all eight Great Lakes basin states and Ontario and Quebec to signal their intention to resist any proposals for the transfer of Great Lakes waters to more arid areas of the United States.[138] The 1986 Great Lakes Toxic Substances Control Agreement signed in 1986 by the eight Great Lakes states, and agreed to by Ontario and Quebec in 1988 in the form of a memorandum of understanding, commits the signatories to reducing toxic substances in the Great Lakes Basin.[139] A number of other water management agreements between states and provinces were concluded in the 1980s.[140]

The IJC itself has become the focus of criticism in this regionalization of public concern. The Great Lakes governors, for example, expressed frustration with the way the IJC had been operating.[141] They proposed reforms in the following areas: the means for dealing with diversions from the Great Lakes; the bilateral nature of the IJC and the consequent lack of a formal relationship with the states and provinces, particularly as regards issues in which they have the major jurisdictional responsibility; the lack of authority for the IJC to initiate a reference; the lack of responsiveness of the federal governments to IJC recommendations; the narrow scope of

136. Colborn, *supra* note 118.

137. *See* Globe and Mail (Canada), Feb. 2, 1991, at A5.

138. *Reprinted in* Great Lakes Governors Task Force, Council of Great Lakes Governors Final Report and Recommendations on Water Diversions and Great Lakes Institutions app. III (1985). *See also Great Lakes Charter*, 4 Great Lakes Rep. (1985); 8 Int'l Envtl. Rep. 100 (1985). Under the Charter, states and provinces have an obligation to provide prior notice and consultation for any increased diversion or consumptive use of Great Lakes waters exceeding 5 million gallons per day average in any 30-day period. It adopts an "ecosystem" approach similar to the 1978 Great Lakes Water Quality Agreement.

139. *See* Colborn, *supra* note 118, at 213.

140. *E.g.*, the 1986 St. Croix International Waterway Commission between New Brunswick and Maine; the 1989 Lake Memphramagog Environmental Agreement between Quebec and Vermont; the 1989 Saskatchewan-Montana Technical Group; the 1982 MOU between B.C. and Wash. Concerning the Replacement of the Zosel Dam; and the 1982 B.C.–Alaska Stikene-Iskut Rivers Information Exchange (list compiled by Environment Canada, Inland Waters Directorate).

141. Great Lakes Governors Task Force, *supra* note 138, at 33–34.

many of the references; and the length of time for the IJC to complete investigations.[142]

The managerial approach of the governments in favor of bilateral consensus and agreement on objectives present an opportunity for the IJC to pursue its evaluation function. With agreement on objectives and on the program, there is a need for an impartial bilateral body to evaluate the progress of the national, state, and provincial governments in implementing the programs. The evaluation process would serve the governments and the regional coalition of interest groups who need the information. In the process of evaluation the IJC could also provide public hearings as a means by which such groups could express their views on how well the governments are doing and on what more they should be doing.

The emerging managerial approach reflects the changing context of bilateral environmental relations. Boundary problems have often resisted solution because of differing political approaches to resource and environmental issues. As concern for the environment has grown, the scope has increased from local, regional, national, bilateral, and continental to global scales. Much more action is now under way at the international level to address issues that require multinational solutions.

The concerns over global pollution and environmental mismanagement have led to international efforts on climate change, ozone depletion, and loss of biodiversity. These result in international agreements that set targets and impose on the signatories obligations to introduce domestic measures. Recent years have seen the 1985 Montreal Guidelines for the Protection of the Marine Environment Against Land-Based Sources of Pollution;[143] the 1985 Helsinki Protocol to Control the Transboundary Flow of Sulphur Dioxide;[144] the 1985 Vienna Convention for the Protection of the Ozone Layer;[145] the follow-up 1987 Montreal Protocol on Substances that Deplete the Ozone Layer[146] (to reduce by 50 percent of 1986 levels by 1999) and the 1990 London Protocol to phase out CFCs by the year 2000;[147] and an ECE Convention on Environmental Impact Assessment in a Transboundary Context.[148] Major negotiations under way include an Economic Commission for Europe Protocol on VOC emissions to parallel the 1988

142. *Id.*

143. *Protection of the Marine Environment Against Pollution from Land-Based Sources (Montreal Guidelines 1985)*, 14 Envtl. Pol'y & L. 256–259 (1987).

144. *Protocol on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Percent* [July 8, 1985], Int'l Envtl. Rep. (BNA) No. 21, at 3021 (Mar. 1989) (entered into force Sept. 2, 1989).

145. *See 1985 Vienna Convention for the Protection of the Ozone Layer*, 14 Envtl. Pol'y & L. 72 (1985); Int'l Envtl. Rep. (BNA) No. 21, at 3101 (Jan. 1989) (entered into Sept. 22, 1988).

146. *Montreal Protocol on Substances That Deplete the Ozone Layer (Sept. 16, 1987)*, 17 Envtl. Pol'y & L. 256 (1987).

147. *1990 London Protocol, June 1990 in London*, Int'l Envtl. Rep. (BNA) No. 21, at 3151 (Mar. 1991).

148. *Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, (Espoo, Finland)*, (U.N. Doc. E/ECE/1250) (1991).

Nitrogen Oxide Protocol[149] freezing nitrogen oxides to 1987 levels; an ECE Convention on the Long Range Transport of Airborne Pollutants;[150] and framework Conventions on Climate Change[151] and Biodiversity[152] (both to be signed at the United Nations Conference on Environment and Development at Rio de Janeiro in June 1992).[153]

In the past, Canada would pursue multilateral initiatives to advance its priorities on the bilateral agenda, such as acid rain. As Allan Gotlieb, the former Canadian Ambassador to the United States, said, "We persistently sought international sanction, in the form of new rules, for actions that were strongly opposed by and largely directed against the United States."[154] Now, more environmental bilateral action is taken up with international initiatives unrelated to boundary problems. Canada is, in addition, giving greater emphasis to environmental bilateral agreements with countries other than the United States, such as Mexico[155] and the former Soviet Union.[156]

Of growing importance internationally and bilaterally is the relationship between trade and the environment. For example, in September 1991 the General Agreement on Tariff and Trade Tribunal (GATT) ruled that the United States could not use its laws on dolphin protection in tuna fishing to block Mexican tuna imports.[157] GATT argued against the use of trade measures for environmental protection in a February 1992 report because this would reduce economic growth in poor exporting countries and thus their ability and willingness to pay for environmental improvements.[158] The Director General of GATT, Arthur Dunkel, warned "we must watch that the question of environment is not exploited by those

149. *1988 Protocol to the 1979 Convention on Long Range Transport of Air Pollutants Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, reprinted in*, 18 Envtl. Pol'y & L. 228 (1988); Int'l Envtl. Rep. (BNA) No. 21, at 3041 (Jan. 1991) (entered into force Feb. 14, 1991).

150. *1979 Geneva Convention on the Long Range Transport of Air Pollutants, Nov. 17, 1979*, Int'l Envtl. Rep. (BNA) No. 21, at 3001 (Nov. 1988) (entered into force Mar. 16, 1983).

151. See report on negotiating guidelines in 14 Int'l Envtl. Rep. (BNA) Current Reports, at 97 (Feb. 27, 1991); *see also* National Round Table on the Environment and the Economy, On the Road to Brazil 23–34 (1991).

152. National Round Table on the Environment and the Economy, *supra* note 151, at 69–78.

153. *See id.* (providing a general discussion of the issues).

154. Acid Rain: The Facts, *supra* note 128, at 8.

155. Agreement on Environmental Cooperation, Mar. 16, 1990, Can.-Mex., 1990 Can. T.S. No. 32.

156. Agreement on Environmental Cooperation, Nov. 20, 1989, Can.-U.S.S.R., 1989 Can. T.S. No. 24.

157. The GATT Panel reasoned that acceptance of U.S. arguments would mean that a country could ban imports based on differing environmental or health policies of the exporting country. Thus, the potential application of trade restrictions designed only to impose one country's standards on another could lead to protectionist abuses. The GATT Council has not considered the report because the two countries are addressing the issue bilaterally. GATT Secretariat, Trade and Environment 14–15 (Feb. 12, 1992); *see also* GATT Focus, Nov.–Dec. 1991, at 6 (newsletter).

158. GATT Secretariat, *supra* note 157, at 25.

who support commercial protectionism. If that happens, the world would suffer a double loss through a slow-down in growth of trade and application of inadequate or inefficient environmental policies."[159] From an environmental point of view, such a statement offers little assurance.

In negotiation of the Canada–United States Free Trade Agreement, the environmental impact of the Agreement was fiercely argued and has come to be a significant concern in consideration of the North American Free Trade Agreement. In the Canada–United States Free Trade Agreement, Canadians feared the loss of their ability to regulate the export or southward diversion of Canadian water resources. Legislation was introduced to ban large-scale exports or diversions and to regulate smaller tanker ones.[160] Although the legislation died on the order paper with the dissolution of Parliament for the 1988 Canadian federal election, the legislative initiative could be revived. More generally there was a perception that there would have to be a harmonization of environmental regulations to ensure no economic advantages and no "pollution havens." The fear was "downward harmonization." In the negotiations of the North American Free Trade Agreement among Canada, the United States and Mexico these concerns are even stronger, but shared by environmentalists in Canada and the United States. They are also shared by industry in these two countries, which fears lower environmental standards and less rigorous enforcement will give Mexico a comparative manufacturing advantage. Environmental concerns may be addressed by giving greater emphasis to multilateral environmental and conservation agreements with trade provisions, and use of bilateral environmental agreements, like the Canada-Mexico Agreement on Environmental Cooperation,[161] to achieve standards-related technical cooperation. There is no doubt the North American Free Trade Agreement will lead to a more regional North American approach to dealing with trade-related environmental issues and possibly to dealing with transboundary issues.

The conclusion of the Canada–United States Free Trade Agreement marked another significant change in bilateral relations: the rediscovery of bilateral dispute settlement mechanisms.[162] For Canada this was the most important feature of the Agreement because of the increasing concern about unilateral American trade actions against Canada and the fear of growing protectionist sentiment and policies in the United States. The fear was accentuated by growing concern over the fragmentation of political power in the United States and the recognition that traditional diplomatic approaches through the State Department and the White

159. Globe and Mail, *supra* note 137, at B6.

160. Bill C-156, *Canada Water Preservation Act*, 2nd Sess., 33d Parl. (Aug. 25, 1988) (first reading).

161. Agreement on Environmental Cooperation, *supra* note 155.

162. North American Fair Trade Agreement, at chs. XVIII and XIX (1991).

House no longer work. Canada has come full circle from the period of negotiation of the Boundary Waters Treaty by once again putting its faith in joint quasi-judicial tribunals to gain an "equal footing" with the United States.[163] In Canadian eyes the legitimacy of the Free Trade Agreement will depend on how well the trade dispute settlement mechanisms work. Ironically, in considering a free trade tribunal, the IJC was cited as a useful dispute resolution model.[164] If the Free Trade Agreement is extended to Mexico and beyond such forms of dispute settlement are certain to be central.

What will be the effect on bilateral environmental relations and the IJC from the increased focus on international environmental problems and the renewed interest in trade dispute settlement arrangements? The growing internationalization of environmental objectives and standards will not render transboundary issues academic. Multilateral agreement is often achieved on the basis of lowest common denominator consensus, which fails to address the specific concerns of neighboring countries where one has higher standards than the other. Also, there will always be local projects and issues in which environmental spillovers harm one side to the benefit of the other. As transboundary environmental project assessments become more formalized, in the spirit of the new trade settlement mechanisms, there may be increased willingness to see troublesome projects dealt with bilaterally or perhaps through use of the IJC at an earlier stage. There is reason to hope that the multilateral and trade solutions to environmental problems will facilitate more effective bilateral boundary management.

CONCLUSIONS

In Canada–United States relations, the usefulness of the IJC is based on the confidence that the governments have in it as their bilateral adviser and facilitator. Where governments for strategic or policy reasons prefer diplomatic approaches to institutional ones, the IJC will have little opportunity to prove itself. However, when it is called upon, confidence is achieved by the IJC striking an acceptable balance among conflicting national perspectives and the IJC's own unique international perspective. This requires sensitive political antennae, technical competence, and consensus building, often through concentration on technical issues. Reforms that would disturb the balance result in loss of confidence and neglect by the governments of the useful work the IJC can accomplish.

163. *See supra* notes 10 and 11.
164. *See, e.g.*, F. Stone, *To Avoid Trade Disputes*, 7 Pol'y Options 20 (1986).

Since the 1970s there has been a recurring theme that the IJC is not living up to its potential. It has proven itself a capable, independent, and impartial body. If given the responsibility and support, it could do more to realize the objective of stable boundary relations by working more effectively to reduce and avoid transboundary environmental damages. It represents no special interest and its only concerns are the boundary resources and the environment. It is well placed to work on "ecosystem approaches" and broader regional environmental issues, and to spot emerging problems and suggest preventive or remedial action. The IJC has the experience and potential for the role, but it has been called on too seldom.

Critics say the political interest has been lacking to give the IJC a freer, more active role in areas such as (1) setting the bilateral agenda by bringing emerging issues to the attention of government (the watchdog role), setting boundary environmental quality objectives, revising orders of approval to meet changing circumstances, and calling to task the governments more vigorously for failures in meeting environmental quality or remedial program objectives; (2) taking a more formal role in transboundary environmental project assessment; (3) performing a greater and more effective managerial role in research and program implementation; (4) reducing its dependence on governments for expertise and resources; and (5) encouraging greater public involvement in its work.

Many critics see reform as evolutionary, capable of taking place only within existing legal arrangements. For example, although the Boundary Waters Treaty is inadequate for today's conditions, a 1974 IJC Seminar concluded that it would be impossible to negotiate as good a treaty today. Despite its shortcomings, it is unique in that it does have some guidelines and, most important, it is sufficiently broad to allow the IJC to expand its role into the environmental field. The Treaty is a "living instrument" well suited to evolutionary change.[165]

Catastrophic events may well force government to throw evolutionary caution to the winds. Recent changes in the former Soviet Union and Eastern Europe show that we should not assume immutable political and institutional features on the international landscape. Similarly, rapid environmental change may force unprecedented international institutional reforms. But the purpose of this paper has been to look at the scope for change within the current rules of the game; it is not to engage in what-if scenarios. In this context, no reform should be made to confer upon the IJC management, regulatory and enforcement authority for the Great Lakes or other shared resources that would give the IJC supranational authority to bind the governments. Such an institution would not be politically accountable to the public that would be affected by its actions. Such

165. IJC, Summary of the International Joint Commission Seminar on the IJC, Its Achievements, Needs and Potential 21–22 (1974) (unpublished manuscript).

reforms have never been given much credence by governments in the past and they still are not.[166]

Reform must account for the delicate balancing role of the IJC in maintaining the confidence of the governments. When one or both governments do not want to do something to fix a perceived problem along the boundary, it will not get fixed. International commissions can do nothing to alter that basic fact, and any attempts by them to force action outside the limits set by government consensus will fail and likely damage the credibility and thus the usefulness of the organization.

The scope of government consensus, however, can be expanded in response to political pressures. Nevertheless, it is clear from the 1991 Air Quality Agreement[167] that the governments have relegated the IJC to a minor role. It will be a challenge to regain for new issues the level of authority it has had for the Great Lakes water quality. However, the growing transnational coalitions on various environmental issues offer the possibility that the governments can be influenced to think more creatively about using the IJC in solving emerging transboundary and regional environmental issues. Trade-inspired reform may also make governments more open to institutional innovation.

Reforms should focus on what the IJC does well; that is, its traditional approval functions with attendant monitoring of works along the boundary to ensure continuing compliance, investigations on a one-time basis, and ongoing responsibilities flowing from references. Reforms should not propose new functions that would alter the relationship the IJC has to its government clients. The reforms that can be made in this area are not likely to be dramatic, but they could prepare the IJC for increased responsibilities as Canada and the United States reach increasing understanding on environmental quality issues and seek common approaches to manage them. The IJC's strengths as a third party adviser, a fact finder and technical mediator, an environmental assessment project evaluator, an overseer keeping certain types of issues off the bilateral agenda, a consensus builder, and increasingly as an evaluator under the Great Lakes Water Quality Agreement are the types of qualities required in the more depoliticized and managerial setting that may be emerging. The most promising areas of reform in the new changing political environment will stress less the traditional strengthening of institutional effectiveness and efficiency in coming up with technical solutions. Rather, they will be in the area of information generation in response to public and government needs and in the use of objective evaluations in forcing the governments to be more politically accountable to their citizens in demonstrating progress in dealing with bilateral environmental issues.

166. Munton, *supra* note 3, at 64–75.
167. Agreement on Air Quality, *supra* note 40.