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Mixed Blessings: The Great Lakes Compact and Agreement, the IJC, and International Dispute Resolution

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MIXED BLESSINGS: THE GREAT LAKES COMPACT AND AGREEMENT, THE IJC, AND INTERNATIONAL DISPUTE RESOLUTION

Austen L. Parrish[*]

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ABSTRACT

For scholars of international law and international dispute resolution, the Great Lakes–St. Lawrence River Basin Water Resources Compact and Agreement may seem a mixed blessing. On the one hand, they promise environmental cooperation and management of the Great Lakes at an unprecedented scale. The agreements have been heralded as a tremendous advancement in state-provincial relations. On the other hand, international scholars should be nervous for what the agreements signify for international law and dispute resolution. The Compact and Agreement are remarkable for replacing an already functioning regulatory regime: the 1909 Boundary Waters Treaty, administered by the International Joint Commission (IJC).

This Article does not criticize the agreements, but it does lament the reluctance of the United States and Canada to more readily embrace the IJC,

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and the powers granted to it under the Boundary Waters Treaty. The Compact and Agreement move transboundary environmental management and dispute resolution from the international to the sub-national level. By doing so, they likely will further curtail the two countries' use of the IJC. At the very least, the agreements reflect a missed opportunity to reinvigorate, rather than undermine, the IJC. If the IJC has been only marginally effective recently, its shortcomings are a result of U.S. and Canadian national policy. The federal governments have been reluctant to embrace the IJC as an effective bilateral institution. It did not have to be this way. The result, this Article concludes, is unfortunate.

INTRODUCTION

For scholars of international law and international dispute resolution, the Great Lakes-St. Lawrence River Basin Water Resources Compact and Agreement[1] may seem a mixed blessing. On the one hand, the Compact and Agreement should be praised. For decades, greater state-provincial cooperation over Great Lakes management has been sought.[2] The Compact and Agreement realizes that goal and promises environmental cooperation and management of the world's largest surface freshwater system[3] at an unprecedented scale. The agreements together ambitiously establish: (1) a virtual ban on water diversions; (2) a basin-wide environmental standard for water use; and (3) increased conservation measures.[4] For these and other measures, scholars proclaim the agreements to be a "tremendous advance-

1. Great Lakes–St. Lawrence River Basin Water Resources Compact, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf [hereinafter 2005 Great Lakes Compact]; Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf [hereinafter 2005 Great Lakes Agreement].

2. *See, e.g.*, Marcia Valiante, *The Great Lakes Charter Annex 2001: Legal Dimensions of Provincial Participation*, 13 J. ENVTL. L. & PRAC. 47 (2003) [hereinafter Valiante, *Charter Annex*]; Chris A. Shafer, *Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulation*, 17 T.M. COOLEY L. REV. 461 (2000); Steven M. Siros, *Transboundary Pollution in the Great Lakes: Do Individual States Have Any Role to Play in Its Prevention?*, 20 S. ILL. U. L.J. 287 (1996); David J. Allee, *Subnational Governance and the International Joint Commission: Local Management of United States and Canadian Boundary Waters*, 33 NAT. RESOURCES J. 133 (1993).

3. GREAT LAKES COMM'N, TOWARD A WATER RESOURCES MANAGEMENT DECISION SUPPORT SYSTEM FOR THE GREAT LAKES-ST. LAWRENCE RIVER BASIN 9 (2003). The Great Lakes contain twenty percent of the world's fresh surface water and ninety-five percent of North America's fresh surface water.

4. 2005 Great Lakes Compact, *supra* note 1, § 1.3; 2005 Great Lakes Agreement, *supra* note 1, art. 100.

ment" in environmental protection.[5] At the very least, they reinforce the long-held, almost romantic, belief[6] that a unique Canadian-U.S. talent exists for bilateral cooperation and dispute resolution.[7]

On the other hand, some scholars may have a more muted response. The Compact and Agreement are remarkable for replacing an already functioning regulatory regime that the International Joint Commission (IJC) administers: the 1909 Boundary Waters Treaty.[8] The Compact and Agreement transfer oversight of Great Lakes water diversions from the IJC to the states and provinces. They create dispute resolution processes, not in an international body, but in a Council consisting of regional state and provincial leaders. They permit enforcement through private citizen suits. In

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5. Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 435 (2006) [hereinafter Hall, *Horizontal Federalism*]; *see also* Noah Hall, *MidWest Region Report: Governors Reach Agreement on Great Lakes Water Compact – Proposal Now Goes to State Legislature for Approval*, 9 No. 1 A.B.A. WATER RESOURCES COMMITTEE NEWSL. 9 (2006) (describing the Compact as "a major advancement in both the substantive legal rules for water use in the Great Lakes basin and the cooperative management among the states and provinces that share this resource"); *Eight U.S. Great Lake States, Ontario, and Quebec Conclude New Agreements to Limit Diversions of Water from Great Lakes Basin*, 100 AM. J. INT'L L. 467, 468 (John R. Crook ed., 2006) [hereinafter *Diversions*] (describing the agreements as providing "unprecedented protections" for the Great Lakes Basin); Marcia Valiante, *Harmonization of Great Lakes Water Management in the Shadow of NAFTA*, 81 U. DET. MERCY L. REV. 525, 526 (2004) (describing Annex 2001, the precursor to the Compact and Agreement, as "an important attempt to develop for the first time a comprehensive water management regime that is coordinated among the ten Basin jurisdictions") [hereinafter Valiante, *Harmonization of Great Lakes*].

6. Richard B. Bilder, Working Paper 8:4, *When Neighbors Quarrel: Canada-U.S. Dispute-Settlement Experience* 3-4 (May 1987) ("[I]n a world in which it sometimes seems that each country is at odds with every other, the Canada-U.S. relationship has sometimes looked like an island of tranquility in a sea of conflict. . . . [T]he idea [being] that Canada and the U.S. had somehow developed a magic formula for achieving a happy international marriage.").

7. *Id.* (describing the uniqueness of the Canada-U.S. relationship for dispute resolution); *see also* KARI ROBERTS, A CONTINENTAL DIVIDE? RETHINKING THE CANADA-U.S. BORDER RELATIONSHIP 2 (2006), http://www.cwf.ca/abcalcwf/doc.nsf/(Publications)/FA47E7AA8D6604C0872571A8004995BD/$file/A%20Continental%20Divide.pdf (noting that the Canadian-U.S. relationship is often "hailed internationally as a model for cooperative issue resolution"); Erik B. Wang, *Adjudication of Canada-United States Disputes*, 19 CAN. Y.B. INT'L L. 158, 159 (1981) (citing Marcel Cadieux, *Sixth Annual Conference of the Canadian Council on International Law, Ottawa, October 21, 1977*, 1 CAN.-U.S. L.J. 19 (1978) (describing the historic ability of countries to resolve disputes, but questioning whether that era has ended)).

8. Treaty Between the United States and Great Britain Relating to the Boundary Waters Between the United States and Canada, U.S.-U.K., Jan. 11, 1909, 36 Stat. 2448 [hereinafter 1909 Boundary Waters Treaty].

short, to a significant extent, the agreements move transboundary environmental management and dispute resolution to the sub-national level.[9]

This ambivalence to the Compact and Agreement should not be interpreted as criticism. The state and provincial leaders who signed the agreements did so because they perceived them as necessary. Canada historically has left environmental protection largely to the provinces.[10] In the last decade, the U.S. federal government has retreated from rigorous federal environmental protection[11] and seems less inclined to tackle transboundary problems with Canada.[12] The IJC is in disfavor and has lost much of its political effectiveness.[13] In this context, the states and provinces understandably have explored "new options for managing regional resources and environmental problems that cross political boundaries."[14] But the result is disconcerting, at least for those who see international and bilateral institutions as the more desirable method of resolving *international* disputes. Viewed in this light, the Compact and Agreement is a somewhat strained, if not awk-

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9. Valiante, *Charter Annex*, *supra* note 2, at 53 ("What is unique [about events leading up to the Compact and Agreement] is that they represent first steps in the development of a geographically defined governance regime at the sub-national level."); Dan Tarlock, *Five Views of the Great Lakes and Why They Might Matter*, 15 MINN. J. INT'L L. 21, 25-26 (2006) (explaining how the countries "have been trying to develop an effective binational regulatory regime for the lakes despite the fact that a functioning regulatory regime already exists—the 1909 Boundary Waters Treaty, administered by the IJC." (footnote omitted)).

10. William R. MacKay, *Canadian Federalism and the Environment*, 17 GEO. INT'L ENVTL. L. REV. 25, 46-50 (2004) (describing collaborative federalism and how federal-provincial diplomacy shapes environmental policy in Canada); Neil Hawke, *Canadian Federalism and Environmental Protection*, 14 J. ENVTL. L. 185 (2002) (describing environmental protection in Canada and the roles of the federal and provincial governments).

11. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1142-46, 1165-70 (1995) (noting the shift towards state control of environmental issues); *see also* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 721-22, 798-801 (2006) (arguing that the current federal system "hinders the capacity" of both state and federal governments to protect the environment and noting the unwillingness of the federal government to advance environmental goals).

12. For a general discussion, see Shi-Ling Hsu and Austen Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity* (forthcoming 2007) (on file with authors). Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 ECOLOGY L.Q. 233, 298 (2006) ("[C]urrent relations between the United States and Canada are at a low ebb owing to other high profile issues: the United States's embargo of Canadian cattle due to mad cow disease concerns; the United States's embargo of softwood lumber (which has a particular impact on B.C.); Canada's refusal to support the Iraq War with troops; proposed oil drilling in the Arctic National Wildlife Refuge (which Canada opposes); tightening U.S. border control policies in the wake of the 9/11 terrorist attacks; and continuing disagreements over Pacific Ocean salmon harvest levels.").

13. *See infra* Part II.B.

14. Hall, *Horizontal Federalism*, *supra* note 5, at 406.

ward, domestic approach, cobbled together to avoid difficult constitutional problems, but not fully equipped to solve the transboundary challenges the two countries face.[15]

This Article explores the implications of the Compact and Agreement for international dispute resolution between Canada and the United States and suggests that the agreements may reflect an end of an era of IJC influence. At the very least, the agreements represent a missed opportunity to reinvigorate, rather than undermine, the IJC. The Compact and Agreement reflect the now conventional wisdom that nonstate actors have a central role to play in international law, as well as the governments' reluctance to more readily embrace international institutions. The IJC's recent shortcomings are a result of U.S. and Canadian national policy.[16] It did not have to be this way. And that, this Article concludes, is unfortunate.

I. THE COMPACT AND AGREEMENT

The Great Lakes Compact and Agreement were concluded one year ago, in December 2005.[17] The agreements focus on water diversions and broadly aim to do two things. First, they ban, with narrow exceptions,[18] new or increased water diversions to areas both inside and outside of the Great Lakes–St. Lawrence River Basin.[19] The Compact broadly defines the relevant waters to include all "ground or surface water contained within the Basin."[20] Second, the agreements spell out standards for conserving and

15. *See* Shafer, *supra* note 2, at 475-77 (discussing some of the Constitutional problems that faced the states and provinces in entering the agreement); *see also* Tarlock, *supra* note 9, at 37-39 (describing the legal challenges to negotiate a binding mechanism to regulate Great Lakes diversions); Valiante, *Charter Annex*, *supra* note 2 (describing the legal challenges facing Ontario and Quebec in adopting the proposed Compact and Agreement).

16. Stephan Toope & Jutta Brunnée, *Freshwater Regimes: The Mandate of the International Joint Commission*, 15 ARIZ. J. INT'L & COMP. L. 273, 276 (1998) ("The IJC will only be as strong and as effective as the Canadian and U.S. governments allow it to be.").

17. *Diversions*, *supra* note 5, at 467. The Governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin and the Premiers of Ontario and Québec approved the Compact and Agreement.

18. 2005 Great Lakes Compact, *supra* note 1, § 4.9 (listing exceptions to prohibited diversions).

19. *Id.* § 4.8 ("All New or Increased Diversions are prohibited, except as provided for in [the Compact]."); 2005 Great Lakes Agreement, *supra* note 1, art. 200 (prohibiting diversions and creating a management system for regulation of withdrawals); *see also* Hall, *Horizontal Federalism*, *supra* note 5, at 435-44 (describing in detail the agreements); Richard F. Ricci et al., *Battles over Eastern Water*, 21 A.B.A. NAT. RESOURCES & ENV'T 38, 41-42 (2006) (summarizing the key provisions of the Compact and Agreement).

20. 2005 Great Lakes Compact, *supra* note 1, § 1.2; *see* Hall, *Horizontal Federalism*, *supra* note 5, at 435 (explaining the significance of this definition and describing it as "a long overdue advancement in water law").

managing the Great Lakes' waters.[21] They require each state or province to adopt a set of "environmentally-based common standards into its domestic regulatory regime."[22] These "standards represent numerous advances in the development of water use law, including uniform treatment for ground and surface water withdrawals, water conservation, return flow, and prevention of environmental impacts."[23] The standards will be reviewed every five years.[24] If the Compact proceeds through the eight state legislatures and the U.S. Congress, it will become binding law.[25]

The methods for enforcing and administering the Compact are ambitious. The Compact places enforcement power in the hands of a Council, consisting of governors from the eight states.[26] The Council "can promulgate and enforce rules to implement its duties."[27] It has "broad authority to plan, conduct research, prepare reports on water use, and forecast water levels."[28] The Council also has the power to conduct investigations and institute court actions.[29] The Compact permits enforcement lawsuits in both state and federal court:

> Any Party or the Council may initiate actions to compel compliance with the provisions of this Compact, and the rules and regulations promulgated hereunder by the Council. Jurisdiction over such actions is granted to the court of the relevant Party, as well as the United States District Courts for the District of Columbia and the District Court in which the Council maintains offices.[30]

Recognizing that disagreements may arise occasionally, the agreements also provide for "broad and comprehensive"[31] dispute resolution procedures. Beyond a general agreement to engage in alternative dispute resolution,[32] the Compact also provides for public participation, consultation, and negotiation.[33] If acts taken pursuant to the Compact cause harm, ag-

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21. 2005 Great Lakes Compact, *supra* note 1, art. 4.

22. Valiante, *Charter Annex*, *supra* note 2, at 47.

23. Hall, *Horizontal Federalism*, *supra* note 5, at 406.

24. 2005 Great Lakes Compact, *supra* note 1, § 3.4.

25. *Id.* § 9.4; *see also* Hall, *Horizontal Federalism*, *supra* note 5, at 445 (describing how, once ratified, the Compact will be difficult to terminate or amend).

26. 2005 Great Lakes Compact, *supra* note 1, §§ 2.1-.9, 3.1-.4; *see also id.* § 4.5 (describing how the Council will consider Regional Review findings made by representatives of states and provinces).

27. Hall, *Horizontal Federalism*, *supra* note 5, at 444; 2005 Great Lakes Compact, *supra* note 1, §§ 2.1-.3, 3.3.

28. Hall, *Horizontal Federalism*, *supra* note 5, at 444.

29. 2005 Great Lakes Compact, *supra* note 1, § 7.3.

30. *Id.* § 7.3(2).

31. Hall, *Horizontal Federalism*, *supra* note 5, at 444.

32. *Id.* § 7.2(1).

33. *Id.* § 5.1 (requiring consultation with federally recognized Tribes); *Id.* § 6.2 (setting forth procedures for public participation).

grieved persons are "entitled to a hearing" governed by state law.[34] After exhaustion of administrative remedies, individuals also have the right to judicial review in the U.S. District Courts for the District of Columbia, or in the district where the Council of Governors maintains its offices.[35] The right to judicial review may be one of the greatest advancements, or at least surprises, of the Compact.

The Compact and Agreement have been widely viewed as advancement.[36] The preexisting regulatory regime had grown to have significant political limitations, while the "mechanisms in place for managing proposals to export [water] from the Basin were inadequate."[37] Many viewed the patchwork of federal, regional, and local laws that governed water diversions from the Great Lakes prior to the Compact and Agreement as ineffective.[38] Indeed, in the late 1990s, proposals for large-scale water diversions from the lakes "touched a deep anxiety within the Great Lakes Basin over the security of regional waters and re-ignited fears within Canada over the vulnerability of its water resources."[39]

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34. *Id.* § 7.3(1).

35. *Id.*

36. *See* authorities cited *supra* note 5, (praising Compact and Agreement as major advancements).

37. Valiante, *Charter Annex*, *supra* note 2, at 48.

38. Hall, *Horizontal Federalism*, *supra* note 5, at 408, 416-32 (describing the Boundary Waters Treaty, the Supreme Court's landmark decision regarding Chicago's diversion of Great Lakes water in *Wisconsin v. Illinois*, the original Great Lakes Basin Compact, the Great Lakes Charter of 1985, various state legal regimes, the federal 1986 Resources Development Act, and the 2001 Great Lakes Charter Annex); *see also* Joseph W. Dellapenna, *Interstate Struggles over Rivers: The Southeastern States and the Struggle over the 'Hooch*, 12 N.Y.U. ENVTL. L.J. 828, 850-64 (2005) (describing the "complex amalgam of international agreements, federal statutes, judicial decrees, and interstate (and interprovincial) compacts" that regulate use of Great Lakes waters); Valiante, *Harmonization of Great Lakes*, *supra* note 5, at 525 (noting that "[p]roposals to take water out of the Great Lakes have a long and controversial history that led to the development of a complex web of treaty obligations, domestic legislation, judicial oversight and sub-national agreements"); Siros, *supra* note 2, at 287 (explaining that in "a relatively small area, many different regulatory and media systems collide, creating wide ranging environmental control problems").

39. Valiante, *Charter Annex*, *supra* note 2, at 48, 53-55 (describing the 1998 proposal to allow Nova Group to take water from Lake Superior and export it by tankers to Asia); *see also* Tarlock, *supra* note 9, at 22 (noting that "fears about future in-basin consumptive uses and transbasin diversions have been a major political and legal issue in the basin for more than two decades"); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 20-22 (2003) (describing public outcry after the 1998 Nova Group proposal and 2001 Perrier water proposal to divert water from the Great Lakes).

II. THE END OF AN ERA?

The Compact and Agreement, however, are by no means the first attempt to protect the Great Lakes from large-scale diversions.[40] The two countries have sought to protect the resource for more than a century. Indeed, the agreements are striking because they supplant, and largely ignore, an existing comprehensive international regulatory regime.

A. The Boundary Waters Treaty and the IJC

Bi-national management and cooperation of the Great Lakes began over a hundred years ago. In the early 1900s, several projects were proposed to divert waters from the Great Lakes-St. Lawrence Basin.[41] At the time, boundary waters were a "significant political irritant" for the two countries, with disputes over not only water diversions but also navigation and power generation.[42] The tension in Canada-U.S. relations led to the creation of the 1909 Boundary Waters Treaty.[43]

The Boundary Waters Treaty was the first international water rights treaty not focused directly on navigation.[44] Although the treaty's negotia-

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40. Shafer, *supra* note 2, at 465-67 (describing history of Great Lakes diversions and diversion proposals).

41. *See generally* William L. Griffin, *Great Lakes Diversions and Consumptive Uses in Historical International Legal Perspective*, 75 MICH. B.J. 62, 62-67 (1996) (describing events leading up to adoption of the 1909 Boundary Waters Treaty); *see also* Valiante, *Harmonization of Great Lakes*, *supra* note 5, at 527 (sketching the development of the 1909 Boundary Waters Treaty); Daniel K. DeWitt, Note, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 300-08 (1993) (detailing the history of the Boundary Waters Treaty in connection with the Great Lakes); Jennifer Woodward, Note, *International Pollution Control: The United States and Canada—The International Joint Commission*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 325, 326-28 (1988) (describing enactment of the Boundary Waters Treaty).

42. Toope & Brunnée, *supra* note 16, at 277; *see also* N.F. Dreisziger, *Dreams and Disappointments*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 10-11 (Robert Spencer et al. eds., 1981) (describing early transboundary disputes involving water diversions); Richard Kyle Paisley et al., *Transboundary Water Management: An Institutional Comparison Among Canada, the United States, and Mexico*, 9 OCEAN & COASTAL L.J. 177, 181-83 (2004) (describing the "growing water related disputes between Canada and the United States" at the beginning of the twentieth century and the development of the Boundary Waters Treaty).

43. 1909 Boundary Waters Treaty, *supra* note 8.

44. *See* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 415 (2005); *see also* Colleen P. Graffy, *Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes*, 10 GEO. INT'L ENVTL. L. REV. 399, 424 (1998) (explaining how the Boundary Waters Treaty was one of the first "non-navigational international watercourse treaties").

tion was "a long and hard fought process,"[45] the result was visionary for its time: "[t]he substantive law of the treaty, the political-legal concepts underlying conflict-avoidance and dispute-settlement, and its pioneering anti-pollution obligations all fashioned a multiple-use instrument that went beyond experience elsewhere and perhaps even beyond the full appreciation of the draftsmen themselves."[46] The treaty established "principles for the use of boundary waters, including the Great Lakes,"[47] but its potential reach extended to "all boundary questions, and arguably to other questions of common concern as well."[48]

The Treaty's purpose was straightforward. It sought "to ensure the equitable sharing of boundary waters between Canada and the United States,"[49] while encouraging and providing mechanisms for dispute resolution.[50] In relation to diverting waters (including those from the Great Lakes), the Treaty provided that Canada and the U.S. could not divert boundary waters "affecting the natural level or flow of boundary waters on the other side of the [border]" without permission from the IJC.[51] The treaty also set forth other important obligations, including: (1) the obligation not to pollute boundary waters,[52] and (2) reciprocal court access in cases involving water diversion or obstruction.[53] Each nation pledged that "boundary waters . . . flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."[54]

The International Joint Commission (IJC) was the entity created to administer the Treaty and protect the interests of both countries. The IJC

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45. DeWitt, *supra* note 41, at 306. For a detailed historical description of the Treaty's negotiation, see Dreisziger, *supra* note 42, at 8-21.

46. Maxwell Cohen, *The Commission from the Inside*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 108 (Robert Spencer et al. eds., 1981).

47. Valiante, *Harmonization of Great Lakes*, *supra* note 5, at 527; Dellapenna, *supra* note 38, at 856 (explaining that "'[b]oundary waters' are narrowly defined to include only waterbodies (or their connecting waters) that straddle or cross the international boundary") (quoting 1909 Boundary Waters Treaty, *supra* note 8, preliminary article).

48. Richard B. Bilder, *Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation*, 70 MICH. L. REV. 469, 481 (1972).

49. F.J.E. Jordan, *Great Lakes Pollution: A Framework for Action*, 5 OTTAWA L. REV. 65, 66 (1971).

50. 1909 Boundary Waters Treaty, *supra* note 8, pmbl., at 2448 (stating the purpose of the Treaty in the Preamble is "to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending . . . involving the rights, obligations, or interests [of Canada and the United States]").

51. *Id.* art. III, at 2449-50.

52. *Id.* art. IV, at 2450.

53. *Id.* art. III, at 2449 (permitting injured parties to pursue the same legal remedies available if injured on the other side of the border).

54. *Id.* art. IV, at 2450.

was the "first permanent US-Canadian institution."[55] It was created as an independent, "bi-national body, comprised of six commissioners, three appointed by the United States and three by Canada."[56] Although the Boundary Waters Treaty assigned the IJC "surprisingly wide powers,"[57] the commissioners were intended to be nonpolitical and impartial.[58] The IJC's administrative, quasi-judicial, arbitral, and even investigative powers[59] were part of an "ambitious institutional design."[60] The treaty granted the IJC the power to approve all works and diversions that could impact the natural flow of the boundary waters, including most Great Lakes' diversions.[61] Despite having no enforcement powers, "[n]o other transboundary institution in the world compare[d] with the IJC" with respect to its powers.[62]

For dispute resolution purposes, the Boundary Waters Treaty "establishe[d] broad and flexible provisions."[63] Article IX of the Treaty authorized the IJC to render advisory reports at the governments' request, and provided for a reference procedure:

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55. Kal J. Holsti & Thomas Allen Levy, *Bilateral Institutions and Transgovernmental Relations Between Canada and the United States*, *in* CANADA AND THE UNITED STATES: TRANSNATIONAL AND TRANSGOVERNMENTAL RELATIONS 281, 285 (Annette Baker Fox et al. eds., 1976).

56. Sheryl A. Rosenberg, *A Canadian Perspective on the Devils Lake Outlet: Towards an Environmental Assessment Model for the Management of Transboundary Disputes*, 76 N.D. L. REV. 817, 841 (2000) (detailing the IJC's structure). For a good recent discussion of the Commission and its powers, see Herb Gray, *Canada and U.S. Approaches to Health Care: How the Canadian and U.S. Political, Regulatory, and Legal Systems Impact Health Care*, 31 CAN.-U.S. L.J. 287, 290-94 (2005).

57. William R. Willoughby, *Expectations and Experience*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 24 (Robert Spencer et al. eds., 1981); *see also* Toope & Brunnée, *supra* note 16, at 275 (noting the "unusually strong powers with which the IJC was endowed"); Holsti & Levy, *supra* note 55, at 286 (describing how the IJC had "policy-making and regulatory powers far exceeding that of many committees and boards established after 1945" by the two countries).

58. L.H. Legault, *The Roles of Law and Diplomacy in Dispute Resolution: The IJC as a Possible Model*, 26 CAN.-U.S. L.J. 47, 49-50 (2000). The IJC's impartiality is buttressed by providing immunity to both the IJC and the commissioners from judicial process in both countries. Paisley et al., *supra* note 42, at 183. In addition, "the Commission's decisions are not subject to appeal to the courts of either country." *Id.*

59. *See generally* Willoughby, *supra* note 57, at 25-38 (describing the Commission's powers); Bilder, *supra* note 48, at 485-89 (describing the Commission's powers).

60. Toope & Brunnée, *supra* note 16, at 275.

61. 1909 Boundary Waters Treaty, *supra* note 8, art. III; *see also* Bilder, *supra* note 48, at 482.

62. Toope & Brunnée, *supra* note 16, at 275; *see also* Graffy, *supra* note 44, at 424 (describing the IJC as "particularly effective" and that the Boundary Waters Treaty is "[o]ften emulated as a model for the international community"); *cf.* Don Munton, *Paradoxes and Prospects*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 60 (Robert Spencer et al. eds., 1981) (noting that the IJC has been "recognized internationally as one of the most ambitious examples of a joint boundary water authority").

63. Bilder, *supra* note 48, at 483.

> [A]ny other questions or matters of difference arising between [Canada and the U.S.] involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier . . . shall be referred from time to time to the [IJC] for examination and report.[64]

Article X, in turn, provided detailed procedures upon which the two governments could agree to binding arbitration to resolve differences.[65]

The IJC, for much of its existence, has been influential. It was created at a time of great optimism for international institutions, and both countries embraced it in the early twentieth century with a sense of pride.[66] The IJC handled references "ranging from typhoid in the waters of the Great Lakes in 1929 to air pollution in the Detroit–Windsor area in 1978 and pollution of Lake Erie from oil and gas drilling in 1969."[67] In its first seventy years, the IJC handled well over one hundred cases,[68] including most notably: the Garrison Dam project;[69] the Trail Smelter controversy from the 1920s;[70] and diversions, damming, and other projects related to the Columbia, Flathead, Mary, Milk, Skagit, and St. Croix rivers.[71]

The IJC also played a significant role in managing and protecting the Great Lakes.[72] This included: (1) a 1912 reference to the IJC "to determine '[t]o what extent . . . have the boundary waters between the United States

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64. 1909 Boundary Waters Treaty, *supra* note 8, art. IX.

65. *Id.* art. X (giving the IJC the power, upon reference by joint consent, to "render a decision or finding [upon] any questions or matters so referred" which "involve[d] the rights, obligations, or interests" of the U.S. or Canada).

66. Cohen, *supra* note 46, at 109-10.

67. Timothy M. Gulden, *Transfrontier Pollution and the International Joint Commission: A Superior Means of Dispute Resolution*, 17 SW. U. L. REV. 43, 60 (1987) (citing to ALLEN L. SPRINGER, THE INTERNATIONAL LAW OF POLLUTION 162 (1983)).

68. INTERNATIONAL JOINT COMMISSION, THE IJC AND THE 21ST CENTURY 10 (1997); *see also* Paisley et al., *supra* note 42, at 187 (explaining that the IJC "is thought to stand out as an institution that has effectively and peacefully managed the boundary waters of two nations over ninety years, reconciling or averting more than 130 disputes in the process") [hereinafter COMMISSION]; Wang, *supra* note 7, at 165 (explaining that "[i]n over one hundred cases referred to [the IJC] from 1912 to [1981] it has produced unanimous reports in all but four cases").

69. Legault, *supra* note 58, at 53.

70. COMMISSION, *supra* note 68, at 10; *see also* Parrish, *supra* note 44. The most extensive analysis of the Trail Smelter arbitration by leading scholars is TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE *TRAIL SMELTER* ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

71. *See generally* Legault, *supra* note 58, at 53-54 (describing IJC's involvement with diversion, damming, and other projects).

72. For a detailed discussion of the IJC's involvement with the Great Lakes, see James G. Chandler & Michael J. Vechsler, *The Great Lakes-St. Lawrence River Basin from an IJC Perspective*, 18 CAN.-U.S. L.J. 261, 268-78 (1992).

and Canada been polluted so as to be injurious to the public health'";[73] (2) a 1946 reference "to investigate pollution in the St. Clair River, Lake St. Clair and the Detroit River" flowing into the Great Lakes;[74] and (3) a 1964 reference, where the IJC was asked "to conduct an in-depth analysis of water quality in Lake Erie, Lake Ontario and the International Section of the St. Lawrence River."[75] The IJC, throughout the seventies, eighties, and nineties, "played a critically important role in studying potential threats to the waters of the Great Lakes."[76]

Until the late 1970s, the governments demonstrated their faith in the IJC. In the 1950s, for example, the IJC recommended that the countries authorize it "to establish and maintain continuing supervision over boundary waters pollution through boards of control appointed by" the IJC.[77] "The governments approved . . . the [IJC's] recommendations, including expansion of its power, and incorporated the objectives into their pollution abatement programs."[78] As a result, the period from 1945 through 1965 was an IJC golden era, characterized by large scale water development and joint cooperation.[79]

The IJC's hard work paid off. The IJC was "highly respected"[80] and seen as successful in fulfilling its mandate.[81] It was "praised as a low-key,

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73. Woodward, *supra* note 41, at 329 (citing I.J.C. Files, Docket No. 4 (1912) and quoting INTERNATIONAL JOINT COMMISSION, FINAL REPORT OF THE INTERNATIONAL JOINT COMMISSION ON THE POLLUTION OF BOUNDARY WATERS REFERENCE 5 (1918)).

74. *Id.* at 330.

75. *Id.* at 331 (citing I.J.C. Files, Docket No. 83 (1964)).

76. Hall, *Horizontal Federalism*, *supra* note 5, at 418; *see also* Cohen, *supra* note 46, at 106-08 ("Whatever differences may exist among scholars, there is no important division on the central idea that the IJC has played an unusually constructive part in dispute-avoidance and settlement as well as in such quasi-managerial functions as those it performs [in relation to the Great Lakes] . . . ."); *cf.* INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES (2000).

77. INTERNATIONAL JOINT COMMISSION, REPORT OF THE INTERNATIONAL JOINT COMMISSION, UNITED STATES AND CANADA, ON THE POLLUTION OF BOUNDARY WATERS (1950).

78. Woodward, *supra* note 41, at 331.

79. Barry Sadler, *The Management of Canada-U.S. Boundary Waters: Retrospect and Prospect*, 26 NAT. RESOURCES J. 359, 363-64 (1986).

80. Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 134 (1984).

81. *See* John E. Carroll, *Patterns Old & New*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 43 (Robert Spencer et al. eds., 1981) (noting the IJC's "history of generally successful operation and its legacy of great accomplishments" up to the end of the 1970s); Cohen, *supra* note 46, at 106-07 (describing the Commission as "the oldest and most durable of the constellation of Canada-United States joint institutions" and asserting that "an unreserved unanimity exists about the usefulness of the Commission since its beginnings"); Leonard B. Dworsky & Albert E. Utton, *Assessing North America's Management of Transboundary Waters*, 33 NAT. RESOURCES J. 413, 415-16 (1993) (explaining

behind the scenes actor that help[ed] move governments to solutions the governments [were] prepared to accept,"[82] and was commended for its "objectivity and leadership on environmental issues."[83] For dispute resolution, legal scholars described it as "one of a kind."[84] In part, its legitimacy and respect was a result of its independence and impartiality: the "commissioners [sought] consensus in making decisions and rarely split along national lines."[85]

B. The IJC's Marginalization

But things changed. In the late 1970s, the IJC attempted to take a more active role in transboundary resource management and increase its

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that "[i]n most evaluations, the Commission comes out with high grades" and is a "model[] of success in many ways"); Legault, *supra* note 58, at 54 (asserting that it is "hard to quarrel with [the IJC's] long record of success" and stating that the "Commission [is] truly one of a kind as a system for the settlement of disputes"); Kim Richard Nossal, *The IJC in Retrospect*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 124, 126 (Robert Spencer et al. eds., 1981) (noting the IJC's longevity in its first sixty years as an "active and effective international institution" and that "[t]he Commission, all agree, has been a remarkably successful institution"); *see generally* Parrish, *supra* note 44, at 417-18 nn.285-91 (compiling a list of articles that view the IJC as successful and influential in carrying out its duties under the Boundary Waters Treaty).

82. Alan M. Schwartz, *Great Lakes: Great Rhetoric*, *in* TENSIONS AT THE BORDER: ENERGY AND ENVIRONMENTAL CONCERNS IN CANADA AND THE UNITED STATES 70 (Jonathan Lemco ed., 1992); *see also* Holsti & Levy, *supra* note 55, at 287-88 (explaining that because the IJC's "studies are based on extensive research by technical specialists, its recommendations are influential and are usually acted upon by the senior governments" and that "the IJC can defuse potentially contentious issues; hence its conflict-avoidance function").

83. Hall, *Horizontal Federalism*, *supra* note 5, at 418 (citing Sadler, *supra* note 79, at 370-72). Of course, the IJC has made its mistakes, even in the early years. Willoughby, *supra* note 57, at 32-33 (describing errors committed by the Commission as "debit items").

84. Legault, *supra* note 58, at 54.

85. David Lemarquand, *The International Joint Commission and Changing Canada-United States Boundary Relations*, 33 NAT. RESOURCES J. 59, 68 (1993); *see also* P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 326 (2d ed. 2002) (praising the IJC's "independence [from] both governments" as an "important and unusual characteristic[]"); Carroll, *supra* note 81, at 46, 58 (noting that the "requirements of the treaty and the low profile of the Commission reduce IJC vulnerability to current political whims and pressures" and that it has a "reputation for impartiality"); Alice M. Nobel-Allgire, *Transfrontier Environmental Damage*, 84 AM. SOC'Y INT'L L. PROC. 12, 18 (1990) (giving remarks by Blair Seaborn, former Canadian chairman of the IJC and former Canadian Deputy Minister of the Environment, describing the IJC as "a unique institution that acts with a remarkable degree of independence and objectivity in the judgments and the recommendations it makes"); Nossal, *supra* note 81, at 124 (explaining how the IJC and its "reserve armies of technical experts" are "untainted by purely partisan national concerns" leading to "impartial conclusions"); *cf.* Cohen, *supra* note 46, at 107 ("To some extent the central point of occasional tension, albeit a creative tension, between the governments and the IJC has been the evolution of a Commission view or rationale for its operations which was at times distinct from the views of either or both governments.").

responsibilities.[86] In two high profile cases involving the St. Mary's River and the Garrison Diversion Project, the IJC asserted a right to be consulted only to be rebuffed by the respective governments.[87] The attempt to create a Commission regional office in Windsor, Ontario in 1977 also ruffled government feathers and was seen as an IJC power-grab.[88] Although the office was ultimately created, it was removed from direct IJC authority: one commissioner describing the result as "a disguised but effective emasculation of the IJC."[89] And the IJC increasingly came under attack for resolving matters slowly.[90] As one commentator described: "[t]hese 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."[91] Ultimately, the IJC was seen as a threat to sovereignty.[92] Canada, particularly, became disenchanted with the IJC, believing that Canadian interests were not sufficiently protected.[93] By early 1981, for almost a year, the IJC was entirely unable to function.[94]

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86. Lemarquand, *supra* note 85, at 75; *cf.* Schwartz, *supra* note 82, at 70-71 (describing how, in a 1982 biennial report, the Commission sharply critiqued the government, but what was viewed as a "potentially new 'more aggressive' role for the commission" soon ended).

87. Lemarquand, *supra* note 85, at 75; *see also* Munton, *supra* note 62, at 80-81.

88. Lemarquand, *supra* note 85, at 76; Munton, *supra* note 62, at 80.

89. Munton, *supra* note 62, at 80 (quoting former Commissioner Keith Henry at the July 1978 IJC public meeting on the Great Lakes Water Quality in Windsor, Ontario).

90. Carroll, *supra* note 81, at 51 (describing the "most prevalent criticism of the IJC" to be its "sheer slowness of operation"); Willoughby, *supra* note 57, at 38 (conceding that "occasionally the Commission's boards have taken an unreasonably long time to conduct their studies and to submit their findings").

91. Lemarquand, *supra* note 85, at 76.

92. Munton, *supra* note 62, at 80 (citing Memorandum, George R. Alexander, Director Region V (Great Lakes Area), EPA to Barbara Blum, EPA, Washington, May 16, 1977) (recommending that the regional office be "disestablished" as it could "lead to the 'erosion of the sovereign authority' of the governments"); *see also* Nossal, *supra* note 81, at 129 ("To surrender—even willingly—a modicum of national sovereignty [to IJC-type institutions] would be disadvantageous to both sides, but to Canadians in particular.").

93. Nossal, *supra* note 81, at 129; *see also* Holsti & Levy, *supra* note 55, at 287 n.2 (noting comments of a Canadian official "who suggested that more bodies of the IJC type would not be welcome [in 1976] because they are difficult to control by the central governments"); Lemarquand, *supra* note 85, at 76 ("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."); Sax & Keiter, *supra* note 12, at 295-98 (describing the unlikelihood that Canada would agree to an IJC referral).

94. Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 24 CAN. Y.B. INT'L. L. 247, 255 n.32 (1986) (noting that, from January to September 1981, five of the six commission positions were left vacant and the commission was unable to operate).

Beginning in the 1980s, the countries forced the IJC to embrace a different role. "[R]ecourse to the historic International Joint Commission declined significantly,"[95] and the countries "drastically reduced their reliance upon the IJC's reference functions."[96] Between 1977 and 1991, only two matters were referred to the IJC for investigation.[97] And, of course, neither Canada nor the United States referred a matter for a binding decision.[98] Even in the Great Lakes context, the IJC's powers were undermined. Although in 1986 the IJC was given authority to veto diversions from the Great Lakes,[99] the IJC had little influence.[100] Indeed, the more the IJC tried to reinvent itself to play some role in solving transboundary environmental problems, the more "its freedom of action [was] curtailed by increasingly reluctant governments."[101] Indicative of its dwindling influence, numerous proposals were written to revamp or restructure the IJC entirely.[102] By the early 1990s, the governments had "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."[103]

In the last few years, the IJC has been bypassed completely, even in cases where the Boundary Waters Treaty would certainly apply and the IJC would be a logical place to turn. Two of the most contentious and well-

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95. Lemarquand, *supra* note 85, at 77 (quoting A. Gotlieb, *The United States In Canadian Foreign Policy*, Presented at the O.D. Skeleton Memorial Lecture 12 (Dec. 10, 1991)); *see also* Carroll, *supra* note 81, at 43 (arguing that "the Commission is operating at a level well below potential"); Willoughby, *supra* note 57, at 38 ("It is true that at times both governments have seemed reluctant to ask the IJC to tackle difficult issues.").

96. Toope & Brunnée, *supra* note 16, at 282; *see also* Marcel Cadieux, *The View from the Pearson Building*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 99 (Robert Spencer et al. eds., 1981) (noting that "the two governments seem to have always taken a cautious approach to questions involving the strength of the Commission," and describing two situations in the 1970s when the government refused to strengthen the Commission's role).

97. Toope & Brunnée, *supra* note 16, at 282 (citing David Lemarquand, *supra* note 85, at 74-75 (1993)).

98. Chandler & Vechsler, *supra* note 72, at 263 (explaining that the IJC has "never been asked to undertake [its binding arbitration] role"). When arbitration between the two countries occurred, the countries used a special convention. Legault, *supra* note 58, at 51 (describing the process by which an arbitral decision can be handed down by the IJC through special convention); *see also* Wang, *supra* note 7, at 224-28 (summarizing Canada-U.S. arbitral decisions).

99. Water Resources Development Act of 1986, 42 U.S.C. § 1962d-20 (2000).

100. Dellapenna, *supra* note 38, at 858, 861-62 (noting how the IJC has had little influence over Great Lakes diversions "because the governors of Michigan have vetoed nearly all such diversions").

101. Toope & Brunnée, *supra* note 16, at 275.

102. *See, e.g.*, Munton, *supra* note 62, at 64-81; *see also* Carroll, *supra* note 81, at 43 (arguing for IJC reform and increased IJC power). *But see* Toope & Brunnée, *supra* note 16, at 282 (criticizing proposals to increase IJC powers).

103. Lemarquand, *supra* note 85, at 77.

known controversies are the Trail Smelter and the Devil's Lake Project. The Trail Smelter controversy is an ongoing case, *Pakootas v. Teck Cominco*, where the U.S. EPA and a private citizens group filed suit in a U.S. court against a Canadian company operating solely in Canada, under the U.S. Superfund law, for transboundary pollution.[104] The Devil's Lake Project controversy involves the State of North Dakota's plan to build a diversion channel to drain a polluted lake into a river that runs into Canada.[105] In both disputes, the IJC was rendered powerless, or at least kept out of the picture. Both countries, with more nationalist moods, have grown to see the IJC as marginally relevant.

III. A LAMENT: THE FORGOTTEN EFFECTIVENESS OF BILATERAL INSTITUTIONS

The IJC's marginalization and the creation of a sub-national regime that replaces an existing international regime raises several obvious questions. What motivates the countries' reluctance to use the IJC or to strengthen the Boundary Waters Treaty through treaty amendment? What is behind the rise of a state and provincial sub-national management regime? Despite the reasons behind the change, are these developments positive? A detailed analysis is beyond the scope of this short Article, but a few observations can be made.

Although the political reasons behind the creation of the Compact and Agreement are complex, at least two trends created a receptive political environment for its development. First, the Compact and Agreement reflect the changing nature of international relations where states, provinces, and other non-governmental actors play an increasingly important role.[106] Na-

104. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *17 (E.D. Wash. Nov. 8, 2004) (order denying motion to dismiss on jurisdictional grounds), *aff'd*, 452 F.3d 1066 (9th Cir. 2006); *see generally* Parrish, *supra* note 44. Several academics have now commented on the case. *See, e.g.*, Neil Craik, *Trail Smelter Redux: Transboundary Pollution and Extraterritorial Jurisdiction*, 14 J. ENVTL. L. & PRAC. 139 (2004); Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617 (2004); Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 18 GEO. INT'L ENVTL. L. REV. 1 (2005); Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233 (2006).

105. Province of Manitoba v. Norton, 398 F. Supp. 2d 41 (D.D.C. 2005); *see also* John Knox, *Environment: Garrison Dam, the Columbia River, the IJC, NGOs*, 30 CAN.-U.S. L.J. 129 (2004); Rosenberg, *supra* note 56; *United States and Canada Agree on Measures to Address Devils Lake Flooding and Ecological Protection*, 99 AM. J. INT'L L. 909 (John R. Crook ed., 2005).

106. Although the prominence of non-state actors is new, their involvement in transnational relations is not. *See, e.g.*, Holsti & Levy, *supra* note 55, at 283 (explaining how "[t]he informal and formal communications between federal government bureaucracies and between officials of the states and provinces are no less important" than formal government

tional governments and nation-states "are no longer the sole bearers of rights and duties in the international sphere, nor are they the sole actors in the international arena."[107] Non-state and sub-national actors, like states and provinces, have an important voice in international relations and law.[108] "Domestic interest groups, transnational corporations, and global networks of NGOs all take part in the new global, political, and social constellation that defines the age of globalization."[109] Local governments are "increasingly becoming major actors in the emerging global legal order."[110] Even

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institutions); Joseph S. Nye, Jr., *Transnational Relations and Interstate Conflicts: An Empirical Analysis*, *in* CANADA AND THE UNITED STATES: TRANSNATIONAL AND TRANSGOVERNMENTAL RELATIONS 367, 367-69 (Annette Fox et al. eds., 1976) (describing the importance of transnational and transgovernmental actors as well as state actors in Canada-U.S. relations); *see generally* TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972).

107. Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 265 (2006); *see also* Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 883-84 (2006) (cataloguing literature describing roles of non-state actors in international law). For some general discussions of the phenomenon, see Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 169-75 (1999). For a discussion of subnational regimes in the context of climate change litigation, see Hari M. Osofsky, *Local Approaches to Transnational Corporate Responsibility Mapping the Role of Subnational Climate Change Litigation* (2007) (on file with author).

108. *See generally* Peter J. Spiro, *Nonstate Actors in Global Politics*, 92 AM. J. INT'L L. 808 (1998) (reviewing literature describing the recent rise of non-state actors in international law); *see also* Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 529 (2001) (describing a system in the nineteenth and twentieth centuries where "the state was the only player, and the need to protect its sovereignty was paramount," and recent changes to this model); Nossal, *supra* note 81, at 126 (describing how even in the early 1980s decentralizing trends were apparent).

109. Blank, *supra* note 107, at 265; *see also* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 492-511 (2005) (describing the myriad of non-state actors that influence international law); Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 41 (1974) (describing the development of networks that drive international policy); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF. Sept./Oct. 184-86 (1997) (arguing that the state is disaggregating in part because of transgovernmental networks); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (exploring governmental networks created by disaggregated states) [hereinaftet SLAUGHTER, NEW WORLD ORDER].

110. Blank, *supra* note 107, at 263; *see also* Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006) (describing the development of international local government law); Julie Mertus, *Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL. 537, 552-56 (2000) (describing the prominence of non-state actors in a globalized world).

non-state judicial systems appear on the rise.[111] Many scholars observing the change pay more attention to actors within states[112] or emphasize the role of transnational processes[113] and global, transgovernmental networks.[114]

Given this now well-catalogued phenomenon, the fact that states and provinces have reached out to tackle transboundary problems on their own is hardly astonishing, particularly since they appear to act with the federal government's blessing. Surely, the scholarship that embraces sub-national actors as international norm creators often contains both a descriptive and a normative component. In a globalized world, sub-national actors not only can, but are expected, to act and solve global problems. In that context, the pressure on the national governments to reach agreements over environmental issues—such as Great Lakes diversions—declines.

Another trend also helps explain why sub-national agreements, like the Compact and Agreement, are coming into existence—despite the existence of the Boundary Waters Treaty. The U.S. reluctance to use the IJC is not an isolated occurrence; rather it reflects a larger trend. In recent years, the U.S. rejected or retreated from international treaties in a whole host of contexts.[115] Some academics actively encouraged this disengagement, be-

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111. *See* Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (2005) (examining non-state justice systems for indigenous groups).

112. *See* OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2005); Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 799-801 (2005) (describing the difference between a traditional unitary state model and a theory that disaggregates the state); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1302-06 (2006) (reviewing JACK A. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)) (describing cosmopolitanism and critiquing realist, state-centric visions of international law).

113. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-58 (1997).

114. SLAUGHTER, NEW WORLD ORDER, *supra* note 109, at 108-27; *see* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

115. *See generally* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1197 (2005) (describing U.S. opposition to a "dazzlingly broad" range of international laws and institutions, including the ICC, the Kyoto Protocol, United Nations agencies, the Convention on the Law of the Sea, and the Comprehensive Test Ban Treaty); *see also* Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 670 (2006) ("[The U.S.,] in particular, has recently had a decidedly uneasy relationship with international legal norms and institutions, as illustrated by the refusal to ratify the Kyoto Protocol, the 'unsigning' of the Rome Treaty creating the International Criminal Court, the rejection of the Land Mines and Comprehensive Test Ban Treaties, the repudiation of the ABM treaty, and, perhaps most ominously, the assertion of a doctrine of preventive war that is in considerable tension with conventional understandings of the norms governing the use of force.").

lieving international law to threaten democratic sovereignty.[116] This scholarship, to the extent it indiscriminately indicts all international institutions, is misguided but has influenced policy makers. In such a world, embracing the IJC may be politically impossible for the two countries.

As a normative matter, the IJC's decreased relevance[117] is unfortunate. First, the IJC has served the countries well in the past, particularly when it comes to factual findings and public participation. Most scholars believe that it has been highly successful. The IJC "is an institution strikingly open to public participation."[118] Indeed, the IJC—with half of its members being American and half Canadian—has some of the qualities of a hybrid court, seen as positive in other contexts.[119] As two commentators have described the IJC's value:

> First and foremost, [the IJC is valuable because of its] binational advice formulated by eminent statesmen appointed at the most senior levels of the Canadian and United States Governments. Secondly, the advice is developed relying on the best scientific and socio-economic expertise available from the government and private sectors as well as from affected or concerned interest groups. Thirdly, it is formulated in a less adversarial atmosphere than would exist in binational discussions.[120]

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116. *See generally* Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)) (describing the revisionist movement to undermine the use of international law because of its perceived inconsistency with democratic governance); *see, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (presenting a critical, negative view of international law and a disdain for international institutions); ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 10 (2003) (asserting that international courts undermine democratic institutions to advance a liberal agenda). For additional examples, in a similar vein, see Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 73 (2000); Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000); Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

117. It is unclear whether the Boundary Waters Treaty has been undermined or strengthened. The Compact may paradoxically strengthen the Boundary Waters Treaty by making the Treaty enforceable through the citizen suit provisions. For a discussion, see Hall, *Horizontal Federalism*, *supra* note 5.

118. Toope & Brunnee, *supra* note 16, at 283.

119. William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 976-77 (2004) (indicating that hybrid tribunals are models by which national and international legal systems are influencing each other, whereby the international system may include local judges, prosecutors, and procedures to make it a more unified system); *see also* Brady Hall, *Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT'L L. 39, 45-46 (2005) (demonstrating that "hybrid" courts are a combination of international and local law where judges are both international and local).

120. Chandler & Vechsler, *supra* note 72, at 281-82.

Seen in this light, the whittling away of the IJC's power—first by relegating it to the Great Lakes and then second supplanting it entirely—if not misguided, is certainly not a positive development.[121]

Second, the issue of Great Lakes' diversions is not purely a regional problem. The Great Lakes are a national, if not an international, resource.[122] In fact, one of the motivations behind the Compact and Agreement was to prevent arid southwestern states from accessing Great Lakes water.[123] And many of the challenges facing the Great Lakes, such as climate change, are not purely regional issues.[124] Some suggest that the Great Lakes water

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121. Ironically, the IJC had a hand itself in these developments. It was a 2000 IJC report recommending greater regional involvement that spurred the state and provincial governments to act. INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES (2000).

122. The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter, June 18, 2001, http://www.cglg.org/projects/water/docs/GreatLakesCharter Annex.pdf (describing the Great Lakes as a "national treasure"); *see also* The Great Lakes Water Quality Act, 33 U.S.C. § 1268(a)(1)(A) (2002) (stating that "the Great Lakes are a valuable national resource, continuously serving the people of the United States and other nations as an important source of food, fresh water, recreation, beauty, and enjoyment").

123. Klein, *supra* note 39, at 18-20 (describing the Great Lakes "water wars" and describing the change of political power from the Midwestern states to the Southwest); *see also* Rob Fanjoy, *Governors Sign Great Lakes Compact*, PLANNING, Feb. 2006, at 50 (noting that the Compact intended to prevent diversions to the arid west and that supporters of the Compact hope it will be signed into law prior to 2010, "when western and southwestern states with rapidly growing populations will undoubtedly gain more congressional seats"); Anonymous, *They Need It. We Waste It.*, CHI. READER, Jan. 13, 2006, at 1 (describing the Compact as a "mid-continent OPEC" to protect the Great Lakes Basin from diversions to the arid southwest); Gretchen Ehlke, *Great Lakes Governors OK Water Deal—Fears that Southwest States Will Try Tapping into the Lakes Are Behind the Agreement*, WIS. ST. J., Dec. 14, 2005, at C1 (stating that Governors signed the Compact to prevent booming Southwest cities from raiding Great Lakes water); *see also That Big Sucking Sound*, GRAND RAPIDS PRESS, Oct. 22, 2001, at D4 (describing a billboard entitled "Back off suckers. Water diversion . . . the last straw"). The Canadians had similar concerns. *See, e.g.*, *Troubled Waters on Great Lakes*, TORONTO STAR, Sept. 25, 2004, at H06 (noting that "Canadian environmentalists have argued that [prior drafts of the Compact and Agreement] amount[ed] to little more than a box of straws for sucking more and more water out of the Great Lakes"); *cf.* Christopher Scott Maravilla, *The Canadian Bulk Water Moratorium and Its Implications for NAFTA*, 10 CURRENTS INT'L TRADE L.J. 29 (2001) (describing Canada's prohibition on all bulk water exports of Canadian freshwater).

124. INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES, INTERIM REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 12, 20 (1999), http://ijc.org/php/publications/html/interimreport/interimreporte.html (noting concerns over the impact of global warming on the Great Lakes); *see also* Tarlock, *supra* note 9, at 39 (explaining that "[g]lobal climate change helps fuel the persistent regional fear that the lakes will be tapped to augment water supplies outside the basin, although the lakes are less vulnerable to the projected effects of global climate change than small bodies of water in arid regions") (citing Stanley Changnon, *Understanding the Physical Setting: The Great Lakes Climate and Lake Level Functions*, *in* LAKE MICHIGAN DIVERSION AT CHICAGO AND URBAN

should be exported internationally on humanitarian grounds, "as pollution, overuse and population pressures have imperiled [world] water supplies."[125] Moreover, regional compacts and agreements raise significant constitutional concerns[126] and serious questions as to whether diversion bans violate international trade agreements, like GATT and NAFTA, which international agreements do not.[127] Therefore, solving Great Lakes issues through regional agreements seems less than ideal.[128]

Lastly, whether private litigation in the district courts is the best, or only, way to resolve complicated transboundary problems is unclear.[129] One of the significant changes of the Compact and Agreement's regime from the Boundary Water Treaty is the ability for private enforcement actions.[130] The Boundary Waters Treaty does not permit private enforcement action.[131] But

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DRAUGHT: PAST, PRESENT AND FUTURE REGIONAL IMPACTS AND RESPONSES TO GLOBAL CLIMATE CHANGE 39 (Stanley Changnon ed., 1994)); Charles F. Glass, Jr., Note, *Enforcing Great Lakes Water Export Restrictions Under the Water Resources Development Act of 1986*, 103 COLUM. L. REV. 1503, 1504 (2003) (noting that "several studies have forecasted that climate change could substantially reduce lake levels in coming years").

125. Brian D. Anderson, *Selling Great Lakes Water to a Thirsty World: Legal, Policy & Trade Considerations*, 6 BUFF. ENVTL. L.J. 215, 217, 223 (1999).

126. *See supra* note 15 and accompanying text.

127. Milos Barutciski, *Trade Regulation of Fresh Water Exports: The Phantom Menace Revisited*, 28 CAN.-U.S. L.J. 145 (2002); Sanford E. Gaines, *Fresh Water: Environment or Trade?*, 28 CAN.-U.S. L.J. 157 (2002).

128. Hall, *Horizontal Federalism*, *supra* note 5, at 449 ("Clearly individual states, acting alone, cannot adequately address transboundary and interstate pollution."); *see also* Mark A. Drumbl, *Environmental Supra-Nationalism*, 59 WASH. & LEE L. REV. 289, 298 (2002) ("Environmental policy cannot just be a matter for local government. Accordingly, environmental governance increasingly is operating at the regional, continental, multinational, and even global level."); Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 931-34 (1997) (explaining that legal regimes have been slow to develop to address the issue of transboundary pollution).

129. Hall, *Horizontal Federalism*, *supra* note 5, at 449 (noting that the U.S. Supreme Court "has admitted that it is not the ideal forum for addressing transboundary pollution disputes, which tend to involve complex technical and scientific issues with major political and economic ramifications"); *cf.* John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 764-66, 772 (1997) (arguing that courts are "imperfect tools for gathering information, especially when relevant issues for decision involve broader political, economic, and social events and trends"); *see also* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 830 (1989) (noting the problems with domestic courts deciding issues involving foreign affairs); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1668 (1997) (arguing that courts are poorly equipped to address questions involving foreign relations).

130. *See supra* notes 26-35, and accompanying text (describing private enforcement actions under the Compact).

131. Dellapenna, *supra* note 38, at 857 ("Private litigants who have attempted to invoke the terms of the *Boundary Waters Treaty* to challenge regulatory decisions in the United States have been uniformly rebuffed."); *see also* DiLaura v. Power Auth. of N.Y., 786

transboundary issues—such as diversion of water from the Great Lakes—often implicate complicated scientific and environmental issues that courts may not be ideally suited to address. Also, potential problems with the appearance of court-bias may undermine the perceived legitimacy of any court decision.[132] This is not to jump into the burgeoning debate over whether domestic courts should, or effectively can, enforce international law. Instead, the point is that some international institutions, like the IJC, can complement or avoid domestic litigation by building consensus.

This is not to suggest that Canada and the United States need some form of continental government. The IJC was never intended for such a purpose,[133] and this Article does not argue otherwise. The IJC has always been a pragmatic, consensus-building institution, used as a means to equitably solve cross-border dilemmas while minimally interfering with national sovereignty. Not at its creation, and not now, is anyone suggesting "the utopian dreams of new levels of government and the 'surrender of sovereignty' to higher forms of international life which bedazzled political philosophers in the post-war years."[134] Nor is it to argue that the Commission should be imparted with significant, or perhaps even any, enforcement powers. Many institutional reasons suggest that advocating such an approach would be impractical.[135] The point made here is more modest: some problems—such as Great Lakes diversions—are international problems, which will continue to benefit from international solutions. In short, as a new subnational regulatory regime edges one-step closer to fruition, in the form of the Compact and Agreement, the countries should not forget the IJC. If we are wise, it is an institution that will remain pertinent.

F. Supp. 241, 250-52 (W.D.N.Y. 1991) (finding that the Boundary Waters Treaty does not create private rights or permit private rights of action).

132. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 45-46 (2006) (describing perception that U.S. courts are predisposed to favoring citizens over foreigners); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121-22, 1143 (1996) (exploring reasons why foreigners fear U.S. courts, but concluding, based on empirical analysis, that foreign litigants do not fare badly in U.S. litigation); *cf.* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 17 (2005) (arguing that domestic courts are subject to political control).

The perception of bias is not lost for Canadians, despite the close ties to the U.S. *See* Christopher L. Doerksen, *The Restatement of Canada's Cuban (American) Problem*, 61 SASKATCHEWAN L. REV. 127, 134 (1998) ("Canada believes that a judge raised within the cultural construct of the United States will necessarily tend to favor U.S. interests . . . .").

133. John W. Holmes, *Introduction: The IJC and Canada-United States Relations*, *in* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON 4 (Robert Spencer et al. eds., 1981).

134. *Id.* at 5.

135. Toope & Brunnée, *supra* note 16, at 282, 287 (arguing that the "IJC is useful and modestly influential" and that "[t]urning it into a pseudo-judicial entity would undermine, not enhance, its effectiveness").

CONCLUSION

The Compact and Agreement, by many accounts, is a great step forward in state-provincial cooperation and environmental management of the Great Lakes. The creation of private rights of action to ensure compliance with the agreements is also remarkable. It is unfortunate, however, that the result of the creation of a new sub-national regulatory regime may well displace the countries' reliance on the IJC. The IJC is an important institution that has served the countries well. That it has been increasingly overlooked in recent years is a shame. The Compact and Agreement seem to spell even further marginalization of this venerable institution. For that reason, the Compact and Agreement hold mixed blessings.