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

Austen L. Parrish

Indiana University Maurer School of Law, austparr@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Environmental Law Commons, International Law Commons, Transnational Law Commons, and the Water Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
MIXED BLESSINGS: THE GREAT LAKES COMPACT AND AGREEMENT, THE IJC, AND INTERNATIONAL DISPUTE RESOLUTION

Austen L. Parrish

2006 Mich. St. L. Rev. 1299

TABLE OF CONTENTS

| ABSTRACT | .......................... | 1299 |
| INTRODUCTION | .......................... | 1300 |
| I. THE COMPACT AND AGREEMENT | .......................... | 1303 |
| II. THE END OF AN ERA? | .......................... | 1306 |
| A. The Boundary Waters Treaty and the IJC | .......................... | 1306 |
| B. The IJC’s Marginalization | .......................... | 1311 |
| III. A LAMENT: THE FORGOTTEN EFFECTIVENESS OF BILATERAL INSTITUTIONS | .......................... | 1314 |
| CONCLUSION | .......................... | 1321 |

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.

* Associate Professor of Law, Southwestern Law School. J.D., Columbia University, 1997; B.A., University of Washington, 1994. The author is the Director of Southwestern’s Summer Law Program in Vancouver, B.C., Canada, where he teaches international environmental law at the University of British Columbia. The author is grateful to Noah Hall for his comments and suggestions and to Clinton Hare and Natasha Hill for their research assistance.
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 Agreement¹ 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 system³ 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-


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. At the very least, they reinforce the long-held, almost romantic, belief that a unique Canadian-U.S. talent exists for bilateral cooperation and dispute resolution.

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. 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


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.").


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 protection11 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-

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)).


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.

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 influ-
ence. 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 rele-
vant 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 prob-
lems 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 chal-
enges 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 Quebec 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); Rich-
ard F. Ricci et al., Battles over Eastern Water, 21 A.B.A. NAT. RESOURCES & ENV'T 38, 41-

²⁰. 2005 Great Lakes Compact, supra note 1, § 1.2; see Hall, Horizontal Federal-
ism, 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.\textsuperscript{21} They require each state or province to adopt a set of “environmentally-based common standards into its domestic regulatory regime.”\textsuperscript{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.”\textsuperscript{23} The standards will be reviewed every five years.\textsuperscript{24} If the Compact proceeds through the eight state legislatures and the U.S. Congress, it will become binding law.\textsuperscript{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.\textsuperscript{26} The Council “can promulgate and enforce rules to implement its duties.”\textsuperscript{27} It has “broad authority to plan, conduct research, prepare reports on water use, and forecast water levels.”\textsuperscript{28} The Council also has the power to conduct investigations and institute court actions.\textsuperscript{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.\textsuperscript{30}

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

\textsuperscript{21} 2005 Great Lakes Compact, \textit{supra} note 1, art. 4.
\textsuperscript{22} Valiante, \textit{Charter Annex, supra} note 2, at 47.
\textsuperscript{23} Hall, \textit{Horizontal Federalism, supra} note 5, at 406.
\textsuperscript{24} 2005 Great Lakes Compact, \textit{supra} note 1, § 3.4.
\textsuperscript{25} \textit{Id.} § 9.4; \textit{see also} Hall, \textit{Horizontal Federalism, supra} note 5, at 445 (describing how, once ratified, the Compact will be difficult to terminate or amend).
\textsuperscript{26} 2005 Great Lakes Compact, \textit{supra} note 1, §§ 2.1-.9, 3.1-.4; \textit{see also id.} § 4.5 (describing how the Council will consider Regional Review findings made by representatives of states and provinces).
\textsuperscript{27} Hall, \textit{Horizontal Federalism, supra} note 5, at 444; 2005 Great Lakes Compact, \textit{supra} note 1, §§ 2.1-.3, 3.3.
\textsuperscript{28} Hall, \textit{Horizontal Federalism, supra} note 5, at 444.
\textsuperscript{29} 2005 Great Lakes Compact, \textit{supra} note 1, § 7.3.
\textsuperscript{30} \textit{Id.} § 7.3(2).
\textsuperscript{31} Hall, \textit{Horizontal Federalism, supra} note 5, at 444.
\textsuperscript{32} \textit{Id.} § 7.2(1).
\textsuperscript{33} \textit{Id.} § 5.1 (requiring consultation with federally recognized Tribes); \textit{Id.} § 6.2 (setting forth procedures for public participation).
grieved persons are "entitled to a hearing" governed by state law. 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. 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. 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." 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. 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."
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. 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. 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. The tension in Canada-U.S. relations led to the creation of the 1909 Boundary Waters Treaty.

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

40. Shafer, supra note 2, at 465-67 (describing history of Great Lakes diversions and diversion proposals).
43. 1909 Boundary Waters Treaty, supra note 8.
tion was “a long and hard fought process,” 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.” The treaty established “principles for the use of boundary waters, including the Great Lakes,” but its potential reach extended to “all boundary questions, and arguably to other questions of common concern as well.”

The Treaty’s purpose was straightforward. It sought “to ensure the equitable sharing of boundary waters between Canada and the United States,” while encouraging and providing mechanisms for dispute resolution. 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. The treaty also set forth other important obligations, including: (1) the obligation not to pollute boundary waters, and (2) reciprocal court access in cases involving water diversion or obstruction. 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.”

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

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.
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).
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." It was created as an independent, "bi-national body, comprised of six commissioners, three appointed by the United States and three by Canada." Although the Boundary Waters Treaty assigned the IJC "surprisingly wide powers," the commissioners were intended to be nonpolitical and impartial. The IJC's administrative, quasi-judicial, arbitral, and even investigative powers were part of an "ambitious institutional design." 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. Despite having no enforcement powers, "[n]o other transboundary institution in the world compare[d] with the IJC" with respect to its powers.

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


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.
Article X, in turn, provided detailed procedures upon which the two governments could agree to binding arbitration to resolve differences. 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. 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.” In its first seventy years, the IJC handled well over one hundred cases, including most notably: the Garrison Dam project; the Trail Smelter controversy from the 1920s; and diversions, damming, and other projects related to the Columbia, Flathead, Mary, Milk, Skagit, and St. Croix rivers.

The IJC also played a significant role in managing and protecting the Great Lakes. This included: (1) a 1912 reference to the IJC “to determine ‘to what extent . . . have the boundary waters between the United States . . .’”

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).
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).
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,
behind the scenes actor that help[ed] move governments to solutions the governments [were] prepared to accept,“ and was commended for its “objectivity and leadership on environmental issues." For dispute resolution, legal scholars described it as “one of a kind." 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.”

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
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. 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. 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.” And the IJC increasingly came under attack for resolving matters slowly. 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.” Ultimately, the IJC was seen as a threat to sovereignty. Canada, particularly, became disenchanted with the IJC, believing that Canadian interests were not sufficiently protected. By early 1981, for almost a year, the IJC was entirely unable to function.

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.


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," and the countries “drastically reduced their reliance upon the IJC’s reference functions.” Between 1977 and 1991, only two matters were referred to the IJC for investigation. And, of course, neither Canada nor the United States referred a matter for a binding decision. 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, the IJC had little influence. 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.”

Indicative of its dwindling influence, numerous proposals were written to revamp or restructure the IJC entirely. 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.”

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-

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 & Brunnee, 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 & Brunnee, 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).


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”).


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 & Brunnee, 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. 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. 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. As 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).


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
national 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." Non-state and sub-national actors, like states and provinces, have an important voice in international relations and law. "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." Local governments are "increasingly becoming major actors in the emerging global legal order." Even
non-state judicial systems appear on the rise.\textsuperscript{111} Many scholars observing the change pay more attention to actors within states\textsuperscript{112} or emphasize the role of transnational processes\textsuperscript{113} and global, transgovernmental networks.\textsuperscript{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.\textsuperscript{115} Some academics actively encouraged this disengagement, be-

\begin{itemize}
\item \textsuperscript{111} See Brynna Connolly, \textit{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).
\item \textsuperscript{115} See generally Anupam Chander, \textit{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, \textit{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.").
\end{itemize}
believing international law to threaten democratic sovereignty. 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 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.” 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. 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.


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

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).


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. READ., 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." Moreover, regional compacts and agreements raise significant constitutional concerns and serious questions as to whether diversion bans violate international trade agreements, like GATT and NAFTA, which international agreements do not. Therefore, solving Great Lakes issues through regional agreements seems less than ideal.

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


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 . . . ").


134. \textit{Id.} at 5.

135. Toope & Brunnee, \textit{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.