Fordham Law Review

Volume 49 | Issue 3 Article 11

1980

Ixtoc I: International and Domestic Remedies for Transboundary Pollution Injury

William J. Macdonald

IXTOC I: INTERNATIONAL AND DOMESTIC REMEDIES FOR TRANSBOUNDARY POLLUTION INJURY

INTRODUCTION

On June 3, 1979, Ixtoc I, an offshore oil rig controlled by Pemex,[1] exploded.[2] The ensuing leak polluted the Gulf of Mexico with approximately 3,000,000 barrels of oil, making it the largest oil spill in history.[3] Although the United States incurred relatively little dam-

---

1. Pemex (Petroleos Mexicanos) is a wholly-owned subsidiary of the Mexican government. F.W. Stone Eng'r Co. v. Petroleos Mexicanos, 352 Pa. 12, 14, 42 A.2d 57, 59 (1945); [1979] 10 Envir. Rep. (BNA) 765; *see* D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1286 (D. Del. 1976) ("[T]he Mexican government . . . entered the oil business through Pemex . . . . "), *aff'd*, 564 F.2d 89 (3d Cir. 1977). The rig was owned by a United States corporation, Sedco, Inc. *The Impact of the Blowout of the Mexican Oil Well Ixtoc I and the Resultant Oil Pollution on Texas and the Gulf of Mexico: Hearings Before the House Comm. on Merchant Marine and Fisheries and the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 96th Cong., 1st Sess. 20 (1979) [hereinafter cited as *Ixtoc Hearings*] (statement of Stephen Mahood). Permargo (Perforaciones Marinas Del Golfo, S.A.), a privately owned Mexican drilling company, had operated the rig since August 1977. *Id.* At the time of the accident, Permargo was acting for Pemex under a long-term offshore drilling contract. *Id.*

2. *Ixtoc Hearings, supra* note 1, at 22 (statement of Stephen Mahood). On June 2, 1979, a "major loss of circulation" occurred. *Id.* at 21. Permargo personnel on the rig deferred a decision on what course to pursue to Pemex officials on shore, who, after a few hours delay, decided to remove the drill and bit. Sedco personnel strongly disagreed. *Id.* At 10:00 p.m. on June 2, 1979, the drill pipe was removed and newly mixed mud was inserted to equalize pressure. The high pressure of the pumped mud caused the drill collar to bend, making it impossible to shut off the flow of mud. The mud was followed by oil and gas, which ignited and burned uncontrollably. The fire intensified, the spill began, and the rig was abandoned. *Id.* at 21-22.

3. The rate of the leak was estimated at 30,000 barrels per day. *Id.* at 81 (statement of Adm. Paul Yost). Some early reports estimated that the leak had slowed to approximately 10,000 barrels a day. [1979] 10 Envir. Rep. (BNA) 1597. Later disclosures, however, indicated that the flow was probably constant throughout the duration of the spill (30,000 barrels per day). [1980] 10 Envir. Rep. (BNA) 2252; N.Y. Times, Feb. 26, 1980, § 1, at 15, col. 2. By December 1979, three months before it was capped, Ixtoc I had spilled 136,000,000 gallons of oil (2,500,000 barrels), making it twice the size of the Amoco Cadiz spill off the coast of Brittany, France, previously the largest spill. [1980] 10 Envir. Rep. (BNA) 765. The well was finally capped on March 23, 1980. *Id.* at 2252. By comparison, the Santa Barbara Channel blowout of 1969, which sparked a national movement for regulation of offshore drilling, leaked only about 2,300,000 gallons (41,000 barrels). R. Easton, Black Tide 110 (1972). The sheer size of the Ixtoc spill was compounded because the oil did not float in a homogeneous state. Instead it dispersed as emulsion, [1979] 10 Envir. Rep. (BNA) 1033, 1597, a mixture of one liquid (oil) finely dispersed in another liquid (water). It cost the United States an average of $75,000 to $85,000 a day to clean up the oil that reached its shores. *Ixtoc Hearings, supra* note 1, at 90 (statement of Adm. Paul Yost).

age,[4] many individual United States nationals suffered severe injury to both their homes and businesses[5] and deserve redress.[6] Any recovery from Pemex, which is wholly-owned by the Mexican government,[7] depends, however, on overcoming the traditional and still formidable theory of state sovereignty.[8]

The proliferation of offshore drilling ventures increases the possibility of future accidents[9] and of future litigation. This Note analyzes

---

4. Meteorologists and oceanographers believe that particularly favorable sea currents and wind patterns during the fall of 1979 prevented even more disastrous effects to the United States. [1980] 10 Envir. Rep. (BNA) 1200; N.Y. Times, Feb. 26, 1980, § 1, at 15, col. 3-4.

5. *Ixtoc Hearings*, *supra* note 1, at 108-19 (statement of Glen McGehee). Four types of injuries were sustained because of the Ixtoc I blowout: (1) damage to tourism on the entire Texas Gulf coast; (2) damage to the environment, primarily the Texas coastal shelf, beaches, intertidal, and subtidal zones; (3) damage to environmental baselines such as the Texas Deepwater Port and the Offshore Continental Shelf Development; and (4) damage to the fishing industry and the costs of clean-up. *Id.* at 140. The total damages suffered were in excess of $580,000,000. N.Y. Times, May 23, 1980, § 1, at 17, col. 5.

6. Various suits brought by private individuals, the State of Texas, and the United States Government have been consolidated in one action. *In re* Sedco Inc., Nos. H-79-2157, H-79-1892, H-79-2389, H-79-2436 (S.D. Tex., filed July 1, 1980); *see* note 1 *supra*.

7. *See* note 1 *supra*.

8. *See generally* J. Bodin, Six Livres de la Republique (4th ed. 1579); H. Laski, The Foundations of Sovereignty and Other Essays (1968); C. Merriam, The History and Theory of Sovereignty Since Rousseau (1900); Sovereignty Within the Law (A. Larson ed. 1965). Although not unknown to the Greek city states, the concept of sovereignty emerged along with the modern structure of nations at the close of the sixteenth century. D. Nincic, The Problem of Sovereignty in the Charter and in the Practice of the United Nations 2 n.2 (1970). Some early political thinkers advocated absolute sovereignty, which would place no external restraints on the behavior of a nation. E. de Vattel, The Law of Nations lxiii (1861). The modern relative theory of sovereign immunity eclipsed this absolute theory, however, by arguing that every nation is sovereign and free from intervention from other nations within the sphere of its jurisdiction. This independence, however, is limited by the freedom and independence of other nations, as well as by international conventions and specific agreements among nations. C. Eagleton, The Responsibility of States in International Law 11-14 (1928).

9. In 1976, 400 offshore units yielded 15% of the total world oil production. Yashiro, *Development of Petroleum Resources in the Ocean*, in Marine Technology and Law 17, 23-24 (1978). Increasing demand and limited supply will probably lead to increased offshore drilling as the high price of oil makes the high cost of offshore drilling economically feasible. For example, United States offshore oil production in the Gulf of Mexico alone will increase from 414,185 barrels in 1970 to an estimated 741,443 barrels in 1985. Bureau of Mines, U.S. Dep't of the Interior, Information Circular 8575, Offshore Petroleum Studies 18 (1973). Increased production has been accompanied by increased spills. In the first seven months of 1979, 513,000 tons of oil were spilled; for the entire year of 1978, only 260,488 tons were spilled. [1979] 10 Envir. Rep. (BNA) 992. Continually increasing exploitation of offshore oil seems inevitable given the widespread public and private enthusiasm. For example, Congress has expressly encouraged domestic offshore development particularly in the Atlantic

the adequacy of the mechanisms for redress available to those injured by transnational oil pollution. Whether redress is sought internationally through the International Court of Justice (I.C.J.)[10] or in the United States through the Foreign Sovereign Immunities Act,[11] the conflict is between an injured party's right to compensation and the nation's exclusive right to judge activities within its sovereign territory. Part I considers the potential for pursuing a claim in the I.C.J.; Part II examines the application of the Foreign Sovereign Immunities Act in United States courts. The Ixtoc I spill is merely a specific example; the discussion applies to other transboundary pollution incidents involving injured American nationals and a foreign nation defendant.

I. SUIT IN INTERNATIONAL COURT

A. *Transboundary Pollution Rule of Law*

Over the last several decades, international custom has required that nations be responsible for government controlled activities that cause damage to other nations.[12] Under traditional rules of national

---

Ocean and Gulf of Alaska. *See* Ad Hoc Select Comm. on the Outer Continental Shelf, 94th Cong., 2d Sess., Study on the Effects of Offshore Oil and Natural Gas Development 4 (Comm. Print 1976). Plans already are made for United States drilling companies to provide 120 drilling rigs to Mexico in the next 10 years. N.Y. Times, January 28, 1979, § 1, at 16, col. 2. Furthermore, at least 30 nations are producing from offshore wells, and 40 others are in the process of developing offshore capabilities. Yashiro, *supra*, at 23-24.

10. The I.C.J. is the successor of the Permanent Court of International Justice (P.C.I.J.) created by the League of Nations. *Compare* U.N. Charter art. 7, para. 1 *with* League of Nations Covenant art. 14. The process for the management of the I.C.J. is set forth in the U.N. Charter. U.N. Charter arts. 92-96. To insure impartiality, no member of the Court may exercise any political or administrative function or engage in any occupation or profession while sitting. Stat. I.C.J. art. 16, para. 1, *reprinted in* W. Bishop, International Law 923 (2d ed. 1962). The I.C.J. has 15 judges, with regular elections of five judges every three years; *id.* art. 13, para. 1, *reprinted in* W. Bishop, *supra*, at 923; no two members may be nationals of the same nation. *Id.* art. 3, para. 1, *reprinted in* W. Bishop, *supra*, at 921. Candidates must be elected by a majority of both the General Assembly and the Security Council to ensure a cross representation of various nations. *Id.* art. 10, *reprinted in* W. Bishop, *supra*, at 922. *See generally* S. Rosenne, The International Court of Justice (2d ed. 1961) [hereinafter cited as S. Rosenne 1961].

11. 28 U.S.C. §§ 1330, 1332(a)(2),(4), 1391(f), 1441(d), 1602-1611 (1976).

12. The concept of national responsibility was patterned after notions of how individuals should act in society. W. Hall, A Treatise on International Law 1 (6th ed. 1909). Our modern system of international responsibility recognizes liability for international injuries. 1 H. Lauterpacht, International Law 383-84 (1970). The doctrine of sovereignty traditionally discouraged the imposition of liability unless grounded in a nation's consent by treaty, rules of law, or custom. *Id.* at 384. The scope of these sources, however, has expanded dramatically in recent years with a corresponding expansion of the principles of national responsibility. C. Eagleton, *supra* note 8, at 207-08. As a result, it is clear that nations are responsible for injuries they inflict on

responsibility, direct damage to the property of another nation creates a duty to redress the injury.[13] Although no specific multilateral convention explicitly imposes liability for transnational pollution injuries resulting from offshore drilling,[14] an international court will discern a general international rule from other sources[15] and apply that rule to the specific situation.[16] In the transboundary pollution situation, re-

---

other nations. W. Bishop, *supra* note 10, at 636-704; C. Eagleton, *supra* note 8, at 21; A. Freeman, The International Responsibility of States for Denial of Justice 15, 22-27 (1970); H. Lauterpacht, *supra*, at 401.

13. *See* C. Amerasinghe, State Responsibility for Injuries to Aliens 74-75 (1967); C. Eagleton, *supra* note 8, at 51, 80, 103; Bleicher, *An Overview of International Environmental Regulation*, 2 Ecology L.Q. 1, 11, 25 (1972); Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 Am. J. Int'l L. 50, 75-76 (1975).

14. A multilateral convention involves the same formalities and imposes the same obligations as any other treaty. Nations adopt, sign, ratify, or accede to the treaty. *See generally* I. Brownlie, Principles of Public International Law 582-613 (2d ed. 1973). The need for a universal convention governing transnational pollution injury from offshore mining activities is reflected by the plethora of regional and bipartite treaties created for various other environmental problems. *See, e.g.*, Treaty Banning Nuclear Tests, Aug. 5, 1963, United States-United Kingdom-Soviet Union, 14 U.S.T. 1313, T.I.A.S. No. 5433; The Indus Waters Treaty, Sept. 19, 1960, Pakistan-India, 419 U.N.T.S. 125, *reprinted in* 55 Am. J. Int'l L. 797 (1961); Agreement for Full Utilization of the Nile, Nov. 8, 1959, United Arab Republic-Sudan, 453 U.N.T.S. 51; Agreement Relating to the St. Lawrence Seaway, Feb. 27, 1959, United States-Canada, 10 U.S.T. 383, T.I.A.S. No. 4199; Act Between the States of the Niger Basin, *done* Oct. 26, 1963, 587 U.N.T.S. 9. Many commentators have advocated a comprehensive treaty. *See, e.g.*, J. Barros & D. Johnston, The International Law of Pollution xv (1974); Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 Nat. Resources J. 179, 179 (1973); Kutner, *The Control and Prevention of Transnational Pollution: A Case for World Habeas Ecologicus*, 9 Law. Americas 257, 279 (1977); Nanda, *The Establishment of International Standards for Transnational Environmental Injury*, 60 Iowa L. Rev. 1089, 1101-08 (1975); Neuman, *Oil on Troubled Waters: The International Control of Marine Pollution*, 2 J. Mar. L. & Com. 349, 352 (1971). Even the U.N. Secretary-General has stated that "investigation and control of marine . . . pollution . . . is a matter on which international action on both regional and global scales is now becoming urgent." U.N. Doc. E/4487, ¶ 278 (1968). *See generally* U.N. Conference on the Human Environment, June 16, 1972, principle 21, U.N. Doc. A/CONF. 48/14 and Corr. 1, *reprinted in* 11 Int'l Legal Materials 1420 (1972) (responsibility of nations not to injure the environment of other nations), *endorsed*, G.A. Res. 2996, 27 U.N. GAOR, Supp. (No. 30) 42, U.N. Doc. A/CONF. 48/14 (1972) (reported in D. Djanovich, United Nations Resolutions 278-79 (1978)).

15. I. Brownlie, *supra* note 14, at 19-23; D. O'Connell, International Law 28-29 (1965). "[I]f an international tribunal is unable to discover an existing treaty or customary rule relevant to the dispute, in theory at least the conclusion seems inescapable that the rule which the tribunal adopts . . . is a new rule of international law." D. Greig, International Law 31-33 (1970); *see* Stat. I.C.J. art. 38(D), *reprinted in* W. Bishop, *supra* note 10, at 926; S. Rosenne, The World Court 25 (3d rev. ed. 1973) [hereinafter cited as S. Rosenne 1973].

16. Because of lack of precedent, "the international judge [may have to] resort to general notions of justice and equity in deducing the new rule or in refining an existing rule." D. Greig, *supra* note 15, at 27. Moreover, the court is "at liberty to

sponsibility under international law is derived principally from two sources, judicial decisions and treaties and conventions.[17]

1. Judicial Decisions

The leading case on transboundary pollution is the *Trail Smelter Arbitration (United States v. Canada),*[18] which concerned American property damaged by emissions of sulphur dioxide from a smelter in British Columbia.[19] Initially, a Canadian-United States International Joint Commission determined that past damage should be redressed.[20] As the pollution continued, the two countries formed a tribunal to determine present and future damages.[21] The tribunal established an administrative organization to regulate the smelter[22] and determined that

> under the principles of international law . . . no [nation] has the right to use or permit the use of its territory in such a manner as

---

adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law." Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2, at 16. *See generally* H. Lauterpacht, The Development of International Law by the International Court 155-72 (1958); S. Rosenne 1961, *supra* note 10, at 420-29.

17. The Statute of the I.C.J. lists four primary sources of international law: "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; [and] (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations . . . ." Stat. I.C.J. art. 38, *reprinted in* W. Bishop, *supra* note 10, at 926. For organizational purposes, only international conventions and judicial decisions will be separately discussed in this Note. International custom and general principles are, in part, composed of the two previous sources, I. Brownlie, *supra* note 14, at 4-5, and hence, are not separately treated. The teachings of publicists also will not be separately discussed because the influence of publicists permeates any discussion of international law. Although some commentators question the use of teachings of international publicists by the Court, *see* D. Greig, *supra* note 15, at 41, various cases use their teachings. *See* Temple of Preah Vihear, [1962] I.C.J. 6, 39 (Alfaro, J.); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. 221, 235 (Read, J., dissenting); International Status of South-West Africa, [1950] I.C.J. 128, 153 (McNair, J.); Diversion of Water from the Meuse, [1937] P.C.I.J., ser. A/B, No. 70, at 76-77 (Hudson, J.). For this reason, this Note mentions support by international publicists within the context of the judicial decisions and conventions.

18. 3 R. Int'l Arb. Awards 1905 (1938).

19. *Id.* at 1917. In 1930, the smelter at Trail emitted between 330 and 350 tons of sulphur daily. *Id.*

20. The International Joint Commission awarded $350,000 and provided that future damages be adjusted by the owner of the smelter or the governments. Future damages were never adjusted by the company, nor determined by the governments. *Id.* at 1918-19.

21. *Id.* at 1907. The tribunal found damages for the period from 1932-1937 to be $78,000. *Id.* at 1931.

22. *Id.* at 1934.

> to cause injury by fumes in or to the territory of another [nation] or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[23]

The rationale of *Trail Smelter* has been applied uniformly in diplomatic settlements involving extraterritorial environmental damage resulting from radiation,[24] noxious odors,[25] and interference with riparian rights.[26]

In *Corfu Channel*,[27] the I.C.J. implicitly accepted the *Trail Smelter* reasoning by extending national responsibility to include activities occurring within a nation's territory that cause injury to foreign nationals.[28] In *Corfu*, British seamen were injured when their vessel

---

23. *Id.* at 1965. The tribunal undermined any potential argument that Canada's duty derived solely from the convention and, therefore, its decision would have little precedential value. "Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible . . . for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty . . . of Canada to see to it that this conduct should be in conformity with . . international law as herein determined." *Id.* at 1965-66.

24. *See* Nanda, *supra* note 14, at 1101. In 1954, the United States, while conducting hydrogen bomb tests in the Marshall Islands under a United Nations Trusteeship, exposed the crew of a Japanese fishing vessel to excessive levels of radiation. The United States agreed to pay two million dollars as compensation for the injury. The significance of the settlement is that it creates an expectation that a nation is responsible for pollution damage and should therefore make reparations. *Id.* at 1098. In 1958, the United States and Japan exchanged diplomatic correspondence concerning the prospective damage from nuclear tests conducted near the Marshall Islands. After Japan asserted that the United States should be solely responsible, the United States agreed to make reparations for all substantial damages. 4 M. Whiteman, Digest of International Law 578-86 (1963). When Australia requested I.C.J. action to prevent resumption of French nuclear tests in the South Pacific, the I.C.J.'s dissent noted that "each state is free to act as it thinks fit within the limits of its sovereignty, and in the event of genuine damage or injury, if the said damage is clearly established, it owes reparation to the state having suffered that damage." Nuclear Tests, [1973] I.C.J. 99, 131 (Ignatio-Pinto, J., dissenting on jurisdictional grounds).

25. *See* 6 M. Whiteman, *supra* note 24, at 256-57.

26. Lac Lanoux (Spain v. France), 12 R. Int'l Arb. Awards 281 (1957) (in French only). Spain objected to a French plan to divert waters of Lake Lanoux into the Ariege river for use in a hydroelectric plant. The tribunal declined to rule on the question because no Spanish interests had been injured. The tribunal did state, however, that any French act injuring Spanish interests would support a claim. *Id.* at 308.

27. [1949] I.C.J. 4, 7; *see* 1 L. Oppenheim, International Law 343 (8th ed. H. Lauterpaucht 1955).

28. *Corfu* is cited to support the proposition that knowledge of potential polluters imputes to the sovereign controlling the territory responsibility for transnational pollution injury. *See, e.g.*, Bleicher, *supra* note 13, at 17-18; Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 Int'l & Comp. L.Q. 1189, 1226-31 (1965); Holstein, *State Responsibility and the Law of International Watercourses*, 7 Law. Americas 535, 544 (1975); Lester, *River Pollution in International Law*, 57 Am. J. Int'l L. 828, 839-40 (1963).

collided with mines in the Strait of Corfu and sank.[29] The I.C.J. held Albania responsible for the protection of nationals of other countries from dangerous conditions within its jurisdiction.[30] The Court held that the laying of the mine field could not have been accomplished "without the knowledge of the Albanian Government"[31] and that every nation has the "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other [nations]."[32]

2. Treaties and Conventions

Progressively stricter notions of nation responsibility for pollution damages have developed in the last fifty years through treaties and conventions.[33] Early conventions primarily sought to limit oil discharge from large ships.[34] To secure signatories, however, these conventions did not completely prohibit oil discharge or impose liability.[35] Rather, the nation of registry determined what fines the ship

---

29. [1949] I.C.J. at 12-13.

30. *Id.* at 36.

31. *Id.* at 22.

32. *Id.* This rationale is largely supported by international jurists and commentators. *See* U.N. Secretariat Survey of International Law, U.N. Doc. A/CN. 4/1/Rev. 1, at 34-35 (1949); W. Bishop, *supra* note 10, at 344; C. Hyde, International Law 725 (2d rev. ed. 1947); C. Jenks, The Prospects of International Adjudication 408 (1969); Bleicher, *supra* note 13, at 16-30; Goldie, *supra* note 28, at 1226-32; Hoffman, *State Responsibility in International Law and Transboundary Pollution Injuries*, 25 Int'l & Comp. L.Q. 509, 513-20 (1976); Holstein, *supra* note 28, at 544. Kelson, *State Responsibility and the Abnormally Dangerous Activity*, 13 Harv. Int'l L.J. 197, 235-38 (1972); Kutner, *supra* note 14, at 279; Read, *The Trail Smelter Dispute*, 1 Can. Y.B. Int'l L. 213, 213-29 (1963); Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 Ore. L. Rev. 259, 281-82 (1971); Teclaff, *International Law and the Protection of the Oceans from Pollution*, 40 Fordham L. Rev. 529, 545 (1972) [hereinafter cited as Teclaff I]; Teclaff, *The Impact of Environmental Concern on the Development of International Law*, 13 Nat. Resources J. 357, 370 (1973).

33. *See* J. Barros & D. Johnston, *supra* note 14, at 200-62; Teclaff I, *supra* note 32, at 532-41.

34. In 1926, the United States held the first international convention on pollution, the Washington Conference. The United States delegate urged a complete prohibition of oil discharge from ships. Shepard & Mann, *Reducing the Menace of Oil Pollution*, 31 Dep't State Bull. 311, 311 (1954). The draft convention, however, was halfheartedly endorsed and simply enabled nations to create contiguous zones where discharge from ships could be prohibited. Final Act of the Preliminary Conference on Oil Pollution of Navigable Waters, Annex art. 1, *reprinted in* 1 U.S. Dep't of State, Papers Relating to the Foreign Relations of the United States 1926, at 238, 245 (1941). For a history of conventions regulating pollution from ships, see Higgins, *Pollution: International Conventions, Federal and State Legislation*, 53 Tul. L. Rev. 1328 (1979).

35. In 1954, under British initiative, the first generally accepted convention restricting oil pollution was signed. International Convention for the Prevention of Pol-

owner should pay.[36] The 1958 Convention on the High Seas[37] introduced the concept of nation responsibility for offshore mining, but did not impose liability for violating guidelines set forth in the convention.[38] A more recent international convention imposes liability on owners of polluting vessels. The Brussels Convention on Civil Liability for Oil Pollution from Ships[39] establishes limited strict liability[40] and gives jurisdiction to the courts of the nation in which the injury occurs.[41] Offshore mining pollution, however, is not expressly covered.[42]

Other international environmental developments couple principles of national responsibility with liability for offshore mining accidents. The 1976 Convention on Civil Liability for Oil Pollution Damages from Offshore Operations[43] imposes strict liability on offshore instal-

---

lution of the Sea by Oil, *opened for signature* May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900. This convention merely substituted a reduction of permissible discharge for the absolute bar proposed in the 1926 initiative. *Id.* art. III, 12 U.S.T. at 2992. Although amendments in 1962 decreased the permissible discharge, the standard still fell far short of the standards of the 1926 initiative. *See id.* art. III(a)-(b) (1970 amendments), *reprinted in* 9 Int'l Legal Materials 1, 3-4 (1970), *adopted*, International Convention for the Prevention of the Pollution of the Sea by Oil, Apr. 11, 1962, 17 U.S.T. 1523, T.I.A.S. No. 6109.

36. International Convention for the Prevention of Pollution of the Sea by Oil, art. VI, *done* Apr. 11, 1962, 17 U.S.T. 1523, T.I.A.S. No. 6109.

37. Convention on the High Seas, *done* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200.

38. *Id.* art. 24, 13 U.S.T. at 2319 ("Every State shall draw up regulations to prevent pollution of the seas . . . resulting from the exploitation and exploration of the seabed and its subsoil . . . ."). The convention merely restated the duty of a nation to control pollution; a duty was imposed "to prevent pollution of the seas by the discharge of oil from ships or pipelines." *Id.*, 13 U.S.T. at 2319. A nation whose regulation falls below a certain standard violates international law and is subject to penalties. *Id.*, 13 U.S.T. at 2319. Because of imprecise standards, however, no method exists to determine compliance with the convention. Teclaff I, *supra* note 32, at 534.

39. International Convention on Civil Liability for Oil Pollution Damage, *done* November 29, 1969, *reprinted in* 9 Int'l Legal Materials 45 (1970).

40. *Id.* art. III, *reprinted in* 9 Int'l Legal Materials at 47 ("[T]he owner of a ship at the time of an incident . . . shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.").

41. *Id.* art. IX, *reprinted in* 9 Int'l Legal Materials at 56 ("Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States . . . actions for compensation may only be brought in the Courts of any such Contracting State or States.").

42. *See id.*, *reprinted in* 9 Int'l Legal Materials at 56.

43. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources [hereinafter cited as 1976 Seabed Treaty], *reprinted in* 16 Int'l Legal Materials 1450 (1977); *see* Dubais, *The 1976 London Convention on Civil Liability for Oil Pollution Damage from Offshore Operations*, 9 J. Mar. L. & Com. 61 (1977)

lation operators for pollution damages to a contracting party.[44] Unfortunately, the convention is regional and only nations bordering the North Sea, Baltic Sea, or North Atlantic Ocean may accede to it.[45] The Stockholm Declaration on the Human Environment,[46] although not contractually binding, requires that nations prevent activities within their jurisdiction or control from causing environmental damage to other nations.[47] Again, no mechanism for redress is provided.[48]

The most important development in the area of transnational pollution is the United Nations Third Conference on the Law of the Sea (UNCLOS).[49] Although still in draft form, UNCLOS reflects the international concern for having nations redress transnational pollution injuries. If and when this convention is approved, polluters of

> areas (including the marine environment) under the jurisdiction of other [nations] . . . [will be] liable to other [nations] for such damage. The "activities" of concern may thus originate on land or any-

---

44. 1976 Seabed Treaty, *supra* note 43, art. 3, *reprinted in* 16 Int'l Legal Materials at 1452.

45. *Id.* art. 18, *reprinted in* 16 Int'l Legal Materials at 1455.

46. Report of the U.N. Conference on the Human Environment, U.N. Doc. A/CONF. 48/14, 5-7 (1972), *reprinted in* 11 Int'l Legal Materials 1416 (1972). *See generally* Mendelsohn, *Ocean Pollution and the 1972 United Nations Conference on the Environment*, 3 J. Mar. L. & Com. 385 (1972); Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harv. Int'l L.J. 423 (1973).

47. U.N. Conference on the Human Environment, June 16, 1972, principle 21, U.N. Doc. A/CONF. 48/14 and Corr. 1, *reprinted in* 11 Int'l Legal Materials at 1420. Mexican acceptance of national responsibility for environmental injury caused to other nations is clearly reflected in the statement of the Mexican delegate to the General Assembly's Second Committee on principle 21 of the Stockholm Declaration. "[T]he responsibility of all states is to avoid activities within their jurisdiction or control which might cause damage to the environment beyond their national frontiers and to repair the damage caused." 27 U.N. GAOR, Second Committee (1470th mtg.) 158, U.N. Doc. A/C 2/SR. 1470 (1972) (statement of González Martínez).

48. *See* U.N. Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF. 48/14, *reprinted in* 11 Int'l Legal Materials at 1416.

49. U.N. Doc. A/CONF. 62/WP.10 (1977), *reprinted in* 16 Int'l Legal Materials 1108 (1977). This convention will provide that "1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law for damage attributable to them resulting from violations of these obligations. 2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by persons, natural or juridical, under their jurisdiction. 3. States shall co-operate in the development of international law relating to criteria and procedures for the determination of liability, the assessment of damage, the payment of compensation and the settlement of related disputes." *Id.* art. 236, *reprinted in* 16 Int'l Legal Materials at 1189. "States have the obligation to protect and preserve the marine environment." *Id.* art. 193, *reprinted in* 16 Int'l Legal Materials at 1176.

> where at sea, including flag ships and *sea bed installations*, and the [nation] is responsible whether the enterprise is public or private.[50]

When accepted, UNCLOS will provide the binding contractual force of a treaty, making it unnecessary to infer an international rule on transboundary pollution.[51]

Present international law evidences the well accepted practice of imposing liability on a nation inflicting pollution damage on another nation. Thus, if the I.C.J., or any other tribunal, were to rule on transboundary oil pollution, such as that caused by Ixtoc I, the nation controlling the rig would be liable for damages. A clear rule of law, however, is not sufficient to ensure that the claim will be adjudicated.

B. *Suit in the I.C.J.*

1. Preliminary Considerations in the I.C.J.

Traditionally, a nation resorts to the I.C.J. only after diplomatic negotiations and arbitration have failed.[52] Before suit is commenced,

---

50. D. Livingston, Marine Pollution Articles in the Law of the Sea Single Informal Negotiating Text 23 (1976).

51. The UNCLOS text, as presently written, makes transboundary polluters liable for the injury they cause. UNCLOS is probably the greatest multilateral undertaking in history because it seeks to provide rules for "every possible issue involving relations between nations with respect to the oceans, such as fishing, national jurisdiction, navigation, environment, scientific research, seabed exploitation, and transfer of technology." Charney, *United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts*, 11 Vand. J. Transnat'l L. 39, 39 (1978). Unlike the past two Law of the Sea Conferences, this conference intends to establish a regime that will resolve problems as they arise. Ganz, *The United Nations and The Law of the Sea*, 26 Int'l & Comp. L.Q. 1, 2 (1977). The pollution provisions largely are finalized and merely await conclusion of the entire treaty. Bernhardt, *A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference*, 20 Va. J. Int'l L. 265, 265 (1980). Many feel that the overall convention will be concluded in the near future. N.Y. Times, Apr. 7, 1980, § 1, at 18, col. 1 (an initial list of 100 problems has been reduced to fewer than a dozen).

52. The U.N. Charter impliedly suggests that negotiation, mediation, conciliation, and arbitration be used before judicial settlement. *See* U.N. Charter art. 33, para. 1. The failure of negotiations concerning the Ixtoc I spill is likely because Mexico disclaims responsibility. [1979] 10 Envir. Rep. (BNA) 1075, 1279, 1353-54; N.Y. Times, Oct. 3, 1979, § 1, at 5, col. 1; *see* J. Siqueiros, *La Responsibilidad Civil de Petroleos Mexicanos en el Caso del Pozo Ixtoc-I*, El Foro, Julio-Septiembre 1979, at 58 ("A la luz del Derecho Internacional Público, en su etapa actual en el caso [de Ixtoc I], no existe responsibilidad del Estado mexicano para indemnizar los posibles danos sufridos por gobiernos extranjeros, o por entidades públicas o privadas de otro Estado.") (The Mexican government, under present international law applied to the specific facts of the [Ixtoc I spill], does not have the responsibility to indemnify public or private entities of a foreign nation for damages incurred. (translation by the *Fordham Law Review*)).

however, other requirements must be met. In a suit brought by a nation on behalf of its nationals,[53] a nation must prove that the individual is in fact a national[54] and that the local remedies of the defendant nation have been exhausted.[55] Additionally, whether a nation

---

53. Espousal and settlement of claims for injuries sustained from a foreign nation is not a matter of legal right. 8 M. Whiteman, *supra* note 24, at 1216; Restatement (Second) of Foreign Relations Law of the United States § 212 (1965). Generally, when the State Department decides to espouse a claim and the claim is successful, the lump sum awarded is distributed in compliance with relevant federal statutes. 8 M. Whiteman, *supra* note 24, at 1219; Restatement (Second) of Foreign Relations Law of the United States § 214 (1965). The primary distribution statute is the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1627 (1976), which established the Foreign Claims Settlement Commission to distribute lump sum awards. *Id.* § 1622. The decision whether to espouse a national claim and the amount distributed upon settlement, however, can be constitutionally challenged. *See* Phelps v. McDonald, 99 U.S. 298 (1878) (bankrupt claimed government paid damages set by international commission to wrong party); Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970) (failure to espouse claim); Meade v. United States, 2 Ct. Cl. 224 (1866) (right to release claims of nationals), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869). *See generally* Note, *Constitutional Issues in the Settlement of Property Claims Against Foreign States*, 2 Hastings Const. L.Q. 1091 (1975).

54. The nationality rule requires that "from the time of the occurrence of the injury until the making of the award the claim must . . . have belonged to a person or to a series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward." 2 L. Oppenheim, *supra* note 27, at 347-48; *accord, e.g.*, Barcelona Traction Light & Power Co., [1964] I.C.J. 6; Nottebohm, [1955] I.C.J. 4; Panevezys-Saldutsikis Ry., [1939] P.C.I.J., ser. A/B No. 76; 8 M. Whiteman, *supra* note 24, at 1233-34. The nationality principle ensures a sufficient connection between the plaintiff nation and the injured individual. Nottebohm, [1955] I.C.J. 4, 23 This nationality must be established before the plaintiff nation has a viable legal interest in the claim. G. Schwarzenberger, International Law 589-91, 611 (3d ed. 1957); H. Van Panhuys, The Role of Nationality in International Law 59 (1959). *See generally* 5 G. Hackworth, Digest of International Law §§ 541-546 (1943); C. Joseph, Nationality and Diplomatic Protection (1969); H. Van Panhuys, *supra*; Borchard, *The Protection of Citizens Abroad and Change of Original Nationality*, 43 Yale L.J. 359 (1934); Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. Chi. L. Rev. 180 (1946).

55. The exhaustion of local remedies rule is also called the rule of local redress. Generally, the rule compels an individual to seek redress in the injuring nation's courts before the injured party's government can pursue a claim on the national's behalf. The doctrine has ancient roots, 3 H. Grotius, De Jure Belli ac Pacis § V(1) (1919), and is regularly applied today. *E.g.*, Barcelona Traction, [1964] I.C.J. 6; Interhandel, [1959] I.C.J. 6, 11, 27; Nottebohm, [1955] I.C.J. 4, 7-8; Ambatielos, [1953] I.C.J. 10, 13; Anglo-Iranian Oil Co., [1952] I.C.J. 93, 99; Phosphates of Morocco, [1938] P.C.I.J., ser. A/B, No. 74, at 14; Administration of the Prince Von Pless, [1933] P.C.I.J., ser. A/B, No. 54, at 151; Mavrommatis Jerusalem Concessions, [1925] P.C.I.J., ser. A, No. 5, at 45. The rule, however, may not apply in at least four situations: (1) when a declaratory judgment is sought, *see* German Interests in Polish Upper Silesia, [1925] P.C.I.J., ser. A, No. 6, at 12-13; (2) when it is waived in a *compromis* or treaty, *see* notes 61-62 *infra;* (3) when a party is estopped from asserting it, *see* Norwegian Loans, [1957] I.C.J. 9, 17; or (4) when the local remedy

asserts its nationals' claims or sues in its own behalf, the I.C.J. must have "contentious" jurisdiction over the parties.[56]

2. Contentious Jurisdiction

A nation may reject the contentious or "personal" jurisdiction of the I.C.J. on the ground that no court or nation has the right to pass judgment on the exercises of sovereign authority.[57] This defense ef-

---

is not effective or when it would be obviously futile to seek redress in the foreign nation's courts. *See* Finnish Ships Owners (Finland v. Great Britain), 3 R. Int'l Awards 1479, 1544 (1934). *See generally* C. Amerasinghe, *supra* note 13, at 169-267 (1967); C. Eagleton, *supra* note 8, at 95-124; T. Haesler, The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals 51-53 (1968). Borchard, *The Local Remedy Rule*, 28 Am. J. Int'l L. 729, 730 (1934); Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 Am. J. Int'l L. 389, 395 (1964). Many, however, feel that the local redress requirement may not be necessary in the transnational pollution injury situation. F. Garcia Amador, L. Sohn & R. Baxter, Convention on International Responsibility of States for Injuries to Aliens (Draft N.12 with explanatory notes) (1974); Bleicher, *supra* note 13, at 25. "Since the requirement of exhaustion of local remedies would be peculiarly burdensome where the individual plaintiff had been injured by out-of-state pollution the wrong complained of is held to incur state-to-state responsibility, and exhaustion of local remedies is not required." Lester, *supra* note 28, at 849; *accord*, Hoffman, *supra* note 32, at 538. "Indeed, insistence on the application of the local remedies rule in a transnational pollution context would violate basic considerations of equity as many pollution victims might find it simply beyond their means to engage in the costly and complex pursuit abroad of compensation." *Ixtoc Hearings*, *supra* note 1, at 263 (statement of Günther Handl).

56. Stat. I.C.J. art. 36, para. 2, *reprinted in* W. Bishop, *supra* note 10, at 926. Contentious jurisdiction is analogous to personal jurisdiction in United States law because it creates jurisdiction over the parties to the action. Unlike personal jurisdiction, contentious jurisdiction is based solely on consent; appearance before the I.C.J. depends exclusively on the will of the parties. *See* Monetary Gold, [1954] I.C.J. 19, 32; Anglo-Iranian Oil Co., [1952] I.C.J. 93, 100-03. Jurisdiction, however, is not unilaterally revocable once consent is given; the court has the power to determine whether jurisdiction exists. "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Stat. I.C.J. art. 36, para. 6, *reprinted in* W. Bishop, *supra* note 10, at 926, *see* Nottebohm, [1953] I.C.J. 111, 119-20 (Preliminary Objections). *See generally* I. Shihata, The Power of the International Court to Determine its Own Jurisdiction (1965).

57. W. Bishop, *supra* note 10, at 63; J. Brierly, The Law of Nations 149 (1955). The underlying premise for rejecting the scrutiny of one nation's activity by another nation or other international authority is the principle that nations are equal. R. Klein, Sovereign Equality Among States 143-44 (1974). The Charter of the United Nations expressly incorporates this concept. U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members."). The United Nations' respect for national sovereignty is manifested in article 2(7), which expressly rejects U.N. power to intervene in matters within the exclusive jurisdiction of member nations. U.N. Charter art. 2, para. 7. The United States has long accepted this traditional rule. The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825)

fectively precludes a plaintiff nation from compelling appearance of a defendant nation before the I.C.J. Consequently, contentious jurisdiction can only be obtained by express or tacit consent of the nations that are parties to the action.[58] This consent requirement, however, does not render the I.C.J. powerless. Approximately sixty cases have been adjudicated by the I.C.J., and its rulings have been obeyed by the party nations.[59]

A nation may consent to the Court's jurisdiction in two ways. First, a nation may, by a provision in a treaty, concede jurisdiction over disputes arising out of the subject matter of the treaty[60] or make the

---

("No principle of general law is more universally acknowledged, than the perfect equality of nations . . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."). *See generally* E. Dickinson, The Equality of States in International Law (1920); P. Kooijmans, The Doctrine of the Legal Equality of States (1964).

58. Absent some previous consent, an "individual nation remains the supreme authority for deciding whether and under what conditions to submit a dispute to international adjudication, and no other nation can summon it before an international court without its consent. . . . Here again, decentralization of international adjudication is but another term for national sovereignty in respect to the judicial function." H. Morgenthau, Politics Among Nations 301 (4th ed. 1967); S. Rosenne 1961, *supra* note 10, at 260. Without consent, international jurisdiction will not lie. *See* Rights of Nationals of the United States in Morocco, [1952] I.C.J. 176; Eastern Carelia, [1923] P.C.I.J., ser. B, No. 5, at 28; S. Rosenne 1961, *supra* note 10, at 260. In limited situations, tacit consent is acceptable. *See* Minority Schools, [1928] P.C.I.J., ser. A, No. 64, at 24 ("The consent of a state to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it."). Generally, this tacit consent is inferred when the parties plead the merits of the claim without objecting to the Court's lack of jurisdiction. S. Rosenne 1961, *supra* note 10, at 296.

59. No specific mechanism compels recalcitrant nations to comply with the judgments of the I.C.J. Nations only consent to a good faith adjustment of their disputes and good faith compliance with the decision is assumed. Supplementing this moral directive, the Charter of the United Nations specifies not only that each member must comply with the decisions of the I.C.J., but that when a nation refuses to comply, the other party may seek assistance from the Security Council. U.N. Charter art. 94. Because only one nation, Albania, has failed to honor the I.C.J.'s judgment, *see* S. Rosenne 1973, *supra* note 15, at 40, parties to international disputes never use this provision. *Id.* Even if this practice were to change, however, the political motivations of the Security Council members make effective utilization of article 94 unlikely. *Id.*

60. Compulsory jurisdiction is effected by a compromissory clause in a treaty, convention, or note. Approximately 223 agreements containing compromissory clauses are deposited with the Secretary-General of the United Nations. [1978-1979] I.C.J.Y.B. 87-102 (1979). Jurisdiction often is predicated on these clauses. *See* Northern Cameroons, [1963] I.C.J. 15 (jurisdiction based on article in trusteeship agreement); Monetary Gold, [1954] I.C.J. 19 (jurisdiction based on statements of the parties to submit to the I C.J.); Mavrommatis Jerusalem Concessions, [1925] P.C.I.J., ser. A, No. 5 (jurisdiction based on Mandates of the League of Nations which included compromissory clauses). *See generally* Note, *Jurisdiction of the International Court of Justice under Compromissory Clauses in Exchange Notes*, 67 Am. J. Int'l L. 563 (1973).

acceptance of jurisdiction the very substance of the treaty.[61] Second, a nation may accept the I.C.J.'s jurisdiction unilaterally with a declaration to the Court creating "compulsory" jurisdiction[62] over disputes concerning treaties, questions of international law, breaches of international obligations, and reparations for such breaches.[63]

Many nations have signed declarations of compulsory jurisdiction,[64] including both the United States[65] and Mexico.[66] Many of these

---

61. *E.g.*, Arbitral Award Made by the King of Spain on 23 December 1906, [1960] I.C.J. 192, 194 (Washington Agreement of July 21, 1957), Sovereignty Over Frontier Lands, [1959] I.C.J. 209, 231 (Special Agreement of March 7, 1957); Minquiers and Ecrehos, [1953] I.C.J. 47, 49 (Special Agreement of December 29, 1950); Corfu Channel, [1949] I.C.J. 4, 6 (Special Agreement of March 3, 1948); The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10, at 5 (Agreement of January 4, 1927). Nations may also submit a wide variety of disputes to the Court for adjudication. *See* Haya de la Torre, [1951] I.C.J. 71 (Protocol of Friendship and Cooperation, May 24, 1934, Colombia-Peru); Electricity Co. of Sofia & Bulgaria, [1939] P.C.I.J., ser. A/B, No. 77 (Treaty of Conciliation Arbitration and Judicial Settlement, June 23, 1931, Belgium-Bulgaria).

62. U.N. member nations may unilaterally accept as compulsory the jurisdiction of the I.C.J. Stat. I.C.J. art. 36, para. 2, *reprinted in* W. Bishop, *supra* note 10, at 926. *See generally* Owen, *Compulsory Jurisdiction of the International Court of Justice: A Study of Its Acceptance by Nations*, 3 Ga. L. Rev. 704 (1969).

63. Stat. I.C.J. art. 36, para. 2, *reprinted in* W. Bishop, *supra* note 10, at 926.

64. To date, 45 of 138 nations have accepted compulsory jurisdiction. [1978-1979] I.C.J.Y.B. 56-86 (1979). Of the 60 cases brought before the I.C.J., 14 were brought under the compulsory power of the Court, including some of the most politically significant. S. Rosenne 1973, *supra* note 15, at 73. In 1979, the following nations had accepted compulsory jurisdiction: Australia, Austria, Belgium, Botswana, Canada, Colombia, Costa Rica, Democratic Campuchea (Cambodia), Denmark, Dominican Republic, Egypt, El Salvador, Finland, Gambia, Haiti, Honduras, India, Israel, Japan, Kenya, Liberia, Lichtenstein, Luxembourg, Malawi, Malta, Mauritius, Mexico, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Philippines, Portugal, Somalia, Sudan, Swaziland, Sweden, Switzerland, Uganda, United Kingdom, United States, and Uruguay. [1978-1979] I.C.J.Y.B. 56-86 (1979).

65. 61 Stat. 1218 (1947), T.I.A.S. No. 1598. The most important sections of the U.S. declaration are the reservations, which state that "this declaration shall not apply to (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." *Id.*

66. [1978-1979] I.C.J.Y.B. 75 (1979). "In regard to any legal dispute that may in [the] future arise between the United States of Mexico and any other State out of events subsequent to the date of this Declaration, the Mexican Government recognizes as compulsory *ipso facto* . . . the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2, of the Statute . . . . This Declaration, . . . does not apply to disputes arising from matters that, in the opinion of the Mexican Government, are within the domestic jurisdiction of the United States of Mexico . . . ." *Id.*

unilateral declarations, however, are subject to reservations.[67] Because reciprocity is the cornerstone of contentious jurisdiction, the defendant nation need defend only to the extent that its declaration overlaps or coincides with the declaration of the plaintiff nation.[68] For example, in submitting to compulsory jurisdiction, the United States reserved the right to exclude the Court's jurisdiction over matters "which are essentially within the domestic jurisdiction of the United States of America, as determined by the United States of America."[69] Practically, this reservation, the Connally Amendment, allows the United States to consent to the I.C.J.'s jurisdiction on a case by case basis.[70] More importantly, any nation sued by the

---

67. Various reservations are inserted in declarations accepting compulsory jurisdiction of the I.C.J. These reservations either make ratification a condition of acceptance (Belgium, Liberia), set a time limit often subject to a notice of termination of the court's jurisdiction after time has expired (Denmark, Japan, Liberia), exclude certain disputes in which the parties have agreed to other methods of resolution (Australia, Austria, India. Israel, United States), or exclude disputes arising before jurisdiction was accepted (Finland, Honduras). [1978-1979] I.C.J.Y.B. 56-86 (1979).

68. *See* Interhandel, [1959] I.C.J. 6, 23; Right of Passage over Indian Territory, [1957] I.C.J. 125, 145; Norwegian Loans, [1957] I.C.J. 9, 23-24; Anglo-Iranian Oil Co., [1952] I.C.J. 93, 103; Electricity Co. of Sofia & Bulgaria, [1939] P.C.I.J., ser. A/B, No. 77, at 80-82; I. Brownlie, *supra* note 14, at 701; S. Rosenne 1973, *supra* note 15, at 71-72. The I C.J., however, has taken jurisdiction when the pledge of acceptance of compulsory jurisdiction has expired. *See* Nottebohm, [1953] I.C.J. 111, 120, 123.

69. 61 Stat. 1218; T.I.A.S. No. 1598; *see* note 65 *supra*. This amendment was accepted only after a great deal of debate by the Senate Committee on Foreign Relations. *See* S. Rep. No. 1835, 79th Cong., 2d Sess. 5 (1946) ("The question of what is properly a matter of international law . . . should be decided by the [I.C.J.] . . . [A] reservation of the right of decision as to what are matters essentially within the domestic jurisdiction would tend to defeat the purpose . . . of the proposed declaration and the purpose of . . . the Statute of the [I.C.J.]"). In addition, the American Bar Association advised that the Connally Amendment be deleted because of its deleterious effect on the I.C.J.'s powers of compulsory jurisdiction. Jackson, *Jurisdiction of World Court: Association Urges New American Declaration*, 33 A.B.A.J. 249 (1947); *see* Briggs, *The United States and the International Court of Justice: A Re-Examination*, 53 Am J. Int'l L. 301 (1959); Humphrey, *The United States, the World Court and the Connally Amendment*, 11 Va. J. Int'l L. 310 (1971); Layton, *The Dilemma of the World Court: The United States Reconsiders Compulsory Jurisdiction*, 12 Stan. L. Rev. 323 (1960); Note, *The Connally Amendment, The Conflict between Nationalism and an Effective World Court*, 53 Ky. L.J. 164 (1964). For commentary favoring the Connally Amendment, see Boyle, *Proposed Repeal of Connally Reservation—A Matter of Concern*, 43 Marq. L. Rev. 317 (1960); Note, *"As Determined by the United States of America,"* 10 Am. U.L. Rev. 146 (1961). Liberia, Malawi, Mexico, Philippines, Portugal, and the Sudan have inserted reservations similar to the Connally Amendment. [1978-1979] I.C.J.Y.B. 72-82 (1979). Portugal's extreme self judging clause will not allow jurisdiction over any disputes if notice is given to the Secretary-General of the United Nations. *Id.* at 80. For the texts of the United States and Mexican reservations, see notes 65-66 *supra*.

70. *See* Letter from Eric H. Hager, as Agent for the United States, to the International Court of Justice, *reprinted in* Aerial Incident of 27 July 1955, I.C.J. Plead-

United States in the I.C.J. may assert the Connally Amendment in its defense.[71]

Even though the rule of law is clear, the difficulties of exercising contentious jurisdiction over Mexico for the Ixtoc I spill seem insurmountable. Because Mexico has disclaimed responsibility for the spill, express consent to the I.C.J.'s jurisdiction in this particular instance is unlikely.[72] Furthermore, Mexico has not consented by a more general treaty or agreement.[73] Finally, even with consent to compulsory jurisdiction,[74] the Connally Amendment provides Mexico with a complete defense.[75] Unfortunately, without repeal or modification of the Connally Amendment, the I.C.J. will remain an ineffective judicial mechanism for the United States, even as to countries that have consented to the compulsory jurisdiction of the I.C.J.

II. SUIT IN UNITED STATES COURT

A. *Foreign Sovereign Immunities Act—Historical Context*

Alternatively, suit may be brought in United States federal court under the Foreign Sovereign Immunities Act of 1976 (the Act).[76]

---

ings 676-77 (1960) (decision can be wholly arbitrary); H. Morgenthau, *supra* note 58, at 276 (same).

71. Aerial Incident of 27 July 1955, [1960] I.C.J. 146, 148 (U.S. claim dismissed when Bulgaria asserted reciprocal operation of Connally Amendment); *see* Norwegian Loans, [1957] I.C.J. 9, 24, 27 (I.C.J. had no jurisdiction over French claim when Norway asserted France's "essentially within" clause); Goldie, *The Connally Reservation: A Shield for an Adversary*, 9 U.C.L.A. L. Rev. 277 (1962); Gross, *Bulgaria Invokes the Connally Amendment*, 56 Am. J. Int'l L. 357 (1962).

72. *See* note 52 *supra*.

73. *See* note 14 *supra* and accompanying text.

74. *See* notes 62-68 *supra* and accompanying text.

75. *See* note 71 *supra* and accompanying text.

76. 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976). For a detailed discussion of the Act, see von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33 (1978); Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, Pub. L. No. 94-583, 90 Stat. 2891, 18 Harv. Int'l L.J. 429 (1977). Jurisdiction over transnational polluters also arguably can be asserted under the objective territorial jurisdiction theory, sometimes referred to as the universality principle, or under the protective principle of jurisdiction. *Ixtoc Hearings*, *supra* note 1, at 251-54 (statement of Jordan Paust). Under the first theory, jurisdiction exists over "acts done outside a geographic jurisdiction, but which are intended to produce and [do produce] detrimental effects within it. Those circumstances justify a state in punishing the cause of the harm as if it had been present at the effect." United States v. Keller, 451 F. Supp. 631, 635 (D.P.R. 1978); *accord*, Strassheim v. Daily, 221 U.S. 280, 285 (1911); United States v. Fernandez, 496 F.2d 1294, 1296 (5th Cir. 1974); United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968). Objective territorial jurisdiction, however, is considered only as a means of asserting jurisdiction over criminals. *See* I. Brownlie, *supra* note 14, at 297; D. Greig, *supra* note 15, at 169-70; 1 C. Hyde, *supra* note 32, at 798-804. Pollution damage, regardless of size, is probably not a crime. Hence, jurisdiction would probably not exist under this theory. The

The Act, essentially a federal long-arm statute, codifies the law of sovereign immunity[77] and provides for both personal[78] and subject-matter jurisdiction[79] over foreign nations. The Act may be used by the United States government and by individual United States nationals.[80]

Previously, a foreign nation's immunity in a United States court[81] was determined by the State Department, which based decisions on

---

protective principle permits jurisdiction over extraterritorial acts if a significant national interest is at stake. United States v. Pizzarusso, 388 F.2d 8, 9 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); Rivard v. United States, 375 F.2d 882, 887 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); *see* Rocha v. United States, 288 F.2d 545, 549-50 (9th Cir.), *cert. denied*. 366 U.S. 948 (1961); United States v. Archer, 51 F. Supp. 708, 709 (S.D. Cal. 1943). This protective principle, however, is usually limited to crimes, such as espionage, sedition, or treason, that threaten the security of the nation. I. Brownlie, *supra* note 14, at 296-97; D. Greig, *supra* note 15, at 167-68.

77. H.R. Rep. No. 1487, 94th Cong., 2d Sess. [hereinafter cited as FSIA Report], *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605.

78. *Id.* at 8, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6606.

79. *Id.* at 13, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6611.

80. *Id.* at 6-7, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6604-05; *see* Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543 (1977) [hereinafter cited as *Day in Court*].

81. The doctrine of sovereign immunity has ancient sources in the history of western culture. *See* note 8 *supra*. The concept that no nation could interfere with another nation's exercise of sovereign rights remained a basic premise of international relations well into the nineteenth century. The United States first espoused support of absolute sovereign immunity in Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812). The zenith in the United States of this doctrine was reached in 1895, when Attorney General Harmon, in response to Mexico's protest against diversion of the Rio Grande, stated that "the rules, principles, and precedents of international law impose no liability or obligation upon the United States." 21 Op. Att'y Gen. 274, 283 (1895). Ironically, shortly before denying Mexico's appeal, the United States had appealed to Great Britain to ensure that Canadian waterways would not be diverted and damage the United States. Unlike the United States reaction to Mexican requests, the British government expressed willingness to provide those injured with both damages and injunctive relief. 2 J. Moore, Digest of International Law 451-52 (1906). Increasing commercial activity and economic interdependence of the nations of the industrial revolution led the United States to adopt a more limited view of sovereign immunity. J. Sweeney, The International Law of Sovereign Immunity 20, 37 (1963). A distinction began to emerge between *jure imperii*, purely public acts, and *jure gestionis*, private acts in which the sovereign acted as a private individual or corporate entity. Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984 (1952). Tate's letter formally adopted the private-public distinction to the absolute sovereign immunity doctrine and officially sanctioned the judicial practice of seeking State Department consent before exercising jurisdiction over foreign nations. *Id.* at 985; *see, e.g.*, Petrol Shipping Corp. v. Greece, 360 F.2d 103, 110 (2d Cir.) (no immunity for private acts), *cert. denied*, 385 U.S. 931 (1966); Pan Am. Tankers Corp. v. Vietnam, 296 F. Supp. 361, 363 (S.D.N.Y. 1969) (immunity as to sovereign acts (*jure imperii*) but not private acts (*jure gestionis*)); Harris & Co. Advertising v Cuba, 127 So. 2d 687, 690 (Fla. Dist. Ct. App. 1961) (*jure gestionis*).

political, rather than legal, considerations.[82] These essentially subjective decisions were inconsistent[83] and often left the plaintiff with-

---

82. FSIA Report, *supra* note 77, at 7-8, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6605-06; *see* note 77 *supra*. This practice arguably stemmed from Marshall's conviction that the determination whether to grant jurisdiction should be "disclosed to the court by the suggestion of the attorney of the United States." Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 147 (1812); *see* Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945) (jurisdiction denied because of potential embarrassment of the executive branch); *Ex parte* Peru, 318 U.S. 578, 588 (1943) (same); Hellenic Lines, Ltd. v. Embassy of S. Viet Nam, 275 F. Supp. 860, 860-61 (S.D.N.Y. 1967) (same). The Court in *Peru* held that a plea for sovereign immunity by the State Department "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. Unfortunately, the Tate Letter failed to clarify United States policy on sovereign immunity primarily because the definitions of public and private acts were imprecise. This inadequacy, coupled with continued judicial deference to State Department fiat, left United States policy frought with ambiguities. *See* Letter from Robert Ingersoll & Harold Tyler, Jr. to Rep. Albert (Oct. 31, 1975), *reprinted in* FSIA Report, *supra* note 77, at 45, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6634; Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 268-70 (1951). *See also* European Convention on State Immunity, May 16, 1972, *reprinted in* 11 Int'l Legal Materials 470 (1972) (European acceptance of restrictive theory of sovereign immunity). Some commentators had argued that the decision should be made by the judiciary. *E.g.*, Jessup, *Has the Supreme Court Abdicated One of its Functions?*, 40 Am. J. Int'l L. 168, 169 (1946); Moore, *The Role of the State Department in Judicial Proceedings*, 31 Fordham L. Rev. 277, 302 (1962); Richard, *Sovereign Immunity—Proposed Statutory Elimination of State Department Role—Attachment, Service of Process, and Execution—Senate Bill 566, 93d Congress, 1st Session (1973)*, 15 Harv. Int'l L.J. 157 (1974); *Day in Court*, *supra* note 80, at 550; Note, *The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law*, 53 Minn. L. Rev. 389, 389-97 (1968). Other commentators had argued that the immunity decision should be within executive control. *E.g.*, Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 Cornell L.Q. 461, 462 (1963); Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*, 44 Minn. L. Rev. 1101, 1104 (1960).

83. For a survey of the general confusion generated by State Department suggestions, see Ocean Trans. Co. v. Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967) (sovereign's purchase of a boat not immune); The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946) (United States government not immune for merchant ships); Sullivan v. Sao Paulo, 36 F. Supp. 503 (E.D.N.Y.) (Brazil immune from claims arising from bond sales), *aff'd*, 122 F.2d 355 (2d Cir. 1941); Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 215 A.2d 864 (Venezuela cancelled contracts, State Department recommendation to dismiss accepted), *cert. denied*, 385 U.S. 822 (1966). In Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961), creditors of Cuban nationals sought to attach a Cuban vessel. The court accepted a State Department suggestion to dismiss the suit. *Id.* at 26. The decision, however, may have been affected by the sensitive, on-going negotiations for the return of a hijacked United States airliner from Cuba. *Day in Court*, *supra* note 80, at 549; Note, *Doctrines of Sovereign Immunity and Act of State—Conflicting Consequences of State Department Intervention*, 25 Vand. L. Rev. 167, 170-71 (1972).

out redress.[84] By entrusting this decision to the judiciary,[85] Congress sought to guarantee, irrespective of possible adverse effects on United States diplomatic relations, a day in court for parties injured by a foreign nation engaged in commercial endeavors.[86]

B. *The Act and Oil Spills*

Before a federal court will exercise jurisdiction under the Act, the plaintiff must show that one of the Act's exceptions to sovereign immunity[87] applies to the facts of the case[88] and that due process is not

---

84. "[T]he current practice [of State Department suggestion] has caused inequitable results for private litigants as a result of departmental suggestions of immunity in commercial cases." *Jurisdiction of United States Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 59 (1976) [hereinafter cited as *House Hearings*] (statement of Peter Trooboff). "A private party who deals with a foreign government entity cannot be certain of having his day in court to resolve an ordinary legal dispute." *Id.* at 27 (statement of Monroe Leigh); *accord*, P. Jessup, The Use of International Law 83 (1954).

85. FSIA Report, *supra* note 77, at 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6606. State Department decisionmaking in these situations was thought to prevent unnecessary embarrassment to the executive branch and engender fewer diplomatic controversies with foreign nations. *See* Hellenic Lines, Ltd. v. Embassy of S. Viet Nam, 275 F. Supp. 860, 861 (S.D.N.Y. 1967); Letter from Robert Ingersoll & Harold Tyler, Jr. to Rep. Albert (Oct. 31 1975), *reprinted in* FSIA Report, *supra* note 77, at 45, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6634. "These peculiarly judicial questions require resolution on the basis of specified criteria and subsequent interpretative decisions. As a political and policymaking Agency, the Department of State is an inappropriate forum for dispassionate determination of the commercial/noncommercial question and related issues. Moreover, . . . it is ill-equipped to perform that judicial function." *House Hearings*, *supra* note 84, at 58 (statement of Peter Trooboff); *accord*, *id.* at 31 (statement of Bruno Ristau).

86. *See* note 84 *supra*.

87. Exceptions to sovereign immunity are found in 28.U.S.C. § 1605(a)(1)(1976) (waiver), *id.* § 1605(a)(2) (commercial activities), *id.* § 1605(a)(3) (expropriation claims), *id.* § 1605(a)(4) (litigation involving immovable inherited and gift property), *id.* § 1605(a)(5) (non-commercial torts), and *id.* § 1605(b) (maritime liens). Section 1605(a)(3) provides a mechanism for redress from foreign expropriation. It allows jurisdiction over claims for property taken by a foreign nation without payment "in violation of international law." 28 U.S.C. § 1605 (1976); *e.g.*, Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682 (1976); Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980). Section 1605(a)(5) was designed to provide compensation for injuries resulting from traffic or automobile accidents. FSIA Report, *supra* note 77, at 21, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6620. It is, however, broadly defined to exclude from immunity all "non-commercial torts," and indeed, various tort claims are expected to be brought under this section. *See* Letelier v. Chile, 488 F. Supp. 665, 673 (D.D.C. 1980).

88. "For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or

violated.[89] Because offshore pollution involves transboundary injury resulting from an extraterritorial act, the plaintiff must satisfy the requirements of section 1605(a)(2).[90] That section provides that a foreign nation is not outside the jurisdiction of the United States, even when the injury causing act occurs outside the United States, if the act is "in connection with a commercial activity . . . that . . . causes a direct effect in the United States."[91] Thus, the Act applies if the defendant is a "foreign state," the activity giving rise to liability is "commercial," and the activity has a "direct effect" in the United States.[92]

---

implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus sections 1330(b), 1608, and 1605-1607 are all carefully interconnected." FSIA Report, *supra* note 77, at 13-14, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6612.

89. This Note evaluates the statutory requirements under the Act. Although the legislative history indicates that satisfaction of the statutory requirements creates a sufficient nexus between the foreign state's commercial activities and the United States, it also specifies that the Act's application should be consistent with the principles in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), International Shoe Co. v. Washington, 326 U.S. 310 (1945), and their progeny. FSIA Report, *supra* note 77, at 13, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6612. The Supreme Court has developed an effects test that permits extension of jurisdiction for acts occurring outside the forum that have an effect within the forum, provided the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Kulko v. Superior Court, 436 U.S. 84 (1978); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). Further, the effects doctrine has been applied extraterritorially in situations similar to transboundary pollution. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 500-01 (1971) (allowed jurisdiction over foreign state defendant for interstate pollution because it would not be unfair to sue defendant where damage occurred), Illinois v. City of Milwaukee, 599 F.2d 151, 155-56 (7th Cir. 1979) (same), *cert. granted*, 444 U.S. 961 (1979) (No. 79-408). *See generally* Note, *Extraterritorial Jurisdiction over Foreign States: The "Direct Effect" Provision of the Foreign Sovereign Immunities Act of 1976*—Carey v. National Oil Corporation, 13 J. Int'l L. & Econ. 633 (1979).

90. 28 U.S.C. § 1605(a)(2) (1976). Section 1605(a)(2) provides an exception to immunity for commercial activities having a nexus with the United States. This is the relevant provision because it allows jurisdiction over acts that occur outside the United States that have effects in the United States. Section 1605(a)(5), the only other arguably relevant section, is inapposite because it requires that both the injurious effect and the act occur within the United States. *See* 28 U.S.C. § 1605(a)(5) (1976).

91. *Id.* § 1605(a)(2).

92. Courts generally follow this three-step analysis. *See, e.g.*, Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) (per curiam); Perez v. Bahamas, 482 F. Supp. 1208 (D.D.C. 1980); Harris v. VAO Intourist, 481 F. Supp. 1056 (E.D.N.Y. 1979); Upton v. Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979); National Am. Corp. v. Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).

A "foreign state" is defined as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state."[93] The definition of agency or instrumentality expressly includes a corporation when a majority of its shares or a proprietary interest is controlled by a foreign nation.[94] In *Carey v. National Oil Corp.*,[95] for example, a corporation wholly-owned by the Libyan government, the Libyan National Oil Company (LNOC), was held to be a foreign nation for jurisdictional immunity purposes.[96] The Pemex/Mexican government relationship is identical; like LNOC, Pemex is wholly government owned and should be a foreign nation under the Act.[97]

The second prerequisite, "commercial activity," is defined as "either a regular course of commercial conduct or a particular commercial transaction or act."[98] This requirement distinguishes purely governmental, public, or sovereign acts from government acts of a commercial or private nature.[99] Prior to the Act, this distinction had been frustrated when courts emphasized the purpose, not the nature, of the activity.[100] Congress, however, emphasized the nature of the

---

93. 28 U.S.C. § 1603(a) (1976).

94. *Id.* § 1603(b)(2) (1976). A foreign state "is an organ of a foreign state or political subdivision thereof, or [a corporation,] a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.*

95. 592 F.2d 673 (2d Cir. 1979) (per curiam).

96. *Id.* at 676 n.1; *see* Geveke & Co. v. Kompania Di Awa I Elektrisidat Di Korsou N.V., 482 F. Supp. 660, 661 (S.D.N.Y. 1979); Harris v. VAO Intourist, 481 F. Supp. 1056, 1058 (E.D.N.Y. 1979); Corporacion Venezolana v. Vintero Sales Corp., 477 F. Supp. 615, 619 (S.D.N.Y. 1979); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 394 (D. Del. 1978).

97. 592 F.2d at 676; *see* note 1 *supra*. "It is true that Pemex is engaged in a commercial business, the operation in Mexico of an oil company for profit." D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280, 1286 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977).

98. 28 U.S.C. § 1603(d) (1976).

99. FSIA Report, *supra* note 77, at 16, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6615; *e.g.*, Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 855 (S.D.N.Y. 1978). Marshall recognized this theory in holding a nation responsible for private acts in Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824). He stated that "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Id.* at 907. For a modern rendition of Marshall's conclusion, see *House Hearings*, *supra* note 84, at 27 (statement of Monroe Leigh) ("[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause."). *See generally* Lauterpacht, *supra* note 82. The notion of limited sovereign immunity is based on this distinction. *See* note 81 *supra* and accompanying text.

100. FSIA Report, *supra* note 77, at 14, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6613. In Berizzi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926), the United States Supreme Court held that a state-owned ship operated by the state to transport cargo for hire was immune from suit. The court reasoned that whenever an

endeavor when it defined commercial activities to include those that private individuals ordinarily pursue, regardless of whether a nation is acting in the particular case.[101]

Offshore drilling seems clearly within this definition. The legislative history of the Act includes a "mineral extraction company" as an example of those activities within the "broad spectrum of [commercial] endeavor."[102] Courts have long defined "mineral" to encompass other resources, including oil.[103] Additionally, courts have construed "commercial activity" broadly to include contracting for oil,[104] agreeing to letters of credit,[105] operating hotels, cargo ships[106] or airports,[107] and selling newspapers.[108]

Two cases, however, arguably preclude the finding that offshore oil drilling is commercial. In *Yessenin-Volpin v. Novosti Press Agency*,[109] the court held that the publication of allegedly libelous articles in Russian periodicals was not commercial activity[110] because the Soviet

---

instrumentality of a nation is engaged in furthering a public purpose it may not be held accountable to private parties in a United States court. Because the Court found that the purpose of the Pesaro was to further the trade of the Italian people and thus add revenue to the nation, it declined to exercise jurisdiction over the dispute. *Id.* at 575-76; *see* note 81 *supra* (prior to the Act, courts distinguished between public and private acts).

101. 28 U.S.C. § 1603(d) (1976); *see* Gittler v. German Info. Center, 95 Misc. 2d 788, 790, 408 N.Y.S.2d 600, 602 (Sup. Ct. 1978) (cultural center immune from wage claim because the center was governmental in nature due to its function of promoting the foreign nation in the United States). Emphasizing the nature, not the purpose, can bring acts within the scope of sovereign immunity protection. In Perez v. Bahamas, 482 F. Supp. 1208 (D.D.C. 1980), an allegation that police enforcement of a Bahamian fishing law constituted "commercial activity" was held unfounded. *Id.* at 1210. Although the activity may have had some commercial goal or purpose—the protection of Bahamian fishing resources for Bahamian commercial fisherman—the court held that the nature of the act was not commercial and, therefore, was immune. *Id.* at 1211.

102. FSIA Report, *supra* note 77, at 16, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6615. Airlines, state trading corporations, and export associations are also included. *Id.*, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6614.

103. Northern Pac. Ry. v. Soderberg, 188 U.S. 526, 534 (1903); MacDonald v. United States, 119 F.2d 821, 827 (9th Cir. 1941), *modified and aff'd sub nom.* Great N. Ry. v. United States, 315 U.S. 262 (1942).

104. Carey v. National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979) (per curiam) (implicitly found a commercial activity, but held not sufficiently connected to the United States to permit jurisdiction).

105. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1294-95 (S.D.N.Y. 1980) (by implication).

106. Bechring Int'l v. Imperial Iranian Air Force, 475 F. Supp. 383, 390 (D.N.J. 1979).

107. Upton v. Iran, 459 F. Supp. 264, 266 (D.D.C. 1978) (by implication), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

108. Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 856 (S.D.N.Y. 1978) (dictum).

109. *Id.*

110. *Id.*

government collaborated in, rather than contracted for, the publication.[111] The court reasoned that potential liability for publishing official government commentaries "would contravene the spirit of sovereign immunity as well as the letter of the Immunities Act."[112] Similarly, in a suit to enjoin OPEC price fixing, *International Association of Machinists v. OPEC*,[113] the court determined that the challenged activity should be defined narrowly as the control of production, not the fixing of price.[114] Because only a sovereign can control the "terms and conditions for the removal of a prime natural resource" from its territory, the challenged activity was held purely governmental, and hence, noncommercial.[115]

Both of these cases involve commercial activity that traditionally has been afforded sovereign immunity protection. Refusing to apply the Act mechanically, both courts apparently judged the overall character of the sovereign's activity within the spirit of sovereign immunity. The implicit reasoning is that, because the United States would be immune from suit for defamation[116] or price-fixing,[117] foreign nations should be extended comparable immunity.[118] Offshore

111. "[A] given entity may at some times engage in commercial activities, on which it would not be immune, and at other times take actions 'whose essential nature is public or governmental,' on which it would be immune." *Id.* at 855.

112. *Id.* at 856. The court used the "in connection" language to avoid mechanical application of the Act. Although the activity seemed to be commercial for the purposes of the Act, the court concluded that jurisdiction over the Russian news agency was improper when the periodicals were actually publications of the Soviet government. *Id.* The court's determination that the claim was not sufficiently connected to the activity probably was made because the Soviet Union, although acting in a manner which would be considered to be commercial by a United States court, was acting within the "spirit" of sovereign immunity. *See id.*

113. International Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979).

114. *Id.* at 567.

115. *Id.*; *see* FSIA Report, *supra* note 77, at 16, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6615. The *OPEC* court admitted expert testimony that tended to prove that the price variations of OPEC oil were not directly caused by price fixing. Rather, price fluctuation was an indirect result of OPEC's control of supply. This extrinsic cause obviated the need to consider the activity as price fixing, which clearly can be performed by private individuals. 477 F Supp. at 566-67. The plaintiff in *OPEC*, however, challenged price fixing, not the exercise of control over supply. *Id.* at 558. Thus, *OPEC's* factual determination is questionable.

116. The United States generally waived its immunity from suit, 28 U.S.C. § 2674 (1976), but retained its immunity for certain intentional torts, including libel and slander. 28 U.S.C. § 2680(h) (1976).

117. Government price fixing does not lead to antitrust liability. *See, e.g.*, Parker v. Brown, 317 U.S. 341, 350-51 (1943); Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258, 1259 (6th Cir. 1974) (per curiam); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 135 (8th Cir. 1970).

118. *See* notes 109-15 *supra* and accompanying text; *cf.* notes 68-75 *supra* and accompanying text (reciprocity is a basic principle of international law); note 120 *infra* (broad jurisdictional reach of United States antitrust law criticized as an unfair imposition on foreign nations).

drilling, however, is not within the spirit of sovereign immunity. Because the United States would be liable for offshore drilling,[119] foreign nations also should be liable.

The final criterion requires that the activity have "direct effects" in the United States.[120] No precise definition, however, exists within

---

119. The United States would be liable for damages caused by governmental offshore drilling. *See* 28 U.S.C. § 2674 (1976).

120. This criterion demonstrates the relationship between statutory exceptions to sovereign immunity for commercial activities and due process requirements. FSIA Report, *supra* note 77, at 17, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6615. It is unclear whether satisfaction of the statute's requirement of "direct effects" satisfies due process requirements as well. In Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980), the court, by accepting the locus of the effect as the controlling criterion, *id.* at 1299, implicitly accepted that satisfaction of direct effects also satisfies the due process requirements of minimum contacts. In Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979), the court stated that the facts of the case did not fulfill minimum contacts "and thus cannot reach the level of 'direct effects.'" *Id.* at 677. This implies that, if direct effects criteria are met, minimum contact requirements are also satisfied. In the most recent case construing the application of the Act, Nikkei Int'l, Inc. v. Nigeria, No. 77 Civ. 2348 (S.D.N.Y. Aug. 19, 1980), the court's initial consideration was whether the sovereign was immune. If the sovereign is not immune, reasonable contacts with the forum are still necessary to create both subject matter and personal jurisdiction. *Id.*, slip op. at 20. This determination, however, necessarily requires that the contacts with the forum be reasonable. *Id.* at 28. The reasonableness standard in *Nikkei* is the minimum contacts standard of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 28 (1980). Minimum contacts analysis evaluates the burden placed on the defendant in litigating in the forum, the interest of the forum in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief. 444 U.S. at 292; No. 77 Civ. 2348, slip op. at 28. If only minimum contacts standards control, jurisdiction over transboundary polluters is clear. Damages in a forum of $580,000,000 create a strong interest in adjudicating the dispute. *See* note 5 *supra* and accompanying text. The burden on the defendant is not great. *See* note 89 *supra* and accompanying text. Finally, the plaintiff has no other effective and convenient relief. *See* note 55 *supra*. *See generally* Note, *The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act*, 4 Fordham Int'l L.J. ___ (1980). An imprecise variation of the effects doctrine under the Act is the effects doctrine used in antitrust law. *See* B. Hawk, United States, Common Market, and International Antitrust 21 (1979). The limits of antitrust and constitutional jurisdiction probably were delineated in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (Alcoa). Judge Learned Hand formulated the "intent and effect" test in which an intent to and an effect on the imports or exports of the United States makes extraterritorial application of antitrust law appropriate. *Id.* at 423. These criteria have been criticized as inconsistent with international law, an unreasonable imposition of American political and economic values on other nations, and unclear in application. Jennings, *Extraterritorial Effects of Antitrust*, 1957 Brit. Y.B. Int'l L. 146; Stanford, *Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195, 210-11 (1978). *See generally* B. Hawk, *supra*, at 19-59. Later cases have revised the standard. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 615 (9th Cir. 1976) ("not limited to trade restraints which have both a direct and substantial effect on [United States]

the context of the Act.[121] The only guidance provided by Congress is that the Act is patterned after the District of Columbia long-arm statute[122] and that "direct effects" criteria should be applied consistent with section 18 of the Restatement, Second, of the Foreign Relations Law of the United States.[123]

As construed by the courts, the District of Columbia statute requires that either the tortious act and its effect occur within the District[124] or the injury occur within the jurisdiction and the defendant have "regular business contacts" with the District.[125] If this statute is applied rigidly in the context of the Act, transnational pollution injury might not meet the direct effects criterion. The first section clearly could not be satisfied because the act that caused the injury occurred outside the territorial waters of the United States.[126] Meeting the requirements of the second section would depend on whether the firm responsible for the oil spill has "regular business contacts." Sufficient business contacts probably exist over Pemex,[127]

---

foreign commerce"); United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504, 592 (S.D.N.Y. 1951) ("a conspiracy . . . which affects American commerce"); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949) ("a direct and influencing effect on trade"), *modified and aff'd*, 341 U.S. 593 (1951).

121. FSIA Report, *supra* note 77, at 19, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6618.

122. *Id.* at 13, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6612.

123. *Id.* at 19, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6618.

124. Margoles v. Johns, 483 F.2d 1212, 1214 (D.C. Cir. 1973) (construing D.C. Code Encyl. § 13-423(a)(3) (West Supp. 1970)). In *Margoles*, defamation published in Wisconsin caused injury in the District of Columbia. *Id.* at 1213. The court interpreted "tortious injury" restrictively to include both the act and the injury. Thus, a connection with the forum greater than the act's injurious consequences was necessary before the court would exercise jurisdiction. *Id.* at 1219-20.

125. Aiken v. Lustine Chevrolet, Inc., 392 F. Supp. 883, 885 (D.D.C. 1975) (construing D.C. Code Encyl. § 13-423(a)(4) (West Supp. 1970)).

126. *See* notes 1-2 *supra* and accompanying text.

127. Although the District's tortious injury requirement is rather restrictive, the District's "transacts business" requirement is interpreted to extend jurisdiction to the farthest reaches permitted under the due process clause. Margoles v. Johns, 483 F.2d 1212, 1218 (D.C. Cir. 1973); Dorothy K. Winston & Co. v. Town Heights Dev., Inc., 376 F. Supp. 1214, 1216 (D.D.C. 1979). Additionally, the "regular business contacts" requirement permits jurisdiction even when defendant's contacts bear no relation to the tort that forms the basis of the cause of action. Aiken v. Lustine Chevrolet, Inc., 392 F. Supp. 883, 885 (D.D.C. 1975). Pemex may have satisfied the District's statute because of Pemex's long history of commerce with the United States. S.T. Tringali Co. v. Tug Pemex XV, 274 F. Supp. 227, 230 (S.D. Tex. 1967) (Pemex is "constantly sending its vessels into American ports."); F.W. Stone Eng'r Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945) (various construction contracts). This commercial connection with the forum will be substantially augmented by the purchase of 120 offshore drilling rigs from the United States. *See* note 9

but possibly not over other nations participating in offshore oil drilling. Courts, however, do not universally apply the District of Columbia statute. In fact, some never mention it at all.[128] Thus, the extent to which compliance with the District of Columbia statute is required is unclear.

The Act also incorporates the direct effects standard of section 18(b)[129] of the Restatement, which provides that

> [a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[130]

Courts, in construing "substantial," "direct," and "foreseeable," determine "direct effects" primarily by the locus of the injury.[131] In *Harris v. VAO Intourist*,[132] the court held that the death of a United States national while abroad was necessarily indirect.[133] Something

---

supra. Pemex also contracted with Sedco, Inc. for the bareboat charter of the drilling rig involved in this particular accident. *Ixtoc Hearings*, *supra* note 1, at 20 (statement of Stephen Mahood). All of these connections lead to the conclusion that Pemex has satisfied the business contacts requirement by purposefully availing itself of the laws of the United States. *See* Nikkei Int'l, Inc. v. Nigeria, No. 77 Civ. 2348, slip op. at 24-30 (S.D.N.Y. Aug. 19, 1980) (letter of credit contract signed with U.S. bank sufficient contact); National Am. Corp. v. Nigeria, 448 F. Supp. 622, 637 (S.D.N.Y. 1978) (same), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *cf.* note 120 *supra* (contacts are constitutionally sufficient to warrant exercise of jurisdiction).

128. Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) (per curiam); Nikkei Int'l, Inc. v. Nigeria, No. 77 Civ. 2348 (S.D.N.Y. Aug. 19, 1980); *see* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1295 (S.D.N.Y. 1980). The *Verlinden* court discussed the District of Columbia long-arm statute, but not in the context of direct effects, and concluded that "the District's statute is only a guide to interpreting the Act, not a binding directive." *Id.*

129. In Harris v. VAO Intourist, 481 F. Supp. 1056 (E.D.N.Y. 1979), the court determined that § 18(b) of the Restatement is controlling because § 18(a)'s language is unconstitutionally broad. *Id.* at 1063.

130. Restatement (Second) Foreign Relations Law of the United States § 18 (1965).

131. Nikkei Int'l, Inc. v. Nigeria, No. 77 Civ. 2348, slip op. at 29 (S.D.N.Y. Aug. 19, 1980); Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1295 (S.D.N.Y. 1980); Harris v. VAO Intourist, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979).

132. 481 F. Supp. 1056 (E.D.N.Y. 1979).

133. *Id.* at 1062; Upton v. Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979). The *Upton* court, in a wrongful death action, analogized the Act's long-arm provision to the District of Columbia long-arm statute and found that the deaths or injuries to Americans abroad did not have "direct effects" on the United States. *Id.* at 266. The court stated that "[t]he common sense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Id.* Because the fact of death, rather than

more substantial and direct than the effect on grieving survivors was necessary to exercise jurisdiction. Furthermore, the effects of defamation[134] and the breach of a letter of credit[135] were deemed to be substantial and direct when the United States was the locus of the injury.[136] Under the rationale of these cases, the standards of section 18 would be met in transboundary pollution cases. The spoilation of the Texas coast with its concommitant damages is a more "substantial" impact than the consequences of a breach of a letter of credit[137] or a defamatory remark.[138] Moreover, the locus requirement is satisfied because the United States directly incurs the injury.[139] As with the District of Columbia statute, however, courts have not universally applied the Restatement and have reached decisions without ever expressly mentioning it.[140]

In most instances of transboundary pollution, the jurisdictional requirements of both the District of Columbia long-arm statute and section 18 will be met.[141] In the instances when the standards of the District of Columbia are not met, jurisdiction under the Act is still appropriate because the District of Columbia statute guides and does not bind.[142] Any doubt as to jurisdiction for transboundary pollution is dispelled by the legislative history of the Act, which cites *Trail Smelter*[143] as an example of injury that will be redressed.[144]

Iran's tortious act, caused the injury in the United States, the court reasoned that jurisdiction was not permissible. *Id.* As in *Harris*, the situs of the injurious effect was controlling. *Id.*

134. *See* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 855 (S.D.N.Y. 1978). The *Yessenin* court suggested that injury to the good name and reputation of a United States resident caused by the writing and publication of articles outside the United States would constitute a "direct effect" for the Act's purposes. *Id.*

135. In National Am. Corp. v. Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979), the breach of a New York letter of credit payable to a New York beneficiary would have met the statutory requirement of "direct effects" because the alleged injury occurred in the United States and was substantial. *Id.* at 637; *accord*, Nikkei Int'l, Inc. v. Nigeria, No. 77 Civ. 2348 (S.D.N.Y. Aug. 19, 1980).

136. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980).

137. *See* note 135 *supra* and accompanying text.

138. *See* note 134 *supra* and accompanying text.

139. *See* notes 1-2 *supra.*

140. Upton v. Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

141. *See* notes 127, 137-39 *supra* and accompanying text.

142. *See* note 128 *supra.*

143. For a discussion of *Trail Smelter*, see notes 18-27 *supra* and accompanying text.

144. *Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 20 (1973) (statement of Charles Brower). "There is also no immunity if the case involves '[a]n act outside the territory of the United States in connection

CONCLUSION

The transboundary pollution situation presents unique problems for both the international and domestic judicial systems. Although redress is available for injured United States nationals under the Act, international regulation of pollution creating activities is critically needed before the deterioration of the marine environment exceeds man's ability to provide effective restitution. A policy relying on mere financial compensation is, at best, logically indefensible and, at worst, reprehensibly short-sighted. Conclusion of the Conference on the Law of the Sea may well provide the prescient global policy that will allow seabed exploitation without irreparable harm to the environment.

William J. Macdonald

---

with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States." This exception would embrace extraterritorial conduct having effects within the United States such as an action for pollution of the air by a factory operated commercially by a foreign state. It is, in fact, a situation which we have had on our borders from time to time." *Id. See also* Restatement (Second) Foreign Relations Laws of the United States § 18 (1965) (jurisdiction appropriate to redress transboundary injury). *See generally*, Note, *Extraterritorial Jurisdiction Over Foreign States: The "Direct Effect" Provision of the Foreign Sovereign Immunities Act of 1976*–Carey v. National Oil Corporation, 13 J. Int'l L. & Econ. 633 (1979).