TRANSBOUNDARY POLLUTION FROM MEXICO: IS JUDICIAL RELIEF PROVIDED BY INTERNATIONAL PRINCIPLES OF TORT LAW?

INTRODUCTION

This article considers the availability of private remedies to California residents, local and state governments for damage resulting from transboundary pollution from Mexico. The following analysis is applicable to any international pollution conflict, but the specific focus will be on the sewage pollution flow from Tijuana, Mexico into the ocean waters off San Diego, California.[1]

BRIEF HISTORY

Sewage flow from Mexico into California has caused conflict and damage for decades.[2] As early as 1933, sewage haphazardly flowing north from the city of Tijuana contaminated wells and crops in San Ysidro, the southernmost valley of California.[3] Temporary relief for the problem was provided by building a joint U.S. and Mexican sewage pipe that discharged the Tijuana sewage offshore into 15 feet of water.[4] This pipe, known as an "outfall" was adequate for low sewage flows of 1 million gallons per day, but the flow from Tijuana grew to 4 million gallons per day in the 1960's.[5] By 1962, the sewage flow had overloaded the system and contaminated several beach areas, at times as far north as the famous Hotel Del Coronado in San Diego.[6] The result of this critical

1. The United States and Mexico share a 1900 mile inland and maritime boundary. The border area is defined by the Treaty with Mexico on Water Utilization, Feb. 3, 1944, United States-Mexico, 59 Stat. 1219, T.S. No. 994 [hereinafter 1944 Water Treaty] as the area situated 100 kilometers (approximately 60 miles) on either side of the boundary line.

2. *See* Tijuana River Valley Border Pollution: Hearings Before the Select Committee of International Water Treatment and Reclamation, California State Assembly, March 13, 1984 [hereinafter 1984 Hearing]; *see also* Meislin, *Mexico's Wayward Waste: U.S. is Unhappy Host*, N.Y. Times, March 14, 1985, at A2, Col. 3.

3. *See* 1984 Hearing, *supra* note 2, at 4-5 (testimony of Mr. Ladin Delaney, Executive Officer at San Diego Water Quality Control Board).

4. *Id.* President Roosevelt authorized the joint overall project which was completed in 1939.

5. *Id.* In 1986 the sewage flow was 20 million gallons per day and was predicted to be 150 million gallons per day for the year 2000. Draft Letter from California Governor Deukmejian to President Reagan (January 17, 1986) (discussing the San Diego-Tijuana Sewage Problem)(available at San Diego Office, Cal. Regional Water Quality Control Board).

6. *Id.* at 5. *See* map and accompanying text, *supra* note 1. In the summer of 1983, seven miles of South Bay beachfront, up to but not including the beach at Hotel del Coronado, were

situation was an agreement between San Diego and Tijuana to connect the Tijuana sewage overflow directly into the San Diego Metro Sewage System.[7] This connection was to be used only for emergency periods but by 1978, connection usage was 365 days a year.[8] The estimated total sewage flow from Mexico by 1984 was 20 million gallons per day, of which the San Diego municipal system received 13 million gallons. The 7 million gallons not processed through the connection have simply flowed across the border through drains and gulches into the Tijuana River, through the estuary and finally across the beach.[9]

In 1984, the Mexican government began construction of a pump station and canal system to take the sewage 5.6 miles south of the border and discharge it directly into the ocean.[10] California officials are concerned about the utility of this system, however, because the ocean currents will still carry the untreated sewage northward into the San Diego area.[11] These officials recommend a long deep-water ocean outfall which would take the sewage far off-shore and prevent the discharges into the Tijuana River, but such a system would cost up to $200 million.[12] Many officials believe that an adequate waste-water collection treatment, and disposal system will never be built or maintained by Mexico without the aid of the United States.[13] In order to protect itself, the State of California has made efforts to build a "defensive system" involving catch basins and a pipeline system to route any delinquent sewage back to Tijuana, but funding by the United States Congress is crucial to the successful construction of this defensive system.[14]

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quarantined because of the sewage for 27 days at the height of the tourism season. La Rue, *Sewage Leak Closes South Bay Beach*, San Diego Union, December 27, 1984, at B-1, B-4.

7. 1984 Hearing, *supra* note 2, at 6. *See also* La Rue, *Mexico to Get Loan for Tijuana Sewage System*, San Diego Union, March 7, 1985, at A1, A5.

8. 1984 Hearing, *supra* note 2, at 6. Moreover, International Boundary Waters Commission Commissioner J. F. Friedkin has reported to San Diego City Councilman Uvaldo Martinez that U.S. beaches have been regularly quarantined on "the first 2.4 miles of beach immediately north of the boundary, because of the raw sewage discharges from the Tijuana River . . . ." Report of May 1, 1985 (available at San Diego Office, Cal. Regional Water Quality Control Board).

9. 1984 Hearing, *supra* note 2, at 6-7.

10. *Id.* at 7.

11. *Id.*

12. *Id.* at 8-9. *See* Letter from California State Water Resources Control Board Chairwoman Onorato to EPA Administrator Thomas (Feb. 13, 1985) (recent announcement that "Mexican government would seek an independent solution to the problem" is not satisfactory. There is "ample evidence that Mexican officials have severe difficulty with operation and maintenance of mechanical treatment facilities.")(available at San Diego Office, Cal. Regional Water Quality Control Board). *See* McDonnell, *Tijuana Suffers Sewage Plant Woes: Shutdown Stirs Debate on Mexico's Handling of Problem*, L. A. Times, November 16, 1987, at 1.

13. *Id.* at 8 (testimony of Executive Officer Ladin Delaney of the Regional Water Quality Control Board).

14. *'Big Pipe' To Funnel Sewage Back to Mexico.* San Diego Tribune, Feb. 8, 1988, at B1, Col. 2. *See also* Lowry and Associates Report on Defensive Measures for the Tijuana River Valley, City of San Diego Manager's Report No. 85-173, (April 5, 1985)(review of consultant's

The State of California, city of San Diego, EPA officials and citizens of San Diego are concerned about the health and economic effects caused by the untreated sewage.[15] U.S. ocean waters at the border have been more continuously monitored, demonstrating indications of bacteriological contamination.[16] Clean water is important for promotion and maintenance of tourism and fishing, industries which support the local economy.[17] The flow of sewage could trigger "widespread bankruptcy" for South Bay businesses and "could be devastating to the San Diego tourist trade in general."[18]

ARTICLE SYNOPSIS

The thesis of this article is that private citizens and governmental entities in California do not have to rely on diplomacy and international agreements, but may take direct judicial action to prevent the pollution or obtain damages for injuries and dimunition in property values. Relief may be possible through the filing of a lawsuit against the Mexican government in a Mexican or, preferably, a United States court.[19] This comment proceeds from the basic axiom that nations have a duty to prevent transboundary pollution and should be held responsible for the transboundary effects of pollution generated domestically.[20]

This comment addresses (I) the existing governmental approaches to the Mexican transboundary pollution problem; (II) rules of international law applicable to transboundary pollution; and (III) potential judicial remedies available to citizens and local governments for pollution damages in California. The discussion of judicial remedies focuses particularly on sovereign defenses available to Mexico in actions filed in U.S. courts.

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report on possible defensive measures)(available at San Diego Office, Cal. and Regional Water Quality Control Board). For a discussion of the alternatives available utilizing Mexican funding, see 1984 Hearing, *supra* note 2.

15. 1984 Hearing, *supra* note 2, at 74 (testimony of Chief Gary Stephany, San Diego County Department of Health Services).

16. *Id.* Some of the diseases linked to sewage contaminated water include typhoid, salmonella, shigella and hepatitis.

17. *See* Carson, *Border Sewage Threatens: State Report Says It Could Harm Businesses, Tourist Trade*, San Diego Union, April 11, 1985, at A1, A13; State Report, County of San Diego Board Meeting on Border Sewage Emergency, Jan. 9, 1985, at 3 (available at San Diego Office, Cal. Regional Water Quality Control Board); *see also*, Letter from County of San Diego Department of Health Services to Corp. of Engineers Colonel Butler, Aug. 5, 1986 (Tijuana Sewage/ Public Health Concerns)(available at San Diego Office, Cal. Regional Water Quality Control Board).

18. Carson, *Border Sewage Threatens: State Report Says it Could Harm Businesses, Tourist Trade*, San Diego Union, April 11, 1985, at A1, A13.

19. *See infra* notes 65-111 and accompanying text.

20. *See infra* notes 41-63 and accompanying text.

I. THE EXISTING GOVERNMENTAL APPROACHES TO REMEDY MEXICAN TRANSBOUNDARY POLLUTION

Since the 1800's Mexico and the United States have tried to agree on water quality and water allocation issues.[21] The first real agreement was in 1944. In the treaty of 1944,[22] the countries agreed to the distribution of waters from the Rio Grande (Texas/Mexico border) and the Colorado River (California/Mexico border). This treaty established the International Boundary and Water Commission [IBWC], which is an intergovernmental entity[23] designed to study existing problems, implement potential solutions, and enforce any agreements made.[24] Some commentators argue, however, that joint boundary commissions like the IBWC have not played effective roles in the control of pollution, and that this is particularly true regarding the sewage from Mexico.[25]

The United States and Mexico have tried to resolve the sewage pollution problem by agreement. The United States' Environmental Protection Agency [EPA] and Mexico's Subsecretariat for Environmental Improvement [Subsecretariat] signed an informal memorandum of understanding in June 1978 aimed at increasing cooperation between the two countries.[26] The EPA and the Subsecretariat are expected to monitor the implementation of the memorandum. They are to make recommendations to the parties and hold annual review meetings.

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21. *See supra* notes 2-14 and accompanying text. Prior to the 1900's, conflicts at the United States and Mexico border focused on the distribution and salinity of the waters of the Colorado River. Mexico complained that they were not getting enough water, and the water they were getting had a high salt content. For a discussion of the Colorado River Salinity problem, *see* Comment, *Congress and EPA Propose Solutions to Southwestern River Salinity*, 4 ENVT'L. L. REP. 19143 (1974). The text of the 1944 Treaty does not address the issues of water pollution. Even though the IBWC played an important role in the salinity dispute, it really lacks the sufficient structure or authority to deal with pollution problems. In this early period the United States followed an absolute sovereignty approach as opined by Attorney General Harmon. Harmon announced that "the rules, principles, and precedents of international law impose no liability or obligation upon the United States" to refrain from upstream utilization which might harm downstream Mexican interests. 21 Ops. Atty. Gen. 274, 283 (1895). This so-called "Harmon Doctrine" has been replaced with the principle of "equitable utilization of international water courses." *See* Utton, *International Water Quality Law, reprinted in* INTERNATIONAL ENVIRONMENTAL LAW 155-56. (1974).

22. Treaty with Mexico on Water Utilization, Feb. 3, 1944, United States-Mexico, 59 Stat. 1219, T.S. No. 994.

23. The IBWC is an international body consisting of government liaisons from both the United States and Mexico. The provisions of the 1944 Treaty pertaining to the IBWC are codified at 22 U.S.C. §§ 277-278b (1976).

24. *Id.*

25. *Sewage: Diplomacy Not Enough,* The San Diego Tribune , July 23, 1985, at B6, Col. 1. *See generally* Hoffman, *State Responsibility in International Law and Transboundary Pollution Inquiries*, 25 INT'L & COMP. L.Q. 509 (1976).

26. Memorandum of Understanding Between the Environmental Protection Agency of the United States and the Subsecretariat for Environmental Improvement of Mexico for Cooperation on Environmental Programs and Transboundary Problems, June 14-June 19, 1978, United States-Mexico, 30 U.S.T. 1574, T.I.A.S. No. 9264, *reprinted* in 17 I.L.M. 1056 (1978) [hereinafter 1978 Memorandum].

In August 1983, the Border Area Pollution Agreement was signed by President Miguel de la Madrid of Mexico and President Ronald Reagan of the United States.[27] Although the 1983 Agreement is authoritative on its face, several provisions within it reduce its potential effectiveness. The most debilitating of these is that no funds are committed by either party.[28] Also, each party is expected to bear the entire cost of its own participation (the United States cannot assist Mexico in funding).[29] Furthermore, the parties have only obligated themselves to solve the pollution problems "to the fullest extent practical," an ambiguous term.[30] The 1983 Agreement specifies that its provisions are subordinate to existing state and national laws, therefore the agreement does not preempt the weak local laws in Mexico.[31] Lastly, the Agreement is void of enforcement provisions.[32]

In July 1985, the countries signed an amendment to the 1983 Agreement.[33] In this amendment, Mexico agreed to construct, operate and maintain sewage treatment facilities to process all of its sewage and to be independent of the San Diego sewage treatment connection.[34] The biggest problem with the 1985 Amendment is that Mexico demanded complete internal control over fulfilling its part of the bargain.

The provisions of the 1983 Agreement and the 1985 amendment appear especially ineffective in light of the country's economic problems. The Mexican Government is concentrating its resources into reviving the country's collapsed economy.[35] Nonetheless, in a September 1986 Water Work Group Coordinators Meeting, the Mexican delegation noted that "in spite of severe economic difficulties, the Mexican government has

27. On Cooperation for the Protection and Improvement of the Environment in the Border Area, 19 WEEKLY COMP. PRES. DOC. 1137, (August 14, 1983) [hereinafter 1983 Agreement].

28. *See* N.Y. Times, Sept. 14, 1983, at A16, Col. 1.

29. *See* 1983 Agreement *supra*, note 30, at art. 14.

30. *Id.*

31. *Id.* arts. 5, 7, 15.

32. *See* N.Y. TIMES, Sept. 14, 1983, at A16, Col. 1.

33. *See* LaRue, *Two Nations Sign Pact on Sewage*, San Diego Union, July 19, 1985, at B-1. Mexican officials have unveiled an ambitious $91 million plan to bring Colorado River water to Tijuana and to build new sewer mains and two Mexican treatment plants meant to end cross-border pollution. When the proposed work is completed, about 80% of existing residences in Tijuana will be on the sewage line. Of the $91 million to be spent, $46.4 million would come from a loan Mexico requested through the Inter-American Development Bank [IDB]. U.S. Ambassador John Gavin had threatened to oppose the loan unless Mexico gave assurances that sewage treatment was a part of the plan. U.S. officials, however, remain concerned that treatment standards may not be maintained. LaRue, *Sewage: Mexico Bares Plan to End Sewage Woes*, San Diego Union, Feb. 5, 1985, at A-1, Col. 1.

34. *See* Minute No. 270, IBWC, signed April 30, 1985 at Ciudad Juarez, Chihuahua. The Commission reviewed Mexico's plan and formulated recommendations to the two governments with respect thereto. *But see infra* note 12 and accompanying text.

35. N.Y. Times, Sept. 14, 1983, at A16, Col. 1.

given priority to the solution of environmental problems."[36]

Mexico realizes the necessity of developing environmental controls.[37] However, the current reality of Mexico's economy leaves little hope for progress against the sewage pollution. The question is: how much environmental protection can and will Mexico attempt?[38] Mexico has endorsed the Third World position adopted at Stockholm.[39] Under this view, pollution is regarded as the natural result of the industrialization process. Environmental interests will only be considered after a certain standard of living is achieved.[40] Therefore, the question of Mexico's commitment to environmental protection remains unanswered. Will Mexico wait until a certain standard of living is achieved in Tijuana before environmental protection becomes a real priority?

II. INTERNATIONAL PRINCIPLES OF TRANSBOUNDARY POLLUTION

A. Doctrine of State Responsibility

With regard to transboundary environmental problems, there exist general principles and doctrines of law recognized by nations. A good starting point is with the maxim: "sic utere tuo ut alienum non laedas" or "one must so use his own rights as not to infringe upon the rights of others."[41] The sic utere tuo principle acknowledges the limited nature of a state's sovereign right to develop its resources.[42] This principle rejects absolute sovereign immunity for damages resulting from infringement on others' rights.[43]

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36. *See* Report of the Water Work Group to The Third National Coordinators Meeting (Sept. 3, 1986), (Mexico City).

37. In 1971, Mexico amended its Constitution to give the General Health Council the power to order "measures . . . to prevent and combat environmental pollution." Acevedo, *Legal Protection of the Environment in Mexico*, 8 CAL. W. INT'L L.J. 22, 23 (1978). The government then created the Subsecretaria de Mejoramiente del Ambiente (SMA) within the Ministry of Health and Welfare and passed a comprehensive environmental law. *See* Bath, *U.S.-Mexico Experience in Managing Transboundary Air Resources: Problems, Prospects and Recommendations for the Future*, 22 NAT. RESOURCES J. 1147, 1156 (1982).

38. The commitment of the Mexican government to allocate resources to implement the law is questionable. Since the most pressing environmental problem currently facing Mexico is the air pollution afflicting Guadalajara, Monterrey, and Mexico City, the federal government has focused its initiatives in those cities. Moreover, small staffing and insufficient technical capacity hinders the SMA, the agency in charge of implementing environmental regulations, in its efforts to deal with environmental problems. *Id.* at 1157-59. *See generally* LEGAL PROTECTION OF THE ENVIRONMENT IN DEVELOPING COUNTRIES (Prieto & Nocedal eds. 1974)

39. *See* Bath, *supra* note 37, at 1157. *See also* Cuadra, *Aspectos Juridicos de la contaminacion atmosferica en el area fronteriza*, in AIR POLLUTION ALONG THE UNITED STATES-MEXICO BORDER 120 (H. Appelgate & C. Bath eds. 1974).

40. *See* Bath, *supra* note 37 at 1157.

41. Arbitblit, *The Plight of American Citizens Injured by Transboundary River Pollution*, 8 ECOLOGY L. Q. 339 (1979).

42. *See* Lipper, *Equitable Utilization*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 15, 23-28 (A. Garretson, R. Hayton, & C. Olmstead eds. 1967).

43. *See, e.g.* The Schooner Exchange, 11 U.S. (1 Cranch) 116 (1812) (court rejected the

Under the doctrine of state responsibility, states are forbidden to allow their territories to be used in a manner which is detrimental to other states.[44] This principle was applied in a frequently cited decision involving transboundary pollution, the *Trail Smelter* arbitration.[45] In that arbitration, the United States claimed that sulfur dioxide fumes from a lead and zinc smelter in Canada were causing damage in the state of Washington. At the outset, private parties made several attempts to negotiate a solution.[46] Later, both national governments agreed to submit the issue to arbitration where it was held that:

> [U]nder the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes, in or to the territory of another, or the properties of persons therein, when the case is of serious consequence, and the injury is established by clear and convincing evidence.[47]

The arbitrators further held that it was the duty of Canada to see that Canada's actions were in conformity with its obligations under international law as decided in the judgment.[48] The *Trail Smelter* holding is frequently cited as precedent for the principle of international law that every state has an obligation to prevent transboundary pollution.[49] Because this is a U.S. boundary case, its rule of law should be received favorably by a U.S. court considering a private suit against Mexico.

B. The Stockholm Principles

Various international organizations have addressed the problem of cross-border pollution.[50] Representatives of several European nations

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concept of absolute immunity). *See* Discussion of Sovereign Immunity, *infra* notes 113-165 and accompanying text.

44. GRAD, 3 TREATISE ON ENVIRONMENTAL LAW, § 13.02 at 13-42.

45. The Trail Smelter Case (United States v. Canada), 3 R. Int'l Arb. Awards 1905 (1941) [hereinafter Trail Smelter].

46. *See* Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. INT'L L. 213 (1963) (In 1927, after private attempts to resolve the dispute failed, the U.S. suggested that the problem be referred to the International Joint Commission under Article IX of the Boundary Waters Treaty, Jan. 11, 1909, United States-Canada, 36 Stat. 2448, T.S. No. 548. The treaty was set up between Canada and the U.S. to handle border disputes regarding water resources. Canada agreed to undertake a 5-year study resulting in a report recommending that Canada pay $350,000 damages to the United States and that the company install certain pollution control devices. Canada paid the money and installed devices which significantly decreased sulfuric emissions, but damage was still occurring in the U.S. At this point, the arbitration board was brought in to determine the extent of Canada's responsibility.)

47. *Id.* at 1965.

48. *Id.*

49. *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). *See also* the Corfu Channel Case (United Kingdom-Albania), 1949 I.C.J. 4, 22, as establishing a principle of state responsibility in transboundary pollution disputes.

50. *See* Wetsone, *Air Pollution Control Laws in North America and the Problems of Acid Rain and Snow*, 10 ENVT'L. L. REP. 50001, 50016 (1980).

convened to establish specific principles to deal with international pollution. The two most important conferences, in terms of developing principles of international environmental law, were the Stockholm Conference,[51] and the Helsinki Rules.[52] The Stockholm Conference developed principles 21 and 22 of Stockholm Declaration:

> Principle 21: States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[53]
> Principle 22: States shall cooperate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[54]

These principles taken together demonstrate an international acceptance of the rule that each state has a duty to confront environmental problems. This suggests that Mexico is liable for the detrimental effects of its sewage pollution in California. Principle 22 implies that Mexico has a duty to compensate individuals suffering damage from its pollution. Such compensation should follow from any other detrimental effects caused by the pollution, such as economic losses from reduced tourism. Mexico is therefore liable for activities within its control that affect areas beyond its borders.[55]

C. *The Helsinki Rules*

Equally influential in the international law arena are the Helsinki

51. United Nations Declaration on the Human Environment, U.N. Doc. A/Conf. 48/14 (1972) [hereinafter Stockholm Declaration], (adopted by the participants in the 1972 U.N. Conference on the Human Environment at Stockholm, Sweden ("Stockholm Conference")).

52. Helsinki Rules on the Uses of the Waters of International Rivers, Aug. 20, 1966 (adopted at the 52nd Conference of the International Law Association) [hereinafter Helsinki Rules], *reprinted in* Wetstone, *supra* note 50.

53. Stockholm Declaration, *supra* note 51.

54. *Id.* A number of countries have established treaties or agreements to control pollution of shared water bodies including the Netherlands and West Germany (1960), India and Pakistan (1960), and France, Belgium and Luxembourg (1950). *See generally* BARROS & JOHNSTON, THE INTERNATIONAL LAW OF POLLUTION (1974).

55. *See generally* Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe,* 26 HARV. INT'L. L. J. 1 (1985).

Rules.[56] These Rules have been adopted as establishing a duty for nations to prevent transboundary pollution.[57]

The chief contribution of the Helsinki Rules to environmental law is their applicability in specific factual contexts. Art. X(1) states the specific rule concerning pollution: "[A] state must prevent any new form of pollution or any increase in the degree of existing water pollution . . . which would cause substantial injury in the territory of a co-basin state . . .."[58] Article V(2) of the Rules lists eleven non-exclusive factors to be considered by a tribunal.[59] Each of the factors should be considered by the tribunal to achieve a just resolution.

The potential effectiveness of the Helsinki Rules can be shown by applying them to hypothetical claims by California citizens and governmental units against the Mexican government for its failure to prevent damage to American interests caused by the sewage pollution to the waters of the Tijuana River and the Pacific Ocean. The factors most significant to the Mexican situation are as follows: the geography of the basin,[60] the economic and social needs of each basin state,[61] and the degree to which the needs of a basin state may be satisfied without causing substantial injury to a co-basin state.[62] It appears that the California residents and local governments could state a very strong claim under these factors. The geography of the basin leaves the State of California vulnerable to the northerly flows and currents from Mexico. If Mexico does not construct an adequate canal or pump system, California will continue inevitably to receive the uninvited and untreated sewage.[63] With regard to the economic and social needs of each basin, California could argue economic and social injury from the pollution, but Mexico could answer

56. *See* Helsinki Rules, *supra* note 52 at 50016.

57. *See generally* Note, *Selected Environmental Law Aspects of the Garrison Diversion Project*, 50 N.D. L. REV. 329 (1974). *See also* BARROS & JOHNSON, *supra* note 54.

58. Helsinki Rules, art. X(1)(a), *reprinted* in Wetsone, *supra* note 50. Additionally, art. IX defines water pollution as "any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin . . . ." Helsinki Rules, art. IX, *reprinted* in BARROS & JOHNSON, *supra* note 54, at 81.

59. These factors include: (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin state; (b) the hydrology of the basin, including in particular the contribution of water by each basin state; (c) the climate affecting the basin; (d) the past uses of the waters of the basin, including existing uses; (e) the economic and social needs of each basin state; (f) the population dependent on the waters of the basin in each basin state; (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin state; (h) the availability of other resources; (i) the avoidance of unnecessary waste in the use of waters of the basin; (j) the practicability of compensating one or more of the co-basin states as a means of adjusting conflicts among uses; and (k) the degree to which the needs of a basin state may be satisfied without causing substantial injury to a co-basin state. Helsinki Rules, art. V(2), *reprinted in* BARROS & JOHNSON, *supra* note 54, at 78-79.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See supra* note 13 and accompanying text.

very persuasively that their country's collapsed economy makes it impossible to remedy the pollution at this time. Finally, the degree to which the needs of a basin state may be satisfied without causing substantial injury is a factor clearly in the United States' favor. Mexico has an undeniable need to dispose of Tijuana's sewage but it cannot continue to allow its sewage to flow into the waters without causing or potentially causing substantial injury.

The Helsinki Rules therefore would support an American plaintiff's attempt to demonstrate that the Mexican Government has an international legal duty to prevent injury from transboundary pollution. These factors, together with *Trail Smelter* and Stockholm Principles analyzed above, put American plaintiffs on solid footing on the issue of Mexico's duty to prevent transboundary pollution. This is especially true in light of the continuous and ongoing nature of the sewage pollution from Tijuana, of which Mexico is necessarily aware.

III. THE INDIVIDUAL CITIZEN'S AND LOCAL GOVERMENT'S JUDICIAL REMEDIES FOR TRANSBOUNDARY POLLUTION

California residents and the local governments have two possible options for legal action against Mexico for its sewage pollution: (1) an action in a Mexican federal court for damages or injunctive relief, and (2) an action in a California state or federal district court for damages or injunctive relief. There are potential problems with either approach.[64]

A. Direct Action by Private Citizens or California Officials in Mexican Court

A suit in a Mexican court faces many procedural and substantive barriers.[65] The Mexican federal courts are organized into 3 layers: one supreme court, intermediate appellate courts, and individual district courts.[66] The district courts are more analagous to state courts in the United States.[67] The Mexican state courts are organized similarly to the federal system, but in small outlying areas, there may be an abbreviated structure.[68]

64. *See generally,* BAYITCH & SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES (1975); HERGET & CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM (1978); *see also supra* notes 9-14 and accompanying text.

65. Among the barriers to a suit are personal and subject jurisdiction, service and summons, conflicts of laws, and proof of "usages, customs and case law" including laws of foreign legal systems. *See* BAYITCH & SIQUEIROS, *supra* note 64, at 229.

66. *See* HERGET & CAMIL, *supra* note 64, at 71.

67. *Id.*

68. *See* HERGET & CAMIL, *supra* note 64, at 72.

Procedure is governed by the codes of civil procedure for the particular court, state or federal.[69] Mexico's Federal Code of Civil Procedure is similar to the United States version.[70] The Charter of Bogota,[71] which emphasizes equal access to the courts, governs personal jurisdiction. The Mexican Constitution provides safeguards for non-discrimination between nationals and aliens.[72] "No one shall be deprived of life, liberty, property, possessions or rights without a trial by courts . . . ."[73]

A typical plaintiff's complaint consists of three parts: statement of facts, considerations of law, and prayer for relief.[74] The initial complaint and defendant's answer serve as the main brief to the court. Additional pleadings are permitted but are not common.[75]

The procedure of the trial is worth noting briefly. There are fairly loose procedures for introducing evidence,[76] at least in comparison with United States evidence standards. Evidence is introduced at a series of hearings possibly out of the presence of the deciding judge,[77] and is almost always reduced to writing by a secretary.[78] Witnesses are questioned by the judge, however, the lawyers may submit questions to the judge.[79] There is no cross examination.[80] The answers are recorded by the secretary.[81]

The written record of the case, therefore includes the secretary's recordation of the evidence and witness's testimony.[82] The deciding judge then reviews the written record and at that time the lawyers may appear for oral argument.[83] The judge will write his decision in a standard format of one or two pages calling for the appropriate relief.[84] If the case is appealed, the appellate court may make its own decision on both factual and legal issues.[85] There is no formal requirement for courts to follow prior precedents.[86]

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69. *Id.*
70. *Id.* at 74.
71. *See* BAYITCH & SIQUEIROS, *supra* note 64, at 229.
72. Const. art. 14, para. 2. (Mex.).
73. Duncan, *The Mexican Constitution of 1917: Its Political and Social Background,* 5 INTER.-AM. L. REV. 277 (1963) (translation).
74. *See* HERGET & CAMIL, *supra* note 64, at 72.
75. *Id.*
76. *Id.* at 75.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 76.
83. *Id.*
84. *Id.*
85. *Id.* at 76.
86. *Id.* If, however, a court makes a ruling on an issue consistently in five different cases, with a majority vote, that interpretation becomes binding on that court.

With that as background, it would be difficult, if not impossible, to locate precedent with which to determine the likelihood of success of a complaint against Mexico for transboundary pollution. It has been suggested that the president of Mexico and other powerful persons or groups may exercise some degree of political influence upon the courts.[87] Depending upon the area of law involved in the case, the court may defer to the government and on other issues they may uphold the rights of the individual.[88] Further research into Mexican law is necessary to determine the courts tendencies in environmental law litigation.

The brief outline of the Mexican court system offers little assurance for successful resolution of the pollution problem from courts within Mexico. It is likely that the best way to remedy the sewage problem is by suit in the United States against Mexico.

B. Direct Action by Private Citizens or California Officials in United States Court

The best chance for resolution of the sewage pollution problem may be to file suit against Mexico in a U.S. court applying international tort principles and invoking the tort exception to the FSIA.[89] This exception requires a finding that the foreign state violated some duty. As discussed previously, the Helsinski Rules, Stockholm Principles and the *Trail Smelter* arbitration establish that foreign states have a duty to avoid or remedy transboundary pollution.[90] The following section discusses common law remedies available in a private action, procedural issues relevant to a suit against a foreign nation, and immunity defenses available to Mexico.

1. Common Law Remedies

Theoretically, tort law can provide both damages[91] and injunctive relief[92] to those who demonstrate injury resulting from pollution traceable to another's wrongful act or omission. Pollution is actionable under theories of private or public nuisance, trespass, negligence, or possibly even strict liability.[93] The theories are discussed below. (The theory of

87. *Id.* at 78.
88. *Id.*
89. *See* FSIA, *infra* notes 112-65 and accompanying text.
90. *See supra* notes 41-63 and accompanying text for discussion of the international law duty to not interfere with or damage the property of a foreign state.
91. *See, e.g.,* Michie v. Great Lakes Steel, 495 F.2d 213 (6th Cir.), *cert. denied,* 419 U.S. 997 (1974); Spaulding v. Cameron, 38 Cal. App. 2d 265, 239 P.2d 625 (1952).
92. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Milwaukee v. Illinois, 451 U.S. 304 (1981).
93. *See generally* RODGERS, HANDBOOK ON ENVIRONMENTAL LAW (1977). *See* Springer, *The Evolving Law of State Responsibility in* A. SPRINGER, THE INTERNATIONAL

strict liability, however, will not be discussed in this comment.) Numerous questions arise, however, as to the procedure for pursuing any one of the theories above, such as whether there is proper standing for the plaintiff, how to assign liability to the defendant, and how to provide effective remedies for the plaintiff. Other questions may arise concerning the choice of laws and the enforcement of judgments.

a. Nuisance

Nuisance is a broad basis of liability for interference with one's land.[94] Nuisances are classified as either public or private.[95] In a private nuisance suit, an individual claims interference to their rights to the use or enjoyment of their land and sues to have the offending activity enjoined.[96] Since nuisance cases are very fact-sensitive, precedential value is not high. The court determines whether the disturbance complained of amounts to an actionable nuisance by considering the effect the disturbance would have on ordinary and reasonable persons. The court will also weigh the equities between the two parties.[97] Two criteria that often prove to be sufficiently narrow to deny plaintiffs claims in environmental suits are that "the interference must be substantial and a continuing one as seen by or affecting a person of ordinary sensibilities"[98] and that only land rights are protected from invasion.[99] If a California plaintiff can prove that their use of land or water has been detrimentally altered (for example, by showing a change in speciation of trees or fish resulting in a decline of a harvested natural resource), then a private nuisance theory may provide an appropriate remedy.

An action against the perpetrator of a public nuisance can only be brought by the state, unless an individual can show special injury different in kind from that suffered by the general public. A special injury to

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LAW OF POLLUTION: PROTECTING THE GLOBAL ENVIRONMENT IN A WORLD OF SOVEREIGN STATES 132 (1983). *See* Lohrmann, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085 (1970).

94. *See* RODGERS, *supra* note 93, at 100-154. *See, e.g.*, Van v. Bowie Sewerage Co., 127 Tex. 97, 90 S.W.2d 561; Love Petroleum v. Jones, 205 So.2d 274 (Miss. 1967)(in nuisance actions the danger of future harm may cause present danger).

95. *See* RODGERS, *supra* note 93, at 102. People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971)(public nuisance).

96. *See, e.g.*, Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1960). Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E. 2d 871, 309 N.Y.S. 2d 312 (1970). *See also* Lohrmann, *supra* note 93; RODGERS, *supra* note 93.

97. *See* RODGERS, *supra* note 93, at 116-21. *See, e.g.*, Copart Industries, Inc. v. Consolidated Edison, 41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977).

98. *See* Lohrmann, *supra* note 93 at 1106-14. For specific cases, see Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971); Fish v. Hanna Coal & Ore Corp., 164 F. Supp. 870, 872 (D. Minn. 1958); Smillie v. Continental Oil Co., 127 F. Supp. 508 (D. Colo. 1954).

99. *See* Warren v. Webb, 127 Eng. Rep. 880 (1808).

an individual would occur if the public nuisance interferes with an individual's right to use and enjoy their real property.[100] Therefore, Mexico's pollution could be held to create a public nuisance actionable by either the State of California or an individual capable of showing a specific interference with their property.[101]

b. Trespass

A plaintiff may successfully claim a trespass if there has been an intrusion of protected interests by either visible or invisible "pieces of matter or by energy."[102] Plaintiffs in trespass suits are not required to demonstrate actual injury because the law presumes some damage from any unauthorized invasion of anothers land.[103] Thus, a trespass action would not present the causation barriers to a California plaintiff's relief as those posed in nuisance suits. Intrusion by sewage could be evidenced by water sampling and testing, and aerial photography. The trespass theory affords injunctive relief to ensure that the guilty party refrain from repeating such action,[104] or damages for injurious consequences resulting from the trespass.[105] Plaintiffs claiming personal or economic injury from Mexico's sewage may find proper redress for their claims under this theory.

c. Negligence

Straight negligence suits are seldom used in environmental lawsuits involving non-hazardous activities. Generally, a negligence theory requires proof by the plaintiff of a breach of duty of due care by the defendant.[106] Recovery will be justified when the defendant has failed to carry out a legally recognized duty, the breach of which caused damage to

100. *See* Venuto, *supra* note 98; Raymond v. Southern Pacific, 259 Or. 634, 488 P.2d 460 (1971); Smejkal v. Empire Lite-Rock, Inc., 274 Or. 575, 547 P.2d 1363 (1979).

101. California Assemblyman Steve Peace, 80th District, introduced a bill on Feb. 21, 1986 which attempted to vest powers and duties in a new International Border Control Authority relating to "the mitigation of sources of pollution, contamination and nuisance which originates across the border." This bill was rejected by the legislature, but reference is made to the "nuisance" created by the pollution. AB 4309, Calif. Leg. 1985-86 Regular Session Journal of the Assembly at 9950.

102. *See* RODGERS, *supra* note 93, at 154-58. *See generally,* I. SLOAN, ENVIRONMENT AND THE LAW 45 (1971). *See, e.g.,* Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1960) (nuisance involved flouride deposits consisting of gases, fumes and particulates).

103. *See, e.g.*, Reynolds Metals Co. v. Lampert, 316 F.2d 272 (9th Cir. 1963).

104. SLOAN, *supra* note 102, at 47.

105. *See, e.g.,* Mudrich v. Standard Oil Co., 87 Ohio App. 8, 86 N.E.2d 324 (1949), *aff'd*, 153 Ohio St. 31, 90 N.E.2d 859 (1950).

106. United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947); Diamond Springs Lime Co. v. American River Constructors, 16 Cal. App. 3d 581, 94 Cal. Rptr. 200 (1971).

another party.[107] The plaintiff must show a causal link between the defendant's action and the plaintiff's injury.[108] However, the plaintiff must establish negligence first and then the causal link to the injury.

According to established international environmental principles discussed earlier,[109] Mexico has a duty to prevent injury to the territory of another.[110] Therefore, the sewage pollution problem could be seen as Mexico's negligence. However, plaintiffs must prove a causal link between (1) the offending action, (2) the pollution, and (3) the injury. The injury could be shown in health effects, or damage to the water, aquatic life and tourism.[111] This causation requirement may present difficulties for California plaintiffs. The long-range transport, as well as the length of time elapsed before injury actually occurs makes the causal link difficult to prove. However, aerial photography and monitoring of the water could support the causation issue.

The negligence theory seems to provide a plausible route to substantial redress for the injury to the California citizens. The selection of the appropriate remedy to be employed, however, depends on the specific facts presented in the case and the degree of permanent solution and compensation for injuries sought by the plaintiffs.

2. Procedural Barriers to Suit

If the pollution that has occurred in the San Diego area originated in California, it is clear that an injured private plaintiff or local government could obtain relief under the common law. But because the polluter in this case is a foreign sovereign, the plaintiff must be prepared to overcome certain special procedural defenses available to the Mexican government.

a. The Foreign Sovereign Immunities Act

A practitioner contemplating a lawsuit in a United States court against a foreign nation must begin with the Foreign Sovereign Immunities Act [FSIA].[112] Although the FSIA may provide immunity for foreign nations in many cases, several statutory exceptions exist to allow

107. *Id.*
108. *Id.*
109. *See supra* notes 41-63 and accompanying text.
110. *Id.*
111. *See supra* notes 15-18 and accompanying text.
112. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 54-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-11) (1976) [hereinafter FSIA]. Also relevant to the practitioner is the act of state doctrine discussed *infra* at notes 166-202 and accompanying text.

subject matter jurisdiction in suits against foreign nations.[113] The FSIA covers such initial issues as obtaining personal jurisdiction over the foreign sovereign,[114] obtaining subject matter jurisdiction over the sovereign,[115] service of process,[116] and venue.[117] The FSIA also provides guidance for the means of obtaining a default judgment,[118] and for the execution of the judgment against the sovereign.[119] The legislative history of the FSIA provides guidance for a practitioner on many of these issues.[120]

The FSIA becomes relevant procedurally during the initiation of the suit and substantively after the suit is filed in court. Once the suit is filed, the burden is on the defendant foreign state to demonstrate entitlement to immunity under the FSIA.[121] However, as mentioned previously, the act provides several exceptions to immunity, any of which are sufficient to cause denial of immunity.[122] The exception with the most potential to block immunity for Mexico in a suit brought by California citizens or officials, is the non-commercial tort exception. The following is a discussion of the non-commercial tort exception and other relevant provisions and requirements in the FSIA.

i. The Non-Commercial Tort Exception

In the FSIA, the non-commercial tort exception[123] is under the heading "General Exceptions to the Jurisdictional Immunity of a Foreign State." The relevant language of this exception is as follows:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States of the states in any case -

113. For a detailed discussion of the FSIA, see Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385 (1982); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunity Act in Practice*, 33 S.W. L.J. 1009 (1979).

114. 28 U.S.C. §§ 1330(b), 1608 (1982).

115. 28 U.S.C. §§ 1330(b), 1604 (1982).

116. 28 U.S.C. § 1608 (1982).

117. 28 U.S.C. § 1391(f) (1982).

118. 28 U.S.C. § 1608(e) (1982).

119. 28 U.S.C. § 1610 (1982).

120. *See* HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 9-10 (1976), *reprinted* in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604 (hereinafter House Report).

121. The immunity issue must be examined for each claim asserted against a foreign state. 28 U.S.C. §§ 1330, 1604-1605 (1982).

122. 28 U.S.C. § 1605(a)(5) (1982). In addition it might be wise for a plaintiff to plead alternatively that Mexico's activity was "commercial" and therefore under § 1605(a)(2) immunity would be denied. The definition of the term "commercial" has not been determined dispositively by the Courts. *See, e.g., In re* Sedco, Inc., 543 F. Supp. 561 (S.D. Tex. 1982) and IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). For a definition of "commercial activity" see 28 U.S.C. § 1603(d) (1982).

123. 28 U.S.C. § 1605(a)(5)(1982).

> (5) in which money damages are sought against a foreign state for personal injury or death, or damages to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to -
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

Under this subsection, if a foreign state's non-commercial acts or omissions cause tortious injury within the United States, a foreign states immunity is denied,[124] unless the foreign state's act or omission involved a discretionary function.[125] The term "discretionary function" protects foreign states from claims upon acts or decisions made at the policy making level of government, thus those torts involving acts or omissions of a fundamentally governmental nature are not actionable.[126] The Ninth Circuit, in *Olsen ex rel. Sheldon v. Government of Mexico*,[127] interprets the definition of a discretionary act as requiring the court to distinguish between the planning level and the operational level of governmental activity. Decisions at the planning level are governmental, and thus are not actionable. The decisions at the operational level, which are designed to carry out the policy, are not afforded immunity from liability "even though such acts may involve elements of discretion."[128]

Though the statutory language employed in the exception is of a general nature, the legislative history reveals that the tort exception was directed primarily at disallowing immunity for problems such as the traffic accidents of foreign diplomats.[129] Nonetheless, the legislative history certainly does not preclude a court from denying immunity for other types of generally tortious activity.

The language of § 1605(a)(5) states that immunity is denied for non-commercial torts "occurring in the United States and caused by the tortious act or omission."[130] This is clearly ambiguous language. In

124. Persinger v. Islamic Republic of Iran, 729 F.2d 835, *cert. denied*, 105 S.Ct. 247 (1984).
125. Olsen *ex rel.* Sheldon v. Government of Mexico, 729 F.2d 641, *cert. denied*, 105 S.Ct. 295 (1984).
126. *Id.* at *646-47.*
127. 729 F.2d at 647.
128. In addition to the discretion question, the court in *Olsen* advocated looking at two other factors: 1) the ability of the U.S. courts to evaluate the act or omission of the state, and 2) the potential impairing effect such an evaluation would have on the effective administration of the states government. *Id.*
129. *See* House Report, *supra* note 120, at 20-22.
130. 28 U.S.C. § 1605(a)(5) (1982).

Persinger v. Islamic Republic of Iran,[131] and *In re Sedco*,[132] the courts realized the ambiguity of the language, but nevertheless held that it was necessary that both the tort and the injury occur in the United States in order to deny sovereign immunity to the foreign state. The decisions were based in part on restrictive language in the legislative history indicating that "[t]he tortious act or omission must occur within the jurisdiction of the United States . . . ."[133]

In contrast to those cases is the decision in *Letelier v. Republic of Chile*,[134] where the court required only that the tortious injury occur in the United States. In *Letelier*, the Chilean Republic was allegedly responsible for sending a death squad to the United States to assassinate Chilean dissident-leader Letelier. The Chilean Republic asserted that the acts for which it was accused, that is planning the assassination, would have been carried out entirely within Chile. The court held that this circumstance alone would not absolve the Chilean Republic if "the actions of its alleged agents resulted in tortious injury in this country. To hold otherwise would totally emasculate the purpose and effectiveness of the FSIA."[135]

In *Olsen*, the court rejected the rule in *Sedco* requiring every aspect of the tortious conduct to occur in the United States.[136] In a footnote, the court also distinguished the *Persinger* case on similar grounds.[137] The court stated: "Such a result contradicts the purpose of the FSIA, which is to serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts."[138] The *Olsen* decision required the plaintiff to establish that at least one entire tort occurred in the United States in order to satisfy the non-commercial tort exception.[139]

It is difficult to reconcile the statutory language with the legislative history. It is even more difficult to reconcile the court decisions on this issue. Despite the sometimes restrictive language of the legislative history, however, the court should look to the type of tortious activity alleged in order to answer the question regarding the location of the tortious act or omission.

Furthermore, plaintiffs should argue that the facts involved in the

131. 729 F.2d 641, 842, *cert. denied,* 105 S. Ct. 295 (1984).
132. 543 F. Supp. 561, 567 (S.D. Tex. 1982).
133. *See* House Report, *supra* note 132.
134. 488 F. Supp. 665 (D.D.C. 1980).
135. *Id.* at 674.
136. 729 F.2d at 646.
137. 729 F.2d at 646, n. 3.
138. *Id.* at 646.
139. *Id.*

Mexican sewage pollution dispute require the court to look to the international principles of co-boundary states. In such geography, and for such tortious activity, the boundary line for all practical purposes does not exist. As discussed earlier each nation adjoining a boundary line has a duty to prevent transboundary pollution.[140] This international legal principle of interdependence between co-boundary states may be sufficient to bring the "tortious act of omission within the jurisdiction of the United States."

ii. Obtaining Subject Matter Jurisdiction

Federal district courts generally have jurisdiction over actions against foreign states, as to any claim for relief with respect to which the foreign state is not entitled to immunity either under the FSIA or under any applicable international agreement.[141] The FSIA expressly provides that suits may be brought in either federal or state courts.[142] Foreign states are guaranteed the right to remove any civil action from state court to federal court.[143] Having the right to remove the action to federal court is extremely important considering the likely sensitivity of those actions against foreign states. In addition, it is important to develop a uniform body of federal case law in this unclearly defined area.

iii. Obtaining Personal Jurisdiction

Personal jurisdiction over the foreign state is achieved using a special system for service of process[144] through international channels.[145] Personal jurisdiction exists in any case where the foreign state is not entitled to immunity under the FSIA and where service has been made in accordance with the statute's requirements.[146] This does not mean personal jurisdiction can exceed the constitutional limits imposed by the due process clause.[147] As stated in *International Shoe Co. v. Washington*,[148] due process requirements were met only when the defendant had sufficient minimum contacts with the forum, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." The FSIA is unique in that it employs a mechanical statutory

140. *See supra* notes 41-63 and accompanying text.
141. 28 U.S.C. § 1330(a) (1982).
142. *Id.*
143. 28 U.S.C. §§ 1330, 1602-1611 (1982). For legislative history, see House Report, *supra* note 120. This section was intended to apply solely to those foreign defendants not immune from suit under the FSIA.
144. 28 U.S.C. §§ 1330(b), 1608 (1982).
145. *Id.*
146. *Id.*
147. Olsen, 729 F.2d at 648.
148. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

formula: subject-matter jurisdiction plus service of process equals personal jurisdiction.[149] Jurisdiction exists, however, only if such complies with the constitution.[150]

Determining whether minimum contacts are present and whether maintenance of suit over a foreign sovereign offends traditional notions of fair play and substantial justice requires consideration of several factors. The factors to be considered include the extent to which the defendant availed itself of privileges of United States law, the extent to which litigation in the United States was foreseeable to the defendant, the inconvenience to the defendant of litigating in the United States, and any countervailing interest of the United States in hearing the suit.[151]

In the Ninth Circuit, the defendant's contacts with the forum state are analyzed in two ways. If the non-resident defendant's activities within a state are "substantial" or "continuous and systematic,"[152] there is a sufficient relationship between the defendant and forum to support jurisdiction even if the cause of action is unrelated to the defendant's forum-related activities.[153] If, however, the defendant's activities are not substantial or continuous and systematic, personal jurisdiction can instead turn on the nature and quality of the defendant's contacts relating specifically to the cause of action.[154] For example, in *Data Disc, Inc. v. Systems Technology Assoc., Inc.*,[155] the court based personal jurisdiction on the defendant's forum-related activities. The Ninth Circuit has continuously looked to three requirements: (1) whether the non-resident defendant purposefully availed himself of the benefits and protections of the forum's laws; (2) whether the plaintiff's claim resulted from the defendant's forum-related activities; and (3) whether the exercise of jurisdiction was reasonable.[156]

Jurisdiction is reasonable where "under the totality of the circumstances the defendant could reasonably anticipate being called upon to present a defense in a distant forum."[157] A California court could

149. *Id.* at 316.

150. *See, e.g.,* Continental Graphics v. Hiller Industries, Inc., 614 F. Supp. 1125 (D.C. Utah 1985).

151. *Id.* at 1129. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, (1980); Kulko v. California Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

152. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445-47 (1952); Data Disc, Inc. v. Systems Technology Assoc. 557 F.2d 1280, 1287 (9th Cir. 1977).

153. Perkins, 342 U.S. at 445-47.

154. Data Disc, 557 F.2d at 1287.

155. *Id.*

156. *See* Olsen, 729 F.2d at 648; Data Disc, 557 F.2d at 1287; *see also,* Raffaele v. Compagnie Generale Maritime, 707 F.2d 395, 397 (9th Cir. 1983).

157. Taubler v. Giraud, 655 F.2d 991, 993 (9th Cir. 1981); World-Wide, 444 U.S. at 297. The Supreme Court determines reasonableness by considering the relative significance of each factor below:

foreseeably establish personal jurisdiction over Mexico in light of the foregoing analysis. The plaintiff's claim would result from Mexico's forum-related activities and furthermore, the reasonableness test could be met. Mexico knows of the pollution problem and could anticipate being called to present a defense. While there is no mechanical or quantitative test for determining the reasonableness of jurisdiction, at least those factors indicated will be considered by the court.

iv. Service of Process under the FSIA

Service of process upon a foreign state should be in accordance with the FSIA.[158] Service upon an agency of the Mexican Government is adequate if in accordance with the directions of the Mexican federal court.[159] First, documents entitled letters rogatory[160] must be obtained from the Mexican district court. The letters rogatory must then be submitted to appropriate persons in Mexico, with arrangements made for translation of English materials into Spanish,[161] and finally the submission of the translated letters to the officials of the Mexican federal court.[162]

v. Venue and Judgments under the FSIA

The method of establishing venue,[163] the means for obtaining a default judgment,[164] and the execution of the judgment against the sovereign[165] are all provided for in the FSIA.

b. The Act of State Doctrine

While the act of state doctrine is related to the FSIA, it is different in its underlying focus and operation.[166] The major purpose of the judicially created act of state doctrine is to avoid litigating a claim against a

1. Extent of Purposeful Interjection;
2. Burden of Defending;
3. Conflict with Nation's Sovereignty;
4. Interests of Forum State;
5. Most Efficient Resolution;
6. Convenient and Effective Relief for Plaintiffs; and
7. Availability of an Alternate Forum.

158. 28 U.S.C. § 1608 (1982).
159. *See* BAYITCH & SIQUEIROS, *supra* note 64, at 261.
160. *Id.* at 260-61.
161. *Id.*
162. *Id.*
163. 28 U.S.C. § 1391(f) (1982).
164. 28 U.S.C. § 1608(e) (1982).
165. 28 U.S.C. § 1610 (1982).
166. *See generally* Comment, *Applying an Amorphous Doctrine Wisely: The Viability of the Act of State Doctrine after the Foreign Sovereign Immunities Act,* 18 TEX. INT'L LAW J. 547 (1983).

foreign nation that might embarrass our executive branch relations.[167] The doctrine commands that the acts of a sovereign be presumed valid. The *Underhill v. Hernandez*[168] case is the classic American case which formulates the act of state doctrine. In *Underhill* the court states: Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.[169]

Nearly seventy years later, the United States Supreme Court reaffirmed the *Underhill* decision in the *Banco National de Cuba v. Sabbatino* decision.[170]

Sabbatino involved the validity of an expropriation of property executed within Cuba, under Cuban law.[171] Upon the United States government's reduction of the Cuban sugar quota, the Cuban government expropriated an American corporation's property and rights to secure payment of the sugar under contract.[172] The sole issue before the *Sabbatino* court was whether the act of state doctrine would preclude the court from inquiring into the validity of the Cuban government's act. The lower courts[173] had assessed a monetary judgment against Cuba.

In its analysis, the *Sabbatino* court recognized that the act of state doctrine was not bound by international law principles or the United States constitution.[174] The court recognized, however, that "[t]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice."[175] The court further states that the less important the issue is for foreign relations, the weaker the justification is for the use of the act of state doctrine.[176]

The decision in *Sabbatino,* to apply the act of state doctrine to

167. *See infra* note 195 and accompanying text.

168. 168 U.S. 250 (1897).

169. *Id.* at 252.

170. 376 U.S. 398, 416 (1964); *see also* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976)(where Cuba's operation of cigar business was commercial and therefore act of state doctrine inapplicable.)

171. *Id.* at 401.

172. *Id.* at 398.

173. For the lower courts' opinion, see 193 F. Supp. 375 (S.D.N.Y. 1961) *aff'd* 307 F.2d 845 (2d Cir. 1962).

174. Sabbatino, 376 U.S. at 427.

175. *Id.* at 428-33.

176. *Id.* at 427-28.

accept Cuba's acts of expropriation, was based partly upon the disagreement and nonconsensus in international law in the area of expropriation.[177] Since there was no consensus in international law principles that Cuba's act violated international law, Cuba's act was valid.

At first glance, the mere fact that the *Sabbatino* court allowed Cuba's act to stand, appears to undermine a suit against Mexico for sewage pollution. Upon further inquiry, however, the *Sabbatino* case can support such a claim because, as discussed earlier, there is a consensus in international principles of law that nations have a duty to prevent or remedy transboundary pollution. Since there is a consensus, Mexico's failure to prevent transboundary pollution is an appropriate situation for the judiciary to render a decision. The court can look to international laws for guidance.

The federal circuit courts have not consistently applied the act of state doctrine.[178] The Ninth Circuit,[179] (which includes California in its jurisdiction) uses a fairly liberal approach. This approach has been deemed by one commentator as "the flexible approach."[180] This approach, which narrows a defendant's chances of prevailing on an act of state defense, has been followed by other jurisdictions.[181]

The Ninth Circuit utilizes a balancing process considering factors such as the vital national interests of each state, the extent and nature of the hardship that inconsistent enforcement actions would impose, the extent to which the required conduct is to take place in the territory of the other state, the extent to which enforcement can reasonably be expected to achieve compliance.[182]

The two core Ninth Circuit cases, which provide fairly thorough analyses of the act of state defense are *Timberlane Lumber Co. v. Bank of America*[183] and *International Association of Machinists and Aerospace Workers (IAM) v. Organization of the Petroleum Exporting Countries (OPEC).*[184]

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177. *Id.* at 428-31.

178. *Compare* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert denied*, 434 U.S. 987 (1977)(allowing no judicial inquiry into motivation behind foreign sovereign act) *with* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)(utilizing balancing approach to weigh foreign relations concerns against interest of the United States in enforcing the law).

179. *See* Timberlane, 549 F.2d 597.

180. *See* Comment, *supra* note 166, at 560-63.

181. Mannington Mills, Inc. v. Congoleum Corp. 595 F.2d 1287 (3d Cir. 1979); Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982); Compania de Gas de Nuevo Lareda, S.A. v. Entex, Inc., 686 F.2d 322 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1435 (1983).

182. *See* Timberlane, 549 F.2d at 613-15, *citing* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40. For a more in-depth examination of this balancing approach see United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir. 1980), *cert. denied*, 454 U.S. 1098 (1981).

183. 549 F.2d 597 (9th Cir. 1976).

184. 649 F.2d 1354, *cert. denied*, 454 U.S. 1163 (1982).

In the *Timberlane* decision, the test applied by the court was whether there was a potential for interference with foreign relation between the foreign sovereign and the United States.[185] This test is the touchstone test used by the United States Supreme Court in *Sabbatino*.[186] Both courts did not wish to pass on the validity of a foreign nation's acts.[187] Neither court, however, approved of blank-check immunity.[188]

The act of state defense did not bar the plaintiff's action in *Timberlane*.[189] *Timberlane* was an antitrust case involving citizens of Honduras and officials of the Bank of America and Timberlane Lumber Company. The court held that it was clear that there was an absence of any conflict with law or policy of the Honduran government, therefore the act of state defense was inapplicable.[190]

In *IAM v. OPEC*,[191] four years after the *Timberlane* decision, the court followed a similar approach to that used in *Timberlane*. This time, however, the court came to a different conclusion.[192] In *IAM*, the act of state doctrine was applicable to bar jurisdiction in an action by a labor union (IAM) against the member nations of OPEC.[193] IAM sought to enjoin OPEC's price-setting activities in the petroleum market. The court compared the act of state doctrine to the political question doctrine applied in domestic law.[194] The court decided to shift the resolution of the conflict to the executive branch stating:

"The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world."[195]

The *Timberlane* and *IAM* cases involve facts very different from those which would be presented by a plaintiff in a suit against Mexico. The Ninth Circuit's test and balancing approach as applied to the instant facts could result in the denial by the court of the act of state doctrine.

Since the Ninth Circuit decisions rely on a balancing of the issues, a plaintiff in a suit against Mexico has a chance of prevailing over the act of state defense. The court has focused on the potential interference with

185. Timberlane, 549 F.2d at 607-608.
186. Sabbatino, 376 U.S. at 412.
187. Sabbatino, 376 U.S. at 423; Timberlane, 549 F.2d at 607.
188. Sabbatino, 376 U.S. at 428; Timberlane, 549 F.2d at 606.
189. Timberlane, 549 F.2d at 615.
190. *Id.*
191. 649 F.2d 1354.
192. *See* 649 F.2d at 1358. The court did not employ the balancing approach but instead focused on the refusal to judge the legality of the foreign sovereign's act, citing as authority the United States Supreme Court decision in Underhill v. Hernandez, 168 U.S. 250 (1897).
193. 649 F.2d at 1355.
194. *Id.*
195. 649 F.2d at 1358.

foreign relations, and of not passing on the validity of a foreign nation's acts.[196] First, a plaintiff could argue that to date foreign relations between Mexico and the United States executive branch on the sewage pollution issue have not resolved this increasingly serious problem.[197] Therefore, hearing the suit would not interfere with any on-going foreign relations. Secondly, the court would not have to pass judgment on the validity of Mexico's action. The court could simply see it in a factual context, without inquiring into the motivation behind the act. The act, after all, is Mexico's negligence in not providing sewage treatment for one of its fastest growing cities.[198] The question to the court is not why is Mexico polluting, but the question is how can we get Mexico to treat its sewage and to stop polluting the waters off San Diego.

In *IAM*, the court makes the comparison to the non-justiciability under the political question doctrine.[199] This principle of non-justiciability does not apply to the instant facts because the executive branch has tried all of the normal routes to "achieve international objectives."[200]

The court's terminology that, "an ill-timed judicial decision challenging the acts of foreign states could nullify" and embarrass the United States[201] simply does not apply in a suit against Mexico because the timing is ripe for this action. The United States should be embarrassed for not taking a tougher stance to stop this sewage pollution. A court decision, or at least the threat of suit, may be the only way to resolve this situation.

CONCLUSION

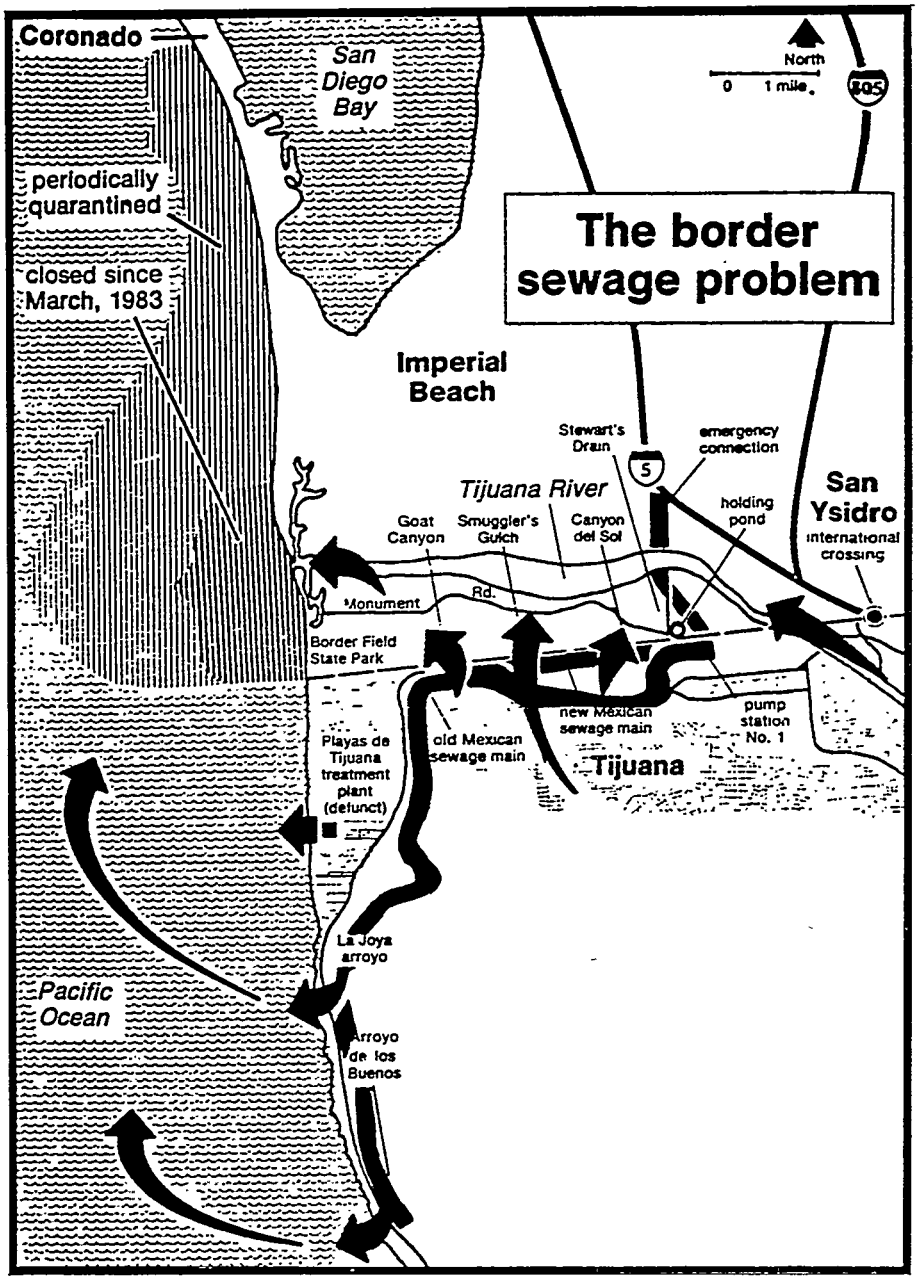
Since to date there has been little actual progress resulting from international negotiations between Mexico and the United States regarding the sewage pollution from Mexico, it would be wise to consider more forceful and dramatic measures, namely a judicial action against Mexico. This is possible, by filing suit against Mexico in a United States court or in a Mexican court. The plaintiff will first have to leap the hurdles involved with the FSIA and the act of state doctrine. Mexico will attempt

196. *Id.*
197. *See supra* notes 22-36 and accompanying text.
198. In a written letter dated Nov. 5, 1987, to this author from Mike McCann, Senior Water Quality Control Engineer at the of the Calif. Water Quality Control Board, San Diego Region, McCann estimated Tijuana's population at greater than 1 million people, and stated that figure could exceed 2 million by the year 2,000. Further, McCann writes that less then 50% of the population have sewer hook-ups, and that currently and for the near future, Tijuana has no sewage treatment facilities for its approximately 20 million gallons of sewage per day.
199. 649 F.2d at 1358-59.
200. *Id.*
201. *Id.*

to invoke immunity under the FSIA, but the plaintiff can counter-argue that the tort exception to FSIA immunity clearly applies in this situation. Assuming the immunity hurdle can be overcome, the plaintiff will be on fairly solid footing regarding the substantive issues. As developed in this comment, tort law provides the plaintiff with several common law remedies for relief from the continuing sewage flow and threatened sewage flow from Mexico. The bare truth is that Mexico has breached its international duty to prevent injury caused by its forseeable transboundary pollution. If the flow of sewage is allowed to continue it could trigger widespread bankruptcy for South Bay businesses and could be devastating to the San Diego tourist trade in general. There are also potentially serious health effects from the high count of bacteria and viruses in the water. As outlined in this comment, court action against Mexico would not be without complications, but it may be the only way to demonstrate to Mexico the gravity of the situation.

Margaret M. Sullivan

Annex I


Coronado
San Diego Bay
periodically quarantined
closed since March, 1983
The border sewage problem
North
0 1 mile
805
Imperial Beach
Stewart's Drain
emergency connection
5
Tijuana River
holding pond
San Ysidro
international crossing
Goat Canyon
Smuggler's Gulch
Canyon del Sol
Monument Rd.
Border Field State Park
new Mexican sewage main
pump station No. 1
old Mexican sewage main
Tijuana
Playas de Tijuana treatment plant (defunct)
La Joya arroyo
Pacific Ocean
Arroyo de los Buenos