How CERCLA's Ambiguities Muddled the Question of Extraterritoriality in *Pakootas v. Teck Cominco Metals, Ltd.*

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For almost ninety years Teck Cominco Metals, Ltd., a Canadian company, discharged hazardous substances into a stretch of the Columbia River located in Canada which then migrated downstream and caused environmental harm in northern Washington State. Considering a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claim brought against the company, the federal district court found the case required an extraterritorial *application of CERCLA; that to have held it involved a domestic application of the statute would have required dependence on a "legal fiction." The Ninth Circuit affirmed the decision, but reversed the reasoning. It held the facts only triggered a* domestic *application of the remedial statute.*

There was nothing technically erroneous in the Ninth Circuit's reasoning. What the court failed to address, however, was the logical gap left by a notoriously poorly worded statute. CERCLA's ambiguities have long frustrated practitioners and judges, and one can imagine few other statutes that render the identity of the defendant and the location of his conduct completely irrelevant for purposes of establishing jurisdiction. Characterizing the case as domestic side-stepped its actual effect. Furthermore, the Ninth Circuit's reasoning for this disjuncture relied upon the fact that, as a remedial statute, CERCLA is unconcerned with party behavior. However, this reasoning is contradicted by the fact that the personal jurisdiction underlying the case involved a test that required intentional action by the defendant.

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In addition to adhering more closely to the ordinary meaning of "extraterritoriality," had the Ninth Circuit adopted the district court's reasoning it would have resulted in valuable case law clarifying the presumption against extraterritorial applications of U.S. law and its exceptions. Both analyses were permissible under the ambiguously worded statute, and this author believes that policy considerations should have tipped the balance in favor of finding an extraterritorial rather than domestic application of CERCLA. Such an application might have proven complementary, rather than detrimental, to notions of comity, ideas of reciprocity, and other international dispute mechanisms.

INTRODUCTION

Although Congress has the authority to apply its statutes to any nation or territory it deems appropriate,[1] it is wary of enforcing statutes outside its domestic boundaries because the United States is primarily concerned with what occurs within its territory. In *Pakootas v. Teck Cominco Metals, Ltd.*,[2] the Ninth Circuit grappled with the question of

1. *See* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

2. 452 F.3d 1066 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188).

whether to hold a Canadian company liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for harm incurred in the state of Washington. Although the court had recently faced the issue of applying CERCLA abroad in *ARC Ecology v. United States Department of the Air Force*,[3] *Pakootas* is distinguished by the fact it involved *imposing* liability on the resident of another sovereign for harmful effects suffered domestically, instead of the federal government *admitting* liability for the effects of U.S. actions abroad.

Pakootas presented the possibility of two different analyses, depending on whether the court considered the nationality of the responsible party and the point of origin of the pollution to be important. If the court considered nationality and original location, then the case would involve an extraterritorial application of CERCLA under the "adverse effects" exception to the presumption that U.S. laws are not applied beyond its borders.[4] If nationality and origin were irrelevant, however, then the case would only involve a domestic application of the statute. The district court stated that ignoring these factors would be to depend on a legal fiction, but the Ninth Circuit subsequently found them immaterial, and was thus able to conclude that *Pakootas II* was a domestic application of CERCLA.

The Ninth Circuit's reasoning was not flawed, as the elements of a CERCLA offense are broadly defined within the statute and the Ninth Circuit employed permissible definitions of "facility" and "release." However, as a remedial (as opposed to a prescriptive or regulatory) statute, CERCLA stands alone among environmental legislation in its complete disregard of the source of the pollution. The Ninth Circuit's reasoning did not differentiate between a foreign party whose conduct occurred outside of the country and a domestic party acting within it, based on the rationale that under CERCLA the identity of the responsible party and the point of origin of the pollution are irrelevant: CERCLA is a remedial statute supposedly unconcerned with altering an actor's conduct. However, the district court established personal jurisdiction over Teck Cominco through a scienter-based test under which only intentional actors are reachable. This incorporation of intent alters CERCLA from a remedial to a command-and-control statute, with behavior-modifying effects. Instead, the court could have integrated the defendant's location and status as a foreign party by using a more expansive definition of "facility" or "release," as allowed under the statute. In this Note I argue that the court should have recognized that,

3. 411 F.3d 1092 (9th Cir. 2005).

4. *See* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) ("the presumption [against the extraterritorial application of statutes] is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in *adverse effects* within the United States" (emphasis added)).

within the broader framework of U.S. environmental law, it is inappropriate for the courts to ignore party identity in CERCLA litigation.

The *Pakootas II* holding represents a missed opportunity for the Ninth Circuit to adhere to the logical meaning of an extraterritorial application of domestic law and to clarify the law on the presumption against extraterritoriality, the adverse effects doctrine, and the future application of U.S. environmental statutes abroad. Current case law on extraterritoriality is inconsistent, making it difficult to predict when a statute's application abroad will be upheld, and judicial explication would have been beneficial for efficiency and uniformity. In addition, policy arguments did not justify avoiding the question of extraterritoriality by categorizing *Pakootas II* as a domestic case. First, there is little potential conflict, if any, with existing international laws; rather, the expansion of U.S. statutes may serve as motivation to strengthen largely voluntary international environmental laws. Second, the interest in effectively addressing regional environmental problems outweighs the economic fears related to retaliatory reciprocity.

Practical considerations may have motivated the court to find that *Pakootas II* was a domestic case. For example, if CERCLA applied extraterritorially, Canada could have retaliated by imposing liability on U.S. corporations for violations of Canada's environmental statutes. Counterbalancing this concern, however, is that such reciprocity would in fact be beneficial for the regional environment, which is the goal behind statutes such as CERCLA.

This Note first outlines the background of statutes and case law informing the *Pakootas* decision, including the basics of CERCLA and the extraterritorial application of U.S. statutes. I then lay out the factual and legal foundations of the district court's decision and the Ninth Circuit's reasoning in its affirming opinion. Third, I look at what sort of policy arguments may have influenced the courts' decisions, and what alternative decisionmaking regimes might have been available. Finally, I address the practical effects the Ninth Circuit's decision may have in the future.

I. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

Congress passed CERCLA just before President Carter left office near the end of 1980.[5] The statute levied a five-year tax on chemical and petroleum companies, collecting $1.6 billion to devote to environmental

5. 42 U.S.C. §§ 9601–9675 (2006) (enacted Dec. 11, 1980).

remediation.[6] There was little resistance to the initial passage of the statute, but when the magnitude of the costs involved and the expansiveness of the liability imposed became clear, people quickly took sides.[7] These concerns were further aggravated by the imprecise wording and ambiguous phraseology of the statute.[8] Although given the laudatory nickname "Superfund," the statute has been extensively criticized since its passage.

To understand the effects of the Ninth Circuit's holding in *Pakootas*, it is necessary to have an elementary understanding of certain portions of CERCLA. Superfund is largely a remedial statute—backward-looking in the sense that it seeks to correct past wrongs rather than influence future behavior.[9] There are two primary underlying goals: the cleanup of hazardous substances regardless of liability, and the imposition of these costs on the responsible party.[10] Such goals are contrasted against command-and-control statutes, such as the Resource Conservation and Recovery Act (RCRA), which prescribe party behavior and attempt to prevent the harm from occurring in the first place. However, CERCLA is not purely remedial. Part of the rationale behind its structure is to deter future improper disposals of hazardous substances, which, although indirect, is an attempt to alter behavior.[11] The focus of the statute is overwhelmingly domestic: it addresses the local health, welfare, and environment and how they might be affected by hazardous substance contamination.[12] Even CERCLA's definition of "environment" is limited

6. *See* EPA, CERCLA Overview, http://www.epa.gov/superfund/policy/cercla.htm (last visited Sept. 29, 2006).

7. *See* DANIEL A. FARBER, JODY FREEMAN, ANN E. CARLSON, & ROGER W. FINDLEY, ENVIRONMENTAL LAW 842 (7th ed. 2006).

8. For example, in section 107(a)(1) the statute says "owner *and* operator," but in conjunction with other parts of the statute the courts have found this to be a mistake, that it means "owner *or* operator." *See, e.g.*, United States v. Md. Bank & Trust Co., 632 F. Supp. 573, 577–78 (D. Md. 1986) ("Notwithstanding the language 'the owner and operator', a party need not be both an owner and operator to incur liability under this subsection."). The Third Circuit has stated that "[b]ecause of the great haste with which CERCLA was passed, inconsistencies and redundancies pervade the statute." United States v. CDMG Realty Co., 96 F.3d 706, 715 n.5 (3d Cir. 1996). The Ninth Circuit has similarly asserted that "'neither a logician nor a grammarian will find comfort in the world of CERCLA.'" Pakootas v. Teck Cominco Metals, Ltd. (*Pakootas II*), 452 F.3d 1066, 1079 (9th Cir. 2006) (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001)).

9. *See* FARBER ET AL., *supra* note 7, at 841 (contrasting CERCLA with the Resources Conservation and Recovery Act (RCRA), a primarily forward-looking statute).

10. *See* Gerald F. Hess, *The Trail Smelter, the Columbia River, and the Extraterritorial Application of CERCLA*, 18 GEO. INT'L ENVTL. L. REV. 1, 19 (2005) (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989)).

11. *See* FARBER, *supra* note 7, at 841–42; *see also, e.g.*, 42 U.S.C. § 9606(a) (2006) (abatement actions). *But see, e.g.*, *Pakootas II*, 452 F.3d at 1077–79 (stating that CERCLA is solely a remedial statute).

12. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 298 (2006).

to domestic areas: navigable and ocean waters under U.S. management and "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."[13]

CERCLA complaints may be brought by any person, on his own behalf, against any party alleged to have violated the statute or any official alleged to have failed to perform a nondiscretionary act.[14] Like other environmental statutes, the rationale for citizen suit provisions is that they "empower local groups to ensure that federal regulations are enforced and that environmental problems are corrected."[15] Unless suing an official, the complaint must be brought before the district court with jurisdiction over the alleged violation.[16] Although the plaintiff has little leeway in choosing a jurisdiction, he is afforded much greater flexibility in designing the complaint itself. A CERCLA cause of action rests on the showing of four elements: first, that the site is a "facility"; second, that there has been a "release" or a threatened release of a hazardous substance from the facility; third, that the release or threatened release caused the plaintiff to incur costs;[17] and fourth, that the defendant is one of the four types of responsible parties delineated in section 107(a).[18]

Although the elements of a CERCLA action seem straightforward, in practice they become difficult to apply because the terms are so broadly defined within the statute. A "facility" can be virtually any site where a hazardous substance has "come to be located."[19] There are two subsections in the definition, together which encompass virtually any physical structure or formation where a hazardous substance might be placed or has settled.[20] Moreover, the subsections are not mutually exclusive: "It has been stated that a 'facility' includes both the container

13. 42 U.S.C. § 9601(8).

14. *Id.* § 9659(a)(1)–(2).

15. Jonathan H. Adler, *Citizen Suits and the Future of Standing in the 21st Century: From* Lujan *to* Laidlaw *and Beyond: Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 48 (2001) ("When federal regulators overlook local environmental deterioration or are compromised by interest group pressure, local groups in affected areas are empowered to trigger enforcement themselves.").

16. 42 U.S.C. § 9659(b)(1).

17. However, no response costs need be incurred if the complaint is brought pursuant to section 159, instead of under section 106. *See* 42. U.S.C. §§ 9606, 9659.

18. *See* William B. Johnson, Annotation, *What Constitutes a "Facility" Within Meaning of § 101(9) of the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9601(9))*, 147 A.L.R. FED. 469, § 2b (2003).

19. "The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." 42 U.S.C. § 9601(9) (2006).

20. *Id.*

from which a hazardous substance has been released and the site where those substances have been placed."[21] Some courts have held that the definition "is broad enough to include both the initial site . . . *and additional sites* to which the substances have migrated following the initial disposal."[22] The definition is thus malleable to the circumstances of the case.[23] Typically, however, the facility defined in the complaint is the final settling location of the hazardous substance before the release or threatened release occurs.[24]

The term "release" is even more expansive, and reaches well beyond the ordinary meaning of the word. It encompasses virtually any type of movement of a hazardous substance from a facility,[25] and has been interpreted to include both active transport and passive migration.[26] The definitions section of the statute defines only "release," but in the sections outlining the parameters of liability, persons covered by the statute include those who transport substances from which "there is a release, or a threatened release." Although this language is only contained in one subsection, it has been construed to apply to the section in its entirety—that is, to all potentially liable parties.[27] Thus a release

21. Johnson, *supra* note 18, § 2a (citing United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987)).

22. *Id.* § 3 (citing City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1279 (N.D. Okla. 2003), *vacated by settlement*, No. 01 CV 0900EA(C), 2003 U.S. Dist. LEXIS 23416 (July 16, 2003); *accord* NutraSweet Co. v. X-L Eng'g Corp., 933 F. Supp. 1409, 1418 (N.D. Ill. 1996), *aff'd*, 227 F.3d 776 (7th Cir. 2000).

23. Johnson, *supra* note 18, § 2b.

24. Although one could seemingly read the statute to include "or otherwise come to be located" as part of subsection (B), *see* United States v. Twp. of Brighton, 153 F.3d 307, 322 (6th Cir. 1998) (Moore, J., concurring) (finding that the "specific bounds of contamination" did not determine the confines of a "facility" under subsection (a), as (a) was not limited by the "come to be located" language of (b)), it is actually a modifier of both subsections (A) and (B). Thus a facility can be any of the things listed in either section, as long as it is also where the hazardous substance is located. *See* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 74–75 (1991) ("In essence, unless the 'facility' is excluded as a consumer product, it falls within the definition as long as a hazardous substance at issue is located there.") (citations).

25. "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident . . . ." 42 U.S.C. § 9601(22) (2006).

26. *See* Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1113 (D. Idaho 2003). While defining releases and rereleases from mine tailings, the court considered the question of first impression of whether passive migration constituted a CERCLA release.

27. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1043 n.16 (2d Cir. 1985) ("The phrase 'from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance' is incorporated in and seems to flow as if it were a part

need not have actually occurred for liability to attach; even if there is only the threat of a release, the determinative factor is whether the plaintiff incurred recovery costs. For instance, if a concerned landowner *thought* the hazardous substance his neighbor was storing had leaked and began cleanup measures, the neighbor would be responsible for those expenditures. Because a "release" can occur in so many different ways—active transport, passive migration, or simply the threat of such—there is great leeway in the design of a complaint.[28]

Under section 107, four types of parties can be held responsible for cleanup costs under CERCLA: a current owner or operator of the facility; an owner or operator from the time of the disposal; an "arranger" of disposal, treatment, or transport; or the party who actually transports the hazardous substance.[29] The party definition in CERCLA is arguably more straightforward and less ambiguous than the other claim requirements. Once the elements have been established, the only defense to CERCLA's strict liability regime is a showing, by a preponderance of the evidence, that the release and resulting damage was due to an act of God, an act of war, or the act of an unconnected third party.[30]

A. The Presumption against Extraterritoriality

Despite Congress' authority to enact legislation governing entities and locations outside of the United States,[31] a central principle of territoriality assumes that legislation only applies within the territory of the United States unless the statute explicitly states that it is meant to extend further.[32] This principle is the presumption against extraterritoriality, a canon of construction that assumes Congress' starting point is domestic concerns.[33] It is an understatement to note that the presumption against extraterritoriality is not a clearly defined area of the law. This may be due in part to the fact the principle infringes on subject areas traditionally relegated to international law and voluntary foreign relations.

The modern incarnation of the presumption against extraterritoriality was expressed in *Equal Employment Opportunity Commission v. Arabian American Oil Co.* (*Aramco*), in which the

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only of subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)–(3) inclusive.").

28. See Johnson, *supra* note 18, § 2a for examples.

29. 42 U.S.C. § 9607(a).

30. *Id.* § 9607(b).

31. *See* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 299 U.S. 244, 248 (1991); *see also* Hess, *supra* note 10, at 25 n.154 (giving as an example Congress' explicit constitutional authority to regulate commerce with foreign nations).

32. *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284–85 (1949).

33. *See id.* at 285.

Supreme Court found an employment statute was not intended to extend to citizen employees working outside the United States.[34] The Court found "Congress' awareness of the need to make a clear statement that a statute applies overseas [had been] amply demonstrated by the numerous occasions on which it [had] expressly legislated the extraterritorial application of a state."[35] Thus if there is no clear statement of congressional intent for the statute to apply abroad, it should be assumed to only apply domestically.

The presumption against extraterritoriality is often justified on foreign policy grounds. Restricting the applicability of U.S. statutes abroad ensures domestic concerns continue to be Congress' top priority. In the foreign relations realm, the presumption helps ensure that U.S. statutes do not conflict with international laws,[36] which depend on the voluntary consideration of principles like comity.[37] The presumption also helps avoid interference with the laws of other sovereigns.[38] For instance, the Third Restatement of Foreign Relations Law of the United States requires jurisdictional expansions to be reasonable, which is "determined by evaluating all relevant factors."[39] When two nations have reasonable

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34. *Aramco*, 499 U.S. at 259.

35. *Id.* at 258.

36. Hess, *supra* note 10, at 42.

37. Comity is the respect afforded to the laws of another sovereign, and is a principle adhered to voluntarily. *See* Robinson-Dorn, *supra* note 12, at 298 n.331, 309 (citing Justice Scalia's dissent in Hartford Fire Insurance Co. v. California, 509 U.S. 764, 817 (1993)).

38. Hess, *supra* note 10, at 42.

39. "Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
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> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
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> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
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> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
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> (h) the likelihood of conflict with regulation by another state."

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

jurisdiction over a particular actor or activity, the law of the sovereign with the "clearly greater" interest should apply.[40]

While expressed as a blanket statement, numerous exceptions to the presumption against extraterritoriality have developed since its first articulation.[41] The exceptions generally take one of three forms. The first is the previously described exception for congressional intent, when the legislature has expressly indicated that the statute applies beyond U.S. borders. Since the *Aramco* opinion, the standard has been that there must be *clear evidence* of congressional intent, as opposed to the more stringent requirement of a *clear statement*.[42] The other two exceptions concern the type of extraterritorial activity itself, rather than the statutory language. The "adverse effects" exception or doctrine is triggered when failure to apply the statute would result in adverse effects felt *within* the United States. The "conduct" exception is applied when the conduct occurs within the United States, regardless of the citizenship of the actor.[43]

The application of the exceptions remains unclear, however, because they were outlined in a D.C. Circuit opinion[44] and thus their articulations are not controlling in other jurisdictions. The lack of binding authority on

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40. *Id.* § 403(3).

41. *See* Jennifer M. Siegle, *Suing U.S. Corporations in Domestic Courts for Environmental Wrongs Committed Abroad Through the Extraterritorial Application of Federal Statutes*, 10 U. MIAMI BUS. L. REV. 393, 397 (2002); *see also* Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 88, 91 (2006) (commenting on the inconsistency of judicial interpretation of the principle).

42. An example of an environmental statute overcoming the presumption through clear congressional intent is the Clean Air Act, in which limited extraterritorial application is expressed in the international air pollution section. The section requires consideration of the effects air pollutants are expected to have on the public health or welfare of another nation and mandates revisions to address such endangerment, but only applies to foreign nations that give somewhat reciprocal rights. *See* 42 U.S.C. § 7415 (2006); Siegle, *supra* note 41, at 405 (citing Jeffrey B. Groy & Gail L. Wurtzler, *International Implications of U.S. Environmental Law*, NAT. RESOURCES & ENV'T, Fall 1993, at 7).

43. *See* Envtl. Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993). The D.C. Circuit delineated these exceptions in *Environmental Defense Fund v. Massey*, and found that the National Environmental Policy Act (NEPA) applied to U.S. decisions when their effects were felt in Antarctica. The presumption against extraterritoriality was rebutted both by the fact the conduct (the decisionmaking) occurred domestically, and that the U.S. has exerted legislative control over the sovereignless continent in the past. The court was careful to limit its holding to the narrow application of NEPA in Antarctica. *See* Abate, *supra* note 41, at 100 (suggesting these exceptions are only firmly accepted by the D.C. Circuit); Katherine Hausrath, *Crossing Borders: the Extraterritorial Application of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")*, 13 U. BALT. J. ENVTL. L. 1, 12 (2005) (stating that the "conduct" exception does *not* apply to U.S. citizens abroad); Hess, *supra* note 10, at 26–40 (elaborating on the exceptions and giving Supreme Court examples of their development and application).

44. *Massey*, 986 F.2d 528.

the issue[45] has begun to create circuit splits with regard to the applicability of the adverse effects exception, the exception that could play the largest role in extending the reach of environmental statutes. The issue is further muddled by the fact that in most jurisdictions there is only sparse case law at any level applying the exceptions. Judicial reluctance to interfere in foreign relations, which is usually steadfastly left to the executive branch, likely explains the lack of precedent on the topic.

Within the Ninth Circuit, *Subafilms, Ltd. v. MGM-Pathe Communications Co.* (*Subafilms*) first addressed the adverse effects exception in 1994.[46] *Subafilms* involved an allegation of infringement under the Copyright Act, where the defendants authorized allegedly illegal conduct abroad while they were in the United States.[47] The en banc panel found the presumption against extraterritoriality applicable because the defendant's act of *authorizing* illegal conduct did not trigger liability under the Copyright Act, and the subsequent illegal conduct itself did not occur within the United States.[48] The court rejected the plaintiffs' contention that the adverse effects doctrine defeated the presumption against extraterritoriality, stating that *Massey*'s articulation of the exception was merely dicta and that the effects doctrine did not *automatically* override the presumption.[49] The court further explained that "[i]n each of the statutory schemes discussed by the *Massey* court, the ultimate touchstone of extraterritoriality consisted of an ascertainment of congressional intent; courts did not rest *solely* on the consequences of a failure to give a statutory scheme extraterritorial application."[50]

After *Subafilms*, it seemed clear that the Ninth Circuit had rejected the effects doctrine as an independently sufficient means of overcoming the presumption against extraterritoriality, and instead treated it as a factor to consider when there was otherwise clear congressional intent about whether the statute was intended to apply abroad. Yet, in 1998, the court considered the effects doctrine once again in *In re William Neil Simon*.[51] The case concerned the effect of the location of a debtor's property in bankruptcy proceedings. The court ultimately found express congressional intent for the statute to apply to property located outside

45. The Supreme Court has not conclusively addressed the exceptions, and the Restatement (Third) of Foreign Relations is only persuasive.

46. 24 F.3d 1088 (9th Cir. 1994) (en banc).

47. *See id.* at 1089–90.

48. *See id.* at 1090, 1099.

49. *See id.* at 1096.

50. *Id.*

51. 153 F.3d 991 (9th Cir. 1998). The only other cases in which the Ninth Circuit cited *Massey* did not involve the "effects" doctrine but rather focused on conduct that took place outside the United States. United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535 (9th Cir. 1994).

the United States.[52] However, before finding congressional intent, the court discussed what "additional factors" would be examined "to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case."[53] The cited factors were the "adverse effects" exception and the "conduct" exception. Although the phrasing was indeterminate and the doctrine was not explicitly part of the holding, the case represented the Ninth Circuit's first affirmative acknowledgment of the adverse effects exception. There has yet to be a subsequent holding addressing the issue.

There is a critical need for clarification as to what extraterritorial activities can or cannot be regulated by U.S. statutes. As recognition increases of the fact that environmental concerns are regional and even global in scale, the confusion about the principle of territoriality will cause mounting problems. One of these concerns is that hazardous substances are increasingly disposed of (intentionally or unintentionally) in nations other than the ones that produced them.[54]

B. The Interplay of the Presumption against Extraterritoriality and the Application of CERCLA

CERCLA appears designed only to encompass resource protection within the United States. As mentioned previously, even the definition of "environment" refers only to the waters, oceans, natural resources, land, and air of the United States or under its jurisdiction.[55] Congress does not seem to have intended Superfund to assist with the cleanup of hazardous substance releases outside of U.S. jurisdiction. However, this observation does not answer the question of whether Congress intended to hold foreign entities liable for conduct the effects of which are felt within the United States. Only two cases have come close to directly addressing this question: *United States v. Ivey*[56] and *ARC Ecology v. United States Department of the Air Force*.[57]

In *United States v. Ivey*, the United States sued a Canadian defendant under CERCLA before a Michigan district court for pollution caused by the disposal of combustionable liquid organic wastes.[58] One of

52. 153 F.3d at 996.

53. *Id.* at 995.

54. *See* Lauren Levy, *Stretching Environmental Statutes to Include Private Causes of Action and Extraterritorial Application: Can It Be Done?*, 6 DICK. J. ENVTL. L. & POL'Y 65, 81 (1997) (suggesting the possibility of extending CERCLA's liability regime beyond domestic borders).

55. 42 U.S.C. § 9601(8) (2006).

56. 747 F. Supp. 1235 (E.D. Mich. 1990) (Order I) (modified May 3, 1990, also reported at 747 F. Supp. 1235 (Order II)).

57. 411 F.3d 1092 (9th Cir. 2005).

58. *Ivey*, 747 F. Supp. at 1239 (Order II).

the defendants, Ivey, was the president and director of the Michigan-based U.S. company that had inhabited the contested site, as well as president and director of its majority shareholder, a Canadian corporation which held the property's mortgage.[59] The Canadian corporation did not exist by the time of the lawsuit, as it had been replaced by a corporation located at its same address, also run by Ivey—this corporation, Ineco, was the second defendant.[60]

The defendants moved to dismiss for lack of jurisdiction on the grounds that CERCLA "does not provide for service of process in foreign countries," thus the defendants could not be served in Canada. Because CERCLA does not specifically address the question of service abroad, the court found Michigan's long-arm statute controlling[61] and analyzed the extent of the defendant's contacts with Michigan.[62] The court determined that minimum contacts between the defendant and the state satisfied jurisdictional requirements.[63] The defendants did not raise questions of the permissibility of the statute's extraterritorial application.[64] As there were substantial contacts between the defendant and Michigan, the court found no due process concerns raised by the extension of service jurisdiction to Canada: the defendant had "purposely availed himself of the privilege of conducting activities in Michigan."[65] Not only were the effects of the defendant's actions felt within the United States, but its conduct occurred domestically as well.

The Ninth Circuit was the next court to face a case relevant to the extraterritorial application of CERCLA. The case involved a claim by foreigners against the United States, rather than a claim by the United States against a foreign party as in *United States v. Ivey*. The dispute in *ARC Ecology* was over cleanup liability for two former U.S. military bases in the Philippines.[66] Filipino citizens and residents sought to make the U.S. government clean up the vacated sites, but the United States opposed liability.[67] Although the site was polluted while the United States occupied the bases, the court found CERCLA inapplicable because the bases were no longer under U.S. jurisdiction at the time of the claim.[68] It also found that the plaintiffs were not covered by the foreign claimants provision of CERCLA. Section 111(l) of the Act mandates liability for hazardous substances "(A) in the navigable waters or (B) in or on the

59. *Id.* at 1237 (Order I).
60. *Id.*
61. *Id.* at 1238.
62. *Id.* at 1238 (Order II).
63. *Id.* at 1240.
64. *See* Hess, *supra* note 10, at 46.
65. United States v. Ivey, 747 F. Supp. 1235, 1239 (E.D. Mich. 1990) (Order II).
66. *See* ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1094 (9th Cir. 2005).
67. *See id.* at 1095–96.
68. *See id.* at 1098–99.

territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident,"[69] but the contamination specified by the plaintiffs was located on the *land* portion of the ex-bases. In short, the case did not involve conduct that occurred within the United States because the bases were no longer under U.S. jurisdiction at the time of the complaint, and Congress' express intent was only for the statute to apply to foreign waters and shorelines. Foreigners are not given an explicit statutory right to bring CERCLA claims for pollution occurring on land.

Because neither *Ivey* nor *ARC Ecology* directly addressed whether CERCLA can be applied extraterritorially when the defendant's actions occur abroad but the effects are felt domestically, *Pakootas v. Teck Cominco* presented a question of first impression.[70] Although courts may be hesitant to address such issues due to their potential to interfere with foreign relations, clear holdings are desperately needed to ensure that extraterritorial case law is predictable and consistent. Clarification of the law is also instrumental to providing notice to foreign parties of the possibility that they will be brought before a U.S. court to answer for their actions.

II. THE CASE AT ISSUE: *PAKOOTAS V. TECK COMINCO METALS, LTD.*

Teck Cominco is a Canadian mining company that extracts zinc, copper, metallurgical coal, gold, lead, and other metals.[71] Cominco was founded under a different name in 1906 and fully merged with Teck in 2001, a deal that resulted in operations in Alaska, Washington, British Columbia, Ontario, Alberta, Australia, Chile, and Peru.[72] One of Teck's refineries, located in British Columbia, is known as the Trail Smelter. It is "one of the world's largest fully-integrated, zinc and lead smelting and refining complexes" with an annual production capacity approaching 290,000 tonnes of zinc and 120,000 tonnes of lead, among other products.[73] A nearby hydroelectric dam provides the complex with power, and an approximately ten-mile long transmission line connects the dam to the U.S. electricity grid.[74] The Trail Smelter has been involved in numerous legal disputes in the past, including well-known arbitration

69. *Id.* at 1103.

70. Pakootas v. Teck Cominco Metals, Ltd. (*Pakootas I*), No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *25 (E.D. Wash. Nov. 8, 2004).

71. Teck Cominco, Operations, http://www.teckcominco.com/Generic.aspx?PAGE=Operations&portalName=tc (last visited Oct. 4, 2007).

72. Teck Cominco, About Us—History, http://www.teckcominco.com/Generic.aspx?PAGE=About+Us+Pages%2fHistory&portalName=tc (last visited Oct. 4, 2007); Teck Cominco, Operations, *supra* note 71.

73. Teck Cominco, *Trail Smelter & Refineries, B.C., Canada*, http://www.teckcominco.com/operations/trail/index.htm (last visited Sept. 10, 2006).

74. *Id.*

involving air pollution before the International Joint Commission over sixty years ago.[75]

Joseph A. Pakootas and Donald R. Michel, both members of the Confederated Tribes of the Colville Reservation, brought the CERCLA action against Teck Cominco.[76] The Colville Tribes have a population of approximately 9,000,[77] and after decades of boundary changes and negotiations with the government their reservation now encompasses 2,100 square acres in North Central Washington.[78] The reservation includes the Upper Columbia River Basin and Lake Roosevelt, which was created by the construction of Grand Coulee Dam in 1939.[79] Pursuant to the Lake Roosevelt Cooperative Management Agreement of 1990, the Colville Tribes have an established legal right "to exercise governmental control over the portions of their reservations covered by Lake Roosevelt, including regulatory control over hunting, fishing, boating, and cultural resources."[80] Currently, however, members of the Colville Tribes are afraid to swim in Lake Roosevelt, eat catch from it, or walk on its beaches because of its polluted state.[81]

A. The District Court Case: Pakootas I

On December 11, 2003, the Environmental Protection Agency (EPA) directed Teck Cominco to determine contamination levels in the Washington State portion of the Columbia River.[82] EPA ordered the mining company to complete a Remedial Investigation/Feasibility Study (RI/FS) of the contaminants released from its Trail Smelter complex.[83] Yet by 2004, Teck Cominco had failed to make any progress on the RI/FS, motivating Pakootas and Michel to bring suit for enforcement under CERCLA.[84] Their complaint alleged that for almost ninety years (1906–1995) hazardous substances had been generated by the complex

75. *See* Hess, *supra* note 10, at 2 (citing Trail Smelter Arbitral Tribunal (Canada v. United States), 3 R.I.A.A. 1938 (1941)); *see also* Hausrath, *supra* note 43, at 21–22.

76. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *1–2 (E.D. Wash. Nov. 8, 2004).

77. Hess, *supra* note 10, at 9; Confederated Tribes of the Colville Reservation, Facts & Information, http://www.colvilletribes.com/facts.htm (last visited Sept. 30, 2007).

78. *See* Confederated Tribes of the Colville Reservation, *supra* note 77.

79. *See* KATHRYN L. MCKAY & NANCY F. RENK, CURRENTS AND UNDERCURRENTS: AN ADMINISTRATIVE HISTORY OF LAKE ROOSEVELT NATIONAL RECREATION AREA 47 (Jan. 2002), *available at* http://www.nps.gov/history/history/online_books/laro/adhi/adhi3.htm.

80. Hess, *supra* note 10, at 9. For more information on the history of the Colville Tribes, see Confederated Tribes of the Colville Reservation, A Walk Through Time, http://www.colvilletribes.com/past.htm (last visited Sept 30, 2007).

81. Hess, *supra* note 10, at 10.

82. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *2–3 (E.D. Wash. Nov. 8, 2004).

83. *Id.*

84. *Id.* at *1, *2.

and disposed of in the Columbia River.[85] Plaintiffs lived downstream of the complex and contended that the hazardous substances migrated down the river and caused adverse effects on the water, sediment, and biological resources of the Upper Columbia River and Roosevelt Lake.[86] In response, Teck Cominco argued that there was no claim for which relief could be granted and that the district court did not have subject matter jurisdiction or personal jurisdiction over the matter because it was a Canadian corporation located and operating outside the United States.[87]

The district court found none of the defendant's arguments convincing.[88] Plaintiffs were able to establish subject matter jurisdiction because the action was brought under a federal statute, and the claim was neither insubstantial nor frivolous.[89] Secondly, limited or specific personal jurisdiction was established because there was a sufficient relationship between the company and the state of Washington, such that the defendant should have "'reasonably anticipate[d] being haled into court there.'"[90] Typically, personal jurisdiction is based on presence, domicile, or consent. If none of these factors are satisfied, then a defendant must have a certain level of contacts with the state to establish that the exercise of jurisdiction is just, and the particular state's long-arm statute must permit it.[91] The contacts requirement can be satisfied by demonstrating that they were "substantial, continuous, and systematic";[92] otherwise, limited or specific personal jurisdiction might be established if (1) the defendant's actions were intentionally directed towards the state or contact was otherwise established, (2) the complaint arises from that contact, and (3) personal jurisdiction in the case would be reasonable, fair, and just.[93]

Local jurisdiction is presumed to be reasonable for conduct by a nonresident that occurs completely outside of a state if the conduct *intentionally* harms the state.[94] A three-part test establishes such conduct, and in *Pakootas I* the district court found that the defendant's actions satisfied each segment. The defendant's actions were intentional, overtly

85. *Id.* at *9–10.
86. *Id.*
87. *Id.* at *2–4.
88. *Id.* at *53–54.
89. *Id.* at *4–5.
90. *Id.* at *7 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
91. *Id.* at *5–6 (citing Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952)). Long-arm statutes are an individual state's governance of actions involving nonresidents.
92. *Id.* at *6 (quoting Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952)).
93. *Id.* at *6–7 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–76 (1985)).
94. *Id.* at *8–9.

directed at the forum state, and it was foreseeable that the harm would be borne by the state.[95] The only other bar to jurisdiction would be to show that the exercise of Washington's jurisdiction would "offend traditional notions of fair play and substantial justice," which the defendant failed to demonstrate.[96]

The court was hesitant to find that the case did not involve an extraterritorial application of a federal statute, solely based on CERCLA's focus on releases of hazardous substances within the jurisdiction of the United States.[97] It found that to do so "would require reliance on a *legal fiction* that the 'releases' of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separate from the discharge of those substances into the Columbia River at the Trail Smelter."[98] Thus the district court assumed an extraterritorial application of CERCLA and proceeded to analyze whether such an extension of the statute would be appropriate.[99]

The district court recognized the presumption that traditionally exists against the extraterritorial application of a statute absent an expression of congressional intent.[100] Distinguishing the facts before it from *Aramco*,[101] the court found that even though there is no explicit language in CERCLA expressing intent to grant extraterritorial jurisdiction, there is

> a clear intent . . . to remedy "domestic conditions" within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.[102]

In sum, the district court found that the remedial nature of the statute, combined with the "well-established" adverse effects exception, made it appropriate to apply CERCLA extraterritorially since the alleged effects had been felt entirely within the United States.

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95. *Id.* at *9.

96. *Id.* at *11–12. See Austen L. Parrish, *Trail Smelter Déjà vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 387– 93 (2005), for a predictive analysis of the jurisdiction questions raised in *Pakootas*.

97. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *14–15 (E.D. Wash. Nov. 8, 2004).

98. *Id.* at *15–16 (emphasis added).

99. *Id.* at *16.

100. *Id.* at *16–20 (citing and quoting Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) and Envtl. Def. Fund v. Massey, 986 F.2d 528, 530–31 (D.C. Cir. 1993)).

101. *Aramco*, 499 U.S. 244 (1991); *see supra* text accompanying notes 34–35.

102. *Pakootas I*, 2004 U.S. Dist. LEXIS 23041, at *27–28.

Finally, the court found that Teck Cominco could be held liable under CERCLA section 107(a)(3) as a corporation that either generated or arranged for disposal of hazardous substances.[103] In determining liability, the court first held that the category of "person" includes domestic and foreign corporations.[104] Next, the court addressed the question of what specific category of person the defendant was: an owner, operator, transporter, or arranger. Because the facility in question was the Upper Columbia River Site and not the Teck Cominco property, the defendant could not be held liable as either the owner or operator of the facility.[105] And the plaintiffs did not allege that Teck Cominco had transported the hazardous substances.[106] Thus the only available category was that of an arranger, but the defendant argued there had to be a third party involved in order for it to be considered an "arranger."[107] Despite the apparent concurrence of the plain language of the statute, however, the court found the defendant's argument unpersuasive in the face of available case law holding that the term should be construed liberally and that third-party involvement was not an essential factor.[108]

Despite Teck Cominco's arguments to the contrary, the court did not find the definition of a "facility" to contain a geographical limitation. The court also held that an amendment stressing CERCLA's applicability to foreign vessels in U.S. waters was *not* a limitation on all other foreign liability.[109] The court did not see this result as "absurd" because CERCLA is not focused on changing defendants' behavior, and does not supersede foreign environmental regulations, but rather simply implements cleanup procedures for actions that affect the United States.[110] That U.S. regulations do not apply to foreign companies, the court opined, is irrelevant for the cleanup that CERCLA attempts to instigate.[111] In sum, the court found that the adverse effects exception permits the extraterritorial application of CERCLA, even though the

103. *Id.* at *29–32.

104. *Id.* at *28–29, *29 n.6 (citing United States v. Ivey, 747 F. Supp. 1235 (E.D. Mich. 1990)), *32.

105. *Id.* at *30–31.

106. *Id.* at *31.

107. *Id.* at *31–33.

108. *Id.* at *33–37 (citing Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992); Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094 (D. Idaho 2003); EPA v. TMG Enters., 979 F. Supp. 1110 (W.D. Ky. 1997); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432 (E.D. Cal. 1995); Acme Printing Ink Co. v. Menard, 881 F. Supp. 1237 (E.D. Wis. 1995); Pierson Sand & Gravel Inc. v. Pierson Twp., 851 F. Supp. 850 (W.D. Mich. 1994), *aff'd*, 89 F.3d 835 (6th Cir. 1996); Nat'l R.R. Passenger Corp. v. New York Hous. Auth., 819 F. Supp. 1271 (S.D.N.Y. 1993); Colorado v. Idarado Mining Co., 707 F. Supp. 1227 (D. Colo. 1989), *rev'd*, 916 F.2d 1486 (10th Cir. 1990)).

109. *Id.* at *41–43.

110. *Id.* at *39–41.

111. *Id.* at *44–46.

statute does not explicitly express an intent to allow foreign jurisdiction.[112] Despite its confident language, however, the district court *sua sponte* certified its decision for immediate appeal.[113]

B. The Ninth Circuit Case: Pakootas II

On appeal, the Ninth Circuit affirmed the district court's decision, but on very different grounds.[114] The court's opinion focused on whether the case was a domestic or extraterritorial application of CERCLA, the answer to which the Ninth Circuit did not find obvious.[115] After ultimately deciding the case involved a domestic application of the statute, the court then considered the defendant's argument that it did not qualify as an "arranger" under section 107(a)(3) because there was no third party involved in the disputed disposals.[116] The Ninth Circuit found the statutory language of section 107(a)(3) to be ambiguous, and overruled precedent by holding that the relevant sections of past opinions were mere dicta and that the plaintiffs' definition fit better with CERCLA's overall purpose and structure.[117] The remainder of this section details how the court came to these conclusions.

The court did not reanalyze the district court's findings on subject matter and personal jurisdiction, since the defendant did not challenge them.[118] Rather, the analysis began by addressing the issue of whether the case involved an extraterritorial application of CERCLA. While the district court found it did, and thus focused its opinion on the permissibility of the application under the facts presented, the Ninth Circuit found that the district court's original assumption of extraterritoriality was incorrect.[119] The court stressed that CERCLA differs from many environmental statutes because it is not regulatory, but instead focuses on the cleanup of releases or threatened releases of hazardous substances.[120]

The court held that the important "facility" requirement was satisfied because the site, as defined by the RI/FS order, was the "extent of contamination in the United States associated with the Upper

112. *Id.* at *50–51.

113. *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1071 (9th Cir. 2006).

114. *See id.* at 1068–69, 1082.

115. *See id.* at 1073–74.

116. *See id.* at 1079–82.

117. *See id.*

118. *See id.* at 1072. It was also decided that although the EPA and Teck Cominco eventually reached a settlement agreement after the complaint was filed, the settlement did not affect the outcome of the case as the plaintiffs were not a party to it. *See id.* at 1071 n.10.

119. *See id.* at 1071, 1074.

120. *See id.* at 1073 (citing Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 881 (9th Cir. 2001)).

Columbia River."[121] It found that the broad construction given to the term allowed any place containing a hazardous substance to qualify as a facility.[122] The opinion carefully detailed the conditions that led to the 2003 order for Teck Cominco to complete an RI/FS, and the annual disposal of approximately 145,000 tonnes of waste (slag) generated by the Trail Smelter into the Columbia River, which then traveled downstream and settled when the waters slowed. [123] Because the "facility" was identified as the settled slag, not the generating complex, the court was able to hold that the case involved a domestic facility, not an extraterritorial one.[124] The location of the original source was considered irrelevant.

An important portion of the court's analysis, pivotal to the characterization of the case as domestic or extraterritorial, involved discussion of the release or threatened release of a hazardous substance. The court considered multiple possibilities for what might constitute the "release" under CERCLA: it could have been the original disposal in Canada; or its travel from the Canadian section of the Columbia River to the U.S. section; or the "leaching of heavy metals and other hazardous substances from the slag into the environment *at the Site*."[125] Instead of ruling out any of the possibilities, the court simply held that the plaintiff's definition of "release" was sufficient: the "passive migration of hazardous substances into the environment from where hazardous substances have come to be located."[126] The court then found that such a "release" was domestic, because when the hazardous substances entered the surrounding environment, the slag from which they were emitted was present within the boundaries of the United States.[127] "That release—a release into the United States from a facility in the United States—is entirely domestic."[128]

In its analysis of whether Teck Cominco was an eligible party for purposes of CERCLA liability the court explicitly stated that the determinative factor characterizing the case's viability was whether the "release" was foreign or domestic, and not the identity of the "person" responsible for the release. The fundamentally different purposes behind liability statutes (such as CERCLA) and regulatory statutes (such as

121. *Id.* at 1074 (emphasis omitted) (quoting *In re Upper Columbia River Site*, Docket No. CERCLA-10-2004-0018, at 2 (Unilateral Administrative Order for Remedial Investigation/Feasibility Study Dec. 11, 2003)).

122. *See id.* (citing *3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990), for the proposition that "facility" is a broadly construed term).

123. *See id.* at 1069–70.

124. *See id.* at 1079.

125. *Id.* at 1074–75 (emphasis added).

126. *Id.* at 1075.

127. *See id.* at 1078.

128. *Id.* at 1075.

RCRA) justified this separation of "release" from "person."[129] The court held that because CERCLA does not seek to change an actor's behavior, but simply requires cleanup efforts and costs, the liable entity's location outside the United States "[did] not change [the] analysis."[130]

Teck Cominco argued that Supreme Court precedent mandated that the term "any person" should be construed to exclude foreign entities, based on case law holding that "any court" was found to exclude foreign courts.[131] The precedent the defendant cited built upon concepts developed in *United States v. Palmer*,[132] which contained two criteria for determining the foreign inclusion of general terms: "[the] general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."[133] Applying the criteria, the Ninth Circuit found that the first need not be considered because Teck Cominco had not challenged the district court's assertion of personal jurisdiction, effectively waiving its right to assert it as a defense.[134] The second factor, of legislative intent, was also satisfied. CERCLA does not contain explicit language pertaining to extraterritorial application, but the court found that although "CERCLA is silent about *who* is covered by the Act[,] . . . [it] is clear about *what* is covered by the Act."[135] Because CERCLA liability is triggered by releases or threatened releases, rather than by generation or disposal, the Ninth Circuit determined that jurisdiction is dependent on where the *release* occurred instead of where the *disposal* occurred.[136]

Lastly, the Ninth Circuit addressed statutory ambiguity in the definition of the term "arranger," and overruled as dicta precedent finding third party involvement necessary.[137] Teck Cominco argued that a third party was an essential element of the "arranger" class as defined in section 107(a)(3), and because there was no third party involved in the *Pakootas* events it could not qualify as such. The relevant provision puts liability on a party that arranged for the disposal of hazardous substances "by any other party or entity."[138] The court agreed that CERCLA is often difficult to interpret based on its wording alone, and found the phrase "by any other party or entity" to be ambiguous. It could be interpreted either as referring to an owner arranging for the disposal of their hazardous

129. *See id.* at 1078–79.
130. *Id.* at 1079.
131. *Id.* at 1076 (citing Small v. United States, 544 U.S. 385, 390– 91 (2005)).
132. 16 U.S. (3 Wheat.) 610 (1818).
133. *Id.* at 631.
134. *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1076 (9th Cir. 2006).
135. *Id.* at 1077 (second emphasis added).
136. *See id.* at 1077–78.
137. *See id.* at 1081.
138. *See id.* at 1079–80; *see also* 42 U.S.C. § 9607(a)(3) (2006).

substances, or to someone who arranged for the disposal of *someone else's* substances.[139]

The defendant argued that the two commas that offset the phrase from the rest of the section should be removed,[140] which created an interpretation consistent with the Ninth Circuit's previous holding in *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*[141] *Kaiser* states that a third party may need to be involved in order for arranger liability to be triggered.[142] The plaintiffs, on the other hand, argued that the phrase referred to the owner of the hazardous substances,[143] which was consistent with the court's reasoning in *Cadillac Fairview/California, Inc. v. United States*, where the court assigned liability to anyone who "'otherwise arrang[es]' for disposal or treatment of hazardous substances."[144] Canons of statutory construction suggest that when there is ambiguity in the statute, the court must choose the interpretation most consistent with the statutory scheme—and the defendant's definition "would [have] create[d] a gap in the CERCLA liability regime by allowing a generator of hazardous substances potentially to avoid liability by disposing of wastes without involving a transporter as an intermediary." Thus the court held that its analysis in *Kaiser Aluminum* was dicta, and that section 107(a)(3) does not require a third party,[145] allowing Teck Cominco to qualify as an "arranger" for purposes of CERCLA liability.

III. ANALYSIS: THE RAMIFICATIONS OF FINDING *PAKOOTAS II* TO BE A DOMESTIC CASE

There were two ways to decide *Pakootas II*: the Ninth Circuit could have found it to involve either a domestic or extraterritorial application of CERCLA. The language of CERCLA allowed the former; logic and policy argued for the latter. Either holding would likely have led to the same practical result for the parties involved, with Teck Cominco having to clean up the hazardous substances contaminating the Columbia River. However, if the court had held the case to involve an extraterritorial

139. *Pakootas II*, 452 F.3d 1066, 1079–81 (9th Cir. 2006).

140. 42 U.S.C. § 9607(a)(3) (emphasis added) reads as follows:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, *by any other party or entity*, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

The commas discussed are those adjacent to the phrase "by any other party or entity."

141. 976 F.2d 1338 (9th Cir. 1992).

142. *See id.* at 1341.

143. *See Pakootas II*, 452 F.3d at 1080.

144. 41 F.3d 562, 565 (9th Cir. 1994).

145. *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1081–82 (9th Cir. 2006).

application of CERCLA, it would have clarified the status of the doctrine of extraterritoriality and its exceptions within the Ninth Circuit. Clarification is important to ensure, *inter alia*, that foreign parties are given notice of situations where they may be held liable in U.S. courts. Furthermore, solidifying the adverse effects exception into Ninth Circuit (and hopefully nationwide) jurisprudence might significantly expand the efficacy of several U.S. environmental statutes that currently cannot address the full scope of regional environmental problems.

While the Ninth Circuit's legal reasoning was acceptable, the court's holding skirted the important issues at stake. It rested on two findings, the first of which was that the facility and release were located within U.S. borders. The second was that the term "arranger" does not appear to be limited to U.S. actors, and it would be an absurd result to interpret the statute to exempt creators of hazardous substances for liability if they simply involved a third party in its disposal. What the Ninth Circuit failed to address was the logical disconnect between holding a Canadian company liable for conduct that occurred entirely in Canada in what it characterized as a domestic application. The court did not comment on the fact that the ability to come to such a disjointed conclusion stems from poor statutory wording that has been heavily litigated since its rushed enactment; the Ninth Circuit itself has noted more than once that "neither a logician nor a grammarian will find comfort in the world of CERCLA."[146]

Any student of the law eventually comes to accept that logic will sometimes be sacrificed for efficiency, consistency, or some other commendable purpose. What differentiates this case, however, is that there was a satisfactory alternative: the case could have been held to involve an extraterritorial application of CERCLA, as the district court found. The following discussion details why the Ninth Circuit may have found *Pakootas II* to involve a domestic application of CERCLA; the disadvantages of the holding and its future consequences; and alternative approaches to the question of extraterritoriality that may help create more predictable and consistent decisions.

A. Policy Considerations That May Have Influenced the Ninth Circuit

Although the Ninth Circuit's opinion itself contained no policy analysis, there are numerous policy considerations that may have factored into *Pakootas II*, both from an international and a domestic perspective. The court may have feared interfering with existing foreign relations systems and disturbing the international dispute resolution

146. *Id.* at 1079 (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001)).

community. There were also significant business concerns associated with holding the Canadian defendant liable, which fluctuated according to whether the case was considered domestic or extraterritorial. Weighing against such concerns, however, was a more logical application of the statute and the opportunity the court had to settle confusion about the extraterritorial reach of U.S. environmental laws. The currently opaque area of extraterritoriality might even have emerged as extending those laws. Environmental problems are not confined by a sovereign's boundaries—it is necessary to address environmental legislation on a regional if not even larger scale. *Pakootas II* could have been the first step towards such a regime. This is not necessarily an argument for an activist judiciary, but rather the simple contention that the Ninth Circuit was faced with two ways to decide a case that would come to the same conclusion, and long term policy concerns weighed on the side of finding the case to be extraterritorial.

1. The International Concern: Conflict with Existing International Norms

Traditionally, international laws have been afforded deference.[147] In addition to longstanding notions of comity, many sovereign nations have entered into freestanding international agreements. The Ninth Circuit may have been concerned that an extraterritorial application of CERCLA in *Pakootas II* would infringe on current dispute devices. However, domestic and foreign environmental regimes may successfully coexist and even complement each other. First, there is no significant discord between the principles underlying domestic and international environmental laws. Second, domestic laws are not preempted in the international context.

Existing international environmental law mechanisms do not appear to be in conflict with domestic ones.[148] For instance, a prior Trail Smelter dispute was resolved through the International Joint Commission (IJC), and established the principle that

> 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 to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[149]

147. *See, e.g.*, Hess, *supra* note 10, at 43–45 (summarizing the interplay of notions of consistency with international law, avoiding conflict with foreign law, and the presumption against extraterritoriality).

148. *See* Robinson-Dorn, *supra* note 12, at 301–19 (arguing that international and domestic environmental laws can serve to strengthen each other).

149. *Id.* at 301–02 (citing Trail Smelter (United States v. Canada), 3 R.I.A.A. 1905, 1965 (Trail Smelter Arb. Trib. 1938)).

This principle was reiterated in documents that resulted from two prominent conferences which set numerous standards for international environmental law: Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.[150] It is important to note that this environmental principle is not at variance with domestic laws—in fact, it is largely a specific application of the underlying idea of the adverse effects exception to the presumption against extraterritoriality.[151] The adverse effects exception allows U.S. laws to be applied extraterritorially to a foreign actor when its actions have caused harm within the boundaries of the United States; the Trail Smelter principle says that a foreign state's fumes cannot cause harm to the territory of another. The adverse effects exception simply seems to allow for a domestic cause of action based on the principle originally drawn from the influential previous Trail Smelter arbitration.

Domestic laws are not explicitly preempted by existing dispute resolution mechanisms. Neither the 1909 Boundary Waters Treaty, the Commission for Environmental Cooperation created by the North American Free Trade Agreement (NAFTA) in 1994, nor the Uniform Transboundary Pollution Reciprocal Access Act preclude the application of domestic laws.[152] In fact, the Side Agreement to NAFTA contains a provision whereby a person or nongovernmental organization can submit a claim to the Secretariat of the Commission for Environmental Cooperation if the plaintiff believes that the United States, Canada, or Mexico has failed to enforce its environmental laws.[153] While a custom of deference to international mechanisms remains, such deference is technically discretionary.

Instead of conflicting, some scholars have suggested that the laws of two different jurisdictions may actually stimulate and encourage one another. Professor Michael Robinson-Dorn suggests that international disputes are often slowly resolved, both because states are only voluntarily bound and because the complaints are between two states rather than just two people; Dorn surmises that adding in the well-rehearsed domestic system as a venue for decisionmaking may help quicken the process.[154] Increasing the number of disputes resolved by domestic means may also encourage the development of more stringent

150. *Id.*

151. "[T]he presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

152. *See* Robinson-Dorn, *supra* note 12, at 304–08; *see also* EPA, About the North American Commission on Environmental Cooperation (NACEC), http://www.epa.gov/oiamount/regions/Mexico/nacec.html (last visited April 1, 2007).

153. *See* Robinson-Dorn, *supra* note 12, at 306–07.

154. *Id.* at 318–19.

and comprehensive international apparatuses, as sovereign nations will likely prefer to be held liable under international laws rather than those of another sovereign.[155]

2. *The Domestic Concern: Reciprocity*

In addition to concerns about conflict with international laws, numerous domestic policy concerns likely loomed not too distant in the background for the Ninth Circuit, including foreign reciprocity of jurisdictional expansion. Were the court to have held Teck Cominco liable extraterritorially for the effects of its hazardous substance disposal, the issue of reciprocity would have taken center stage: Canada might have sought compensation for the effects of U.S. pollution on its territory.[156] The quantity of claims brought against the United States under an adverse effects doctrine might markedly increase. The magnitude of this reciprocity concern depended upon whether *Pakootas II* involved a domestic or extraterritorial application of U.S. law. If the issue was liability under a domestic application of CERCLA, the concerns were significantly smaller because Canada (or any other nation) could only hold U.S. parties liable if it enacted a statute with a similar liability structure. However, if the question was one of extraterritorial liability under the adverse effects doctrine, the door would have been opened to holding individual parties responsible for effects felt *anywhere*, so long as the party is still subject to personal jurisdiction—actors would have to consider the effects of their actions not just within their own country, but regionally as well.[157] From an environmental perspective, such a development in international law would be quite beneficial, for reciprocity would mean that more environmental norms might be enforced.[158] Economically, however, reciprocity can be quite daunting.

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155. *Id.*

156. As an example of the strong opinions and concerns involved in this issue, note the quantity of amici curiae briefs filed after the district court's ruling. For the plaintiffs, the following entities filed amicus briefs: the Spokane Tribe of Indians; the Okanagan National Alliance; the Washington Environmental Council, Washington Public Interest Research Group and Citizens for a Clean Columbia; the Sierra Club and Sierra Club of Canada; and the People of the State of the California, *ex rel.* Bill Lockyer, Attorney General for the State of California, and the States of Arizona, Idaho, Montana, and Oregon. For the defendant, the following entities filed amicus briefs: the Chamber of Commerce of the United States; the Government of Canada; the National Mining Association and the National Association of Manufacturers; and the Canadian Chamber of Commerce and the Mining Association of Canada. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).

157. For an example of the industry concern over this issue, see Beveridge & Diamond, P.C., 9th Circuit Holds that CERCLA Liability May Extend to Canadian Company for Pollution That Originated Beyond U.S. Borders (July 6, 2006), http://www.bdlaw.com/news-61.html.

158. *See, e.g.*, Robinson-Dorn, *supra* note 12, at 316–17 (arguing that proponents of international environmental law should meet EPA's unilateral actions with the reaction

An interesting twist to the policy issues raised by *Pakootas* is the fact that, unlike many environmental statutes, utilizing the adverse effects exception would not significantly expand the reach of CERCLA. To illustrate, consider how the difference would play out in the real world: without extraterritorial reach, CERCLA makes foreign parties liable for disposals of hazardous substances only if the disposal results in an identifiable facility and a release occurring *within* the United States; the location of the original disposal is irrelevant. With extraterritorial reach, the result is very similar: the facility and release do not have to be located within the United States, but the effects must be felt there, and with hazardous substances the distance between the two is unlikely to be very great. This situation will arise along the United States' northern border with Canada or southern border with Mexico, but is unlikely to arise frequently. Therefore the policy concern was not how *CERCLA's* jurisdiction could have been expanded, but rather how the jurisdiction of *other* environmental statutes could have been increased.

It is outside the particular context of CERCLA that the *Pakootas* holding could have had a significant impact. If command-and-control environmental statutes that regulate highly mobile substances were applied outside the United States, there would be a notable increase in the quantity of issues falling under U.S. jurisdiction. This is beneficial in light of the consideration that if environmental statutes are to be truly effective regionally, they cannot be constricted by sovereign boundaries. As evidenced by the earlier Trail Smelter arbitrations, phenomena like air pollution know no boundaries; clean air laws that stop at a particular latitude are nonsensical. Although one can argue that the role of international law should be to fill in such gaps between sovereigns' laws, domestic laws can be stronger, quicker, and have far greater enforcement resources. Until international environmental laws become mandatory, efficient and comprehensive domestic environmental laws should be utilized in order to address regional problems more comprehensively.

On balance, the policy considerations in favor of an extraterritorial holding arguably outweigh those in favor of a domestic holding. The public interest in ensuring that regional environmental issues are properly addressed overshadows concerns regarding traditional deference to international dispute resolution systems and industry concerns about reciprocal liability.

"Outstanding!" and that reciprocity appears "to be a 'win-win' from an environmental perspective").

B. The Conflict between Establishing Personal Jurisdiction and Focusing on CERCLA as a Remedial Statute

Particular elements of *Pakootas II* may narrow the effectiveness of the holding, even within the CERCLA context. The most prominent of these elements is the underlying finding of specific or limited personal jurisdiction, which the Ninth Circuit did not address. However, the district court devoted a significant portion of its opinion to establishing personal jurisdiction over the defendant.

Of note, the application of personal jurisdiction in this case demonstrates a practical problem: CERCLA's jurisdictional reach is dependent on a particular state's long-arm statute. In addition to satisfying a test aimed at ensuring jurisdiction would be just and reasonable, a "federal district court must look to the law of the forum state in determining whether it may exercise personal jurisdiction over an out-of-state defendant."[159] Thus a Canadian company disposing of hazardous substances may face varying consequences depending upon whether its waste migrates into a northeastern or northwestern state in the United States. Predicting the outcome of any case is difficult, exponentially so for an international company, even absent the addition of an element that varies state-by-state. Although deference to state sovereignty is desirable when dealing with other *U.S. states*, it is odd to have the foreign policy of a *nation* vary dependent upon the state in which enforcement may be sought. Foreign policy is a federal matter, and the application of U.S. statutes to nonresidents should be uniform rather than subject to fifty variations. Reformation of personal jurisdiction, however, is far outside the scope of this Note.

What falls within this Note's focus was the conspicuous conflict between the method by which the district court established jurisdiction and the Ninth Circuit's rationale for holding that the case was purely a domestic matter. The only way to establish jurisdiction over the Canadian defendant in the district court was to find that the defendant "intentionally cause[d] injuries within the forum state."[160] Much of the Ninth Circuit's justification for its decision to label the release domestic rather than extraterritorial, however, relied on the premise that CERCLA is a remedial statute that does not consider party behavior but rather only seeks to affect cleanup. Because remedial statutes, including CERCLA, do not attempt to incentivize particular behaviors, the Ninth Circuit found it possible to separate the location of the source of the

159. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *8 n.1 (E.D. Wash. Nov. 8, 2004) (citing MacDonald v. Navistar Int'l Transp. Corp., 143 F. Supp. 2d 918 (S.D. Ohio 2001)).

160. *Id.* at *8–9. The Ninth Circuit opinion did not address the issue because jurisdiction was not challenged on appeal.

hazardous substances from the harm caused once the substances had settled downstream. Although it similarly discussed CERCLA's remedial nature, the district court opined that a holding that *Pakootas* did not involve an extraterritorial application of the statute would "require reliance on a legal fiction."[161] The Ninth Circuit responded: "what the district court dismissed as a 'legal fiction' is the foundation of the distinction between RCRA and CERCLA."[162]

The unsettling result we are left with is that while personal jurisdiction was established by the fact the actor's conduct was intentional (aimed at the forum state), the case was considered a domestic application of CERCLA on the grounds that the statute is traditionally unconcerned with party behavior and motivations (its focus being remedial). The contradiction is not immediately apparent in the opinion because the defendant did not challenge jurisdiction on appeal. But the contradiction effectively undermines the portion of the Ninth Circuit's opinion explaining why *Pakootas II* is not an extraterritorial case. As precedent, because the case is built upon an intent-based foundation, the ultimate holding itself makes CERCLA less of a remedial statute and more of a deterrent to nonresident behavior.

C. Alternative Explanations of Inconsistency in Applying the Presumption against Extraterritoriality

Although the presumption against extraterritoriality is a seemingly clear principle, various statutes and circuit decisions have resulted in a spectrum of interpretations. For example, the D.C. Circuit has recognized and applied the adverse effects exception, while the Ninth Circuit has only acknowledged it as a factor.[163] There have also been variations in the applicability of the exceptions in the context of antitrust laws, trademark laws, and securities regulations. For instance, in trademark and antitrust disputes, the First Circuit "relied on the 'effects' test and invoked the presumption when compliance with both United States and foreign law was impossible."[164] The Second Circuit, however, only invokes the presumption where there is "true conflict" between the two sovereigns' laws.[165] In the area of securities disputes, the Second Circuit uses a hybrid of the effects exception and the conduct exception, while the Fifth Circuit

161. *Id.* at *16.

162. *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1079 (9th Cir. 2006).

163. *See* discussion *supra* Part II.A.

164. *See* Abate, *supra* note 41, at 101–02 (citing United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997)).

165. *Id.* (citing Filetech S.A.R.L. v. France Telecomm., 978 F. Supp. 464, 478 (S.D.N.Y. 1997), *vacated*, 157 F.3d 922 (2d Cir. 1998)).

uses the effects test but explicitly does *not* employ the conduct test.[166] Might there be a better explanation for the wide variance amongst the decisions of these courts apart from the state of the doctrine?

It has been proposed that a more accurate way to differentiate courts' holdings is to separate market statutes from nonmarket statutes.[167] In the context of market statutes, such as antitrust and securities laws, courts will often invoke the "effects" test and usually find that the statute applies extraterritorially. For nonmarket statutes such as employment and environmental legislation, however, the courts often require express congressional intent for the statute to apply extraterritorially. They almost never find such intent.[168]

Randall S. Abate recently recommended that cases involving extraterritoriality would be better decided based on a "continuum of context."[169] Such an indicator would represent the spectrum of territories that might be affected by U.S. statutes: on one end is the United States, at the other are sovereign nations, and in the middle are global commons such as Antarctica, the high seas, and the atmosphere.[170] Arising from the continuum analysis is the suggestion that courts use a two-step decisionmaking process when looking into extraterritorial cases. First, the court should ask whether the statute has a domestic or international focus. If the focus is domestic, then the second step is to inquire if the United States suffered any adverse effects, or if international conflict might arise if the statute were applied.[171] Where the focus is international, the second step would be to determine if the statutory provision imposes a substantive or procedural mandate. A procedural mandate could be applied more broadly because any conflict with another sovereign's laws is less likely to be significant—thus it could be applied to the global commons as well as to some U.S. conduct. A substantive mandate, however, should only be applied to global commons so as to avoid problematic overlap and/or conflict with another nation's policy decisions.[172]

The Ninth Circuit's decision in *Pakootas II* was awkward in many respects, but it may suggest a third way to differentiate among decisions of extraterritoriality. The Ninth Circuit repeatedly emphasized the importance of the fact that CERCLA is a primarily *remedial* statute. This

166. *Id.* at 102 (citing Robinson v. TCI/US West Commc'ns, 117 F.3d 900 (5th Cir. 1997); Itoba Ltd. v. Lep Group PLC, 54 F.3d 118 (2d Cir. 1995)).

167. *See* Hausrath, *supra* note 43, at 9 (citing Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598 (1990)).

168. *See id.*

169. *See* Abate, *supra* note 41, at 137.

170. *See id.* at 89, 104.

171. *See id.* at 130–31.

172. *See id.* at 131.

discussion suggests that there is room for a model that differentiates between different categories of statutes. Such an emphasis on the statute's purpose might increase the predictability of the outcomes of litigation and decrease domestic law conflict with international laws. For instance, when applying a remedial statute such as CERCLA, the presumption against extraterritoriality would be applied less stringently because the focus of the statute is on domestic conditions—the chance there would be substantial conflict with international law or the laws of another sovereign is minimal.[173] However, in the area of command-and-control legislation such as RCRA, the focus of the statute is on changing *behavior.* Thus the chance of substantial conflict with another sovereign's laws would be much higher. Although this analysis may reach a different result than the distinction between domestically or internationally focused statutes suggested in the continuum of context model, it mirrors the emphasis on minimizing conflict between existing international environmental protection mechanisms.

CONCLUSION

There are no technical problems with the Ninth Circuit's explanation of how CERCLA defines a facility, a release, and an arranger, or with how the court applied those terms in *Pakootas II.* But the case could have also qualified as involving an extraterritorial application of the statute, and there were substantial policy arguments that likely should have tipped the balance in favor of holding that it did. Concerns about international reciprocity reactions to an expansion of U.S. jurisdiction should have been outweighed by the need to address environmental problems on a regional, not just domestic, scale. Likewise, balanced against the potential for conflicting sovereign laws is the speedier adjudication that domestic forums may bring to traditionally slow international resolutions.

Case law addressing the presumption against extraterritoriality is less than well defined, and when specifically considering its application in the environmental context it is even murkier. The status of the adverse effects exception has not been clearly addressed within the Ninth Circuit, and it remains extremely challenging to accurately predict the outcome of an extraterritorial case. Ideally the Ninth Circuit would have held, as was more logical, that *Pakootas II* was an extraterritorial case. It would have then served as beneficial precedent that helped clarify the parameters of the presumption within the jurisdiction. Holding it to be a domestic case skirted the practical effect of the decision.

173. *See also supra* text accompanying notes 110–111.

Pakootas II's value as precedent was further undermined by the internal contradiction between the rationale for holding the case to be domestic and the basis by which personal jurisdiction was established. The district court's finding of limited or specific personal jurisdiction included a finding of intentional conduct, but the Ninth Circuit's explanation for considering the claim domestic was based on CERCLA's status as a remedial statute, unconcerned with the motivations of the actors. This awkward and unsettling result undermines the Ninth Circuit's reasoning and the underlying rationale of CERCLA.

In sum, logic and policy were on the side of a finding that *Pakootas II* involved a CERCLA dispute falling under the adverse effects exception to the presumption against extraterritoriality. If the defendant's foreign status had been incorporated into the Ninth Circuit's analysis, it would have lessened the logical disconnect between establishing jurisdiction through an intent-based test and then categorizing a case as domestic because it is unconcerned with a party's motivations. The United States would have moved farther along the path of substantial benefits associated with an expansion of the principle articulated in the first Trail Smelter arbitration over forty years ago: allowing *all* domestic environmental statutes to be applied reciprocally between neighboring countries when one's action affects the other. And finally, *Pakootas II* could have provided valuable precedent clarifying the status of the adverse effects doctrine that would help ensure foreign entities have adequate notice of the possibility they will be found liable in a U.S. court. There are multiple possible explanations for what seems to be an inconsistent application of the presumption against extraterritoriality across various jurisdictions. But the courts themselves have not yet clarified what logic they are utilizing. When the rules for applying the presumption are made explicit, outcomes will become less difficult to predict.