NOTE

A Missed Opportunity: How *Pakootas v. Teck Cominco Metals, Ltd.* Could Have Clarified the Extraterritoriality Doctrine

Jennifer S. Addis[†]

I. INTRODUCTION

The Trail Smelter, which has operated just north of the U.S.–Canadian border for more than 100 years, was the basis of a landmark arbitration decision in international environmental law: the Trail Smelter Arbitration.[1] Years after the decision, however, the lessons that should have been learned from this historic international compromise have gone unheeded.

In a water pollution dispute involving the same smelter, the Ninth Circuit Court of Appeals held that the Comprehensive Environmental Response, Compensation, and Liability Act[2] (CERCLA) applied to a Canadian company's disposal of hazardous waste in Canada.[3] But by characterizing its holding as a domestic application of CERCLA, the court

---

[†] J.D. Candidate, Seattle University School of Law, 2009; B.A., Neuroscience and Behavior, Columbia College of Columbia University, 2000. For their exhaustive editing and excellent ideas, I would like to thank Keith Seo, Carly Summers, and Sarah Lysons. I also thank my dear partner, Aaron Waldkoetter, who cooked many dinners without complaint while I worked on this article. I dedicate this article to my mother, Nickie Addis, who is my constant inspiration, sounding board, and emotional support.

1. For a discussion of the Trail Smelter Arbitration, see *infra* Part IV.C. Briefly, in the 1920s, Washington farmers brought claims against the Trail Smelter to stop its excessive emissions of sulfur dioxide fumes. The dispute was submitted to bilateral arbitration, which ultimately resulted in the Smelter owing minor damages and being forced to comply with emission caps. *See, e.g.*, Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. MICH. J.L. REFORM 681, 696 (2007) (quoting EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 257 (1998)).

2. 42 U.S.C. §§ 9601–9675 (2006).

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

avoided discussing the presumption against extraterritorial application of domestic statutes.[4] This presumption discourages courts from asserting U.S. legislative jurisdiction over foreign persons or conduct, absent legislative intent to the contrary.[5] Although the Ninth Circuit did not articulate the policy considerations underlying its decision,[6] one concern was that an extraterritorial application of CERCLA could provoke retaliatory reciprocal application of Canadian environmental laws to pollution emanating from the United States.[7]

Extraterritorial application of domestic statutes is rarely advisable; international disputes are better handled internationally. Especially at the U.S.–Canadian border, a number of international tribunals exist just to handle international environmental disputes.[8] However, these tribunals are both ineffective and inaccessible for individual private litigants seeking redress from environmental harms.[9] In their present form, these tribunals will most always be rejected in favor of the faster, more accessible, and more effective domestic court system.[10]

Because the accessibility and effectiveness of international dispute resolution systems are unlikely to improve in the near future, courts must clarify the murky and inconsistent law surrounding the extraterritorial application of domestic statutes. Specifically, the Ninth Circuit could have and should have adopted an explicit position regarding when the extraterritorial application of domestic statutes is proper. Such clarification would have both short- and long-term benefits: it would improve consistency in the application of domestic environmental laws; it would provide plaintiffs in transboundary disputes with effective remedies; and it would spur the development of a bilateral dispute resolution system by which to deal effectively with transboundary pollution issues.

---

4. *Id.* at 1073, 1079. The fundamental tenet of the extraterritoriality doctrine is the presumption that domestic statutes are intended to apply only within the boundaries of the United States. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); *see also infra* Part II.D.

5. *See, e.g.*, GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 617 (4th ed. 2007).

6. The Ninth Circuit may have also been reluctant to oppose a previous Ninth Circuit decision, *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994). *See infra* Part IV.B.

7. *See infra* Part IV.B. In addition, the application of domestic environmental statutes raises questions of comity and potential conflicts with the other country's law.

8. The two tribunals most likely to be used in this context are the International Joint Commission and the North American Commission for Environmental Cooperation. *See* discussion *infra* Part IV.C.

9. *See infra* Part IV.C.

10. *See infra* Part IV.C.

Part II of this Note relays the facts surrounding *Pakootas v. Teck Cominco, Ltd.*,[11] gives a brief history of CERCLA and its liability requirements, and then summarizes the reasoning of both the district court and the Ninth Circuit. Part II also includes an overview of the presumption against extraterritoriality and the possible means of rebutting it. Part III addresses the question of whether the application of CERCLA in *Pakootas* was in fact extraterritorial and discusses some of the flaws in the Ninth Circuit's reasoning. After concluding that this was an extraterritorial application of CERCLA, this Part III then examines the Ninth Circuit's current stance on the extraterritoriality doctrine. Next, Part IV considers the ways in which the Ninth Circuit might have held the application of CERCLA to be extraterritorial in *Pakootas* without disregarding its existing precedent and then explores the international and policy considerations that may have been a part of the Ninth Circuit's deliberation. Part IV then discusses the existing problems with the international dispute resolution avenues available to transboundary pollution plaintiffs, and concludes with a proposal for a simple solution that will allow United States and Canadian courts to work hand in hand to develop an interdependent jurisprudence that will help to equitably address future transboundary disputes.

II. BACKGROUND

A. Summary of the Facts

Teck Cominco Metals, Ltd., a Canadian corporation, owns and operates the Trail Smelter, one of the world's largest lead and zinc smelters.[12] Located on the Columbia River, about ten river miles north of the U.S.–Canadian border,[13] the smelter is estimated to have dumped between 450 and 800 tons of slag into the Columbia River every day until it stopped routine dumping in 1995.[14] Teck Cominco itself estimates that it dumped between 145,000 and 186,700 tons of slag into the river annu-

11. Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

12. *See* Teck Cominco, Trail Lead Zinc Smelter Operations, http://www.teckcominco.com (follow the "Operations" link, then select "Trail Operations" in the "Zinc" column) (last visited April 19, 2009).

13. Upper Columbia River Site, Docket No. CERCLA-10-2004-0018, at 3 (EPA Dec. 11, 2003) (Unilateral Administrative Order for Remedial Investigation/Feasibility Study), http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement (follow "Text" hyperlink for Scanned Unilateral Administrative Order) [hereinafter UAO].

14. EPA, Upper Columbia River Site Inspection Report Northeast Washington, TDD: 01-02-0028, 2.11–.13 (2003) [hereinafter EPA Columbia River Report], http://www.epa.gov/r10earth/offices/oec/UCR/Upper%20Columbia%20River%20ESI.pdf.

ally.[15] To put this number into perspective, until as late as 1994 and 1995, Teck Cominco was "discharging more copper and zinc into the Columbia River than the cumulative totals of all permitted U.S. discharges for those materials."[16]

Downriver, Washington State's Lake Roosevelt[17] felt the brunt of the environmental impact.[18] This region is a part of the Confederated Tribes of the Colville Reservation, and in 1999, the Colville Tribes petitioned the Environmental Protection Agency (EPA) to conduct a preliminary assessment of the health and environmental hazards present in the river and lake.[19] Not only was the Colville Tribes' request unprecedented,[20] the EPA's grant of the petition was a step never before taken:[21] the EPA had never before issued a Unilateral Administrative Order (UAO) to a Canadian company doing no business in the United States.[22]

After assessing the Lake Roosevelt and upper Columbia River site, the EPA found "contaminants . . . including, but not limited to, heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc."[23] In addition, the EPA "observed the presence of slag, a by-product of the smelting furnaces, containing glassy ferrous granules and other metals, at beaches and other depositional areas at the Assessment Area."[24] Completing the assessment in early 2003, the EPA concluded that, under CERCLA's Hazard Ranking System, the site was eligible for listing on the National Priorities List and thus qualified for remedial action.[25] At

---

15. *Id.*

16. Karen Dorn Steele, *B.C. Smelter Dumped Tons of Mercury; Records Show Scope of River Pollution*, SPOKESMAN-REV. (Spokane), June 20, 2004, at A1.

17. Franklin D. Roosevelt Lake is a reservoir in the Columbia River watershed created by the construction of Grand Coulee Dam. EPA Columbia River Report, *supra* note 14, at 2-1. It extends approximately 135 miles up the Columbia River, ending just 15 miles south of the Canadian border. *Id.*

18. Because of the dam, the slag that might have otherwise been distributed down the Columbia River is instead trapped in the reservoir. *See* EPA Columbia River Report, *supra* note 14, at 2.5–.6; *see also* Richard A. Du Bey & Jennifer Sanscrainte, *The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-up the Boundary Waters of the United States: A Case Study of the Upper Columbia River and Lake Roosevelt Environment*, 12 PENN ST. ENVTL. L. REV. 335, 337 (2004).

19. Letter from Colleen Cawston, Chair, Colville Bus. Counsel, Confederated Tribes of the Colville Reservation, to Chuck Clarke, Reg'l Adm'r, EPA Region 10 (Aug. 5, 1999), http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/ColvillePetitiontoEPA2AUG1999.pdf.

20. Du Bey & Sanscrainte, *supra* note 18, at 359 n.161.

21. 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, 379–80 (2005).

22. *Id.*

23. UAO, *supra* note 13, at 2.

24. *Id.* at 2–3.

25. *Id.* at 3.

this point, the EPA and Teck Cominco entered into months of fruitless negotiations over how to resolve the dispute.[26] When the talks finally broke down, the EPA issued a UAO directing Teck Cominco to conduct a Remedial Investigation/Feasibility Study (RI/FS) to determine the extent of the contamination and develop remedial strategies.[27]

Teck Cominco sought help from the Canadian Government, which sent a diplomatic note to the U.S. State Department making clear its disapproval of the EPA's position: "Canada does not believe that CERCLA applies to Teck Cominco Metals and is concerned that the issuance of the Unilateral Administrative Order may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States."[28]

Teck Cominco refused to comply with the UAO,[29] and the EPA showed no inclination to enforce it. As a result, two members of the Colville Tribes, Joseph A. Pakootas and Donald R. Michel, filed a citizen suit[30] against Teck Cominco in the Eastern District of Washington.[31]

---

26. In 2003, after completing its assessments of the site, the EPA initiated informal settlements talks with Teck Cominco, hoping that Teck would agree to have its American subsidiary, Teck Cominco American, Inc., perform a Remedial Investigation and Feasibility Study (RI/FS). *See* Letter from David Croxton, Unit Manager, Office of Envtl. Cleanup, EPA Region 10, to Karen Dunfee, Teck Cominco Metals, Ltd. (Oct. 10, 2003), *available at* http://yosemite.epa.gov/R10/CLEAN UP.NSF/UCR/Enforcement (follow "Cover Letter for Special Notice Letter" hyperlink). When these discussions did not progress, EPA triggered formal negotiations via a Special Notice Letter. In response, Teck offered to pay for independent studies, but refused to be a part of a CERCLA proceeding. *See* 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, 268 (2006); *see also* Matthew Preusch, *Pollution Dispute in Northwest Straddles the Border*, N.Y. TIMES, Mar. 20, 2004, at A8.

27. Robinson-Dorn, *supra* note 26, at 268; UAO, *supra* note 13, at 9–10. The EPA has the authority, pursuant to § 9606 of CERCLA, to issue Unilateral Administrative Orders that compel the potentially responsible party to comply with the EPA's directives. To issue such an order, the EPA need determine only that the basic statutory elements of the violation are present and that the site may present an "imminent and substantial endangerment." CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 526 (2d ed. 2007).

28. Diplomatic Note from Embassy of Can. to U.S. Dep't of State (Jan. 8, 2004), http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/TCmemoSupportingMotionDismiss_Exhibits.pdf, at 84.

29. *See* Letter from G. Leonard Manuel, Vice President & Gen. Counsel, Teck Cominco Metals, Ltd., to Michael F. Gearhead, Dir., Envtl. Cleanup Office, EPA Region 10 (Jan. 12, 2004), http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/TCm emoSupportingMotionDismiss_Exhibits.pdf, at 78–79.

30. 42 U.S.C. § 9659(a)(1) (2000). CERCLA provides states and private parties with the right to seek enforcement of orders issued by the EPA. Under CERCLA, "any person may commence a civil action on his own behalf . . . against any person who is alleged to be in violation of any . . . order which has become effective pursuant to this chapter." *Id.*

31. Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

B. CERCLA: A Summary

In December 1980,[32] Congress enacted CERCLA, the Superfund Act, to ensure prompt and effective remediation of hazardous waste sites.[33] The product of last-minute negotiations by a lame-duck Congress, CERCLA essentially combined three previously proposed bills that no one could agree on into something that everyone could live with.[34] In a last-ditch effort to get a bill through both houses before the end of its session and before President-elect Reagan took over,[35] Congress cobbled CERCLA together by adopting language "almost verbatim" from § 311 of the Clean Water Act and lifting the rest from bills amending the Resource Conservation and Recovery Act[36] (RCRA).[37]

CERCLA is one of the most ambiguous and incomprehensible of the environmental statutes.[38] It is said that judges hope that "if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain."[39] This degree of ambiguity makes CERCLA's overarching policies and objectives difficult to interpret. CERCLA is unique among environmental statutes in that it lacks even a statement of goals and purposes.[40] Courts, however, have divined two general goals of the Act: ensuring that hazardous waste sites are adequately cleaned up and ensuring that those responsible for the sites bear the responsibility for remediation.[41]

CERCLA is also unique because it is not directly a regulatory statute.[42] Instead, the Act's operation is primarily remedial, kicking in once

---

32. Congress was spurred by the disastrous and highly publicized Love Canal debacle. *See* N.Y. STATE DEP'T OF HEALTH, LOVE CANAL – PUBLIC HEALTH TIME BOMB, A SPECIAL REPORT TO THE GOVERNOR AND LEGISLATURE (1978), http://www.health.state.ny.us/environmental/investigations/love_canal/lctimbmb.htm (last visited April 19, 2009).

33. *See, e.g.*, Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982); *see also* Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 203 (1996) (noting reasons for CERCLA's enactment).

34. *See* H.R. 85, 96th Cong. (2d Sess. 1980) (containing comprehensive provisions of liability and compensation for oil spillage damage and removal); H.R. 7020, 96th Cong. (2d Sess. 1980) (an amendment to RCRA that proposed to regulate inactive hazardous waste sites); S. 1480, 96th Cong. (2d Sess. 1980) (proposing liability for personal injury as well as broad third-party liability); *see also* Grad, *supra* note 33, at 3–7.

35. Grad, *supra* note 33, at 19–35.

36. 42 U.S.C. §§ 6901–6992k (2000).

37. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 683–84 (2d ed. 1994).

38. *See* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1405 (1997).

39. *Id.*

40. RODGERS, *supra* note 37, at 683.

41. Watson, *supra* note 33, at 203.

42. RODGERS, *supra* note 37, at 683–84.

the regulatory provisions of the RCRA have been violated.[43] Thus, CERCLA imposes liability on actors who have already violated RCRA by disposing of hazardous waste.[44] To present a prima facie case under CERCLA, a party must show that three elements are met: (1) there was an actual or threatened "release"[45] of a hazardous substance; (2) the release was from a "facility";[46] and (3) the defendant falls within one of the four categories of "covered persons" [47] subject to liability under CERCLA.[48]

C. Pakootas' *Path Through the Courts*

To determine whether the Lake Roosevelt dispute justified the application of CERCLA to Teck Cominco, the district court for the Eastern District of Washington first examined whether the dispute actually raised extraterritoriality issues or whether it resulted instead in a purely domestic application of the statute.[49] In its analysis, the court emphasized that the B.C. smelter was the "source of the hazardous substances"[50] but also noted that Washington State's Lake Roosevelt was the site identified by the EPA for remediation.[51]

For the first element of CERCLA liability, the EPA defined the "releases" at issue as "hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site."[52] Thus, the "release" of Teck Cominco's toxic waste occurred domestically, in Lake Roosevelt. For the second element, the EPA specified that the Lake Roosevelt site was a "facility," as defined in CERCLA,[53] from which the release occurred.[54]

---

43. *Id.* at 684.

44. *Id.*; 42 U.S.C. § 9607(a) (2006).

45. CERCLA defines "release," in part, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22).

46. CERCLA defines "facility," in part, as "(A) any building, structure, installation, equipment, pipe or pipeline . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." *Id.* § 9601(9).

47. The four categories of "covered persons" under CERCLA are "(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal . . . and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release." *Id.* § 9607(a)(4).

48. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1073–74 (9th Cir. 2006).

49. Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 257898, at *4–5 (E.D. Wash. Nov. 8, 2004).

50. *Id.*

51. *Id.* at *5.

52. UAO, *supra* note 13, at 5–6.

53. 42 U.S.C. §9601(9) (2006). *See* CERCLA definition of "facility," *supra* note 46.

Although the EPA effectively characterized both the facility and release as discretely domestic, the district court refused to confine its analysis to these solely domestic triggers for CERCLA liability.[55] Instead, the court pointed to the source of the toxic slag: Teck Cominco's smelter in British Columbia.[56] The court declined to restrict its extraterritoriality analysis to two of the three requirements for liability under CERCLA.[57] Such a restriction would have ignored the causal link between Teck Cominco's disposal of the waste into the Columbia River in Canada and the subsequent release of the hazardous chemicals from the slag in Lake Roosevelt.[58] The district court refused to rely on the "legal fiction" that the two events are "wholly separable."[59]

Although the district court held that imposing liability on Teck Cominco necessarily involved an extraterritorial application of CERCLA, it used what is known as the "effects exception"[60] to determine that application of the Act was appropriate.[61] The district court immediately certified the question for appeal to the Ninth Circuit, on the ground that the case involved "a controlling question of law as to which there is a substantial ground for difference of opinion."[62]

Although it upheld the district court's denial of Teck Cominco's motion, the Ninth Circuit concluded that the extraterritorial application of CERCLA was not at issue.[63] In its analysis, the court emphasized CERCLA's role as remedial, rather than regulatory, and noted that the Act's purview was limited to the cleanup site alone and did not extend to the conduct that originally created the waste.[64] This distinction allowed the court to rely on the very "legal fiction" rejected by the district court to find that the application of CERCLA to Teck Cominco in this case was purely domestic.[65] Thus, the Ninth Circuit did not deem it necessary to address whether application of CERCLA required overcoming the presumption against extraterritoriality.[66]

---

54. UAO, *supra* note 13, at 5–6.

55. *See Pakootas*, 2004 WL 2578982, at *5.

56. *Id.*

57. *See id.*

58. *See id.*

59. *Id.*

60. For a general discussion of the "effects exception," see *infra* Part II.D.2.b. For analysis of how that exception is viewed in the Ninth Circuit, see *infra* Part III.B.

61. *Pakootas*, 2004 WL 2578982, at *9 (citing Envtl. Def. Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993)).

62. *Id.* at *17.

63. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1074 (9th Cir. 2006).

64. *Id.* at 1073, 1077–78.

65. *Id.* at 1077–79.

66. *See id.* at 1082.

Teck Cominco petitioned the U.S. Supreme Court for a writ of certiorari to review the Ninth Circuit's decision.[67] Although initially evidencing some interest in the case by inviting the U.S. Solicitor General to articulate the United States's position on the matter,[68] the Court subsequently denied certiorari after the Solicitor General reasoned that the case was effectively moot.[69]

D. The Presumption Against Extraterritorial Application of Domestic Statutes

The extraterritoriality doctrine is jurisdictional at heart; it operates to control "the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders."[70] United States courts presume that domestic statutes apply only territorially, that is, only to persons and conduct within U.S. borders.[71] The advocating party then has the burden of showing why extraterritorial application of a statute is appropriate. The Supreme Court has articulated two possible rebuttals, or "exceptions", to the presumption—congressional intent and domestic adverse effects.[72] Comity concerns are also relevant; even if adverse effects otherwise rebut the presumption, statutory application may be improper if such application would result in international discord.[73] The presumption ensures

---

67. Petition for a Writ of Certiorari, Teck Cominco Metals, Ltd. v. Pakootas, 128 S. Ct. 858 (2008) (No. 06-1188), 2007 WL 621960.

68. *See* Docket Entry, June 4, 2007, *Pakootas*, 128 S. Ct. 858 (No. 06-1188).

69. *Pakootas*, 128 S. Ct. at 858. While the case was pending before the Ninth Circuit, Teck Cominco entered a settlement with the EPA under which it agreed to perform the RI/FS that was originally demanded in the UAO. *See* Settlement Agreement between EPA and Teck Cominco American, Inc. 1 (June 2, 2006), http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement (follow "Agreement for Remedial Investigation and Feasibility Study" hyperlink). As a result of this settlement, the EPA withdrew its UAO. Letter from L. Michael Bogert, Adm'r, EPA Region 10, to Doug H. Horswill, Senior Vice President, Teck Cominco Metals, Ltd. (June 2, 2006), http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter/docs/T eckCominCoVPakootasPetitionAppendix.pdf, at 120. Although this withdrawal rendered moot the issues of injunctive relief and declaratory judgment, the question of civil penalties for each day that Teck Cominco failed to comply with the UAO remained ripe. Appellant's Request for Judicial Notice at 8, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006) (No. 05-35153). Nonetheless, the U.S. Solicitor General in his Amicus Brief for the United States argued that the only issues before the lower courts—those stemming from Teck Cominco's failure to comply with the UAO—were moot, and the case thus did not merit present review. Brief for the United States as Amicus Curiae at 6, *Pakootas,* 128 S. Ct. 858 (No. 06-1188), 2007 WL 4142586.

70. Envtl. Def. Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993).

71. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 403 cmt. g (1987).

72. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

73. *See Massey*, 986 F.2d at 532. When congressional intent rebuts the presumption, courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *See* F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155, 164–65

that, when a court considers whether to apply a domestic statute abroad, it also considers both the purpose of the statute and the international ramifications of extraterritorial application.[74]

1. Nature and History of the Presumption Against Extraterritoriality

The presumption against extraterritoriality, in its current incarnation, was long in the making. During the eighteenth and nineteenth centuries, courts and commentators took a strictly territorial view of U.S. sovereignty and thus of legislative jurisdiction.[75] The presumption was first applied in some form in the early 1800s.[76] Its most well-known modern articulation, however, was made by Justice Holmes, writing for the majority in *American Banana Co. v. United Fruit Co.*[77] Since that case, application of the presumption fell in and out of favor before it was recently re-adopted in *EEOC v. Arabian American Oil Co.* ("*Aramco*").[78] Quoting from the earlier *Foley Brothers v. Filardo*,[79] the *Aramco* court enunciated the presumption in its now-classic form: "[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[80]

Two primary purposes underlie the presumption against extraterritoriality.[81] First, the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[82] Second, the presumption solidifies the principle that when Congress creates legislation, "it is primarily concerned with domestic conditions."[83] These purposes should inform application.

(2004). When a statute is ambiguous, a court will construe it "to avoid unreasonable interference with the sovereign authority of other nations." *See id.*

74. *See Massey*, 986 F.2d at 530–31.

75. *See* BORN & RUTLEDGE, *supra* note 5, at 617. Adherence to the territoriality principle in the area of legislative jurisdiction during this time mirrored a similar approach to personal jurisdiction and choice of law. *Id.* at 78–79, 616.

76. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Rose v. Himely, 8 U.S. 241, 279 (1807); The Apollon, 22 U.S. 362, 370–71 (1824) (Story, J.) ("The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens.").

77. *See* 213 U.S. 347, 356–57 (1909). Justice Holmes noted that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," and that this should lead to "the construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Id.*

78. 499 U.S. 244, 248 (1991).

79. 336 U.S. 281 (1949).

80. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285).

81. *Id.*; *see also* William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 92 (1998); 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. 87, 96 (2006).

82. *Aramco*, 499 U.S. at 248.

83. *Id.*

Before a court decides whether it should apply a statute extraterritorially, it must first determine whether application of the statute would be extraterritorial at all. This determination turns on one or both of two factors: where the regulated conduct or event occurs and where the effects of that conduct are felt.[84] Courts, and even judges within the same circuit,[85] disagree over which of these factors to use in their determinations.[86] Some courts look only to where the conduct occurred. For example, one court stated: "[A]fter identifying the conduct proscribed or regulated by the particular legislation in question, a court must consider if that conduct occurred outside of the borders of the U.S."[87] Other courts look only to where the effects are felt.[88] And, as well illustrated by *Environmental Defense Fund v. Massey*,[89] some courts look to either where the conduct occurred or where the effects were felt. In *Pakootas*, the Ninth Circuit had the opportunity to clarify which approach district courts should use. Instead, however, the court obscured the issue by focusing on a negative: it discussed merely why Teck Cominco's foreign conduct did not make application of CERCLA extraterritorial.[90]

2. Rebutting the Presumption Against Extraterritoriality

Despite the sweeping scope of the presumption against extraterritoriality, two exceptions may rebut the presumption in certain circumstances. First, the presumption may be rebutted when clear evidence exists of a congressional intent for the statute to apply beyond the borders of the United States.[91] Second, the presumption may be rebutted when foreign conduct produces "adverse effects" within the United States.[92]

i. Congressional Intent

The first exception is built into the presumption itself. The presumption applies to "legislation of Congress, unless a contrary intent ap-

84. Dodge, *supra* note 81, at 88–89.

85. *See infra* note 89.

86. Dodge, *supra* note 81.

87. *In re* Maxwell Commc'n Corp., 186 B.R. 807, 815 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

88. Robinson v. TCI/US West Commc'ns, Inc., 117 F.3d 900, 906 (5th Cir. 1997); Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 31 (D.C. Cir. 1987).

89. 986 F.2d 528, 531 (D.C. Cir. 1993). Whereas in the D.C. Circuit's *Zoelsch* decision Judge Bork adopted a more effects-based analysis, *see* 824 F.2d at 31, in *Massey*, Judge Mikva clearly views the location of both conduct and effects as determinative, *see* 986 F.2d at 531.

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

91. *See, e.g.*, Smith v. United States, 507 U.S. 197, 204 (1993).

92. *Massey*, 986 F.2d at 531.

pears."[93] Thus, a domestic statute might overcome the presumption when congressional intent shows that the statute was meant to apply extraterritorially. Just how clear that showing must be is uncertain. Since the *Aramco* decision, the Supreme Court's definition and application of the presumption have been inconsistent.[94] The Court has continued to apply the presumption in most of the relevant cases, but its requirements for the intent necessary to overcome the presumption have become less strict.[95] Although in *Aramco* Justice Rehnquist spoke of requiring a "clear statement" of congressional intent to overcome the presumption,[96] more recent cases have downgraded that requirement to "clear evidence" of such intent.[97]

Under either requirement, however, this exception would have little application in the *Pakootas* case. CERCLA is a notoriously ambiguous statute,[98] and its legislative history is equally unrevealing.[99] The Act contains no "clear statement" that extraterritorial application was intended,[100] and one cannot glean this intent even under the less rigid "clear evidence" standard.[101] Moreover, the legislative history does not show that Congress intended the Act to apply outside of the borders of the United States.[102] Even if Congress might have foreseen the chance that an extraterritorial application was necessary, that foreseeability alone is insufficient to overcome the presumption.[103] The Supreme Court has noted that the mere "possibility" that Congress foresaw a potential for such applicability "is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require."[104] Thus, there is no clear statement or evidence that Congress intended CERCLA to apply outside the borders of the United States.

---

93. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (quoting Foley Bros v. Filardo., 336 U.S. 281, 285 (1949)).

94. *See* Abate, *supra* note 81, at 97–98.

95. *Id.*

96. *Aramco*, 499 U.S. at 258.

97. *See, e.g.*, Smith v. United States, 507 U.S. 197, 204 (1993); *see also* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177 (1993) (looking to "all available evidence" to discern congressional intent).

98. Nagle, *supra* note 38, at 1405.

99. Watson, *supra* note 33, at 202; *see also* Grad, *supra* note 33, at 2.

100. *See generally* 42 U.S.C. §§ 9601–9675 (2006).

101. *See* Nagle, *supra* note 38, at 1409–10.

102. *See* Robinson-Dorn, *supra* note 26, at 299.

103. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 176 (1993).

104. *Id.*

ii. The "Effects" Exception

The years following the Supreme Court's firm embrace of the territoriality principle in *American Banana* found the presumption falling out of favor as courts applied increasingly liberal jurisdictional interpretations of the Sherman Act.[105] In 1945, in *United States v. Aluminum Company of America* ("*Alcoa*"), Judge Learned Hand rejected the territorial focus of *American Banana*, instead finding jurisdiction because the effects of the defendant's foreign conduct were felt in the United States.[106] After *Alcoa*, the presence of domestic effects gradually became the accepted focus for determining extraterritorial jurisdiction.[107] Then, with *Aramco*, the Supreme Court applied the territoriality presumption for the first time in forty years, relegating the effects analysis to a narrow exception to the presumption.[108]

The *Aramco* opinion discussed a limited circumstance in which the presumption may be overcome—when the Lanham Trademark Act is applied to foreign conduct, as illustrated by *Steele v. Bulova Watch Co.*[109] Ignoring *Alcoa* entirely, the *Aramco* court observed that in *Steele* the Act applied to foreign conduct because the "unlawful conduct had some effects within the United States."[110] Citing statutory language,[111] the *Aramco* court reasoned that Congress intended the Lanham Act to apply broadly.[112] Thus, although the Court broached the concept of an effects exception in *Aramco*, it characterized the exception applied in *Steele* as one based on congressional intent.

Years later, the Court again changed course. In *Hartford Fire Insurance Co. v. California*,[113] the Court relied on *Alcoa* to apply the Sherman Act to insurers in London who had allegedly conspired to make certain insurance unavailable in the United States.[114] The Court stated that the "Act applies to foreign conduct that was meant to produce and

105. BORN & RUTLEDGE, *supra* note 5, at 641.

106. 148 F.2d 416, 443–44 (2d Cir. 1945).

107. *See* BORN & RUTLEDGE, *supra* note 5, at 642; Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1472–74 (2008).

108. *See* Dodge, *supra* note 81, at 95.

109. EEOC v. Arabian American Oil Co. (*Aramco*), 499 U.S. 244, 252 (1991) (discussing Steele v. Bulova Watch Co., 344 U.S. 280 (1952)).

110. *Id.*

111. The Court noted that the Lanham Act defined commerce as "all commerce which may lawfully be regulated by Congress." *Id.* Because the Constitution permits Congress to "regulate commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, the Court concluded that Congress intended the Lanham Act to apply extraterritorially. *See Aramco*, 499 U.S. at 252.

112. *Aramco*, 499 U.S. at 252.

113. 509 U.S. 764, 796 (1993).

114. *Id.*

did in fact produce some substantial effect in the United States."[115] The Court based its application of the Sherman Act to foreign actors not on congressional intent but instead on the existence of the domestic effects alone.[116] Ignoring *Aramco* and the territoriality presumption, and over a vigorous dissent by Justice Scalia, the Court articulated a broad effects test that minimized the importance of considering international comity.[117]

A decade later, in *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, the Court changed its approach yet again relying on Justice Scalia's dissent in *Hartford Fire Insurance* to stress the importance of comity when interpreting the jurisdictional reach of a domestic antitrust statute.[118] Thus far, the "effects" exception—the sole clear exception to the broad sweep of the presumption against extraterritoriality —has arisen before the Supreme Court only in the antitrust and trademark arenas.[119]

The Supreme Court's jurisprudence in this area is too inconsistent to provide meaningful guidance for lower courts. Although many of its opinions discussing the presumption make clear that the presumption against extraterritoriality is strong and not easily rebutted,[120] the Court also affirms that the presumption is just that—a presumption and not a bright-line rule.[121] The Court's justifications both for the presumption itself and for the effects exception illustrate that situations do exist when the extraterritorial application of domestic statutes is justifiable.[122] Since *Aramco*, however, the Court has failed to circumscribe the scope of either the presumption itself or its permissible exceptions.[123] Moreover, the Court has failed to clarify the extent to which concerns of international comity should be taken into consideration.

Because of this failure, the lower courts have created their own interpretations of the presumption and the ways it may be rebutted.[124] These exceptions mirror the factors that affect finding extraterritoriality

---

115. *Id.*

116. *Id.*

117. *Id.* at 798–99; BORN & RUTLEDGE, *supra* note 5, at 658 (noting the expansiveness of the Court's effects test).

118. 542 U.S. 155, 164–65 (2004).

119. *See id.*; *see also* Steele v. Bulova Watch Co., 344 U.S. 280, 280 (1952) (addressing the exception with regard to the Lanham Trademark Act).

120. *See, e.g.*, EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258 (1991).

121. *Id.* at 252; *Hartford Fire Ins.*, 509 U.S. at 795–96.

122. *See Aramco*, 499 U.S. at 252.

123. *See* Abate, *supra* note 81, at 97.

124. *See* Envtl. Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (holding that the presumption does not apply when either effects or conduct are within the United States); Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc) (applying the presumption even where adverse effects occurred in the United States); Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045–46 (2d Cir. 1983) (finding that the presumption did not apply when defendants' conduct within the United States permitted the court to exercise jurisdiction).

in the first place.[125] Some circuits find that domestic laws apply only when the conduct is also domestic;[126] some find that domestic laws apply whenever there are adverse effects within the United States;[127] and some find that domestic laws apply when either the conduct or the effects occur in the United States.[128] In *Environmental Defense Fund v. Massey*, the D.C. Circuit adopted this latter view when applying the National Environmental Policy Act (NEPA) to the National Science Foundation's activities in Antarctica.[129] The court noted: "[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."[130] Perhaps in part due to its clarity, the *Massey* court's discussion of the extraterritoriality doctrine has become "a focal point for other lower courts' discussions of the presumption."[131]

Thus, although the Supreme Court has applied the "effects" exception only in the areas of antitrust and trademark,[132] case law evidences an overall trend in the direction of wider extraterritorial application of domestic laws where effects are felt in the United States, both by the Supreme Court and among lower courts.[133]

3. Comity Concerns in Rebutting the Presumption

The *Massey* court noted the importance of determining whether extraterritorial application of a domestic statute "would create a potential for 'clashes between our laws and those of other nations.'"[134] Lower courts generally agree that comity is important but disagree how it

---

125. Because extraterritoriality may be found based on the location of the regulated conduct, or on the location of the effects of the conduct, or on both, the factors that can rebut the presumption will be those same elements.

126. *See Subafilms*, 24 F.3d at 1096.

127. *See* Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 31 (D.C. Cir. 1987); Robinson v. TCI/US West Commc'ns, Inc., 117 F.3d 900, 906 (5th Cir. 1997).

128. *See Massey*, 986 F.2d at 531.

129. *Id.* at 529.

130. *Id.* at 531. It was *Massey*'s interpretation of when the presumption should or should not apply that the district court in *Pakootas* relied upon to find that the presumption did not apply in that case. *See* Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 2578982, at *9 (E.D. Wash. Nov. 8, 2004). However, because the *Pakootas* case arose from the adverse effects that Teck Cominco's conduct caused in Washington, the presumption against extraterritoriality could have yielded to any approach accounting for those adverse effects. Although the Ninth Circuit's position is not at all clear, there is some indication that it has rejected "adverse effects" as a valid rebuttal of the presumption. *See Subafilms*, 24 F.3d at 1096.

131. Dodge, *supra* note 81, at 105.

132. *See id.*; Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

133. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); *Steele*, 344 U.S. at 280; *Massey*, 986 F.2d at 531.

134. 986 F.2d at 532 (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)).

should be considered when determining the propriety of applying a domestic law extraterritorially.[135] Some commentators argue that the effects exception itself disserves international comity by permitting unrestrained exercise of jurisdiction and in fact encouraging courts to apply domestic statutes abroad.[136] Appellate courts have worked to temper the broad grant of jurisdiction offered by *Alcoa*'s version of the effects exception by requiring lower courts to analyze comity concerns.[137] However, there has been little consistency to these attempts, and in *Pakootas*, the Ninth Circuit unwisely deflected its most recent opportunity to consider these questions.

III. ANALYSIS

The court's failure to address extraterritoriality in *Pakootas* is not entirely surprising. The Ninth Circuit's previous consideration of the extraterritoriality doctrine left unresolved the question of when, if ever, the effects exception applies to the presumption.

A. The Ninth Circuit's Faulty Analysis in Pakootas

By rejecting the district court's finding of extraterritoriality in *Pakootas*, the Ninth Circuit wrongly concluded that the statute's application was purely domestic. The court reasoned that because Teck Cominco's foreign "arrangement for disposal" of the toxic slag was not prohibited or regulated by CERCLA, its conduct was not relevant to the extraterritoriality determination. However, the court mistook a liability requirement for unregulated conduct. Had it considered Teck Cominco's foreign disposal of the waste, the court would have properly concluded that the application of CERCLA to that conduct was extraterritorial.

1. The *Pakootas* Court's Analysis

As the district court did below, the Ninth Circuit quickly concluded that two of the three conditions on which CERCLA liability depends were solely domestic.[138] Therefore, whether application of CERCLA in

---

135. *Compare* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613–15 (9th Cir. 1976) (adopting an interest-balancing "rule of reason" by which international comity is considered), *with* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 948–51 (D.C. Cir. 1984) (rejecting the interest-balancing approach due to application difficulties).

136. Parrish, *supra* note 107, at 1478–79; BORN & RUTLEDGE, *supra* note 5, at 573 (pondering whether the effects exception permits "almost limitless legislative jurisdiction").

137. *See, e.g.*, *Timberlane*, 549 F.2d at 613–15.

138. To present a prima facie case under CERCLA, a party must show that three elements are met: (1) there was an actual or threatened "release" of a hazardous substance; (2) the release was from a "facility"; and (3) the defendant falls within one of the four categories of "covered persons" who are subject to liability under CERCLA. *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d

this case was extraterritorial depended on the final condition for CERCLA liability: Teck Cominco's status as a "covered person."[139] Teck Cominco fell under the subsection of "covered person[s]" that imposes liability on "any person" who "arranged for disposal" of hazardous waste.[140] As a result, the court examined whether the correct interpretation of "any person" encompassed foreign actors and whether "arranging" for disposal of waste was conduct "regulated" by CERCLA, thus rendering application of the statute to Teck Cominco extraterritorial.[141]

Teck Cominco argued that the phrase "any person" in § 9607(a)(3) should not be interpreted to include foreign persons, analogizing a Supreme Court interpretation of the phrase "any court" to refer solely to domestic courts.[142] Noting that this interpretation was based in part on *United States v. Palmer*,[143] the Ninth Circuit adopted the test set out in *Palmer* to determine whether "any person" should apply to foreign persons.[144] The *Palmer* test has two components: (1) the forum court must have jurisdiction over the party, and (2) the legislature must have intended the term or phrase to apply to that party.[145] In this case, the forum court clearly had specific personal jurisdiction over Teck Cominco.[146]

In its analysis under the second *Palmer* component, the court used the statutory text to show that Congress intended CERCLA to apply when a release or threatened release affects the environment of the United States.[147] Thus, the person responsible for that domestic release is included in the phrase "any person," whether that person is located in the United States or in a foreign country. This emphasis on the location of the release, rather than the location of the actor, shows not only that it is the effects of the disposal rather than the cause that are important, but also that the identity and location of the person responsible for the release do not matter for purposes of CERCLA liability. It is truly *any* person who can be a responsible party.

1066, 1073–74 (9th Cir. 2006). The court agreed that the "release"—the leaching of hazardous materials from the slag at the site—was solely domestic, and that the "facility"—the Lake Roosevelt site—was entirely within the United States. *Id.* at 1074–75.

139. *See id.* at 1073–74.

140. 42 U.S.C. § 9607(a)(3) (2006).

141. *See Pakootas*, 452 F.3d at 1076–77.

142. *Id.* at 1076 (citing Small v. United States, 544 U.S. 385, 390–91 (2005)).

143. 16 U.S. (3 Wheat.) 610 (1818).

144. *Pakootas*, 452 F.3d at 1076.

145. *Id.*

146. *See* Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

147. *Pakootas*, 452 F.3d at 1077 (quoting CERCLA's definition of "environment" and noting that CERCLA's drafters clearly intended the Act to apply when effects are felt in the United States).

The court likely had an ulterior motive for its complicated analysis. The Ninth Circuit's reasoning, as the court itself acknowledged, bore a striking similarity to the "adverse effects" test often used to find an exception to the presumption against extraterritorial application of a domestic statute.[148] This similarity was probably the reason the *Palmer* test was used in the first place—to set up the distinction the Ninth Circuit wanted to emphasize. The court stressed the difference between situations in which the underlying cause of the domestic effects creates an extraterritorial application issue and situations in which the underlying cause of the domestic effects triggers no liability and so creates no extraterritoriality issue.[149] The court contrasted the *Pakootas* situation with that in *Steele v. Bulova Watch Co.*, in which the Supreme Court held that the presumption against extraterritoriality did not apply when the defendant's liability-creating conduct took place in Mexico.[150] The Ninth Circuit observed that in *Steele*, application of the Lanham Act to the defendant was extraterritorial because the very conduct prohibited by the Act took place in a foreign country; in contrast, under CERCLA, there is no prohibited conduct.[151] The liability-creating *event* took place in the United States.[152] The court's ability to distinguish *Pakootas* rode entirely on its characterization of "arranging for disposal" as both occurring before the attachment of CERCLA liability and as being conduct unregulated by the Act.

After concluding that Teck Cominco could be "any person" for the purposes of CERCLA, the court examined the subsection of "covered person[s]" under which Teck Cominco fell, § 9607(a)(3).[153] That section states that the company must have "otherwise arranged for disposal . . . of hazardous substances."[154] For Teck Cominco to fall under this category, certain conduct was necessary: Teck Cominco must have "arranged for disposal" of its waste.[155] Although Teck Cominco argued that it was not an arranger under CERCLA, the court rejected this argument.[156] The court reasoned that because arranging for disposal of hazardous substances is "neither regulated under nor prohibited by CERCLA, . . . [t]he location where a party arranged for disposal or disposed of hazardous

148. *Id.*

149. *Id.*

150. *Id.* (contrasting Steele v. Bulova Watch Co., 344 U.S. 280, 285–87 (1952)).

151. *Id.*

152. *Id.*

153. *Id.* at 1077–78.

154. 42 U.S.C. § 9607(a)(3) (2006).

155. *Id.*

156. Teck Cominco disputed that it met this definition of "covered persons." *See Pakootas*, 452 F.3d at 1075; Petition for a Writ of Certiorari, *supra* note 67, at 18–21. Its reasons for this dispute fall outside the scope of this Note.

substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially."[157] By adopting this view, however, the court disregarded the fact that one of the events creating CERCLA liability, Teck Cominco's disposal of the waste, occurred outside of the United States.

2. Flaws in the *Pakootas* Court's Reasoning

The issue of extraterritoriality thus turns in part on whether CERCLA's requirement that a covered person "arrange[] for disposal" stands on equal footing with the other two requirements.[158] The events satisfying each of the three requirements for CERCLA liability are equally necessary—yet insufficient standing alone—to establish liability. The *Pakootas* court, however, neglected to view CERCLA liability as a whole. The court concluded that because arranging for disposal neither triggers nor is sufficient for CERCLA liability, the location of the disposal (or arrangement thereof) is not relevant in determining whether CERCLA applies extraterritorially.[159] Because liability did not attach until the release occurred, the location of conduct occurring before that point did not affect the extraterritoriality determination.[160]

CERCLA liability is, however, established in the opposite sequence. A "release" from a "facility" cannot itself create liability when no "covered person" caused that release.[161] Thus, the potentially responsible party must attain the status of "covered person" before CERCLA liability can attach.[162] The chronological order of the elements establishing CERCLA liability casts doubt on the Ninth Circuit's conclusion that no event before the "release" was relevant to an extraterritoriality analysis. For example, no court would disregard the validity of a contract just because liability did not arise for its breach until one party defaulted. Likewise, the *Pakootas* court should not have disregarded the location of Teck Cominco's disposal of hazardous waste just because the release was the final requirement for CERCLA liability.

---

157. *Pakootas*, 452 F.3d at 1078.

158. For Teck Cominco to be liable under CERCLA, there must have been an actual or threatened "release" of a hazardous substance; the release must have come from a "facility"; and Teck Cominco must have "arranged for disposal" of the hazardous substance. *Id.* at 1073–74, 77–78.

159. *See id.* at 1078.

160. *Id.*

161. *See* Petition for Writ of Certiorari, *supra* note 67, at 15; *see also* Reply Brief for Petitioner, Teck Cominco Metals, Ltd., v. Pakootas, 128 S. Ct. 858 (2008) (No. 06-1188), 2007 WL 1453850. Although a release triggers CERCLA liability if the party causing the release is a "covered person," a release caused by a non-covered person will not create liability. As Teck Cominco aptly notes, CERCLA does not create "'a liability' in the abstract." *See* Petition for Writ of Certiorari, *supra* note 67, at 15.

162. Petition for Writ of Certioriari, *supra* note 67, at 15.

The Ninth Circuit reasoned that because CERCLA is a strict-liability, remedial (rather than a regulatory) statute designed to effect cleanup of hazardous waste sites, it is the location of the site to be remediated that matters for the determination of extraterritoriality, not the location of the responsible party or the disposal.[163] By adhering to this somewhat artificial distinction, the court oversimplified the relationship between the remedial and regulatory statutes and failed to put CERCLA in the broader context of environmental law.[164]

Generally, when the location of conduct plays a role in the determination of extraterritoriality, that conduct must be regulated or unlawful under the statute at issue to play a role in the analysis.[165] Thus, whether application of CERCLA in *Pakootas* was extraterritorial may depend on whether the liability-creating conduct can be said to be "regulated." As the court noted, CERCLA is not an inherently regulatory statute; instead, it imposes cleanup costs on the party responsible for a "release."[166] Because the statute does not directly regulate the conduct leading up to that release, the conduct that ultimately creates CERCLA liability—"arranging for disposal" in this case—may be legal.[167] It is this interpretation of "arranging for disposal" on which the Ninth Circuit relied to find a solely domestic application of the statute.[168] Nonetheless, technically regulated or not, "arranging for disposal" was a necessary component of Teck Cominco's liability under CERCLA; a party must also be a "covered person" for liability to attach.[169]

The question therefore becomes whether liability-creating conduct is equivalent to regulated conduct for purposes of finding the application of a statute to be extraterritorial. The two seem to be functionally equivalent. One of the many purposes of regulating potentially environmentally hazardous conduct in the first place is to compel those affected by the regulation to comport with the imposed guidelines.[170] This compulsion is typically achieved by instilling a fear of repercussions—usually financial ones—in the regulated party.[171] CERCLA acts on dis-

163. 42 U.S.C. § 6901 (2006); *see also Pakootas*, 452 F.3d at 1078 n.18.

164. *See, e.g.*, Brief of Amicus Curiae Her Majesty the Queen in Right of the Province of British Columbia in Support of Petitioner at 10, *Pakootas*, 128 S. Ct. 858 (No. 06-1188), 2007 WL 1318989 [hereinafter Brief of British Columbia].

165. *See supra* Part II.D.1; *see also* Robinson v. TCI/US West Commc'ns, Inc., 117 F.3d 900, 905–07 (5th Cir. 1997) (discussing the "conduct" test applied by the Second Circuit).

166. *Pakootas*, 452 F.3d at 1073.

167. *Id.* at 1078.

168. *Id.*

169. 42 U.S.C. § 9607(a)(3) (2006).

170. *See* JOHNSTON ET AL., *supra* note 27, at 5.

171. Regulatory statutes often include provisions authorizing punitive fines or penalties for a party's failure to comply with the regulation. *See* 42 U.S.C. § 6928(c)–(e).

posers of waste in a similar fashion.[172] Although the Act does not lay out explicit guidelines that parties must abide, in its effects it does just that.

Both by imposing cleanup costs on disposers whose conduct results in a release[173] and by virtue of its punitive repercussions,[174] CERCLA effectively imposes certain "guidelines" on the way in which parties dispose of hazardous waste. Although this type of "regulation" is much looser than the more typical "command-and-control" regulation,[175] it achieves a similar end: the conformation of parties' conduct to certain pre-determined objectives.[176] Therefore, although the Act may not involve the same detailed directives by which disposers must abide, it effectively regulates the conduct of those parties in ways similar to more traditional regulatory statutes, like the RCRA.[177]

In contrast, the *Pakootas* court portrayed the two statutes as the opposite sides of a coin: "RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the environment."[178] Therefore, in the court's view, it is the "Canadian equivalent of RCRA, not CERCLA, that regulates how Teck [Cominco] disposes of its waste within Canada."[179] By creating this type of bright line between RCRA's regulation and CERCLA's remediation, the court justified its finding that this application of CERCLA was purely domestic. However, such a distinction oversimplifies the relationship between the two statutes.[180] Although in most instances CERCLA "picks up where RCRA leaves off"[181] when all requirements for liability occur within the United States, the same is not necessarily true when one of the requirements for CERCLA liability occurs extraterritorially. CERCLA imposes liability on a party in part because of that party's activities, either in simply owning the facility at which the waste was disposed, or, as in this case, in arranging for the disposal of the waste. If those activities

172. CERCLA provides for civil penalties of up to $25,000 per day when the responsible party fails to comply with a UAO, *see id.* § 9609(b), and also provides for punitive damages of up to three times the amount of the costs incurred by the agency. *See id.* § 9607(c)(3). *See also* RODGERS, *supra* note 37, at 690.

173. *See* 42 U.S.C. § 9607(a)(4)(A)–(D).

174. *See supra* note 172. The deterrent effect of these repercussions controls parties' behavior; if a party fears that it may have to pay to clean up its mess, it will likely act with greater care in the future.

175. JOHNSTON ET AL., *supra* note 27, at 6.

176. *See id.* at 522–23.

177. RODGERS, *supra* note 37, at 531, 683–84.

178. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1078 (9th Cir. 2006).

179. *Id.*

180. *See, e.g.*, Brief of British Columbia, *supra* note 164, at 10.

181. RODGERS, *supra* note 37, at 684 (quoting R. Stoll, *The New RCRA Cleanup Regime: Comparisons and Contrasts with CERCLA*, 44 SW. L.J. 1299 (1991)).

took place outside of the United States, then CERCLA would be imposing liability as a result of foreign conduct, a paradigmatic instance of extraterritorial application of a domestic statute.

The Ninth Circuit undertook a convoluted analysis to show that the application of CERCLA to Teck Cominco was purely domestic.[182] No amount of complexity, however, could obscure that one of the necessary components of CERCLA liability is the determination that Teck Cominco was a "covered person." This determination necessarily turned on Teck Cominco's conduct in a foreign country. Because Teck Cominco's CERCLA liability rested in part on its conduct in Canada, and because that conduct may be effectively characterized as being "regulated" by CERCLA, the imposition of liability on Teck Cominco is an example of extraterritorial application of domestic law.

B. The Ninth Circuit's Ambiguous Position on Extraterritoriality

The Ninth Circuit's approach to the extraterritoriality doctrine is inconsistent. First, in *Timberlane Lumber Co. v. Bank of America*, the court used a version of the effects exception to conclude that the Sherman Act should apply to a foreign corporation.[183] Then, in *Subafilms, Ltd. v. MGM-Pathe Communications, Inc.*, the court altered its previous reasoning by minimizing the adverse effects question and focusing instead on congressional intent and the prevention of international discord.[184] Finally, in *Pakootas*, the court obscured the issue entirely by reasoning that the application of CERCLA to Teck Cominco is a domestic application, thus not triggering the presumption against territoriality.[185] Not only did the *Pakootas* court fail to clarify the circuit's existing case law, it also undertook flawed reasoning to reach its conclusion.

1. *Timberlane*: The Rule of Reason

In *Timberlane*, the Ninth Circuit relied in part on *Alcoa*'s effects exception to create a three-part test to determine when a domestic antitrust statute should be applied extraterritorially.[186] Although the court agreed with the Second Circuit that such laws might in some cases apply to foreign conduct, it tried to place some check on the broad extraterritorial application permitted by the *Alcoa* test.[187] This check, characterized

182. *Pakootas*, 452 F.3d at 1079.
183. 549 F.2d 597 (9th Cir. 1976).
184. 24 F.3d 1088, 1096 (9th Cir. 1994).
185. *Pakootas*, 452 F.3d at 1079.
186. *Timberlane*, 549 F.2d at 609, 613.
187. *Id.* at 609, 613–15.

by the *Timberlane* court as a "jurisdictional rule of reason," required courts to balance the interests of the forum state with those of the foreign sovereignty.[188] The rule of reason asks whether extraterritorial jurisdiction is appropriate "as a matter of international comity and fairness."[189] Thus, a court should first determine whether the foreign conduct had, or was intended to have, an effect within the United States. Next, a court should determine whether that effect was sufficiently substantial to justify the assertion of jurisdiction. Finally, a court should determine whether jurisdiction is appropriate in light of comity considerations.[190] Although it required a consideration of comity concerns, the *Timberlane* approach gave a court broad discretion to determine when extraterritorial jurisdiction is proper. The *Timberlane* rule of reason influenced the way in which other courts viewed extraterritorial jurisdiction and the inquiry required to approve it.[191]

---

188. *Id.* at 613–15. This balancing requires a court to weigh a series of factors: (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the locations or principal places of businesses or corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *Id.* at 614. In addition, a court should consider the difference between United States and foreign law or policy to determine whether they actually conflict. *Id.*

This inquiry is very similar to the inquiry laid out in the Restatement, which states that the reasonableness of extraterritorial jurisdiction may be determined by a consideration of the following factors: (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; (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; (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; (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 (h) the likelihood of conflict with regulation by another state. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

189. *Timberlane*, 549 F.2d at 615.

190. *Id.*

191. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294–98 (3d Cir. 1979); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (citing *Hartford Fire Ins.*, 509 U.S. at 817) (approving of Justice Scalia's dissent in *Hartford Fire*, which in turn relied in part on *Timberlane*).

2. *Subafilms*: A Retreat to Territoriality

Almost twenty years after *Timberlane*'s approval of the effects exception, the Ninth Circuit reversed course by minimizing the importance of adverse domestic effects and instead emphasizing the territoriality principles espoused in *Aramco*. *Subafilms* involved the domestic authorization by MGM/United Artists (MGM/UA) of the international distribution of the videocassette recording of the movie *Yellow Submarine*.[192] Because the conduct creating liability, the distribution of the video, took place outside of the United States, that conduct was not reachable by the domestically limited Copyright Act.[193]

The *Subafilms* court eschewed the effects exception as a stand-alone rebuttal to the presumption against extraterritoriality.[194] In doing so, the court rejected the plaintiffs' argument, which relied on *Environmental Defense Fund, Inc. v. Massey*, that the Act should be applied extraterritorially because of the potentially wide-ranging adverse effects on the American film industry.[195] Dismissing as mere dicta the discussion of the "effects" exception in *Massey*, the court first emphasized that the "ultimate touchstone" of extraterritoriality is congressional intent.[196] If a court cannot interpret either the legislative history or the statutory language as permitting extraterritorial application, such application is prohibited.[197] Second, extraterritorial application of the statute was inappropriate because alternative remedies existed by which no such application was necessary.[198] Finally, the court found determinative the *Massey* court's "concession" that the presumption is "particularly appropriate" when it protects against "clashes between our laws and those of other nations."[199] Accordingly, the Ninth Circuit concluded that "because an

---

192. *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1089 (9th Cir. 1994). As the original producers of the film, Subafilms, Ltd. and the Hearst Corporation sued MGM/UA, contending that the distribution of the video constituted copyright infringement under the Copyright Act. *Id.* Noting that liability under the Copyright Act arises not from the authorization for distribution but rather from the distribution itself, and that the distribution took place outside of the United States, the *Subafilms* court held that authorization alone could not trigger liability for copyright infringement under the Copyright Act. *Id.* at 1090.

193. *Id.*

194. *See id.* at 1096.

195. *Id.* at 1095. In concluding that the presumption against extraterritoriality could be overcome, the district court in *Pakootas* referenced the "adverse effects" exception articulated in *Massey*. *See* Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 257898, at *6 (E.D. Wash. Nov. 8, 2004) (quoting Envtl. Def. Fund v. Massey, 986 F.2d 528, 531(D.C. Cir. 1993)). In its discussion of *Massey*, however, the district court glossed over the negative treatment that case received in *Subafilms*. *See id.* at *8–9; *Subafilms*, 24 F.3d at 1096–97.

196. *Subafilms*, 24 F.3d at 1096.

197. *Id.* at 1095.

198. *Id.* at 1095 n.10.

199. *Id.* at 1097.

extension of the extraterritorial reach of the Copyright Act . . . would in all likelihood disrupt the international regime" of intellectual property protection, such an extension would be inappropriate.[200] Thus, although the court did not explicitly reject *Massey*'s "adverse effects" exception, it created a very high standard for rebutting the presumption.

Subafilms dealt specifically with the Copyright Act, but the case is nonetheless the best authority available for district courts in the Ninth Circuit when deciding whether the presumption may be overcome.[201] The district court in *Pakootas* sought to harmonize the effects exception from *Massey* with the comity-based approach in *Subafilms*, implicitly advocating a return to a *Timberlane*-style analysis.[202] Noting the *Subafilms* court's emphasis on the prevention of international discord, the district court concluded that the presumption must not apply because no such threat of discord was evident in *Pakootas*.[203] However, the district court failed to consider *Subafilms*' "ultimate touchstone" of extraterritoriality: whether there is evidence of congressional intent that CERCLA apply extraterritorially.[204] The court's failure to consider this factor was understandable; there is no evidence that CERCLA was intended to apply outside U.S. borders.[205]

No subsequent cases have altered the Ninth Circuit's interpretation of the effects exception.[206] Therefore, although inconsistent in some respects and decidedly ambiguous in others, the Ninth Circuit's current position seems to be that the effects exception is not a stand-alone rebuttal to the presumption against extraterritoriality.[207] Nevertheless, the *Subafilms* court left unanswered the question of when, if ever, the exception may apply.

---

200. *Id.* at 1098.

201. Although there have been more recent cases dealing with the question of extraterritoriality, *Subafilms*, as an en banc decision, is the controlling authority on the question. *See* Hart v. Massenari, 266 F.3d 1155, 1171–72 (9th Cir. 2001).

202. *See* Pakootas v. Teck Cominco Metals, Ltd., No. 04-CV-256-AAM, 2004 WL 257898, at *8–9 (E.D. Wash. Nov. 8, 2004).

203. *Id.* at *9.

204. *See id.* at *8–9; *Subafilms*, 24 F.3d at 1096.

205. *See* Nagle, *supra* note 38, at 1405.

206. Although there has been a more recent Ninth Circuit decision specifically referencing the *Massey* exception, the case does not clearly alter the Ninth Circuit's position from that evidenced in *Subafilms*; the court found explicit congressional intent for the extraterritorial application of the U.S. Bankruptcy Code, so there was no need for it to reach the question of whether the presumption could be rebutted using the adverse effects exception. *See* In re Simon, 153 F.3d 991, 995 (9th Cir. 1998). Moreover, as a panel decision, the *Simon* court had no authority to overturn the *Subafilms* decision. *See Hart*, 266 F.3d at 1171–74 (discussing the "binding authority" created by en banc proceedings).

207. *See Subafilms*, 24 F.3d at 1096–97.

IV. PROPOSALS

Despite the ambiguous law in the Ninth Circuit, the *Pakootas* court had an alternative that would have upheld *Subafilms* while still clarifying the extraterritoriality doctrine in the circuit. This alternative would have also permitted the court to lucidly analyze concerns of international comity and reciprocity. Because international tribunals are not presently viable sources of redress for injured parties, the Ninth Circuit should have adopted a narrow version of the effects exception. Although the exception is not a long-term solution, it both permits plaintiffs the chance for immediate remedy and provides incentive for the two nations to develop a workable dispute resolution system in the future.

A. Subafilms *Permitted the* Pakootas *Court to Find Extraterritoriality*

Given the ambiguous nature of its case law on the topic, the Ninth Circuit in *Pakootas* had an inviting opportunity to clarify by either explicitly embracing or rejecting the effects exception. In addition to solidifying the Ninth Circuit's stance, an unambiguous holding in this area would have helped to resolve some of the current disagreement among the circuits regarding the presumption and its various exceptions.[208] However, in light of the existing precedent in the Ninth Circuit,[209] the *Pakootas* court's holding is not surprising. By characterizing the application of CERCLA to Teck Cominco as domestic,[210] the Ninth Circuit avoided following *Subafilms* and denied the plaintiffs recovery. It also avoided a decision explicitly opposing the *Subafilms* position.

The court had a third option that would have averted either result: by distinguishing *Subafilms* and limiting that case to its facts, the Ninth Circuit could have avoided its tortured analysis of CERCLA, properly found that the application of CERCLA to Teck Cominco was extraterritorial, and used the adverse effects exception to rebut the presumption against extraterritoriality. Such an approach would have made for a clearer opinion that remained consistent with *Subafilms*.

Before incapacitating the adverse effects exception, the *Subafilms* court showed its skepticism toward the argument that there would be a "disastrous effect on the American film industry."[211] The court emphasized a number of alternative remedies available to the plaintiffs that did

---

208. *See* Envtl. Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (holding that the presumption does not apply when either effects or conduct are within the United States); *Subafilms*, 24 F.3d at 1097 (applying the presumption even where adverse effects occurred in the United States); Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991).

209. *Subafilms*, 24 F.3d 1088.

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

211. *Subafilms*, 24 F.3d at 1095.

not require the extension of the Copyright Act to extraterritorial acts.[212] Had "disastrous" effects been unavoidable, as they were in *Pakootas*,[213] the court would have probably been more accommodating of the adverse effects exception. In this vein, the *Pakootas* court, in an effort to distinguish *Subafilms*, might have limited the *Subafilms* holding to those situations in which the feared adverse effects may be remedied by some other means.

Furthermore, in *Subafilms*, the Ninth Circuit did not outrightly reject *Massey*'s effects exception; the court merely conditioned the exception upon a sufficient finding of congressional intent. Considerable case law explicitly precluded extraterritorial application of the Copyright Act, and the legislative and textual history of the Act also strongly evidenced a congressional intent for the Act to retain a solely domestic reach.[214]

The history and text of CERCLA tell a much more ambiguous story,[215] but some interpretations of the Act tend to lean in favor of extraterritorial application.[216] There is no case law specifically addressing whether CERCLA applies beyond the border of the United States, but at least one case suggests that such application would be appropriate in certain situations.[217] Although neither CERCLA's text nor its legislative history suggest that the Act was intended to apply outside of national boundaries,[218] Congress did intend to ensure adequate remediation of waste sites within United States borders.[219] The application of the Act to Teck Cominco, whose conduct occurred in Canada but caused adverse effects within the United States, is arguably consistent with this congres-

---

212. *Id.* The court noted that the plaintiffs could have sought redress through breach of contract actions or by bringing suit under foreign copyright laws. *Id.*

213. In the *Pakootas* situation, many of those adverse effects had already occurred. *See* Du Bey & Sanscrainte, *supra* note 18, at 348–50. Because of the health risks presented by Teck Cominco's dumping, it was important that the Tribes achieve a remediation agreement as soon as possible. *Id.* at 365–66.

214. *Subafilms*, 24 F.3d at 1095–96.

215. *See* Grad, *supra* note 33, at 1; Watson, *supra* note 33, at 202; Nagle, *supra* note 38, at 1409–10.

216. *See, e.g.*, Robinson-Dorn, *supra* note 26, at 298–99.

217. *See, e.g.*, United States v. Ivey, 747 F. Supp. 1235 (E.D. Mich. 1990). In *Ivey*, the plaintiff sought to recover the costs it incurred cleaning up a Michigan Superfund Site. *Id.* at 1235. The defendant corporation was owned and operated by Canadian citizens, in Canada. *Id.* The court held that Michigan's long-arm statute gave the court personal jurisdiction over the Canadian defendants. *Id.* at 1240. The Ontario Court of Appeal subsequently upheld the judgment. United States v. Ivey, [1991] 26 O.R.3d 533. It noted that "the judgments at issue . . . go no further than holding [the Canadian defendants] to account for the cost of remedying the harm their activity has caused." Parrish, *supra* note 21, at 402 (quoting *Ivey*, 26 O.R.3d at 549). However, *Ivey* is a clearer case: the defendants' harmful conduct took place within the United States.

218. *See* Nagle, *supra* note 38, at 1409–10.

219. *See, e.g.*, Watson, *supra* note 33, at 203.

sional intent.[220] Therefore, the text and history of CERCLA do not clearly preclude extraterritorial application.[221]

When this ambiguity as to congressional intent exists, the *Subafilms* holding carries less force.[222] The *Subafilms* court left room for extraterritoriality when a statute's legislative history does not preclude such application. This ambiguity prompts consideration of other factors: whether there are likely to be adverse effects felt within the United States if CERCLA were not applied extraterritorially, and whether an extraterritorial application of CERCLA would conflict with international or Canadian law. Thus, by distinguishing *Subafilms* and limiting that case to its application of the Copyright Act, the *Pakootas* court had the leeway to apply CERCLA to Teck Cominco without flying in the face of the *Subafilms* holding.

B. Concerns of Comity and Reciprocity

Although the Ninth Circuit in *Pakootas* could have concluded that the application of CERCLA to Teck Cominco was extraterritorial without disregarding *Subafilms*, the court could not ignore concerns of international comity and potential reciprocal extraterritorial application of Canadian environmental laws. As the *Subafilms* court observed, congressional intent is not the only factor for a court to consider when deciding whether a domestic statute should apply extraterritorially.[223] Equally important is the prevention of "clashes" between the laws of the United States and other countries.[224]

International comity concerns affect a court's analysis in different ways. In international choice-of-law questions, determining which country's law to apply is often made by looking first to see whether there is a "true conflict" between the laws of the two countries.[225] This determination is also pertinent to the question of whether the presumption against extraterritoriality should apply.[226] Comity considerations, however, are relevant not only when there is a conflict between domestic and foreign law, but also when differences between domestic and international policy

220. Robinson-Dorn, *supra* note 26, at 298–99.

221. *Compare id.*, *with* Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1097 (9th Cir. 1994).

222. *See Subafilms*, 24 F.3d at 1096.

223. *Id.* at 1097.

224. *Id.*

225. *See* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991); *see also* Robinson-Dorn, *supra* note 26, at 309.

226. *Aramco*, 499 U.S. at 248.

are sufficient so that international discord could result from the statute's extraterritorial application.[227]

The Ninth Circuit in *Subafilms* found this question to be "decisive in the case of the Copyright Act," fully justifying "application of the *Aramco* presumption."[228] The court concluded that, given the potential for international discord if American copyright laws were applied extraterritorially, it was "inappropriate for the courts to act in a manner that might disrupt Congress's efforts to secure a more stable intellectual property regime."[229] Similarly, whether application of CERCLA to Teck Cominco in this case would result in a clash between United States and Canadian environmental law and policy is a key consideration when determining whether the effects exception should be extended to the application of CERCLA in this case.

In *Pakootas*, the application of CERCLA to Teck Cominco does not seem to present a conflict with Canadian environmental laws. Teck Cominco's operation of the Trail Smelter is regulated under Canada's equivalent to CERCLA, the Environmental Management Act (EMA)[230] and by the Contaminated Sites Regulation.[231] The EMA was modeled after CERCLA, and notably, it permits the provincial authority to "issue a remediation order to any responsible person."[232] Moreover, under the EMA, Teck Cominco would be "absolutely, retroactively, and jointly and separately liable to any person or governmental body for reasonably incurred costs of remediation."[233]

One of the significant differences between the two laws is that, under the EMA, a valid Canadian permit to discharge waste is not a shield to liability.[234] If Teck Cominco were being sued by Canadian citizens, a permit would not protect it from liability; thus, why should it be protected when its discharge crosses the border into and causes damage in the United States? The denial of liability in such an instance creates the most destructive type of border shield.

---

227. *See* BORN & RUTLEDGE, *supra* note 5, at 672; Hoffmann-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155, 165–68 (2004) (refusing to apply a domestic statute extraterritorially when no true conflict existed but when the foreign policies regarding appropriate remedies might be very different).

228. *Subafilms*, 24 F.3d at 1097.

229. *Id.*

230. R.S.B.C., ch. 53 (2003), http://www.qp.gov.bc.ca/statreg/stat/E/03053_00. htm.

231. B.C. Reg. 375/96 (2005), http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375_96/375_96_00.htm.

232. R.S.B.C., ch. 53, §§ 41, 48.

233. *Id.* § 47(1).

234. *Compare id.* § 47(4)(a)–(b), *with* 42 U.S.C. § 9607(j) (2006).

Moreover, Canadian federal law[235] is also consistent with the application of CERCLA to Teck Cominco. The Canadian Supreme Court adopted the "polluter pays" principle and has applied it in many Canadian environmental cases.[236] There is little identifiable conflict between U.S. and Canadian law on the question of whether a polluter should fund the clean-up of its waste.[237] Thus, this lack of conflict is yet another factor in favor of overcoming the presumption in the *Pakootas* case.

In addition to comity considerations, the Ninth Circuit may have attempted to avoid potential problems of reciprocity by concluding that the application of CERCLA was domestic. Although none of these considerations was directly addressed,[238] the concern of reciprocal application of Canadian environmental laws to pollution originating in the United States is not a threat to ignore.[239] As much pollution—whether water or air—comes to Canada from the United States as flows the other way.[240] The concern of retaliatory litigation spurred numerous groups to file amicus briefs opposing the application of CERCLA in the *Pakootas* case.[241] Moreover, although Canadian courts are willing in certain in-

235. Like law in the United States, Canadian law may be either federal or provincial. *See* Brief of British Columbia, *supra* note 164, at 2. However, Canadian environmental statutes are typically provincial. *Id.* at 2, 3.

236. *See, e.g.*, Imperial Oil, Ltd. v. Quebec (Minister of Environment), [2003] 2 S.C.R. 624, 641.

237. Although no clear conflicts between the laws of the two countries emerge, British Columbia nonetheless argued in its Brief in Support of Teck Cominco's Petition for a Writ of Certiorari that application of CERCLA to Teck Cominco would "harm[] comity" by ignoring the bilateral tradition of cooperation. Brief of British Columbia, *supra* note 164, at 3, 12.

238. *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1079 (9th Cir. 2006). The *Pakootas* court did not give any international policy bases for its decision. *See id.*

239. *See* Parrish, *supra* note 21, at 409–14.

240. *See id.* at 410; David G. Lemarquand, *Preconditions to Cooperation in Canada-United States Boundary Waters*, 26 NAT. RESOURCES J. 221, 223 (1986); John E. Carroll, *Water Resources Management as an Issue in Environmental Diplomacy*, 26 NAT. RESOURCES J. 207, 213 (1986).

241. For example, upon Teck Cominco's Petition to the U.S. Supreme Court for a Writ of Certiorari, the following groups filed supporting amicus briefs: the National Mining Association, the Consumer Electronics Association, the U.S. Chamber of Commerce, and the Canadian Mining Association. *Pakootas*, 452 F.3d 1066. Furthermore, before and during the litigation of this matter at the trial level, American industries expressed concern about possible retaliatory litigation from Canadian plaintiffs. *See, e.g.*, Letter from Jack N. Gerard, President & CEO, Nat'l Mining Assoc., to Colin L. Powell, Sec'y of State, John Ashcroft, Att'y Gen., and Michael O. Leavitt, Adm'r, E.P.A. (Apr. 22, 2004), http://www.law.washington.edu/directory/docs/Robinson-Dorn/TrailSmelter/docs/22APR2004GerardofNMAtoPowelletal.pdf; Letter from Thomas R. Kuhn, President, Edison Elec. Inst., to Colin L. Powell, Sec'y of State, and Thomas L. Sansonetti, Assistant Att'y Gen. for the Envtl. & Natural Res. Div. (June 2, 2004), http://www.law.washington.edu/directory/docs/Robinson-Dorn/TrailSmelter/docs/2JUN2004KuhnofEdisionElectrictoPowelletal.pdf.

stances to enforce U.S. judgments against Canada,[242] Canada is also leery about allowing infringements on its own sovereignty.[243]

By characterizing the application of CERCLA to Teck Cominco as domestic rather than extraterritorial, the *Pakootas* court effectively cabined the threat of future extraterritorial applications of U.S. environmental law across the border. By focusing on CERCLA's specific statutory language and the narrow facts of the case, the Ninth Circuit decision created no precedent that another court could use to justify future expansions of U.S. environmental law.

The risk of reciprocity, however, is not an insubstantial specter; it would have been a valid concern for the Ninth Circuit in deciding the *Pakootas* case. This risk, then, provides at least some justification for the court's choice to characterize the application of CERCLA to Teck Cominco as domestic rather than extraterritorial. However, the risk of reciprocity should not have stopped the court from applying CERCLA extraterritorially to Teck Cominco. Even if Canadian courts were to retaliate by applying their own statutes to U.S. defendants, such reciprocal extraterritoriality might encourage both nations to work together to create an effective bilateral dispute resolution system.

C. Problems with the Existing International Dispute Resolution Paradigm

The United States and Canada share a long history of solving their transboundary pollution problem through bilateral negotiations and arbitration, but this history has not resulted in a viable dispute resolution system until today. In 1909, the two countries signed the Boundary Waters Treaty ("Treaty").[244] Although originally created to address a different but parallel concern,[245] the Treaty provides that boundary waters "shall not be polluted on either side to the injury of health or property on the other."[246] The Treaty also created the International Joint Commission

242. *See, e.g.*, United States v. Ivey, [1991] 26 O.R.3d 533.

243. Arthur T. Downey, *Extraterritorial Sanctions in the Canada/U.S. Context – A U.S. Perspective*, 24 CAN.-U.S. L.J. 215, 215 (1998). In *Ivey*, however, the Ontario Court of Appeal acknowledged that the recovery of costs by the United States for its remediation of the waste site left by the defendants did not "represent an illegitimate attempt to assert sovereignty beyond its borders." 26 O.R.3d at 549. For the general facts of *Ivey*, see *supra* note 217.

244. Treaty Relating to Boundary Waters between the United States and Canada, U.S.-Gr. Brit. (for Can.), Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

245. The Treaty's primary purpose was to "ensure the equitable sharing of boundary waters between Canada and the United States." Jennifer Woodward, *International Pollution Control: The United States and Canada: The International Joint Commission*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 325, 326 (1988) (citing the Int'l Joint Comm'n, Sixth Annual Report on Water Quality 10 (1978)).

246. Boundary Waters Treaty, *supra* note 244, art. IV, 36 Stat. at 2450. This provision represents a compromise; Canada wanted a provision prohibiting all pollution which could have trans-

(IJC), to keep a watchful eye on the boundary waters between the countries.[247] The IJC is composed of six members—three from the United States and three from Canada. The Treaty confers upon the IJC, among other things, jurisdiction to hear cases involving boundary water pollution.[248] Although the IJC has jurisdiction, its decisions are not binding; they are only advisory. Therefore, the two countries may use the decision as a starting point for negotiations and reach their own settlement.[249]

The *Pakootas* case arises from the same smelter that was the nucleus of one of the most famous cases of international arbitration: the Trail Smelter Arbitration.[250] Even today, that arbitration is the "only decision of an international court or tribunal that deals specifically, and on the merits, with transfrontier pollution."[251] Beginning in the late nineteenth century and continuing through the 1930s, the Consolidated Mining and Smelting Company (later shortened to "Cominco") produced clouds of sulfur dioxide through its lead and zinc smelting.[252] These emissions resulted in damage to farm and timberlands on both sides of the border.[253] Although the Canadian claims were quickly settled, the American claims caused more problems, eventually leading the two countries to submit hundreds of claims to the IJC.[254] After receiving millions in dollars in claims, the IJC recommended a total award of $350,000, which the United States immediately.[255] After two years of continuing discussions, the two countries decided to submit their dispute to a three-member arbitration panel.[256] Finally, in 1941, the panel used both U.S. and international law to generate a fundamental principle of transboundary pollution law:

> 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 or persons therein, when the case is of serious con-

---

boundary consequences, but the United States refused, preferring a far narrower provision. This compromise was achieved when Canada reassured the United States that the provision would be enforced only in serious cases. Woodward, *supra* note 245, at 327.

247. Boundary Waters Treaty, *supra* note 244, art. VII, 36 Stat. at 2451.

248. *Id.*, art. IX, 36 Stat. at 2452.

249. *Id.*

250. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938), *reprinted in* 35 AM. J. INT'L L. 684 (1941).

251. Hall, *supra* note 1, at 696 (quoting EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 257 (1998)).

252. *Id.* at 697; Robinson-Dorn, *supra* note 26, at 247–50.

253. Hall, *supra* note 1, at 697; Robinson-Dorn, *supra* note 26, at 246–47.

254. Robinson-Dorn, *supra* note 26, at 249.

255. *Id.* at 250.

256. *Id.* at 251.

> sequence and the injury is established by clear and convincing evidence.[257]

Applying this principle, the panel found that Canada was responsible for the actions of Trail Smelter, and required Trail Smelter to "refrain from causing any damage through fumes in the state of Washington."[258] In addition to the original $350,000 recommended by the IJC for the damage through 1932, the tribunal granted $78,000 for damage accruing from 1932 through 1937.[259] Moreover, the tribunal permitted the Trail Smelter to continue a strictly regulated operation and made provisions in the event of further damage to Washington residents.[260]

The Trail Smelter arbitration, through its application of the Boundary Waters Treaty, has served as a model for the adjudication of disputes of this type. However, for the IJC to issue a binding judgment, each nation must voluntarily submit.[261] For the United States, such a submission requires approval by the Senate.[262] In the history of the IJC, neither the United States nor Canada has ever submitted a dispute to the IJC for a binding judgment.[263] Thus, even though submission of the present dispute to the IJC would be a method of resolving the dispute by which both countries' environmental laws and interests would be considered,[264] it is unlikely that the United States would ever consent to submitting the dispute for binding arbitration. The most the parties could hope for from the IJC would be an advisory opinion.

Nonetheless, the IJC can effectively kindle negotiations between the United States and Canada. The IJC has been actively involved in another recent transboundary concern: the pollution of the Great Lakes.[265] In 1964, because of growing concern over the water quality in Lakes Erie and Ontario, the United States and Canada jointly referred the problem to the IJC.[266] After almost seven years of investigations and deliberations, the IJC reported high levels of pollutants such as phospho-

---

257. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1965 (1941) [hereinafter Trail Smelter II].

258. *Id.* at 1966.

259. Robinson-Dorn, *supra* note 26, at 252.

260. Trail Smelter II, *supra* note 257, at 1966–81.

261. Robinson-Dorn, *supra* note 26, at 252.

262. Boundary Waters Treaty, *supra* note 244, art. VII, 36 Stat. at 2451.

263. Hall, *supra* note 1, at 706.

264. *See* Parrish, *supra* note 21, at 420–21; *see also* Brief of British Columbia, *supra* note 164, at 14.

265. *See* INT'L JOINT COMM'N, U.S.-CAN., 13TH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY (2006), http://www.ijc.org/php/publications/pdf/ID1601.pdf.

266. Hall, *supra* note 1, at 711.

rus and bacteria.[267] Among its proposals were the suggestions that the two countries create programs to achieve the water quality objectives set forth by the IJC and that they enter into an agreement not only to achieve those objectives but also to take a fully cooperative approach to pollution in the Lakes generally.[268] After two more years of negotiation, the first version of the Great Lakes Water Quality Agreement (GLWQA) was signed in 1972,[269] to be replaced in coming years by several revisions.[270]

Although the GLWQA has been described as the broadest agreement "ever signed by two governments in the environmental field,"[271] its implementation has been hampered by its advisory status and its lack of enforcement provisions.[272] In a situation like the one that instigated the *Pakootas* case, the injured parties would have to be prepared to wait years for a recommendation by the IJC. Even then, previous efforts by citizens to enforce the GLWQA in court have been unsuccessful.[273] Therefore, the GLWQA has not provided an effective means of providing compensation for environmentally injured parties in the Great Lakes region.[274]

A more recent tribunal also exists to resolve transboundary environmental disputes. The North American Agreement on Environmental Cooperation[275] (NAAEC) is a trilateral agreement among the United States, Canada, and Mexico, intended to address regional environmental concerns, particularly those related to the implementation of the North American Free Trade Agreement.[276]

---

267. INT'L JOINT COMM'N, U.S.-CAN., POLLUTION OF LAKE ERIE, LAKE ONTARIO AND THE INTERNATIONAL SECTION OF THE ST. LAWRENCE RIVER 89–93 (1970), http://www.ijc.org/php/publications/pdf/ID364.pdf.

268. *Id.*

269. Hall, *supra* note 1, at 711.

270. Int'l Joint Comm'n, U.S.-Can., The Great Lakes Water Quality Agreement between the United States of America and Canada, http://www.ijc.org/en/activities/consu ltations/glwqa/guide_3.php.

271. *Id.*

272. Hall, *supra* note 1, at 712.

273. *See* Lake Erie Alliance v. U.S. Army Corps of Eng'rs, 526 F. Supp. 1063, 1077 (W.D. Pa. 1981); *see also* Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 1001 (D.C. Cir. 1996).

274. Nonetheless, the The Great Lakes Water Quality Agreement has served as an important example of the two countries working together in pursuit of a common end. The agreement provides citizens with a greater participatory role than they would otherwise have in maintaining the water quality of the Lakes, and this role ensures increased accountability of the two countries' governments to act in accordance with their responsibilities under the GLWQA. *See* Hall, *supra* note 1, at 713–14.

275. North American Agreement on Environmental Cooperation, U.S.-Mex.-Can., art. 14, Sept. 14, 1993, 32 I.L.M. 1480.

276. *See* COMM'N FOR ENVTL. COOPERATION, LOOKING TO THE FUTURE: STRATEGIC PLAN OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION 2005-2010, at 4 (2005), http://www.cec.org/files/PDF/ABOUTUS/2005-2010-Strategic-plan_en.pdf.

NAAEC, in turn, established the North American Commission on Environmental Cooperation (CEC), which was created "to facilitate effective cooperation on the conservation, protection, and enhancement of the North American environment."[277] The CEC is composed principally of three institutions: the Council (composed of cabinet-level officials from each country), the Secretariat (the administrative staff of the CEC), and the Joint Public Advisory Committee (composed of five citizens from each country, brought in to advise the CEC).[278] As a part of its functions, the CEC accepts petitions—from either governments or private parties—asserting that one of the member governments is failing to enforce its environmental laws effectively.[279]

Like other international tribunals, however, CEC's procedures are complex and time-consuming.[280] In addition, even if the CEC's Secretariat accepts the petition and agrees to issue a factual record, no legal enforcement mechanism exists.[281] This combination of intimidating procedural hurdles and limited legal muscle may account why only three citizen submissions have been made since the CEC's inception in 1993.[282] Thus, where domestic litigation remedies exist, and where timely remediation is vital, the CEC does not provide a viable option for environmentally injured citizens.

At present, no accessible mechanism exists by which private litigants can submit a claim for transboundary pollution to an international tribunal for a binding judgment. Although there is hope that this will change, no solution is immediately foreseeable. Thus, for the *Pakootas* plaintiffs, a shorter-term remedy was necessary to ensure that the envi-

---

277. *Id.*

278. *Id.* at 5.

279. Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. INT'L L. 1, 13–14 (2007); Du Bey & Sascrainte, *supra* note 18, at 363.

280. If the petition meets the requirements for a submission, the Secretariat may then choose to request a response from the accused government. Hall, *supra* note 1, at 719. In making this decision, the Secretariat considers whether domestic remedies have first been pursued. *Id.* After the accused government has replied, the Secretariat considers both the petition and the government's response before advising the Council whether a "factual record" should be prepared. *Id.* The final decision whether to pursue the matter lies with the Council, which must approve the petition by a two-thirds majority. *Id.* This majority requirement means that the petition must ultimately be approved in part by officials from the accused government. *Id.* at 719–20.

281. *See id.* at 723; Du Bey & Sanscrainte, *supra* note 18, at 363.

282. For two of these, the Secretariat ultimately refused to issue a factual record. Hall, *supra* note 1, at 720–21. The third submission was made in March of 2006 and concerned the United States' and Canada's obligations to enforce the Boundary Waters Treaty and prevent the pollution of transboundary waters in the diversion of water from Devil's Lake in North Dakota into Lake Winnipeg. *Id.*

ronmental injury to the Columbia River and Lake Roosevelt was adequately redressed.

D. The Ninth Circuit's Lost Opportunity

Although the Ninth Circuit's reluctance in *Pakootas* to deviate from *Subafilms* is understandable, a different approach would have provided the plaintiffs with the same remedy while also clarifying Ninth Circuit law on extraterritoriality. The court could have remained true to Ninth Circuit precedent while also correctly holding that the application of CERCLA to Teck Cominco was extraterritorial.[283] The court could then have used the effects exceptions to rebut the territoriality presumption. Though the effects exception is not an effective long-term solution to the problem of transboundary pollution, it is a workable short-term strategy to provide redress to injured plaintiffs while hopefully prompting nations to reconsider existing international dispute mechanisms.

1. The Ninth Circuit Should Have Adopted and Applied the Effects Exception

After concluding that application of CERCLA to Teck Cominco was extraterritorial, the Ninth Circuit would then have had to determine whether use of the effects exception was appropriate. With thorough analysis, this would have been a simple task. Under *Subafilms*, the court could have determined that the plaintiffs had no alternative remedies, that the congressional intent behind CERCLA is inconclusive, and that application of the statute would be consistent with international comity.[284] By taking this analytical route, the court would have positioned itself to adopt or reject the effects exception, thereby clarifying Ninth Circuit law.

The Ninth Circuit should have adopted the effects exception. Although Supreme Court precedent is inconsistent, recent opinions suggest that the exception still has a place in federal jurisprudence.[285] In addition, despite criticism of the effects exception,[286] there is hope that courts might craft and refine some type of "reasonableness" inquiry to constrain unwarranted assertions of extraterritorial jurisdiction.[287] The *Pakootas*

283. *See* discussion *supra* Parts III.A, IV.A.

284. *See* discussion *supra* Part III.B.2.

285. *See* discussion *supra* Part II.D.2.b.

286. *See generally* Parrish, *supra* note 107.

287. Although a *Timberlane*-style analysis might initially promote uncertainty due to its extensive weighing of factors, such a test could, over time, be refined and narrowed so that judicial goals of predictability might be furthered alongside interests of fairness.

case was an inviting opportunity for the Ninth Circuit to begin creating just such an inquiry, and the court should have taken the bait.

2. The Effects Exception Provides an Effective Short-Term Solution

The use of extraterritorial jurisdiction is not an advisable long-term strategy, but it is an effective short-term solution. The two nations presently have no viable international dispute resolution system. The willingness of the United States and Canada to avoid disputes and engage in bilateral cooperation has withered in recent years.[288] The countries have bypassed treaties and have stopped utilizing the IJC to resolve disputes.[289] Recent disputes between the two nations, including the *Pakootas* controversy, have become prolonged and contentious.[290] This decline in bilateral cooperation has been blamed to some extent on the isolationist tendencies of the U.S. federal government, reflecting not only the U.S. approach towards its relations with Canada, but also its attitude toward international law generally.[291]

This soured relationship, combined with the ineffectiveness of the relevant international tribunals, creates an unaccommodating atmosphere for injured private citizens hoping to use international dispute resolution procedures. To encourage both environmental protection and timely compensation or remediation for injured citizens, the time is ripe to use domestic litigation to effect transboundary environmental change.[292]

The use of extraterritorial jurisdiction will result in positive short-term results.[293] The application of domestic environmental law to a responsible foreign party permits the injured party relatively timely remediation, at the responsible party's expense. Such an outcome would be unattainable if the injured party were limited to international dispute resolution mechanisms such as the IJC or CEC.[294] In addition, this use of domestic environmental law provides enforceable environmental protec-

288. Parrish, *supra* note 279, at 14–15.

289. *Id.*

290. *Id.* In addition to the *Pakootas* case, other bilateral disputes have cropped up along the border. The water pollution dispute over Devil's Lake has been "nasty" and has created "political turmoil." *Id.* at 15–16. Recent disputes range from "the closing of the U.S. border to Canadian beef and the softwood lumber impasse, to U.S. allegations of lax Canadian immigration laws and security at airports and other points of entry, [and] the disputes over cross border waterways." *Id.* at 15. For a recent discussion of the softwood lumber dispute and its effect on relations between the United States and Canada, see Sarah E. Lysons, Comment, *Resolving the Softwood Lumber Dispute*, 32 SEATTLE U. L. REV. 407 (2009).

291. *Id.* at 20.

292. *See id.* at 57–63; Robinson-Dorn, *supra* note 26, at 316–17.

293. *See* Parrish, *supra* note 279, at 57; Robinson-Dorn, *supra* note 26, at 316–17.

294. *See supra* Part IV.C.

tion where such protection would otherwise be insufficient.[295] Although the United States, as the producer of much of the pollution at the U.S.–Canadian border,[296] may be loathe to risk reciprocity, private suits would nonetheless provide a tangible environmental benefit on both sides of the international border.[297]

In addition to these short-term benefits, the use of domestic litigation may result in tangible long-term benefits as well. The use of transboundary environmental litigation—by both U.S. and Canadian plaintiffs—would prompt the governments of the two countries to reconsider the value of bilateral negotiations.[298] If Canada indeed reciprocated by suing U.S. industries for their polluting, U.S. policy-makers would have a renewed incentive to seek alternative solutions to litigation.[299] Such an incentive could result in renewed bilateral negotiations and perhaps even serve to strengthen the existing international dispute resolution systems.[300] In this sense, while existing dispute resolution mechanisms plod along, making few waves, domestic litigation may act like a shock to the system and instigate considerable change.[301]

For domestic litigation of transboundary harm to have the desired effect, some common-sense principles of extraterritorial statutory application must be established. If the effects exception is adopted, it should be tempered by the requirement that courts consider issues of international comity. Vague rules and inconsistently applied statutes will result in nothing more than free-for-all litigation, with few guidelines and even fewer principles at play. Courts on both sides of the border should pay attention the other's evolving law. Efforts should be made to avoid unnecessary intrusions on the other nation's sovereignty. Above all, however, courts should keep in mind the ultimate objective: the equal protection of both nations' environments. If and when courts take these principles to heart, an international judicial dialogue can develop and help preserve the place we all call home.

V. CONCLUSION

The Ninth Circuit's decision in *Pakootas v. Teck Cominco Metals, Ltd.* stands as a symbol of what might have been. The opinion might have been one of the most important and influential transboundary pollu-

295. *See* Robinson-Dorn, *supra* note 26, at 316–17.
296. *See* discussion, *supra* Part IV.B.
297. *See* Robinson-Dorn, *supra* note 26, at 316–17.
298. *See* Parrish, *supra* note 279, at 58–59.
299. *Id.*
300. Robinson-Dorn, *supra* note 26, at 317–19.
301. *Id.*

tion cases in decades. The decision might have clarified the Ninth Circuit's position on the extraterritorial application of domestic statutes. It might even have taken a substantial step toward a wholesale renovation of existing bilateral dispute resolution mechanisms.

Instead, the Ninth Circuit Court hedged its bets. Perhaps unwilling to renounce *Subafilms*, the court obscured the issue of extraterritoriality by concluding that the application of CERCLA to Teck Cominco was merely domestic.[302] This decision failed to clarify the Ninth Circuit's case law, which might have played a vital role in the development of an international judicial dialogue on the application of environmental statutes. In future decisions in which the Ninth Circuit faces the question of extraterritoriality, the court should boldly define the circuit's position on the doctrine. Only by taking such a step will the extraterritoriality doctrine—both in the Ninth Circuit and nationwide—be clarified.

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