CROSSING BORDERS: WHEN SHOULD CERCLA BE APPLIED EXTRATERRITORIALLY?

BY

KATHERINE HAUSRATH

INTRODUCTION

Teck Cominco Metals, Inc. (“Teck Cominco”) operates a lead and zinc smelter in Trail, B.C., approximately ten miles north of the Canada–Washington State border. The smelter (“Trail Smelter”), which is the largest in North America, sits on the banks of the Columbia River. From 1896 to mid 1995 Teck Cominco dumped 13.4 million tons of heavy metals-tainted mining slag into the Columbia River. This mining waste has contaminated surface water, groundwater and sediments of the river and Lake Roosevelt, an artificial lake created by the Grand Coulee Dam in Washington State. Lake Roosevelt borders the Colville reservation. Teck Cominco has polluted the Columbia River and the river’s shore for more than 100 miles from the Canadian border. The pollution includes lead, arsenic and mercury. According to a 1981 British Columbia government estimate, Teck Cominco dumped an estimated twenty pounds of mercury a day for years.

The Colvilles Confederated Tribes (“Colvilles”) did a study comparing the total reported discharges of dissolved metals from the Trail Smelter to the Columbia from 1994 to 1997 with the pollution from U.S.companies to U.S. surface waters over the same time period. The Colvilles gathered the information on the U.S. companies from the Toxic Release Inventory. According to the report, Teck Cominco’s Trail Smelter discharged more arsenic, cadmium and lead than all U.S. companies reporting water discharges. During two of the years, the Trail Smelter’s discharges exceeded the totals for all U.S. companies for copper and zinc. The mercury
discharges from the Trail Smelter were equivalent to 40 percent, 20 percent and 57 percent of all the U.S. releases to water in 1995, 1996 and 1997 respectively.[12]

In 1999, the Colvilles petitioned the U.S. Environmental Protection Agency (the “EPA”) to list Lake Roosevelt and the upper Columbia River as a Superfund site under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”).[13] Teck Cominco tried to negotiate a settlement with the EPA in which Teck Cominco would have paid $13 million to fund studies of pollution in Lake Roosevelt.[14] Teck Cominco’s United States affiliate, Teck Cominco American Inc.[15], would have entered into the agreement with the EPA.[16] However, the Canadian company was unwilling to submit to CERCLA jurisdiction by signing a binding agreement, and negotiations broke down.[17] Because of this breakdown in negotiations, and as indicated in its original communications[18] with Teck Cominco, on December 11, 2003 the EPA issued a Unilateral Administrative Order[19] (“UAO”) to the Canadian Teck Cominco, ordering that Teck Cominco fund and engage in studies to clean up Lake Roosevelt.[20]

The Canadian government has been unwilling to work with the EPA. In 2003, the EPA requested permission to gather “background” sediment samples from lakes above the Trail Smelter, and the Canadians refused.[21] The EPA was able to obtain other samples from the Washington Department of Ecology, which had collected the samples for a less controversial study in 2001.[22] The Department of Ecology samples showed low background levels of heavy metals upstream of the Trail Smelter and high levels downstream from the Trail Smelter.[23] When the negotiations between the EPA and Teck Cominco broke down, the Canadian government as well as Teck Cominco objected to the UAO as an improper extra-territorial application of U.S. laws.[24]
Since that time, the Colvilles have filed a lawsuit against Teck Cominco, which the state of Washington has joined. The State Department has also become involved in the situation, and is attempting to negotiate a clean-up with the Canadian Embassy.

The heavy metals emitted by the Teck Cominco facility have seriously polluted Lake Roosevelt in Washington State. If a U.S. company had discharged these wastes into the Columbia River, and eventually Lake Roosevelt, it is likely that the company would be subject to clean-up costs and penalties under CERCLA. However, because Teck Cominco’s mine is just inside the Canadian border, it is unclear whether Teck Cominco is subject to CERCLA jurisdiction. Currently, this question is an open area of law.

This article intends to address the gap in the development of extraterritorial law, and advocate a test for deciding when CERCLA should be applied extraterritorially. The Colvilles should be able to succeed in a CERCLA claim against Teck Cominco. This argument can be supported in either of two ways: (1) the regulated conduct in this case is not actually extraterritorial, because it is occurring in the United States; or (2) the adverse effects felt in the United States are an exception to the presumption against the extraterritorial application of United States laws. Part I of this article will outline the history of the administrative actions, litigation, and arbitration at the Teck Cominco Trail Smelter. Part II of this article will review the case law relating to the extraterritorial application of U.S. law, and analyze the two tests courts use in deciding whether to apply a U.S. statute extraterritorially. Part III of this article will summarize the purpose and major provisions of CERCLA, as well as the relevant case law interpreting CERCLA. In Part IV, this article will analyze the relevant policy concerns, including other ways that the U.S. could resolve the case at hand, such as
arbitration and treaties, the impacts that an application of CERCLA to a foreign company could have on U.S. companies, and other examples of cross-boundary pollution. Finally, Part V will apply the relevant tests to the Teck Cominco case, and analyze whether a court should find that CERCLA applies to the case at hand.
I. THE HISTORY OF THE ADMINISTRATIVE ACTIONS, LITIGATION AND ARBITRATION

A. The History of The Trail Smelter’s Pollution

According to documents from the Canadian government, Teck Cominco spilled 6,300 pounds of mercury into the Columbia River in March of 1980. At the same time, Teck Cominco discharged fifteen tons of sulfuric acid into the air. Teck Cominco did not report the spill to authorities for five weeks and the U.S. State Department entered a diplomatic protest to Canada’s External Affairs Ministry. Teck Cominco was eventually fined $5,000, even though it could have been fined up to $1 million.

From March 1980 to October 1981, Teck Cominco accidentally discharged 4,500 gallons of ammonia, 1,471 tons of sulfuric acid, twenty-four tons of phosphate and 9.5 tons of zinc into the Columbia River, according to the B.C. environment ministry. In addition to the accidental discharges, from 1980 to 1996, average daily discharges were as high as forty pounds of arsenic, 136 pounds of cadmium, 440 pounds of lead, 16,280 pounds of zinc and nine pounds of mercury a day, according to Teck Cominco records. Despite the construction of a new smelter in 1997, Teck Cominco’s discharges still sometimes exceed Canadian permit limits for mercury and other pollutants. Teck Cominco has reported numerous spills between September 1987 and May 2001, including one spill that released 1,923 pounds of mercury. Canada charged Teck Cominco two times for the spills in 1989. Teck Cominco pled guilty and the Provincial Court fined it $30,000.

A 1993 report by the Columbia River Integrated Environmental Monitoring Program showed that metals concentrations, including mercury, were as much as forty times greater downstream of the smelter than at any other location on the Columbia River.
A Washington resident approached the EPA in the 1990s concerning mercury levels in Lake Roosevelt, but the EPA never pursued an investigation. After the Colvilles petitioned the EPA to declare Lake Roosevelt a Superfund site, the EPA did a preliminary survey in 2003. The EPA found widespread heavy metals pollution throughout the upper Columbia, including high levels of lead, mercury and zinc.

B. The EPA’s Special Notice Letter and Unilateral Administrative Order

In a special notice letter, the EPA gave Teck Cominco a choice to engage voluntarily in Remedial Investigation and Feasibility Study (“RI/FS”), which consists of research and clean-up. The RI/FS approach allows EPA to assist in settlements and cleanups at contaminated sites not listed on CERCLA’s National Priorities List (“NPL”) in a manner that is equivalent to settlements and cleanups at sites listed on the NPL. The EPA’s letter served three stated purposes. First, it acted as a formal demand for reimbursement of already incurred costs, including interest, and expected costs in response to the health and environmental concerns at the Lake Roosevelt site. Second, the letter notified Teck Cominco that a 60-day period of formal negotiations with EPA began with the sending of the letter. Finally, the letter provided general and site-specific information to Teck Cominco.

At the time that the EPA wrote the Special Notice Letter, the EPA had already engaged in a preliminary assessment and expanded site investigation of the Lake Roosevelt site. The EPA calculated the cost to be approximately $1.8 million. The EPA made a demand for payment of that amount plus interest from Teck Cominco in accordance with Section 107(a) of CERCLA.

The EPA anticipated that the special notice procedures outlined in section 122(c) of CERCLA would facilitate a settlement between Teck Cominco and EPA for this
Accordingly, the letter triggered a 60-day moratorium on some EPA response activities at the Site. During this time, EPA encouraged Teck Cominco to come up with a settlement plan whereby Teck Cominco would conduct or finance the necessary clean-up activities at the Site. The 60-day negotiation period was scheduled to end on December 10, 2003. However, EPA offered to extend the negotiation period for thirty days if Teck Cominco made a good faith offer to conduct or finance the RI/FS. Teck Cominco did not exercise this option, however, and continued to state that it was not subject to jurisdiction under CERCLA.

On December 11, 2003, the EPA issued a Unilateral Administrative Order ("UAO") to Teck Cominco Metals Ltd. The UAO directed Teck Cominco to conduct a remedial investigation and feasibility study under CERCLA with the threat of substantial fines (U.S. $27,500 per day) and treble damages (three times what the EPA may spend in response costs). Teck Cominco subsequently refused to comply with the UAO, insisting that the EPA did not have jurisdiction over it. Because Teck Cominco failed to comply with the UAO, the EPA has began its own studies of Lake Roosevelt, using money from the “Superfund.”

C. The State Department Steps In

In September, 2004, the State Department indicated in a letter to the Canadian government that the “federal government may be willing to settle for a bilateral, mediated solution to the transboundary pollution dispute.” The letter was written by Terry Breese, the director of the State Department’s Office of Canadian Affairs.

The State Department asserts that its letter and statements are not an attempt to bypass the EPA’s clean-up efforts. The letter was written after a consensus was reached between the EPA
headquarters, the Justice Department and the Department of Interior, according to State Department spokeswoman Nancy Nelson. However, a Seattle EPA official stated that the agreement bypassed the regional office and the Seattle office was ordered not to discuss the State Department response. The official said, “They softened up our letter, and we’ve been kept in the dark. This pollution occurred in the United States, and we think Teck Cominco should have to clean it up according to U.S. standards.”

The agreement between the State Department and Canada would allow the United States “reciprocal involvement,” or allow the United States to work on the Columbia River above the U.S.-Canada border. Up until now, Canada has refused to involve the EPA in any Canadian studies of pollution from the Trail Smelter to the U.S. border.

D. The Colville Confederated Tribes’ Lawsuit

The Colvilles have filed a lawsuit in federal court against Teck Cominco under the citizen suit provision of CERCLA. The Colvilles’ lawsuit requests that Teck Cominco pay fines under CERCLA of up to $27,500 a day for refusing to comply with the December 11, 2003 EPA UAO. The UAO directed Teck Cominco to complete studies of the environmental and health risks of the Lake Roosevelt pollution. If the Colvilles were to prevail, the fines would go to the EPA to clean up Lake Roosevelt.

Under CERCLA, an individual can file a citizens suit if the agency—generally the EPA—is not fulfilling its duty to pursue a cleanup. The Colvilles allege that the EPA “has neither commenced nor is diligently prosecuting a court order” to enforce its December 2003 UAO. The Colvilles oppose a bilateral diplomatic remedy for Teck Cominco pollution of Lake Roosevelt and the Columbia River.
In September, the state of Washington joined the Colvilles lawsuit as a matter of right in support of a Superfund cleanup for Lake Roosevelt. The state decided to join the lawsuit after it was “shut out of closed-door diplomatic negotiations between Canada and the White House over the transboundary pollution issue, said David Mears, senior Assistant Attorney General.”

Teck Cominco filed a motion to dismiss with the district court, which the court denied. The motion to dismiss asserted that the court does not have subject matter or personal jurisdiction, and that plaintiffs’ complaint fails to state a claim upon which relief can be granted. In particular, the defendant argues that the provisions of CERCLA cannot be applied to a Canadian corporation for actions taken by that corporation that occur within Canada.

First, the court held that the case arises under CERCLA and it thus is a federal question that confers subject matter jurisdiction on the court. Second, the court found that it had personal jurisdiction because Teck Cominco caused an intentional injury in Washington State. The facts alleged in the complaint satisfy this requirement—from approximately 1906 to mid-1995, Defendant created and released hazardous substances directly into the Columbia River. These substances then flowed into the waters of the United States where they caused ongoing impacts to the surface and ground water of the Upper Columbia River and Lake Roosevelt.

Finally, the court held that the Plaintiffs had a stated a claim upon which relief could be granted. First, the court noted that the upper Columbia River Superfund site (as opposed to the entire Columbia River, which flows over the border with Canada), including Lake Roosevelt, is entirely within the United States. CERCLA addresses the “release” of hazardous substances—including “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or
disposing into the environment . . .”[77] CERCLA defines “environment” as “waters, land, and air under the management authority of the United States, within the United States, or under the jurisdiction of the United States.”[78] The court did note that the releases in Lake Washington would not have occurred without the actions in Canada, but it is a “legal fiction” to try to separate the two.[79]

The court agreed with the Defendant that CERCLA does not clearly address the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S.[80] However, CERCLA expresses clear congressional intent to remedy “domestic conditions” within the territorial jurisdiction of the U.S.[81] This intent, along with the principle that the presumption against extra-territorial application is not followed when the failure enforce the statute would result in adverse effects within the United States, led the court to hold that CERCLA applies in this case.[82]

The district court certified the case for an immediate appeal to the Ninth Circuit because the case involved a question “as to which there is a substantial ground for difference of opinion.”[83]

II. THE EXTRATERRITORIAL APPLICATION OF U.S. LAWS

At the beginning of the nineteenth century, courts presumed that U.S. laws should not be applied extraterritorially.[84] However, since then, courts have begun to carve out exceptions to the presumption that U.S. laws should not be applied extraterritorially.

In deciding whether to apply a United States statute in another country, courts have typically distinguished between “non-market” violations (employment and environmental violations) and “market” violations (anti-trust and securities violations).[85] In a non-market case, the court will look at whether Congress has
expressly intended for the statute to be applied in another country. Almost inevitably, the congressional intent analysis results in a holding that the statute should not be applied extraterritorially. Conversely, market statutes are usually analyzed with an “effects” test, whereby the court will look at whether the alleged behavior actually impacts the United States. An application of the effects test generally results in the statute being applied extraterritorially.

In one of the first cases applying a U.S. law extraterritorially, the U.S. Supreme Court held that the United States could apply the Sherman Act and the Wilson Tariff Act against both Mexican and American corporations. The corporations had engaged in acts in the United States and Mexico that had restrained trade and increased the price of sisal. The Court held that the Sherman Act applied regardless of the fact that all of the sisal production occurred in Mexico and the conduct in question was lawful in Mexico.

A. The Congressional Intent Test

In environmental and labor cases, courts have generally held that statutes should not be applied extraterritorially absent evidence of specific congressional intent. The courts have noted that applying a U.S. statute extraterritorially can have international comity impacts, and thus Congress must clearly have intended to apply the statute in other countries.

The U.S. Supreme Court first outlined the congressional intent test in a case challenging the applicability of a U.S. employment law in Iraq and Iran. “[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” The Court held that Congress is primarily concerned with domestic issues; thus, when Congress does intend a statute to apply extraterritorially, it will clearly express this intent. Applying
the congressional intent test, the court in *Foley Brothers* held that there was no evidence that Congress intended an over-time law to be applied in another country, even though both the employee and the employer were American.

1. **Environmental Statutes**

The Nuclear Non-Proliferation Act, the National Environmental Protection Act, the Marine Mammal Protection Act, and the Resource Conservation and Recovery Act have all been held not to apply extraterritorially. All of the cases have involved American actors undertaking a course of action that has an adverse impact in another country.

The National Environmental Protection Act ("NEPA") is the only environmental statute that the courts have indicated might apply extraterritorially. On some occasions, federal agencies have voluntarily agreed to apply NEPA without arguing that NEPA does not apply extraterritorially. Additionally, the D.C. Circuit has held that NEPA applies to Antarctica. In *Massey*, the National Science Foundation was directed to comply with NEPA when deciding whether to incinerate food waste in Antarctica. The presumption against the extraterritorial application of statutes does not apply where the regulated conduct occurs primarily in the United States, and the effect of the statute will be felt in Antarctica—a continent without a sovereign over which the United States has a great deal of legislative control.

*Massey* specifically outlines three exceptions to the presumption against extraterritorial application of statutes. First, the presumption will be defeated if Congress clearly intended to apply the statute extraterritorially. Second, a statute will apply extraterritorially when the statute regulates conduct that has adverse domestic effects. Finally, the presumption does not apply when the conduct in question is located in the United States. This exception, of course, appears to be a
truism. By definition, conduct that occurs in the United States cannot be extraterritorial. Another court has held that NEPA should be applied extraterritorially to a nuclear reactor, but the court refused to issue an injunction because of the international comity implications.\[^{101}\]

However, some courts have held that NEPA does not apply to conduct by U.S. actors in other countries.\[^{102}\] NEPA also does not apply to the U.S. Army’s transportation of nerve gas from Germany to Johnston Atoll, an unincorporated United States Territory, even though the nerve gas would then be destroyed there.\[^{103}\]

The Nuclear Non-Proliferation Act has been held to not require the Nuclear Regulatory Commission to consider possible health and safety impacts associated with an exported reactor in the Philippines.\[^{104}\] Even if a statute clearly directs an agency to consider foreign environmental impacts, the court held that certain exceptions would keep the court from applying an environmental statute in another country.\[^{105}\] The exceptions listed in the case effectively encompass the effects test. The court held that it would contravene clear congressional intent\[^{106}\] to regulate conduct that occurred outside the territory of the United States and did not have, or was not intended to have, an effect within the United States, or did not involve conduct of nationals of the United States.\[^{107}\] Thus, this decision requires an environmental statute to have both clear congressional intent and either domestic impacts or U.S. citizens as parties before it may be applied extraterritorially.

The Marine Mammal Protection Act (“MMPA”) has been held not to apply to an American citizen taking dolphins with a Bahamian permit.\[^{108}\] The court came to this conclusion because there was nothing in the nature\[^{109}\] of the MMPA that compelled its application in foreign territories, and there was not clear congressional intent that the MMPA should apply extraterritorially.\[^{110}\]
The Resource Conservation and Recovery Act ("RCRA") also has been held not to apply to waste located in a foreign country. In *Amlon Metals, Inc. v. FMC Corporation*, a district court held that RCRA reflects a “domestic focus,” and thus the citizen suit provision could not be pursued extraterritorially.

In sum, nearly every court that has addressed the application of environmental statutes extraterritorially has applied a congressional intent test, and no court has allowed such an application. When applying the congressional intent test, the courts looked at whether Congress intended the statute to apply extraterritorially even in the face of possible international conflicts. In each of these cases, the conduct that the courts refused to regulate was located in another sovereign nation. Also, each case involved conduct by a U.S. actor; the fact that a U.S. actor was involved provided the only possible basis for asserting that the environmental statute applied in another country.

2. *Employment Statutes*

Similar to the environmental statutes, the courts have applied a very strict congressional intent analysis when looking at the extraterritorial application of employment statutes. The Supreme Court held that the Labor Management Relations Act of 1947 does not govern disputes between foreign-owned ships and a foreign crew under foreign articles even when the vessel is in an American port. The Court began its analysis by noting that a ship “voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country.” However, because the exercise of U.S. jurisdiction is not mandatory, Congress must have expressly intended to make the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within U.S. territorial waters. The Court found that nothing in the Act or its legislative history indicates that Congress intended to bring such disputes under the
jurisdiction of the Act. The Court also relied upon comity—in order to interfere in a contract made in another country, there must be clear congressional intent. There is no congressional intent to apply the National Labor Relations Act extraterritorially to ships owned by a foreign subsidiary of a U.S. corporation.

B. The Effects Test

In contrast to the congressional intent test applied in environmental cases, courts have generally applied an “effects” test to determine the extraterritorial application of U.S. law in securities, anti-trust, and trademark cases. To apply the effects test, the court will look at whether any part of the violations in question occurred in the United States or impacted the United States.

The effects test was first articulated in a case involving violations of the Sherman Act. The court broadly assumed without deciding that Congress intended the Sherman Act to apply outside of U.S. boundaries. However, the court held that Congress did not intend the act to apply to conduct technically covered by the act that had no actual effect in the United States.

The Sherman Act applies to “foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” The Supreme Court applied the Sherman Act to foreign insurers who engaged in actions to manipulate the U.S. insurance market. Principles of international comity did not prevent U.S. courts from retaining jurisdiction over the claims against foreign and domestic insurance defendants.

The U.S. Supreme Court continues to apply the effects test to antitrust cases. In F. Hoffmann-La Roche, the Court addressed the issue of comity. “No one denies that America's antitrust laws, when applied to foreign conduct, can
interfere with a foreign nation's ability independently to regulate its own commercial affairs.”[126] Despite this, the Court held that application of American antitrust laws to foreign anticompetitive conduct is reasonable as long as the law was intended to “redress domestic antitrust injury that foreign anticompetitive conduct has caused.”[127] The Court specifically restricted the application of the Sherman Act and the Foreign Trade Antitrust Act of 1982 to domestic harms, even if the same action also independently impacted foreign companies.[128]

The Lanham Act, which deals with trademark infringement and unfair competition, has been held to apply to acts committed in other countries.[129] The Lanham Act grants expansive jurisdictional powers to U.S. courts.[130] To fulfill the Act’s broad purpose, the Lanham Act allows civil liability for “any person who shall, in commerce,” infringe a registered trademark.[131] “Commerce” is defined broadly as “all commerce which may lawfully be regulated by Congress.”[132]

In Steele v. Bulova Watch Co., Bulova Watch Company, Inc., alleged that Steele, a U.S. citizen, violated its trademark by selling watches with the name “Bulova” that he manufactured in Mexico City.[133] The Court relied upon the Congressional intent test and the effects test[134] to find that the Lanham Act applied to the acts in Mexico.[135] “Even when most jealously read, that Act's sweeping reach into ‘all commerce which may lawfully be regulated by Congress’” shows that Congress intended the Lanham Act to be applied to a U.S. citizen outside of the U.S.[136]

Securities laws also apply extraterritorially when necessary to protect American investors.[137] Recently, the District of D.C. applied the Securities Exchange Act to actions that occurred in Belize, finding that Congress intended to apply the Securities Exchange Act extraterritorially where U.S. citizens were defrauded, even though
many of the activities occurred in Belize. Additionally, the court found that comity did not prevent the court from hearing the case.

III. AN ANALYSIS OF CERCLA

A. CERCLA’s Purpose and Major Provisions

In response to national concern regarding hazardous waste sites such as Love Canal, and the contamination of drinking water, Congress enacted CERCLA in 1980. CERCLA also is commonly known as the “Superfund Law.” CERCLA created a five-year, $1.6 billion program to address unclaimed waste sites and the release of hazardous substances. Congress believed that the “orphan” waste sites were of a limited number, and the problem would be addressed in five years. In 1986, Congress extended CERCLA for five years through the Superfund Amendments and Reauthorization Act.

CERCLA bans the discharge of a “reportable quantity” of a “hazardous substance,” onto U.S. land or navigable waters, as well as contiguous waters. CERCLA excepts “federally permitted releases,” which include discharges under the terms of a permit under the Clean Water Act, the Clean Air Act, the Marine Protection, Research and Sanctuaries Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Atomic Energy Act.

“Hazardous substances” includes substances designated pursuant to section 311(b)(2)(A) and section 307(a) of the Clean Water Act, hazardous wastes designated in section 3001 of RCRA, hazardous air pollutants listed in section 12 of the Clean Air Act, hazardous substances listed under section 7 of the Toxic Substances Control Act, and substances listed under section 9602 of CERCLA. Section 9602 is intended to include substances that may present substantial danger to the public health or welfare or the environment when released into the environment. The EPA is
allowed to pass regulations defining the reportable quantities of these hazardous substances.\textsuperscript{[149]}

Section 9603 of CERCLA requires any facility that releases a hazardous substance to immediately report it.\textsuperscript{[150]} Any person who owns or operates a facility at which hazardous substances have been stored or handled, any person who owned such property in the past, or anyone who transports hazardous waste must inform the EPA of the existence of the facility.\textsuperscript{[151]}

The EPA has extensive authority to take the actions necessary to address the release or the threat of substantial release of hazardous substances into the environment.\textsuperscript{[152]} CERCLA distinguishes between “removal,” or immediate and critical cleanup operations, and “remedial action,” which are longer term efforts to repair the damage from releases of hazardous waste.\textsuperscript{[153]}

Section 9604 of CERCLA gives the EPA a number of options for responding to a cleanup.\textsuperscript{[154]} The EPA may direct a responsible party to abate the danger through an administrative order.\textsuperscript{[155]} Or, the EPA may get a district court to order the abatement.\textsuperscript{[156]} Finally, the EPA may clean up the site itself and then sue the responsible party for the costs under section 9607.\textsuperscript{[157]} Failure to comply can subject a responsible party to considerable penalties.\textsuperscript{[158]}

The EPA has great discretion in choosing a cleanup plan. There are two limitations on the cleanup plan—the plan must be in accordance with the National Contingency Plan\textsuperscript{[159]}, and it must be “cost-effective.”\textsuperscript{[160]} CERCLA expressly prohibits pre-enforcement judicial review of response and remedial actions.\textsuperscript{[161]}

CERCLA has two provisions that apply to foreign parties—sections 9611(l) and 9607(a).

CERCLA provides foreign claimants with the right to recover under CERCLA, as long as they follow certain steps. Section 9611(l) provides:

To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if--

(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;

(2) the claimant is not otherwise compensated for his loss;

(3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 et seq.); and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.

Thus, a foreign plaintiff can recover under CERCLA if five factors are met. First, the release must have occurred in the navigable waters of the foreign country, or in the territorial sea or shoreline of a foreign country. Second, the plaintiff must be a citizen of the same foreign country as where the release occurred. Third, the claimant must not receive some other compensation for the harm caused by the release. Fourth, the release must have occurred from a facility or vessel, or from activities conducted under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974. Finally, the foreign country must provide a comparable remedy for U.S. citizens.

2. **CERCLA, 42 U.S.C. § 9607(a) (2000).**

CERCLA does not limit liability under CERCLA to U.S. citizens.
Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—(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 ... arranged for disposal or treatment ..., and (4) any person who accepts or accepted any hazardous substances for transport ...”

Although this section does not specifically mention foreign citizens or corporations, it also does not specifically limit liability to U.S. citizens. The only potentially responsible parties who are exempted from liability are those who can prove that the release was caused by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant; and (4) any combination of the foregoing paragraphs.[162]

The definition of “owner or operator” does not include any reference to U.S. citizens or corporations.[163] Elsewhere in CERCLA, Congress specifically referred to U.S. citizens and foreign citizens.[164] When analyzing a statute, it is to be assumed that Congress knowingly omitted certain descriptions if those words occur elsewhere in the statute. Thus, reading this section in conjunction with the other section, it is clear that Congress did not intend to limit liability to U.S. citizens or corporations.

B. A Case Analyzing the Applicability of CERCLA

In *Arc Ecology v. United States Department of the Air Force*, a court held that CERCLA did not apply to former military bases in the Philippines.[165] CERCLA specifically lists conditions that must be fulfilled in order for a foreign claimant to assert a claim under CERCLA.[166] Because the plaintiffs could not prove that the Philippines provides a comparable remedy for U.S. claimants, as required by section 9611(l)—and did not attempt to rely on it—the court held that CERCLA could not be applied to the military bases.[167]
The court noted that Congress did not intend CERCLA to be applied extraterritorially except in very limited circumstances.\footnote{168} However, the court specifically distinguished between the case at issue and the Teck Cominco case. “In situations where a hazardous substance, pollutant or contaminant is released or threatened to be released into the U.S. from a bordering country, such as Mexico or Canada, [the] EPA could respond under CERCLA to such releases or threatened releases into the United States.”\footnote{169} Although this statement appears in dicta, it lends support to the district court’s denial of Teck Cominco’s motion to dismiss.

IV. Policy Implications

A. The United States and Canada Have a History of Resolving Transboundary Pollution Disputes at the National Level

A court might find that it is more appropriate for the United States and Canada to settle the dispute over the water pollution without resorting to CERCLA. Canada and the United States have a fairly long-standing tradition of addressing transboundary pollution at the international level. In the 1938 Trail Smelter case (involving the same smelter as this case), a specially appointed arbitral tribunal held Canada liable for property damages in the United States caused by a privately owned smelting plant in British Columbia.\footnote{170} The zinc and lead smelting plant in this case emitted up to ten thousand tons per month of sulfur dioxide. These emissions caused substantial harm to forests and farmland in northern Washington State between 1925 and 1937.\footnote{171} The tribunal ordered the Trail Smelter to refrain from causing any future pollution and required Canada to fine the company twenty million dollars.\footnote{172}

More recently, Canada relied upon the Trail Smelter arbitration to request that the United States clean up oil that had leaked onto Canadian shores.\footnote{173} In 1972, a Liberian tanker leaked 12,000 gallons of crude oil into the sea while unloading at the Atlantic Richfield refinery in Cherry Point, Washington.\footnote{174} The oil eventually
contaminated beaches in British Columbia. The Canadian Secretary of State for External Affairs noted that Canada wanted to observe the principle established in the 1938 Trail Smelter arbitration between Canada and the United States. The principle states that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another, and such country shall be responsible to pay compensation for any injury suffered in violation of this principle.  

Canada assumed liability for damage from transnational pollution due to exploratory drilling in the Beaufort Sea in 1976 and 1977. A Canadian corporation requested authorization from the Canadian Government to begin offshore oil and gas operations. Alaskans became concerned about the availability of funds to compensate non-Canadian pollution victims. Eventually, Canada required the corporation to post a bond for compensation to pollution victims, and the Canadian government agreed to guarantee the availability of the bond. 

Because of these several instances of cooperation between the United States and Canada, a court might be hesitant to extend a CERCLA claim to a Canadian corporation. This issue will be discussed more fully below.
B. Reactions from U.S. Companies

If the United States is able to successfully enforce U.S. environmental laws against companies polluting from another country, other countries might be able to enforce their environmental laws against U.S. companies. The National Mining Association sent a letter to former Secretary of State Colin Powell, former Attorney General John Ashcroft and EPA Administrator Leavitt protesting the EPA’s enforcement attempt. The letter stated that the EPA’s UAO to Teck Cominco is ‘unwise’ because it could result in retaliatory action by other nations. “The impact on our domestic operations could be potentially devastating if we now had to defend against allegations that our facilities’ actions ... have violated Canadian or Mexican laws.” The Edison Electric Institute, a representative of U.S. private utilities, also sent a letter urging the administration to avoid enforcing CERCLA against Teck Cominco. The institute represents utilities that discharge airborne pollutants into Canada. The institute also referred to Canadian retaliation. These arguments will be addressed more fully below in the Policy section.

C. Current Examples of Cross-boundary Pollution

This is not simply an academic issue. Currently, Alaskan commercial fishermen and Canadian Native Americans/First Nations are concerned about a proposal to reopen the Tulsequah Chief mining complex by a Vancouver company across the border from Juneau, Alaska. The opponents to the opening are worried that mining waste could impact fisheries and that access roads will disturb wild lands. Recently, there was an auction to sell drilling rights for coal-bed methane gas in the Flathead River Basin, which is across the border from Montana. The expected pollution from the drilling has provoked protests downstream. Additionally, Canada has stated that the proposed water diversion from flooded Devil’s Lake in North Dakota could pollute rivers that feed Manitoba’s Lake Winnipeg.
V. AN APPLICATION TO THE LAKE ROOSEVELT CASE

Applying the law to the Lake Roosevelt case, the congressional intent test would be unlikely to result in an application of CERCLA to the present case. However, it is likely that a court would find that the regulated conduct is located in the United States, or that the Lake Roosevelt case falls into the adverse effects exception to the presumption against extraterritorial application of U.S. laws. Therefore, jurisdiction over Teck Cominco would be permissible under CERCLA.

A. Congress clearly intended CERCLA to apply extraterritorially in certain, specific circumstances

If a court were to apply the congressional intent test to this case, it would be unlikely to succeed, although CERCLA can apply extraterritorially in certain cases. Congress clearly intended CERCLA to apply extraterritorially to hazardous pollutants in other countries, if the claimant meets the very specific steps outlined in section 9611(l). Section 9611(l) provides that a foreign plaintiff may recover for the discharge of a hazardous pollutant in the territorial sea, navigable waters or adjacent shoreline of a foreign country.\[186\] However, the claimant must be a resident of the country in which the pollutants were spilled.\[187\] Additionally, the hazardous substance must have been released from a facility located adjacent to the navigable waters.\[188\] CERCLA distinguishes between on and offshore facilities.\[189\] CERCLA defines an “offshore facility” as a facility “located in, on, or under, any of the navigable waters of the United States” and subject to U.S. jurisdiction.\[190\]

Section 9611(l) does not apply to this case, because the claimants are the Colvilles and not a Canadian (or some other foreign) citizen. Additionally, the hazardous discharge did not occur in the territorial sea, navigable waters or adjacent shoreline of a foreign country. The release at issue is the hazardous waste in the United States. Finally, the release did not occur from a facility located in the navigable
waters of the United States. Therefore, Congress did not intend section 9611(l) to apply to this type of case. Because the congressional intent test does not allow for the application of CERCLA in this case, the conduct must actually occur in the United States, or the adverse effects exception must apply in order to enforce CERCLA.

B. The conduct at issue in the Lake Roosevelt case is not actually extraterritorial

In the case at hand, the conduct being regulated is arguably occurring in the United States. CERCLA prohibits all releases of a reportable quantity of a hazardous substance into the environment, unless an exception is made in the statute. However, environment is defined as U.S. navigable and ocean waters, and “any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.” Therefore, CERCLA’s prohibition on releases contains two essential parts. It prohibits releases of a hazardous substance, as long as these releases occur onto U.S. land or navigable waters. The definition of environment is particularly critical to this analysis—it is clear that Congress only intended CERCLA to apply to releases on domestic soil, unless the claimant can recover under section 9611(l).

Additionally, CERCLA is a remedial statute—the fines levied upon a polluting facility are used to address the “injury or loss of natural resources” from the hazardous pollutants. The structure of CERCLA makes it very clear that the purpose of CERCLA is to clean up hazardous waste sites. CERCLA regulates the hazardous waste site itself, not the prior actions that led to the hazardous waste site. Although Teck Cominco’s prior actions at the Trail Smelter created its liability under CERCLA, CERCLA would not even apply if the pollutants had not crossed the border into the United States.
If the Colvilles are successful in their lawsuit, the fines that they recover will go to clean up the Lake Roosevelt Superfund site. The suit will have no effect upon any future releases from the Trail Smelter; it will simply address the pollutants that have already accumulated in the United States. All of these factors together lead to the conclusion that the complained-of conduct (the Lake Roosevelt Superfund site) in this case is actually occurring in the United States.

An analysis of CERCLA supports the proposition that Congress intended CERCLA to apply to nearly all hazardous waste sites in the United States. First, section 9607(a) of CERCLA does not limit the enforcement of CERCLA to U.S. companies or citizens. Because section 9607 does not limit the people liable under CERCLA to U.S. citizens, any foreign corporation doing business in the United States is clearly responsible for a release under CERCLA. Thus, if the conduct that leads to liability is not the actual Superfund site, then CERCLA would be applied with the absurd result that Teck Cominco presently would not be liable for cleaning up Lake Roosevelt, but if the Trail Smelter were located ten miles farther south (and thus inside the U.S.) Teck Cominco would be liable for the clean up. When the problem that the statute addresses is exactly the same in both cases—the hazardous waste in Lake Roosevelt, and the party is foreign in both cases, the courts should not apply CERCLA in a manner that creates such an arbitrary distinction.

Second, the legislative history of CERCLA demonstrates that Congress saw orphaned hazardous waste sites in the United States as a serious problem. The case at hand clearly falls into the “domestic focus” of CERCLA, because the site to be remediated is actually located in the United States.

Third, Congress made very few exceptions to the applicability of CERCLA; these exceptions include “federally permitted releases,” and acts of god or war, or a third
The fact that so few hazardous pollutants and so few parties are outside of the reach of CERCLA reveals a congressional intent to apply CERCLA to nearly all hazardous discharges in the United States.

Finally, Congress gave the EPA vast enforcement powers under CERCLA. The EPA may issue a uniform administrative order for abatement, have a district court order abatement, or clean up the site itself and then sue the responsible party for the costs under section 9607. The EPA even has discretion in choosing a cleanup plan. All of these powers show that Congress intended the EPA to have great enforcement authority. The vast authority granted to the EPA shows that Congress not only intended CERCLA to apply very broadly to all domestic discharges, but it also wanted to ensure that CERCLA was strictly enforced.

The above analysis of CERCLA proves that Congress clearly intended CERCLA to apply to nearly all domestic impacts. However, even if a court were to find that the conduct leading to liability under CERCLA is not actually located in the United States, Teck Cominco’s actions have still had an adverse effect in the United States.

C. The Lake Roosevelt case falls under the adverse effects exception

The district court in Pakootas correctly applied the adverse effects test—similar to the securities, anti-trust, and trademark cases, the Teck Cominco case involves an extraterritorial action that has a domestic impact. In the market regulation cases, the adverse effect was mainly economic, while in the case at hand, the release of the waste had an adverse economic effect—through the cost of the clean-up—as well as an effect on the health of U.S. citizens and the U.S. environment.

Because the adverse effect of Teck Cominco’s actions include public health and environmental impacts as well as economic impacts, the United States has an even
greater interest in regulating Teck Cominco under CERCLA than in the Securities, Sherman Act and Lanham Act cases. The U.S has an interest in controlling its domestic resources, as does any sovereign. This inherent control that the U.S. exercises over its domestic resources gives even stronger weight to a claim that CERCLA applies to the case at hand.

Teck Cominco’s actions have released vast quantities of pollutants in the U.S. environment. Over a hundred-year period, Teck Cominco dumped 13.4 million tons of heavy metals-tainted sediment into the Columbia River. The pollution includes lead, arsenic and mercury. The mining waste has contaminated surface water, groundwater and sediments of more than 100 miles of the Columbia River as well as Lake Roosevelt in Washington State.

The economic costs of this pollution are hard to calculate at this time. However, the EPA rejected an attempt by Teck Cominco to pay $13 million. This rejection of the offer appears to imply that the costs will be much more than $13 million. Additionally, as of two years ago, the EPA had spent $1.8 million just on a preliminary site investigation of the Lake Roosevelt site.

The Washington State Department of Health has stated that slag-covered beaches on Lake Roosevelt pose a health risk. Despite this risk, more than a million people visit Lake Roosevelt annually. Studies of fish and sediments in Lake Roosevelt have revealed high levels of arsenic, mercury, cadmium, copper, lead, zinc, dioxins, and PCBs. Fish consumption warnings have been issued for Lake Roosevelt because of the high levels of mercury in the fish.

The health and environmental costs of heavy metal pollutants are untold and hard to calculate. A study by the National Institute of Environmental Health Sciences has
estimated the cost of mental retardation from mercury to be approximately $8.7 billion per year for the whole country. The loss of intelligence from mercury toxicity causes diminished economic productivity throughout an affected person’s lifetime. It is impossible to extrapolate from this study the cost of the Teck Cominco pollution, but it is clear that mercury pollution has a significant health and economic effect.

In addition to brain damage, exposure to heavy metals can cause kidney damage, heart disease, behavioral disorders, blindness, and deafness. Children and fetuses are particularly sensitive to heavy metals. Because of these many economic, public health, and environmental costs, a court should apply CERCLA to Teck Cominco.

D. Policy arguments should not be used to frustrate the purpose of CERCLA

Although it is true that the United States and Canada have had a history of resolving cross-boundary pollution disputes without using domestic laws, this history should not be used to absolve Teck Cominco of responsibility for cleaning up Lake Roosevelt. These instances of cooperation do lend support to the notion that the Lake Roosevelt case should be resolved through arbitration between the United States and Canada. However, this policy consideration cannot override the clear intent of Congress in enacting CERCLA. When Congress formulated CERCLA as a strict liability statute in 1980, it intended to clean up domestic hazardous waste sites, no matter what the cost to the liable parties. The vast reach of CERCLA demonstrates this congressional intent. Almost everyone who ever engaged in business involving the hazardous waste is potentially liable for clean up costs. Congress did not intend to exempt hazardous wastes where the liable party happens to be located in another country.

For similar reasons, the concerns of U.S. companies should not be used to hinder a remediation and determination of liability under CERCLA. Any company, no matter where the company is located, should be similarly liable for similar conduct under CERCLA. CERCLA’s
policy is very simply—all hazardous wastes sites in the United States come under the purview of CERCLA. For the above reasons, the congressional intent of CERCLA outweighs any policy considerations in favor of withholding jurisdiction.

CONCLUSION

Courts have traditionally been unwilling to apply environmental statutes in other countries. They have required a strong showing that Congress intended the statute to apply in other countries, and no environmental statute has been able to withstand this scrutiny. If the courts were to apply a strict congressional intent test to CERCLA, it would be unlikely to succeed, because the specific standards laid out in CERCLA for recovery by a foreign claimant do not apply here. However, Congress did intend CERCLA to apply stringently to domestic hazardous waste, whether or not the waste originated in another country. Arguably, the conduct that would be regulated by CERCLA actually exists in the United States, because CERCLA is aimed at cleaning up domestic hazardous waste sites.

However, even if the regulated conduct does not clearly occur in the United States, the Trail Smelter has undoubtedly had an adverse domestic impact. The district court in Pakootas correctly denied Teck Cominco’s motion to dismiss the Colville’s CERCLA citizen suit lawsuit. The court properly found that the adverse effects of the Trail Smelter pollution overrode the presumption against extraterritorial application of U.S. statutes. Future courts should similarly apply CERCLA to foreign actors where the foreign actor is responsible for a Superfund site in the United States.

Karen Dorn Steele, State joins pollution lawsuit; Colville Tribes target mining firm's discharges, SPOKANE SPOKESMAN-REV., Sept. 1, 2004, at B1 [hereinafter Sept. 1 Steele Article].

Karen Dorn Steele, B.C. smelter dumped tons of mercury; Records show scope of river pollution, SPOKANE SPOKESMAN-REV., June 20, 2004, at A1 [hereinafter June 20 Steele Article].

van Rensburg, supra note 1.

van Rensburg, supra note 1.


June 20 Steele Article.

The Toxics Release Inventory is a publicly available EPA database that contains information on toxic chemical releases and other waste management activities. This information is reported annually by certain industry groups and federal facilities. The Toxic Release Inventory was created by the Emergency Planning and Community Right-to-Know Act of 1986 and added to by the Pollution Prevention Act of 1990. EPA, Toxic Release Inventory Program, at http://www.epa.gov/tri/ (Mar. 7, 2005).

June 20 Steele Article.

June 20 Steele Article.

June 20 Steele Article.

van Rensburg, supra note 1.

van Rensburg, supra note 1.

Teck Cominco is headquartered in Vancouver, B.C. but has U.S. subsidiaries in Alaska and Washington state. Sept. 1 Steele Article. See supra note 74 for an explanation of the personal jurisdiction issues.

van Rensburg, supra note 1.

van Rensburg, supra note 1.

See infra note 50.

A Unilateral Administrative Order is an order that the EPA can issue if a potentially responsible party does not agree to clean up a hazardous waste site. The UAO can require a party to undertake removal and remedial activities. EPA, Superfund Unilateral Orders, at http://www.epa.gov/compliance/cleanup/superfund/orders.html (Mar. 21, 2005).

van Rensburg, supra note 1.

Karen Dorn Steele, Pollution dispute may be mediated; State Department wades into Teck Cominco issue, SPOKANE SPOKESMAN-REV., Sept. 24, 2004, at B3, available at LEXIS, News Library [hereinafter Sept. 24 Steele Article].

The NPL is a list created by the EPA that identifies known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States that warrant further investigation and cleanup. EPA, National Priorities List, at http://www.epa.gov/superfund/sites/npl/ (Nov. 17, 2004).
The EPA defined a good faith offer as a written offer that contained the following:

“A statement of your willingness to conduct or finance the RI/FS which is consistent with EPA’s Statement of Work and Consent Order and provides a sufficient basis for further negotiations; A paragraph-by-paragraph response to EPA’s Statement of Work and Consent Order; Demonstration of your technical capability to carry out the RI/FS, including the identification of the firm(s) that may actually conduct the work or a description of the process you will use to select the firm(s); A detailed description of the work plan identifying how you intend to proceed with the work; A statement of your willingness to reimburse EPA for costs incurred in overseeing your implementation of the remedial action; A demonstration of your capability to finance the RI/FS; and The name, address, and phone number of the party who will represent you in negotiations.”  Special Notice Letter at 2-3.


July 22 Steele Article.  The “Superfund” is a program to address releases of hazardous substances, pollutants, and contaminants, and hazardous waste sites for which no responsible owner can be found.  MATTHEW BENDER & COMPANY, INC., TREATISE ON ENVIRONMENTAL LAW, § 4A.02 (2002).

The official asked not to be identified out of fear of retaliation.  Sept. 24 Steele Article.

Karen Dorn Steele, Indians invoke Superfund in bid to get Canadian firm to clean up Roosevelt, SPOKANE SPOKESMAN-REV., July 22, 2004, at A1 [hereinafter July 22 Steele Article].

July 22 Steele Article.
When deciding a motion to dismiss, a claim that a right exists under federal law satisfies subject matter jurisdiction unless the claim is "insubstantial or frivolous." A substantial claim that a federal law creates a remedy is enough for jurisdiction. The court noted that a holding that a federal statute does not provide a remedy should result in a dismissal on the merits rather than for want of jurisdiction. (citing ARC Ecology v. U.S. Dep't of the Air Force, 294 F. Supp. 2d 1152, 1156 (N.D. Cal. 2003)).

The court relied upon the fact that Teck Cominco, a non-resident, had intentionally caused injuries within Washington State. When a non-resident intentionally causes injury within a forum, local jurisdiction is presumptively reasonable, and defendant must “reasonably anticipate” being haled into court in the forum state. (citing Calder v. Jones, 465 U.S. 783, 790 (1984)). Personal jurisdiction is established when the defendant engaged in: "(1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered in the forum state.” (citing Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1994)). Finally, the court noted that the “express aiming” prong is established when a complaint alleges that the defendant engaged in ‘wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.’ (quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)).

A dismissal under Rule 12(b)(6) is proper where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from such allegations. Mendocino Environmental Center v. Mendocino County, 14 F.3d 457, 460 (9th Cir. 1994). The sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; the facts alleged must be accepted as true for purposes of the motion. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).
Id. at *28.

Id. at *54 (citing 28 U.S.C. § 1292(b)).

See, e.g., Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (holding that the Sherman Act could not be applied to actions that occurred in Costa Rica).


Id.

Id.


Id. at 273.


See, e.g., Equal Employment Opportunity Com’n. v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (noting that the congressional intent test “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”).

Foley Bros., 336 U.S. at 285.

Id.

See Nat’l Org. for Reform of Marijuana Laws (NORML) v. United States Dep’t of State, 452 F. Supp. 1226 (D.D.C. 1978) (assuming without deciding that NEPA was fully applicable to a Mexican herbicide spraying program because of the federal agencies’ willingness to prepare an EIS).

Environmental Defense Fund Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993)

Id. at 529.

Id. at 531.

Id.

Id.

Hirt v. Richardson, 127 F. Supp. 2d 833, 844, 849 (D. Mich., 1999). The project at issue involved a plan to dispose of spent nuclear fuel from Russia and the U.S. by using it to fuel an experimental reactor located in Canada. Id. at 837. NEPA mandates an Environmental Assessment for “major federal actions significantly affecting the quality of the human environment….” 42 U.S.C. § 4332(2)(C). The U.S. federal government controlled the Russian shipments of spent fuel, paid for the Russian shipment, the Russian shipment would have passed within a mile of the U.S. border, and the Russian shipment was part of an overall U.S. project. Hirt, 127 F. Supp. 2d at 837. Thus, the court denied the motion to dismiss, because the Environmental Assessment did not
analyze the Russian treatment of the spent fuel, nor the Russian shipment of the fuel. *Id.* Despite this decision, the court refused to issue a preliminary injunction. Because the issuance of an injunction is discretionary, in cases involving an intrusion into foreign affairs an injunction should only be granted with an exceptionally high amount of proof. *Id.* at 849.

[102] The District of D.C. held that the Department of Defense did not need to conduct an Environmental Impact Statement regarding the environmental effect of military bases in Japan. *NEPA Coalition v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993). The court relied upon the fact that long-standing treaties govern Department of Defense operations in Japan. If the court were to require the Department of Defense to prepare an EIS, it might intrude upon this long-standing treaty relationship. *Id.* The court stated that the plaintiffs were unable to show that Congress intended NEPA to apply in situations where there is a substantial likelihood that treaty relations will be affected. *Id.* at 468 (citing *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1366-67 (D.C. Cir. 1980))

[103] *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D.C. Haw. 1990). The court articulated three reasons for its decision: (1) the President and the German Chancellor mutually decided to transport and destroy the nerve gas; (2) it would interfere with foreign sovereignty to extend NEPA to cover environmental damage in other countries; and (3) application of NEPA would interfere with the President’s foreign policy power. *Id.* However, the court did note that an exception could be made if the U.S. agency’s action had environmental impacts within the U.S. or if Germany had not completed an environmental assessment. *Id.*


[105] *Id.*

[106] In deciding that Congress did not intend the Nuclear Non-Proliferation Act to apply in other countries, the court relied upon the impact the decision would have on foreign sovereignty. *Id.* at 1361. If the United States were to conduct an environmental review of a proposed nuclear reactor, it could create the impression that the Philippines was not competent to conduct the environmental review itself. *Id.* Because the overall purpose of the statute is to promote cooperation and non-proliferation, unilaterally imposing environmental regulations upon other countries might cut against this policy. *Id.*

[107] *Id.* at 1357.


[109] The court held that the MMPA is premised upon the theory that a sovereign has control over the natural resources within its territory; therefore, Congress likely did not intend it to be applied in another country. *Id.* at 1003.

[110] *Id.* at 1002-1003.


[113] *Id.* at 142.

[114] *Id.* at 142.

[115] *Id.* at 142.

[116] *Id.* at 142.
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19 (1963). The National Labor Relations Board (“NLRB”) cannot order union elections on a vessel owned by a U.S. corporation. Id. at 19. The vessels in question regularly sailed between United States and foreign ports to transport the corporation’s products and other supplies. Id. at 12. However, each of the vessels was owned by a foreign subsidiary of the American corporation, flew a foreign flag, had a foreign crew, and maintained other contact with the nation of its flag. The NLRB concluded that United Fruit (the U.S. corporation) actually operated a unified maritime operation that included the foreign vessels. Id. at 14. Accordingly, the “substantial United States contacts” outweighed the numerous foreign contacts present. Id. at 15. The foreign vessels were engaged in ‘commerce’ within the meaning of section 2(6) of the Act and the maritime operations ‘affected commerce’ under section 2(7).[117] The statute defined the definition of “commerce” and “affecting commerce” very broadly. Despite the broad definition of commerce, the Court held that there must be other specific evidence of congressional intent to apply the National Labor Relations Act extraterritorially. Id. at 18.

United States v. Aluminum Co. of Am., 148 F.2d 443 (2d Cir. 1945).

Id.

Id. (emphasis added).

The Sherman Act makes every “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, to be illegal.” 15 U.S.C. § 1.


Id. at 770.


Id. at *17-18.

Id. (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 443-444 (2d Cir. 1945)).

Id. at *8.


Steele, 344 U.S. at 283. The statute’s intent is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations. Id. at 284 (citing 15 U. S. C. § 1127).

Id.

Id.

Id.
The Court found that the effect of Steele’s actions extended into the United States. Steele “bought component parts of his wares in the United States, and spurious “Bulovas” filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company’s trade reputation in markets cultivated by advertising here as well as abroad.” Id. at 286.

Steele, 344 U.S. at 287.

Id.

See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).


Love Canal was an infamous 15-acre former chemical waste dump over which a school and a neighborhood were built in Niagara Falls, New York. Love Canal’s notoriety led to dramatic interest in environmental concerns worldwide. Ecunemical Task Force of the Niagara Frontier, Background on the Love Canal, Love Canal Collection, at http://ublib.buffalo.edu/libraries/projects/lovecanal/background_lovecanal.html (Oct. 17, 2001).

MATTHEW BENDER & COMPANY, INC., TREATISE ON ENVIRONMENTAL LAW, § 4A.02 (2002).

Id.

Id.

Id.

Id.


42 U.S.C. § 9601(10).


MATTHEW BENDER & COMPANY, INC., TREATISE ON ENVIRONMENTAL LAW, § 4A.02 (2002).

MATTHEW BENDER & COMPANY, INC., TREATISE ON ENVIRONMENTAL LAW, § 4A.02 (2002).

42 U.S.C. 9603.

42 U.S.C. § 9603. This section requires a facility to retain records for fifty years. The destruction of these records is punishable by a fine or imprisonment of three to five years. The EPA may require the retention of these records for more than fifty years.


A potentially responsible party does not know the full amount of its liability prior to the determination of an EPA liability claim under section 107. Generally, EPA negotiates penalties with potentially responsible parties in advance. This is an effort to create a satisfactory cleanup agreement likely to be incorporated in a consent decree. If the EPA rejects the party's cleanup proposal, the responsible party is faced with the possibility of EPA cleanup activities that may result in substantial EPA expenditures for which it may ultimately be sued for under section 107.48.

The National Contingency Plan consists of several hundred pages that define responses and remedial activities under CERCLA. 42 U.S.C. § 9605.


Id. at 1158 (citing 42 U.S.C. § 9611(l) (2000)).

Arc Ecology, 294 F. Supp. 2d at 1158.


Id. at 454.


Id.
Karen Dorn Steele, Plans differ for fixing pollution from Canada; Industry groups fear retaliatory pollution accusations, SPOKANE SPOKESMAN-REV., June 20, 2004, at A8.

Id.

Id.

Id.

Id.


Id.


Id.

Id. The release could also be from a “vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974,” but none of these sections apply to the case at hand. 42 U.S.C. 9601.

Id.

Id.


42 U.S.C. §§ 9601, 9607.


Karen Dorn Steele, B.C. smelter dumped tons of mercury; Records show scope of river pollution, SPOKANE SPOKESMAN-REV., June 20, 2004, at A1 [hereinafter June 20 Steele Article].

Special Notice Letter at 3.


Id.


Id.

Id.