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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

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INTRODUCTION

Congress has the authority to enact laws beyond the territorial boundaries of the United States.[1] However, whether Congress intended to exercise extraterritorial authority in a given statute is a matter for the courts to ascertain through statutory interpretation.[2] When considering the reach of federal legislation, courts are guided by a presumption against extraterritoriality. This presumption guards against the extraterritorial application of U.S. laws, unless one of three narrow exceptions is met. The application of this presumption by courts in cases addressing the extraterritorial application of U.S. statutes has yielded inconsistent outcomes. This inconsistency is evident both in cases before and after the Supreme Court's landmark 1991 decision in *Equal Employment Opportunity Commission v. Arabian American Oil Co.* ("*Aramco*").[3] Cases involving the extraterritorial application of environmental statutes are not immune from this inconsistency.

Two significant cases pending in 2006 offer an opportunity to

1. *See* U.S. CONST. art. I, § 8, cl. 3 (The Constitution grants Congress broad powers "to regulate Commerce with foreign Nations").

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

3. 499 U.S. 244 (1991).

clarify under what circumstances the extraterritorial application of U.S. environmental statutes is appropriate. The first, *Pakootas v. Teck Cominco Metals, Ltd.*,[4] involves the extraterritorial application of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[5] The second, *Friends of the Earth, Inc. v. Watson*,[6] concerns the extraterritorial application of the National Environmental Policy Act (NEPA).[7]

These two cases should be seen as representing different points along the continuum of territories, a concept first identified in *Environmental Defense Fund, Inc. v. Massey*.[8] The court in *Massey* used the concept of a continuum of territories to describe the circumstances in which an environmental statute could be applied extraterritorially.[9] At one end of the continuum is the United States—in which U.S. statutes naturally should apply—and at the other end are sovereign foreign nations.[10] A U.S. statute must contain clear legislative intent to apply in foreign sovereign nations.[11] In the middle of the continuum are "global commons,"[12] areas in which a court may or may not apply the presumption against extraterritorial application, depending on additional foreign policy concerns.

The application of this continuum of territories analysis to these two Ninth Circuit cases and future cases involving the extraterritorial application of U.S. environmental laws is important for two reasons. First, the application of an integrated judicial standard based on the continuum of context will act to remedy the inconsistent treatment these cases currently receive in lower federal courts.

Second, international environmental law lacks adequate enforcement mechanisms and needs the aggressive protection that U.S. environmental laws can offer for enhanced protection of global commons resources. Environmental problems do not

4. No. 05-35153 (9th Cir. filed Feb. 24, 2005).
5. 42 U.S.C. §§ 9601–9675 (2000).
6. No. C 02-410 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).
7. 42 U.S.C. §§ 4321–4375 (2000).
8. 986 F.2d 528 (D.C. Cir. 1993).
9. *Id.* at 533.
10. *Id.*
11. *Id.* at 531 (quoting *Aramco*, 499 U.S. at 248).
12. 986 F.2d at 534. Global commons areas addressed in this Article are Antarctica, the high seas, and the exclusive economic zone (EEZ). Each context involves areas over which the United States has some measure of legislative control.

recognize geopolitical boundaries. Consequently, a burgeoning body of international environmental law has emerged to address this reality in a largely cooperative framework. However, despite their ambitious and well-intentioned objectives, international environmental legal instruments are plagued by ineffective enforcement mechanisms, which often expose the vulnerable environmental resources in question to continued degradation. International environmental law has not, however, trumped the need for extraterritorial application of U.S. laws to protect the environment. If anything, the need for extraterritorial application of U.S. environmental laws is greater now than ever before. Application of U.S. environmental laws beyond U.S. territorial boundaries under appropriate circumstances can be an indispensable weapon in fulfilling the goal of meaningful environmental protection on a global scale.

Part I of this Article discusses the origins and evolution of the presumption against extraterritoriality before and after the landmark decision in *Aramco*. It explores how the presumption has been applied in a variety of economic contexts and also considers different approaches to the applicability of the presumption. Part II addresses the continuum of context paradigm from *Massey* and describes the extraterritorial application of U.S. environmental statutes in two contexts: 1) disputes concerning foreign sovereign lands and waters, and 2) disputes concerning the protection of the global commons and resources in the Exclusive Economic Zone (EEZ) of the United States.

Part III of the Article addresses two cases that will help define the future of the extraterritorial application of U.S. environmental laws: the extraterritorial application of CERCLA in *Pakootas v. Teck Cominco Metals, Ltd.*, and the extraterritorial application of NEPA in *Friends of the Earth, Inc. v. Watson*. Part IV draws on the continuum of context paradigm discussed in Part II and argues that the extraterritorial application of CERCLA is inappropriate because of sovereignty concerns as evident in *Pakootas v. Teck Cominco Metals, Ltd.* Conversely, the analysis in Part IV supports the extraterritorial application of NEPA in *Friends of the Earth, Inc. v. Watson* as an effective and appropriate avenue to protect the Earth's atmosphere by providing a procedural check on the impacts from sources that contribute to climate change.

I. ORIGINS AND EVOLUTION OF THE PRESUMPTION AGAINST

EXTRATERRITORIALITY

The presumption against extraterritoriality has existed for nearly as long as there have been federal statutes.[13] Throughout this extensive history, however, the extraterritorial application of U.S. statutes has been inconsistent.[14] Judicial interpretation of the presumption has shifted from denying almost all extraterritorial applications of statutes because of foreign affairs concerns, to employing the presumption against extraterritoriality absent an express statement to the contrary from Congress, to the current inconsistent state of the presumption—a presumption against extraterritoriality, with many exceptions.[15]

A. Historical and Conceptual Foundations of the Presumption

The first reported case to discuss the potential extraterritorial reach of a federal statute was the 1804 case of *Murray v. The Schooner Charming Betsy*.[16] In *Murray*, the U.S. Navy seized "the Charming Betsy" on the high seas because it suspected the ship of engaging in trade with Guadaloupe in violation of the Nonintercourse Act of 1800. The Act prohibited trade "between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof."[17] Before being seized, the ship had been sold by its American owner to a resident of St. Thomas, Jared Shattuck. Shattuck was born in the United States, but had moved to St. Thomas, a Danish island, and had become a Danish citizen. He had not, however, expressly renounced his American citizenship.

In evaluating Shattuck's challenge to the seizure of his vessel, the Court had to determine whether the Navy had properly applied the Act to Shattuck. Shattuck contended that applying the Act to him

13. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

14. *See* Jonathan Turley, *"When in Rome": Mulitnational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 600–02 (1998).

15. Jennifer M. Siegle, *Suing U.S. Corporations in Domestic Courts for Environmental Wrongs Committed Abroad Through the Extraterritorial Application of Federal Statutes*, 10 U. MIAMI. BUS. L. REV. 393, 397 (2002).

16. 6 U.S. (2 Cranch) 64 (1804).

17. *Id.* at 77 (quoting Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).

would violate the "rights of neutrality" under international law.[18] The Court agreed and refused to punish Shattuck.[19] The Court held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[20]

A century after *Murray*, the Supreme Court reaffirmed the presumption against extraterritoriality in *American Banana Co. v. United Fruit Co.*[21] by applying the presumption to limit the Sherman Antitrust Act to anticompetitive conduct within the United States.[22] The case involved a dispute between an American banana exporter and a Panamanian importer who seized the American exporter's plantation in Panama.[23] In holding that the provisions of the Sherman Antitrust Act did not apply extraterritorially, Justice Holmes noted that "the general and almost universal rule is 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."[24] Justice Holmes further noted that this "general and almost universal" rule "would lead, in case of doubt, to a 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."[25]

The Supreme Court also has applied the presumption against extraterritoriality to labor laws. In *Foley Bros. v. Filardo*,[26] the Supreme Court denied relief to an American who sought overtime pay for work performed outside of the United States for an American employer.[27] The Court concluded that the U.S. wage and hour laws did not extend to work performed on foreign soil.[28] The Court identified three factors to consider in determining whether to apply a federal law extraterritorially: 1) whether the language of the statute in question provided any indication that Congress

18. *Id.* at 107.

19. *Id.* at 118.

20. *Id.* The Supreme Court also applied the presumption in the early nineteenth century to limit the reach of federal customs and piracy laws. *See generally* The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) (customs laws); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630–32 (1818) (Marshall, C.J.) (piracy laws).

21. 213 U.S. 347 (1909).

22. *Id.* at 357.

23. *Id.* at 354.

24. *Id.* at 357.

25. *Id.* This reasoning came to be known as the "territorial" approach to the presumption.

26. 336 U.S. 281 (1949).

27. *Id.* at 280, 283.

28. *Id.* at 285, 287–90.

intended to apply the statute extraterritorially; 2) whether the legislative history evinced congressional intent to apply the statute extraterritorially; and 3) whether the pertinent administrative interpretations of the statute, if they exist, reveal congressional intent to extend the statute's reach.[29] After *Foley*, lower federal courts applied the presumption to other federal laws, such as the Federal Tort Claims Act[30] and environmental protection laws.[31]

However, the presumption was applied less consistently as the twentieth century wore on. For example, in *Steele v. Bulova Watch Co.*,[32] the only Supreme Court case to address the extraterritoriality of the Lanham Act, the Court held that watches assembled and affixed with the offending "Bulova" trademark in Mexico, and subsequently sold without the authorization of the plaintiff company, constituted a violation of the Act.[33] The Court read the statute broadly and held that the United States could enact laws that governed its own citizens, even if the actions of those citizens took place in another country, as long as such actions did not encroach upon another country's sovereignty.[34]

As early as the 1920's, courts began to state exceptions and develop alternatives to the presumption. The Supreme Court and lower federal courts began to ignore the *American Banana* holding in antitrust cases and focused instead on domestic effects. In *United States v. Sisal Sales Corp.*,[35] the Supreme Court, relying on the effects felt in the United States, applied the Sherman Act to a conspiracy by U.S. persons, formed in this country but carried out abroad, to monopolize imports of sisal.[36] The Second Circuit similarly applied the Sherman Act in its *United States v. Aluminum Co. of America ("Alcoa")*[37] decision. In *Alcoa*, Judge Hand stated that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and

29. *Id.*
30. *See* Smith v. United States, 507 U.S. 197 (1993).
31. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 585–89 (Stevens, J., concurring).
32. 344 U.S. 280 (1952).
33. *Id.* at 285.
34. *Id.* at 285–86.
35. 274 U.S. 268 (1927).
36. *Id.* at 274–76.
37. 148 F.2d 416 (2d Cir. 1945).

these liabilities other states will ordinarily recognize."[38]

In addition to its 1945 *Alcoa* decision regarding the Sherman Act, the Second Circuit also established two basic tests for the extraterritorial application of the Securities Exchange Act. In *Schoenbaum v. Firstbrook*,[39] the court first established the "effects" test, concluding that federal securities law may reach foreign conduct that is "injurious to United States investors," based on the need to protect the integrity of the U.S. securities markets, not the citizens of foreign countries.[40] The court then established the "conduct" test in *Leasco Data Processing Equipment Corp. v. Maxwell*,[41] where it held that the Securities Exchange Act applied to conduct in the United States that directly caused losses to foreign investors.[42] The court dismissed the presumption as inapplicable when significant conduct occurred in the United States.[43]

Other circuits widely adopted these Second Circuit tests, and even expanded them.[44] For example, the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*[45] reconfigured the "effects" test and promoted a three-part balancing test to determine when the Sherman Act applied extraterritorially.[46] In *Timberlane*, an American plaintiff alleged that the defendant corporation had conspired with officials in a foreign country to monopolize the timber industry.[47] Although all of the alleged activities took place in Honduras, involved only foreign citizens, and caused economic impacts primarily in Honduras, the court nonetheless concluded that the Sherman Act applied.[48] The Ninth Circuit's analysis addressed whether the "interests of, and links to, the United States

38. *Id.* at 443.

39. 405 F.2d 200 (2d Cir. 1968), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc).

40. *Id.* at 206–09.

41. 468 F.2d 1326 (2d Cir. 1972).

42. *Id.* at 1336–37.

43. *Id.* at 1334.

44. *See, e.g.*, Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 33 (D.C. Cir. 1987) (expanding the Second Circuit's approach to permit jurisdiction only when fraudulent statements "originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and 'directly cause' the harm to those who claim to be defrauded"); SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (adopting "conduct" test but requiring less conduct in the United States).

45. 549 F.2d 597 (9th Cir. 1976).

46. *Id.* at 615.

47. *Id.* at 601.

48. *Id.* at 615.

including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."[49]

By the 1980s, it seemed clear that the presumption was no longer significant in American jurisprudence. An increasing number of courts were applying federal laws extraterritorially, particularly when American economic interests were at stake.[50] In fact, the 1987 Restatement (Third) of Foreign Relations Law even noted that Justice Holmes's "territorial" approach[51] to the presumption articulated in *American Banana* was no longer the "current law of the United States."[52]

B. The *Aramco* Decision

In *Aramco*,[53] the Supreme Court applied the presumption against extraterritoriality for the first time in nearly 40 years, and held that Title VII did not apply to employment discrimination by an American company against an American citizen that occurred abroad.[54] Ali Boureslan, a naturalized citizen of the United States, worked for Aramco and was transferred at his own request to Saudi Arabia; however, he was fired four years after his transfer.[55] The

49. *Id.* at 613. To answer this question, the court proposed a three-part balancing test: 1) Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?; 2) Is it of such a type and magnitude as to be cognizable as a violation of the statute at issue?; and 3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it? *Id.* at 615. If a court found that these conditions were satisfied, the statute could be applied extraterritorially. *Id.* at 614. In evaluating whether to apply U.S. laws extraterritorially, the Ninth Circuit weighed a number of factors: a) the degree of conflict with foreign law or policy; b) the nationality or allegiance of the parties and the locations or principal places of business of corporations; c) the extent to which enforcement by either state can be expected to achieve compliance; d) the relative significance of effects in the United States as compared with effects elsewhere; e) the extent to which there is explicit purpose to harm or affect American commerce; f) the foreseeability of such effect; and g) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *Id.*

50. *See, e.g.*, Zoelsch v. Arthur Anderson & Co., 824 F.2d 27 (D.C. Cir. 1987) (applying Sherman Act extraterritorially); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc) (applying Securities Exchange Act extraterritorially); Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (applying Lanham Act extraterritorially).

51. *See supra* note 25 and accompanying text.

52. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415, Reporters' Note 2 (1987).

53. 499 U.S. 244 (1991).

54. *Id.* at 248.

55. *Id.* at 247.

plaintiff sued his employer under Title VII, claiming that his discharge was due to his race, religion, and ethnicity. Justice Rehnquist framed the issue as ascertaining whether Congress intended Title VII to apply abroad.[56] Finding no clear congressional intent, the Supreme Court invoked the presumption and declined to apply the statute extraterritorially.[57]

Justice Rehnquist stated that only a "clear statement" in the language of the statute itself would be sufficient to overcome the presumption.[58] Boureslan and the E.E.O.C. first argued that Title VII's broad definition of "commerce" to include commerce "between a State and any place outside thereof" showed an intent to apply the statute to areas outside the United States.[59] Rehnquist dismissed this contention as "boilerplate language"[60] and stated "[i]f we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption."[61] Justice Rehnquist concluded that if Title VII applied to the employment of U.S. citizens abroad, it would have to apply equally to U.S. citizens employed by foreign employers, "which would raise difficult issues of international law."[62]

Rehnquist cited two reasons for invoking the presumption. First, it reminds the judiciary that when Congress legislates, it is "primarily concerned with domestic conditions."[63] Second, it protects against unintended clashes between U.S. laws and those of other nations, which could result in international discord.[64]

Rehnquist carved out an exception for one statute—the Lanham Act—which the Supreme Court had held to apply extraterritorially nearly 40 years earlier in *Steele v. Bulova*.[65] The Chief Justice distinguished *Steele* on two grounds. First, he noted that the Act's commerce language was broader than Title VII's language in that the Lanham Act refers to "all commerce which may lawfully be

56. *Id.* at 248.
57. *Id.* at 248–49.
58. *Id.* at 258.
59. *Id.* at 248–49.
60. *Id.* at 251.
61. *Id.* at 253.
62. *Id.* at 255.
63. *Id.* at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).
64. *Id.*
65. 344 U.S. 280 (1952).

regulated by Congress."[66] Second, Rehnquist observed that "the allegedly unlawful conduct [in *Steele*] had some effects within the United States."[67]

C. Inconsistent Trends in Applying the Presumption After *Aramco*

In the years following the landmark decision in *Aramco,* the Supreme Court and lower federal courts struggled to define the presumption and the circumstances under which it should apply. The Supreme Court itself has been inconsistent in its interpretation of what is required to rebut the presumption. In *Aramco,* the Court required a "clear statement" of congressional intent to apply a U.S. statute abroad,[68] but it has subsequently articulated a less strict requirement of "clear evidence" of congressional intent.[69] Moreover, the Supreme Court has failed to apply the presumption uniformly to all statutes. For example, the Court applied the presumption in a case where the language of the statute appears to be international in nature,[70] but refrained from applying the presumption in another case in which there might have been conflicts between U.S. and foreign laws.[71]

Like the Supreme Court, lower federal courts also have not applied the presumption uniformly to all federal statutes, and a circuit split has developed. Some circuits apply the "effects" test, others apply the "conduct" test, while others apply a combination of the two.[72]

66. *Aramco*, 499 U.S. at 252 (citing 15 U.S.C. § 1127).

67. *Id.* at 252.

68. *Id.* at 258.

69. *See, e.g.*, Smith v. United States, 507 U.S. 197, 204 (1993). Similarly, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993), the Court did not treat the presumption as a clear statement rule, but instead considered "all available evidence" including the Act's text, structure, and legislative history.

70. *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 159 (1993) (holding § 243(h) of the Immigration and Nationality Act, which states that the Attorney General "shall not deport or return any alien" to a country where she would be subject to persecution, did not apply to Haitians apprehended by the Coast Guard on the high seas).

71. *See* Hartford Fire Insurance Co. v. California, 509 U.S. 764, 819 (1993) (Scalia, J., dissenting) (noting that there was a conflict of law because "Great Britain has established a comprehensive regulatory scheme governing the London reinsurance markets").

72. The Second Circuit in *Schoenbaum v. Firstbrook*, 405 F.2d 200, 207–08 (2d Cir. 1968) first discussed the "effects" test. The Second, Fifth, and D.C. Circuits have adopted a more restrictive approach to the "conduct" test that requires the domestic conduct to have been of "material importance" to or have "directly caused" injury in the United States. *See* Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983); Robinson v. TCI/US W.

1. Supreme Court Decisions

In the years following *Aramco*, the Supreme Court has applied the presumption to several statutes in addition to Title VII. However, the Supreme Court has also dodged difficult questions of extraterritorial application in good test cases. For example, one year after *Aramco*, in *Lujan v. Defenders of Wildlife*,[73] the Supreme Court was faced with the issue of whether the Eighth Circuit correctly applied the Endangered Species Act (ESA) to endangered species located beyond U.S. borders. The majority declined to reach this issue though, because it concluded that the plaintiffs lacked standing.[74]

In his concurring opinion in *Lujan II*, however, Justice Stevens applied the presumption and concluded that the ESA does not apply to activities in foreign countries.[75] In applying the presumption, Stevens looked to congressional intent, focusing not on where the conduct being regulated occurred, but on where the effects of that conduct would be felt.[76] Because Congress is generally concerned with domestic conditions, Stevens reasoned that the presumption applied, as it did in *Aramco*, despite the fact that the regulated conduct—federal agency decision making—occurred in the United States.[77]

In the following year, Chief Justice Rehnquist, writing for the Court in *Smith v. United States*,[78] held that tort claims arising in Antarctica could not be brought under the Federal Tort Claims Act (FTCA).[79] Rehnquist looked to the language, structure, and legislative history of the Act as sources of congressional intent.[80] Only after exhausting these sources of congressional intent did Rehnquist turn to the presumption against extraterritoriality to

Communications Inc., 117 F.3d 900, 905–06 (5th Cir. 1997); Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 31 (D.C. Cir. 1987). The Third, Eighth, and Ninth Circuits apply a less restrictive standard that only requires that the domestic conduct be significant to, rather than the direct cause of, the injury in the United States. *See* SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 524 (8th Cir. 1973); Butte Mining PLC v. Smith, 76 F.3d 287, 290–91 (9th Cir. 1996).

73. 504 U.S. 555 (1992) [hereinafter *Lujan II*].

74. *Id.* at 578.

75. *Id.* at 585–89 (Stevens, J., concurring).

76. *Id.* at 588 (Stevens, J., concurring).

77. *Id.* at 585–86 (Stevens, J., concurring).

78. 507 U.S. 197 (1993).

79. *Id.* at 203–04.

80. *Id.*

resolve "any lingering doubt regarding the reach of the FTCA."[81] Rehnquist did not characterize the presumption as requiring a clear statement, but rather as requiring "'clear evidence' of congressional intent to apply the FTCA to claims arising in Antarctica."[82] The plaintiff in *Smith* argued that the presumption should not apply because there was no risk of conflict with foreign law.[83] Rehnquist responded by emphasizing that the primary reason for the presumption is to recognize that Congress is primarily concerned with domestic conditions when it legislates.[84]

The Supreme Court's relatively clear interpretations of the presumption became much less clear in two subsequent cases. The first of these cases was *Sale v. Haitian Centers Council, Inc.*[85] In *Sale,* Justice Stevens, writing for the Court, concluded that § 243(h) of the Immigration and Nationality Act, which provides that the Attorney General "shall not deport or return any alien" to a country where she would be subject to persecution,[86] did not apply to Haitians apprehended by the Coast Guard on the high seas.[87] Like *Smith,* the Court looked to "all available evidence" on the meaning of § 243(h), including its text, structure, and legislative history,[88] to find "the affirmative evidence of intended extraterritorial application that our cases require."[89] The Court justified the application of the presumption on separation of powers grounds, stating that the "presumption has special force when we are construing . . . statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."[90]

The second case to undermine the Supreme Court's presumption doctrine was *Hartford Fire Insurance Company v. California.*[91] The Court held that the Sherman Act applied to London-based insurers and re-insurers who attempted to make specific types of environmental insurance coverage available within

81. *Id.* at 203.
82. *Id.* at 204.
83. *Id.* at 204 n.5.
84. *Id.*
85. 509 U.S. 155 (1993).
86. 8 U.S.C. § 1253(h)(1) (1998).
87. 509 U.S. 155, 159.
88. *Id.* at 177.
89. *Id.* at 176.
90. *Id.* at 188.
91. 509 U.S. 764 (1993).

the United States.[92] The opinion did not mention *Aramco* or the presumption. Instead, the majority relied on lower court precedent, stating that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[93] *Hartford Fire* seems to ignore the concerns over conflict with British laws, which expressly authorized the London insurers' actions. In his dissent, Justice Scalia noted that "there is clearly a conflict in this litigation."[94]

2. Division in the Lower Federal Courts

Following the Supreme Court's decision in *Aramco*, lower federal courts began to carve out exceptions to the *Aramco* holding, which created a circuit split. In *Environmental Defense Fund v. Massey*,[95] the United States Court of Appeals for the D.C. Circuit identified three exceptions to the *Aramco* doctrine when it interpreted the National Environmental Policy Act (NEPA).[96] First, according to the *Massey* court, the presumption against extraterritoriality will not apply where there is an "affirmative intention of the Congress clearly expressed" to extend the scope of the statute to conduct occurring within other sovereign nations.[97] Second, the presumption generally is not applied where the failure to apply the statute to a foreign setting will result in adverse effects within the United States.[98] Finally, the presumption is not applicable when the conduct regulated by the government occurs within the United States.[99]

The Ninth Circuit subsequently rejected the suggestion in *Massey* "that the presumption against extraterritorial application of U.S. laws may be 'overcome' when denying such application would

92. *Id.* at 769–70.

93. *Id.* at 796.

94. *Id.* at 820 (Scalia, J., dissenting). One commentator addressed the possible reason why the *Hartford* Court did not apply the presumption. In *Aramco, Smith* and *Sale*, the extraterritorial conduct at issue had not caused harmful effects within the United States. In *Hartford*, however, the conduct had caused harmful effects in the United States. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 100 (1998).

95. 986 F.2d 528 (D.C. Cir. 1993).

96. *Id.* at 531.

97. *Id.* (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

98. *Id.*

99. *Id.*

'result in adverse effects within the United States.'"[100] In *Subafilms Ltd. v. MGM-Pathe Communications Co.*, the Ninth Circuit held that the presumption precluded application of acts of Congress to conduct that occurs abroad, even if there are harmful effects in the United States.[101] The issue in *Subafilms* was whether authorization within the United States of foreign reproduction of a film violated the Copyright Act.[102] The court concluded that there was "no clear expression of congressional intent in either the 1976 Act or other relevant enactments to alter the preexisting extraterritoriality doctrine."[103]

The Ninth Circuit reasoned that the possibility of conflict with foreign law "justifies application of the *Aramco* presumption even assuming *arguendo* that 'adverse effects' within the United States 'generally' would require a plenary inquiry into congressional intent."[104] The court found a risk of such conflict because the United States was a party to the Universal Copyright Convention (UCC) and the Berne Convention, both of which require "national treatment" and thereby "implicate[] a rule of territoriality."[105] The court concluded that it would be inappropriate for the courts to act in a manner that might disrupt Congress's efforts to secure a more stable international intellectual property regime unless Congress otherwise clearly expressed such intent.[106]

The circuits also have disagreed about the appropriate application of the presumption in the context of antitrust and securities law. In the antitrust context, courts in the Ninth Circuit have invoked the presumption against extraterritoriality to prevent conflicts of laws.[107] The First Circuit relied on the "effects" test and invoked the presumption when compliance with both U.S. and foreign law was impossible.[108] In the Second Circuit, there must be a true conflict between U.S. law and that of a foreign sovereign before the presumption is invoked.[109] Because of these circuit splits,

100. Subafilms Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1096 (9th Cir. 1994) (quoting Environmental Defense Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993)).

101. *Id.* at 1097.

102. *Id.* at 1089.

103. *Id.* at 1096.

104. *Id.* at 1097.

105. *Id.*

106. *Id.*

107. *See, e.g.*, Metropolitan Indus. v. Sammi Corp., 82 F.3d 839, 847 n.5 (9th Cir. 1996).

108. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997).

109. *See* Filetech S.A.R.L. v. France Telecom, 978 F. Supp. 464, 478 (S.D.N.Y. 1997),

even after the *Hartford Fire* decision, the outcome of an antitrust lawsuit may depend upon the circuit in which the claim is brought.

Like the trademark and antitrust laws, the Securities Exchange Act[110] is one of the statutes where the presumption has traditionally been ignored, and circuits have adopted different approaches in addressing its extraterritorial application. For example, the Second Circuit in *Itoba Limited v. Lep Group PLC*[111] combined the "conduct" and "effects" tests that it had established decades earlier.[112] The court reasoned that this hybrid test would give a better indication of U.S. involvement to justify applying U.S. law.[113] Conversely, the Fifth Circuit in *Robinson v. TCI/US West Communications, Inc.*[114] stated that applying the Securities Exchange Act "within the territorial jurisdiction of the United States" included applying the Act to conduct that has effects here, but did not include applying the Act to conduct that occurs here but has effects elsewhere.[115] The court reasoned that to assert its jurisdiction beyond the minimum necessary to protect domestic investors seemed unwarranted in the absence of an express legislative command.[116]

Since *Aramco*, the Supreme Court has addressed the presumption against extraterritoriality extensively, but has failed to include a clear definition of what the presumption is and when it applies. Because of this lack of uniformity and clarity, lower federal courts have continued to embrace different approaches to how the presumption should apply.

II. EXTRATERRITORIAL APPLICATION OF U.S. ENVIRONMENTAL STATUTES

Courts have been much more willing to find the intent required to overcome the presumption against extraterritoriality in cases involving economic regulation—such as securities or antitrust

vacated, 157 F.3d 922 (2d Cir. 1998).

110. 15 U.S.C. §§ 78a *et seq.*

111. 54 F.3d 118 (2d Cir. 1995).

112. *Id.* at 121–22.

113. *Id.* at 122.

114. 117 F.3d 900 (5th Cir. 1997).

115. *Id.* at 906.

116. *Id.*

law—than in non-market areas, like environmental law.[117] The extraterritorial application of environmental statutes poses challenges and provides opportunities that are different from those involved in the economic contexts at issue in most of the cases discussed in Part I. Part II of this Article addresses the inconsistent approaches that federal courts have applied in analyzing the extraterritorial application of environmental statutes, and how the continuum of context recognized in *Massey* is reflected, but not fully realized, in decisions addressing the extraterritoriality of U.S. environmental statutes.

A. Recognition of the Continuum of Context in *Massey*

In *Massey*, the D.C. Circuit stated that there were "three general categories of cases for which the presumption against the extraterritorial application of statutes clearly does not apply."[118] The court recognized that outside of the exclusive jurisdiction of sovereign foreign nations and outside of the United States, there are territories where the presumption applies with little or no force. Generally termed "global commons," these sovereignless areas include the EEZ, the high seas, and Antarctica.[119] The court noted that where "the U.S. has some real measure of legislative control . . . the presumption against extraterritoriality is much weaker."[120]

In *Massey*, the presumption became "much weaker" because the U.S. controlled all air transportation, conducted all search and rescue operations, and maintained exclusive control over research installations under the U.S. Antarctica Program.[121] Combined with Antarctica's status as a global commons area, these facts led the court to conclude that "the presumption against extraterritoriality is particularly inappropriate . . . in this case."[122] The court then

117. *See* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 599–600 (1990).

118. Environmental Defense Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

119. Natural Resources Defense Council v. United States Department of Navy, 2002 U.S. Dist. LEXIS 26360*37–38 (C.D. Cal. Sept. 17, 2002). For helpful additional context on the EEZ and its role in the analysis in *Navy*, *see* Deirdre Goldfarb, Comment, *NEPA: Application in the Territorial Seas, the Exclusive Economic Zone, the Global Commons, and Beyond*, 32 SW. U. L. REV. 735, 749–55 (2003).

120. *Massey*, 986 F.2d at 533.

121. *Id.* at 534.

122. *Id.*

acknowledged that in the high seas, application of NEPA also would "avoid ill-will and conflict between nations arising out of one nation's encroachments upon another's sovereignty."[123]

However, the court acknowledged that there have been situations when the "government may avoid the EIS requirement where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS."[124] In those examples the court cited,[125] alleged harm to national security and foreign policy interests arose from attempts to apply NEPA to foreign sovereign territories.[126] The *Massey* court noted at the end of its opinion that "we do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign."[127]

B. *Massey*'s Continuum of Context Applied to the Extraterritorial Application of Environmental Statutes

What emerges from the D.C. Circuit's analysis in *Massey* is a continuum of territories where the extraterritorial applicability of a U.S. environmental statute corresponds directly to the amount of legislative control the U.S. has over that territory.[128] At one end of the continuum is the United States, and at the other end are sovereign foreign territories, where a statute must demonstrate clear congressional intent to apply.

Between the two ends of the continuum are sovereignless "global commons" areas over which the U.S. has some measure of legislative control. In global commons, the presumption applies with little or no force absent any other foreign policy concerns that a court may find. This middle ground area of the continuum recognized in *Massey* is where procedural environmental statutes, like NEPA's EIS requirement and the consultation requirement in § 7 of the ESA, always should apply outside U.S. territorial

123. *Id.*

124. *Id.* at 535.

125. *Id.* (discussing, among other cases, Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) and Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 796 (D.C. Cir. 1971)).

126. *Id.*

127. *Id.* at 537. The possible extraterritorial application of NEPA to foreign sovereign territories is the test case scenario that Friends of the Earth v. Watson, No. C 02-4106, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005), presents. For a full discussion of the *Watson* case, *see infra* Part III. B.

128. *Massey*, 986 F.2d at 533.

boundaries. These procedural mechanisms regulate only U.S. agency decisions on U.S. soil and thus present no threat of international discord.

1. Foreign Sovereign Territories

Congress must express clear intent for a U.S. statute to apply to foreign sovereign land and waters. In a trio of cases interpreting the application of three environmental statutes, RCRA, CERCLA, and the MMPA, courts have held that a foreign sovereign has exclusive rights to resources located in its territory.[129] Unlike NEPA, none of these three statutes regulates federal agency actions within the United States. Because these courts did not find a clear expression of such congressional intent after an analysis of each statute's language, structure, and legislative history, the extraterritorial reach of these three statutes was restricted.[130]

In *Amlon Metals*[131] and *ARC Ecology*,[132] the plaintiffs sought to have RCRA and CERCLA, respectively, apply to territories of foreign sovereigns. Because of each statute's ambiguous legislative intent, the extraterritorial application of CERCLA and RCRA was restricted under the presumption. The *Amlon Metals* and *ARC Ecology* courts strictly interpreted the language, structure, and legislative history of RCRA and CERCLA to avoid potential foreign policy problems.[133] Although the scope of the MMPA is broader because it applies to the high seas, the MMPA similarly was held not to apply to the waters of a foreign sovereign in *Mitchell*.[134] The court was explicit that since the MMPA is a conservation statute, it would not extend the statute and invade the sovereignty of other nations.[135]

129. *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991) (analyzing RCRA); ARC Ecology v. United States Department of the Air Force, 411 F.3d 1092 (9th Cir. 2005) (analyzing CERCLA); United States v. Mitchell, 553 F.2d 996, 1003 (5th Cir. 1977) (analyzing MMPA).

130. *Id.*

131. 775 F. Supp. 668 (S.D.N.Y. 1991).

132. 411 F.3d 1092 (9th Cir. 2005).

133. *See generally Amlon Metals*, 775 F. Supp. 668 (S.D.N.Y. 1991) (analyzing RCRA); *ARC Ecology*, 411 F.3d 1092 (9th Cir. 2005) (analyzing CERCLA).

134. United States v. Mitchell, 553 F.2d 996, 1003 (5th Cir. 1977).

135. *Id.*

a. RCRA—*Amlon Metals* (Foreign Sovereign Lands)

Enacted in 1976, the Resource Conservation and Recovery Act (RCRA)[136] regulates the generation, transportation, treatment, storage, and disposal of hazardous wastes.[137] *Amlon Metals* is the only case that addresses whether RCRA applies to waste located outside the United States.[138] The court in *Amlon Metals* held that RCRA did not apply extraterritorially to give a United Kingdom corporation and its American agent a cause of action against FMC, a Delaware corporation.[139] The plaintiff and its agent, Amlon Metals, filed suit in U.S. district court alleging that FMC misrepresented the composition and characteristics of copper residue in barrels shipped to England.[140] Plaintiffs sought injunctive relief and damages under RCRA's citizen suit provision.[141]

The plaintiffs in *Amlon Metals* sought to avoid the effect of the presumption against extraterritoriality by citing the "conduct" test articulated in *Leasco Data Processing Equipment Corp. v. Maxwell*.[142] The conduct test provides that when "there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law."[143] The plaintiffs in *Amlon Metals* asserted that the conduct test applied because "significant activities giving rise to the endangerment, including the generation of the waste, the making of the contract and the consignment of the waste to the carrier, took place in the U.S."[144] The court disagreed, stating that in *Leasco*, the court did not apply the conduct test until it found sufficient overseas application of the statute.[145]

136. 42 U.S.C. §§ 6901–6992k (2000).

137. *See* Joshua E. Latham, *The Military Munitions Rule and Environmental Regulation of Munitions*, 27 B.C. ENVTL. AFF. L. REV. 467, 476–77 (2000) (discussing RCRA's requirements for the treatment and handling of waste).

138. *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991). *See generally* Maria A. Mazzocchi, Amlon Metals, Inc. v. FMC Corp.: *U.S. Courts' Denial of International Environmental Responsibility*, 9 FORDHAM ENVTL. L.J. 155 (1997).

139. *Amlon Metals*, 775 F. Supp. at 668.

140. *Id.* at 668–71.

141. 42 U.S.C. § 6972.

142. 468 F.2d 1326 (2d Cir. 1972).

143. *Id.* at 1334.

144. *Amlon Metals*, 775 F. Supp. at 673.

145. *Id.*

Plaintiffs conceded that the initial focus of Congress when passing RCRA was "entirely domestic";[146] however, they cited two pieces of evidence from the Hazardous and Solid Waste Amendments of 1984 (HWSA) to show that Congress intended RCRA to apply extraterritorially. The first piece was Representative Mikulski's remarks that "our own country will have safeguards from the ill effects of hazardous waste upon passage of [HWSA]. We should take an equally firm stand on the transportation of hazardous waste bound for export to other countries."[147] The second piece of evidence was Senator Mitchell's remarks, which also were made in reference to RCRA's waste export provision.[148] The court determined that Mikulski's and Mitchell's remarks referred to RCRA's hazardous waste export provision, not the citizen suit provision.[149]

Plaintiffs then relied on the statute's export provision and the use of the term "any person" in its citizen suit provision.[150] Plaintiffs argued that RCRA's citizen suit provision should be applied extraterritorially because RCRA's citizen suit provision and export provision were passed as a single bill.[151] The court concluded that even if the two provisions were passed at the same time, they "were certainly discussed separately, with a domestic emphasis attached to the remedial provision."[152]

In considering the term "any person," the court stated that "without more [it] cannot be said to establish RCRA's extraterritorial applicability."[153] When read in conjunction with other portions of the citizen suit provision reflecting a domestic focus, such as a lack of venue for waste located in a foreign country and numerous references to "State," the court stated that the term "any person" reveals a domestic focus.[154]

Finally, the court noted that RCRA "contains a number of provisions designed to limit the statute's encroachment on state sovereignty, but contains no parallel provisions protecting the

146. *Id.* at 674.
147. *Id.* (quoting 129 CONG. REC. 27,691 (1984)).
148. *Id. See also* 130 CONG. REC. 20,816 (1984).
149. *Amlon Metals*, 775 F. Supp. at 673.
150. *Id.* at 675.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

sovereignty of other nations."[155] Just as the EPA Administrator must provide notice to "the affected State" before commencing an action to redress "an imminent and substantial endangerment to health and environment," the court noted that "there is no analogous provision requiring notice to the appropriate authorities in a foreign country."[156]

b. CERCLA—*ARC Ecology* (Foreign Sovereign Lands)

Enacted in 1980 in response to the "serious environmental and health risks posed by industrial pollution," CERCLA was designed to give EPA the authority to deal effectively with spills of hazardous substances as well as with the consequences of improper, negligent, and reckless hazardous waste disposal practices.[157] CERCLA imposes strict liability on all potentially responsible parties for the cleanup of hazardous wastes.[158] The statute's primary objectives are "'to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created.'"[159]

CERCLA's citizen suit provision was modeled, in part, on RCRA's citizen suit provision.[160] Due to the similarity between the citizen suit provisions in these statutes, courts have interpreted CERCLA and RCRA as having a similar geographical scope, as illustrated in the Ninth Circuit case, *ARC Ecology v. United States Department of the Air Force.*[161]

In *ARC Ecology*, Philippine residents and environmental organizations sought to compel the U.S. military to conduct a preliminary assessment of environmental pollution on two former U.S. military bases in the Philippines.[162] The Ninth Circuit affirmed the district court's decision that appellants failed to state a claim upon which relief could be granted because CERCLA did not apply

155. *Id.* at 676.

156. *Id.*

157. United States v. Bestfoods, 524 U.S. 51, 55 (1998).

158. *See* 42 U.S.C. § 9607 (2000).

159. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997) (quoting Mardan Corp. v. C.G.C. Music, Ltd., 809 F.2d 1454, 1455 (9th Cir. 1986)).

160. *See* S. REP. NO. 99-11, at 62 (1985), *reprinted in* 2 Legislative History at 654 (Comm. Print 1990).

161. 411 F.3d 1092 (9th Cir. 2005).

162. *Id.* at 1095–96.

extraterritorially.[163] The court stated that it found "no evidence that Congress expressly (or implicitly) intended to authorize suits under CERCLA by foreign claimants allegedly affected by contamination occurring on a U.S. military base located in a foreign country."[164]

The court reviewed the district court's interpretation of CERCLA's geographic scope. The court determined that CERCLA § 105(d)[165] was silent as to its scope and with respect to who may petition for a preliminary assessment.[166] However, appellants argued that Congress intended to apply the statute to former U.S. military bases located outside of the United States. In support of their argument, appellants cited CERCLA's definition of "United States," which includes "any other territory or possession over which the United States has jurisdiction."[167] The court stated that such language would apply to operational U.S. military bases located in foreign countries, but the base in the present case had not been under U.S. control for 10 years by the time suit was filed. Consequently, "without an intergovernmental agreement between the United States and the Philippine government," the U.S. no longer had authority to address any contamination issues at the former base.[168] Noting that the case at bar concerned an extraterritorial application of a U.S. statute, the court then read the statute according to the presumption against extraterritoriality.[169]

The court nevertheless proceeded to review the substance of CERCLA, beginning with § 111(l),[170] which "expressly authorizes some actions by a narrow class of foreign claimants."[171] However, because the military base in question did not release hazardous substances into the navigable waters, territorial sea, or adjacent shoreline of a foreign country as the provision requires, the court found this section inapplicable.[172] In addition, as the appellants "[did] not allege that their suit [was] authorized by a 'treaty or an executive agreement' between" the U.S. and the Philippines, the

163. *Id.* at 1103.
164. *Id.* at 1098.
165. 42 U.S.C. § 9605(d) (2000).
166. *ARC Ecology*, 411 F.3d at 1096.
167. *Id.* at 1097.
168. *Id.* at 1098.
169. *Id.* at 1097.
170. 42 U.S.C. § 9611(l).
171. *ARC Ecology*, 411 F.3d at 1099.
172. *Id.*

court concluded that appellants did not qualify as "foreign claimants" under CERCLA.[173]

The court then consulted other provisions of CERCLA and determined that "the statute's general approach, concerns, and procedures are inimical to judicial challenges to contamination alleged from sites outside of the territorial boundaries of the United States."[174] For example, CERCLA requires that before determining appropriate remedial action, the President must consult with the affected State or States, "unless the State in which the release occurs first enters into a contract" with the United States.[175] However, "[t]he statute does not contemplate like arrangements with foreign countries."[176] In addition, the court noted that "there is no provision in CERCLA that provides authority to place any foreign site on the National Priorities List, and, consequently, no foreign site appears on that list."[177]

Furthermore, the court concluded that there is nothing in CERCLA's legislative history that suggests CERCLA applies to wastes located in a foreign country.[178] Rather, the legislative history indicates that Congress intended a domestic focus.[179] For example, a House committee report noted, just prior to CERCLA's re-authorization, that "there may be as many as 10,000 [] sites across the Nation," and that "the federal government's allocation of resources was inadequate to 'fulfill promises that were made to clean up abandoned hazardous wastes in *this* country.'"[180] Thus, the court reasoned, "[b]ecause the congressional record is silent as to any extraterritorial application of CERCLA, it is unlikely that Congress intended for CERCLA to provide relief to the appellants."[181]

173. *Id.* at 1097–99.
174. *Id.* at 1100.
175. *Id.*
176. *Id.*
177. *Id.* at 1101.
178. *Id.*
179. *Id.*
180. *Id.* (quoting H.R. REP. NO. 99-253, pt. 1, at 55, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2837 (emphasis added)).
181. *Id.* at 1101.

c. MMPA—*Mitchell* (Foreign Sovereign Waters)

Enacted in 1972, the Marine Mammal Protection Act (MMPA)[182] is designed to prevent "such species and population stocks . . . [from] diminish[ing] beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part."[183] To fulfill this goal, MMPA § 1371 establishes a "permanent moratorium," which is a "complete cessation of the taking of marine mammals and a complete ban on the importation into the United States."[184] During a moratorium, the Secretary of Commerce may issue permits for the taking of mammals for various purposes.[185]

Although the Act identifies a clear geographic scope regarding specific prohibitions,[186] the extraterritorial reach of the moratorium was unclear before *United States v. Mitchell* was decided in 1977. In *Mitchell*, an American citizen appealed to the United States Court of Appeals for the Fifth Circuit after being convicted of violations of the MMPA for the illegal taking of dolphins in Bahamian territorial waters.[187] The defendant admitted taking dolphins while employed by the owner of a Bahamian-based aquarium who intended to export the dolphins to Great Britain.[188] The owner obtained Mitchell's permit from the Bahamian government.[189] On appeal, and considering only the extraterritorial scope of the statute, the court held that the MMPA did not apply to the takings of dolphins by an American citizen in foreign waters.[190]

In reaching the decision that the MMPA did not extend beyond the high seas and into foreign sovereign waters, the court considered two principles of statutory construction.[191] Under the first principle, a court must consider the nature of the statute.[192] A law will be applied abroad if limiting its reach to the strictly

182. Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421h.

183. 16 U.S.C. § 1361(2).

184. *Id.* § 1362(8).

185. *See Mitchell*, 553 F.2d at 1000 (citing 16 U.S.C. §§ 1373(a), 1374(b), 1371(a)(3)(A)).

186. *Id.*

187. *Id.* at 997–1000.

188. *Id.* at 997.

189. *Id.*

190. *Id.* at 1004–05.

191. The definition of "high seas" in the MMPA "excludes the territorial waters of sovereign states." *Id.* at 1005 n.15.

192. *Id.* at 1002.

territorial jurisdiction would greatly curtail the scope, usefulness, or purpose of the statute.[193] Under the first principle, the court recognized that because the MMPA is a conservation statute, the nature of such a bill "is based on the control that a sovereign such as the United States has over the resources within its territory."[194] Because other sovereigns enjoy the same authority over the resources located within their own territories, the court stated that it is important for such problems to be resolved through negotiation and agreement.[195] The court noted that, due to the conservation purpose of the statute, restricting the territorial scope of the MMPA would not curtail the scope, usefulness, or purpose of the statute.[196]

The second principle provides "if the nature of the law does not mandate its extraterritorial application, then a presumption arises against such application."[197] Applying the second principle, the court concluded that the presumption applied.[198] Accordingly, the court looked for "a clear expression of congressional intent for application of the Act in foreign territories," considering the structure, language, and legislative history of the MMPA.[199] Sections 1371 and 1362(8), which respectively announce and define the moratorium, do not address the geographic scope of the ban on takings and importation, but rather use all-inclusive language.[200] The court concluded that the MMPA's all-inclusive language, which does not expressly address territoriality, does not indicate clear intent for extraterritorial application.[201]

Moreover, when Congress did define the geographic scope of prohibitions in § 1372, takings without permits were prohibited only in U.S. territory and on the high seas.[202] Such an omission, "of the territory of other sovereigns," the court concluded, "permits the reasonable inference that Congress concluded the prohibitions should not extend extraterritorially."[203] Furthermore, the permit

193. *Id.* (citing U.S. v. Bowman, 260 U.S. 94 (1922)).
194. *Id.* at 1002.
195. *Id.* at 1002–03.
196. *Id.* at 1003.
197. *Id.* at 1002.
198. *Id.*
199. *Id.* at 1003.
200. *Id.* at 1003–04.
201. *Id.* at 1004.
202. *Id.*
203. *Id.*

system in §§ 1373 and 1374 did not contemplate extraterritorial jurisdiction beyond the high seas into foreign sovereign waters.[204]

The legislative history also revealed a domestic focus. The court cited the annual hunt of baby harp seals off the Canadian coast in which "the committee noted the 'great public concern and indignation' over the hunt."[205] Although it could have prohibited American participation in the hunt, the committee only proposed a ban on importation of the skins.[206] Furthermore, debate over the addition of the moratorium to the House bill on the floor of Congress did not include any discussion of territoriality.[207] Consequently, the court held that the MMPA did not extend to the waters controlled exclusively by another foreign sovereign.[208]

2. Contexts in Which the U.S. Has Some Control

Generally referred to as "global commons" areas, the high seas, Antarctica, and the EEZ of the U.S. are sovereignless areas where application of U.S. law does not conflict with the purpose underlying the presumption as articulated in *Aramco*.[209] Courts have held that the presumption does not apply when the U.S. maintains a certain amount of legislative control over a global commons area.[210] For example, *Massey* held that the National Environmental Policy Act (NEPA)[211] applies extraterritorially to Antarctica and the EEZ,[212] and *Lujan I* held that the Endangered Species Act (ESA)[213] applies to the high seas and possibly to the territory of a foreign sovereign.[214] The cases that have addressed the extraterritorial application of NEPA and ESA have permitted extraterritorial application based on the nature of the statute as well as the nature of the place that would feel its effect. This section of the Article will first examine NEPA's application to the global commons and then will address ESA's application to the global commons and foreign

204. *Id.* at 1004.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 1005.
209. *Massey*, 986 F.2d at 534.
210. *Id.*
211. 42 U.S.C. §§ 4321–4335.
212. *See Massey*, 986 F.2d at 529, 533–34.
213. 16 U.S.C. §§ 1531–1544 (2000).
214. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990).

nations.

a. NEPA (Antarctica and the EEZ)

NEPA was enacted in 1969 to "encourage productive and enjoyable harmony between man and his environment."[215] NEPA requires that all agencies of the federal government prepare an environmental impact statement (EIS) before commencing "major Federal actions significantly affecting the quality of the human environment."[216] An EIS is a detailed statement that must include the environmental impact of the proposed action, unavoidable adverse environmental impacts, and alternatives to the proposed action.[217] The extraterritorial reach of NEPA was first addressed in *Massey* and then again in *Natural Resources Defense Council v. Navy*.[218] *Massey* and *Navy* do not, however, fully resolve to what degree, if at all, a court should consider foreign policy concerns in the extraterritorial application of NEPA.

i. Antarctica (*Massey*)

In *Massey*, the Environmental Defense Fund (EDF) appealed a district court's order dismissing its action seeking to enjoin the National Science Foundation (NSF) from permitting the incineration of wastes produced by one of its research facilities in Antarctica.[219] EDF contended that the planned incineration would produce "highly toxic pollutants which could be hazardous to the environment," and that "NSF failed to consider fully the consequences of its decision to resume incineration as required by the decisionmaking process established by NEPA."[220] The district court declined to apply NEPA extraterritorially because the language "did not contain a clear expression of legislative intent through a plain statement of extraterritorial statutory effect."[221]

However, the D.C. Circuit was unconvinced by the district court's method of analysis and concluded that the district court "bypassed

215. 42 U.S.C. § 4321.
216. *Id.* § 4332(2)(C).
217. *Id.*
218. 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002).
219. *Massey*, 986 F.2d at 529.
220. *Id.* at 530.
221. *Id.* at 529.

the threshold question of whether the application of NEPA to agency actions in Antarctica presents an extraterritoriality problem at all."[222] In its reversal, the D.C. Circuit considered 1) the nature of NEPA, 2) the territory that would feel its extraterritorial effect, and 3) additional foreign policy concerns.

The court first noted that the district court overlooked the fact that there are exceptions to the presumption.[223] In examining NEPA, the court concluded that because NEPA regulates federal agency decisions within the United States, and not the substance of agency decisions, the presumption against extraterritoriality did not apply.[224] The court stated, "NEPA would never require enforcement in a foreign forum or involve 'choice of law' dilemmas."[225]

The court then considered the territory that would feel NEPA's effect. Due to the unique status of Antarctica as a sovereignless territory, the court concluded that the presumption was not implicated.[226] The court then concluded that the presumption becomes "much weaker" because the United States controls all air transportation, conducts all search and rescue operations, and maintains exclusive control over research installations under the U.S. Antarctica Program.[227] These factors, combined with Antarctica's status in the international community, led the court to conclude that "the presumption against extraterritoriality is particularly inappropriate ... in this case."[228] Hence, applying NEPA to Antarctica "would not conflict with the primary purpose underlying the venerable rule of interpretation—to avoid ill-will and conflict between nations arising out of one nation's encroachments upon another's sovereignty."[229]

However, the court still considered other foreign policy concerns in addressing two of NSF's arguments that the presumption does control. It was not persuaded that the EIS requirement would interfere with U.S. efforts to work cooperatively with other nations or conflict with the Protocol on Environmental Protection to the

222. *Id.* at 532.
223. *Id.* at 531–32.
224. *Id.* at 533.
225. *Id.*
226. *Id.* at 533–534.
227. *Id.*
228. *Id.* at 534.
229. *Id.*

Antarctic Treaty.[230] The treaty was "years away from ratification," and the court found it "unable to comprehend the difficulty presented by the two standards of review" if an EIS statement were required of the defendants.[231]

ii. The EEZ (*NRDC v. Navy*)

Although only in dicta, the *Massey* court acknowledged that there are "global commons" areas other than Antarctica in which NEPA also may apply.[232] It was not until almost a decade later, in *Natural Resources Defense Council v. United States Department of Navy*,[233] that NEPA's extraterritorial scope became clearer. In this case, the EEZ and high seas were added to the list of global commons areas where NEPA may apply.[234] Although the court borrowed extensively from *Massey*, it did not, as the *Massey* court had done, consider additional foreign policy concerns after examining NEPA and the place that would feel its effect.

In *Navy*, environmental organizations sued the U.S. Department of the Navy seeking to enjoin the Navy from performing sea tests of experimental anti-submarine warfare technologies.[235] Since the sonar tests were capable of significantly affecting the environment and marine wildlife, plaintiffs argued that the Navy was required to undertake NEPA studies before performing more tests in the future.[236]

Persuaded by *Massey*, the United States District Court for the Central District of California held that extraterritoriality analysis did not apply to NEPA in this case because NEPA is designed to regulate agency decisions in the United States.[237] In *Navy*, planning for the LWAD program took place entirely in the United States and is "therefore not subject to the presumption against extraterritoriality."[238] The court acknowledged that NEPA would

230. *Id.* at 534–35.

231. *Id.*

232. *Id.* at 534.

233. 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002).

234. *Id.* at *37–38. For helpful additional context on the EEZ and its role in the analysis in *Navy*, *see* Deirdre Goldfarb, Comment, *NEPA: Application in the Territorial Seas, the Exclusive Economic Zone, the Global Commons, and Beyond*, 32 SW. U. L. REV. 735, 749–55 (2003).

235. *Id.* at *2.

236. *Id.*

237. *Id.* at *32.

238. *Id.* at *34.

not apply extraterritorially when "its application would . . . demonstrate a lack of respect for another nation's sovereignty."[239]

However, there was no "lack of respect for another nation's sovereignty" in *Navy* because "most if not all LWAD sea tests have been conducted in the open oceans or within the United States' EEZ, areas which, like Antarctica as characterized by *Massey*, are global commons."[240] The court in *Navy* considered the high seas and the EEZ, like Antarctica, to be global commons areas because the United States has "substantial legislative control" over the areas.[241] The court added that "the foreign policy implications of applying NEPA in this case are minimal" because the U.S. enjoys the "sovereign" right of exploring, exploiting, conserving and managing natural resources within the EEZ.[242]

Although the *Navy* court borrowed extensively from the court's analysis in *Massey*, unlike *Massey* it did not consider additional policy considerations beyond its examination of the global commons. Because the U.S. has more legislative control in the EEZ than in Antarctica or on the high seas, it follows that there would be less of a threat in the EEZ to "implicate important foreign policy concerns or demonstrate a lack of respect for another nation's sovereignty."[243]

b. ESA (*Lujan v. Defenders of Wildlife*)

Unlike NEPA, the extraterritorial fate of the ESA has been determined more by Congress than by the courts. Described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"[244] the ESA[245] seeks to protect endangered species. The Act requires the Secretary of the Interior to promulgate by regulation "a list of those species which are either endangered or threatened under enumerated criteria, and to

239. *Id.* at *35. *See infra* Part IV for a discussion of NEPA extraterritoriality and foreign policy concerns.

240. *Id.* at *37–38.

241. *Id.* at *41.

242. *Id.* at *38–39. The court concluded that "with regard to natural resource conservation and management, the area of concern to which NEPA is directed, the United States does have substantial, if not exclusive, legislative control of the EEZ." *Id.* at * 41.

243. *Id.* at *34.

244. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

245. 16 U.S.C. §§ 1531–1544.

define the critical habitat of these species."[246] In § 7, each federal agency must consult with the Secretary to "insure that any action authorized, funded, or carried out by such [federal] agency . . . is not likely to jeopardize the continued existence of any endangered species."[247]

At one time, the Department of the Interior had promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extended to actions taken in foreign nations. Section 7(a)(2) subsequently was reinterpreted to include only "actions taken in the United States or on the high seas."[248] Shortly after the promulgation of the regulation limiting § 7(a)(2), organizations dedicated to wildlife conservation filed an action against the Secretary of the Interior. In *Defenders of Wildlife v. Lujan*,[249] the plaintiffs sought a declaratory judgment claiming that the reinterpretation of § 7(a)(2) was in error and an injunction requiring the Secretary to promulgate a new regulation restoring its prior interpretation. The Eighth Circuit affirmed the district court's holding that Congress intended that the Act's consultation requirement apply to projects in foreign nations.[250] The court cited the Act's language, ambitious purpose, and structure, and concluded, "viewed as a whole, [the Act] clearly demonstrates congressional commitment to worldwide conservation efforts."[251]

The court first consulted the statute's language opining that it was "all-inclusive."[252] In particular, "the statute clearly states that *each* federal agency must consult with the Secretary regarding *any* action to insure that such action is not likely to jeopardize the existence of *any* endangered species."[253] The court stated, however, that it would search further for a clearer expression of

246. 16 U.S.C. § 1534.

247. 16 U.S.C. § 1536(a)(2). If an agency proposes to undertake any action that may jeopardize a species listed pursuant to the ESA, the agency must complete a number of consultation measures and, if necessary, make appropriate adjustments. *See* Scott A. Powell, Comment, *Global Protection of Threatened and Endangered Species: Rethinking Section 7 of the Endangered Species Act*, 31 WILLAMETTE L. REV. 523, 524–525 (1995).

248. *Lujan II*, 504 U.S. at 558–9 (quoting 50 C.F.R. § 402.02). The new regulation defines "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." *Id.*

249. 911 F.2d 117 (8th Cir. 1990) [hereinafter *Lujan I*].

250. *Id.* at 118.

251. *Id.* at 123.

252. *Id.* at 122.

253. *Id.* (emphasis in original).

congressional intent.[254]

The Act defines "endangered species" broadly and without geographic limitations.[255] The Act sets out a detailed procedure for determining whether a species is endangered.[256] This section states that the Secretary shall determine whether a species is endangered or threatened after taking into account "those efforts, if any, being made by any State or foreign nation . . . to protect such species."[257] The Secretary is instructed to give consideration to species that have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement, and species identified as in danger of extinction by any State agency or by any agency of a foreign nation.[258] The Act also contains a section entitled "International [C]ooperation," which declares that the United States' commitment to worldwide protection of endangered species will be backed by financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs.[259] On the basis of these statutory provisions, the court concluded that the answer to the extraterritoriality issue can be found in the plain language of the statute.[260]

The court relied on past administrative interpretation of the Act to reinforce its conclusion on the extraterritorial nature of the ESA. The Secretary concluded that Congress intended the duty to extend beyond the United States, and published a final rule on January 4, 1978, providing that § 7 "requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and *in foreign countries*, will not jeopardize the continued existence of a listed species."[261]

The Supreme Court reversed on other grounds, holding that the plaintiffs lacked standing.[262] Although the majority did not address the presumption, Justice Stevens did so in a concurring opinion. Stevens stated, "I am not persuaded that Congress intended the

254. *Id.* at 122.
255. *Id.* at 123 (quoting 16 U.S.C. § 1532(6)).
256. *Id.* (citing to § 1533).
257. *Id.* (quoting § 1533(b)(1)(A)).
258. *Id.* (citing to § 1533(b)(1)(B)(i), (ii)).
259. *Id.* § 1537.
260. *Lujan I*, 911 F.2d at 123.
261. *Id.* at 123–24 (emphasis in original).
262. *Lujan II*, 504 U.S. at 578.

consultation requirement . . . to apply to activities in foreign countries."[263] He opined that the text of § 7 lacks any indication that it applies in foreign countries because there is no geographic reference. Stevens concluded that because other sections of the Act "expressly deal with the problem of protecting endangered species abroad," Congress did not intend the more obscure language of § 7 to apply to foreign countries.[264]

III. THE FUTURE OF THE EXTRATERRITORIAL APPLICATION OF U.S. ENVIRONMENTAL STATUTES: *PAKOOTAS V. TECK COMINCO METALS* AND *FRIENDS OF THE EARTH V. WATSON*

Pakootas v. Teck Cominco Metals, Inc.[265] and *Friends of the Earth v. Watson*[266] are the two most recent cases to address the extraterritoriality of environmental statutes. The issue in *Teck Cominco Metals* is whether CERCLA may be applied to a Canadian corporation's operations that caused pollution that migrated into the United States.[267] The issue in *Watson* concerns whether NEPA may be applied to U.S. investment agencies that fund overseas projects, where the emissions from those projects contribute to global warming.[268] In both cases, which are pending in 2006, the litigants are seeking redress for harm that is felt in the United States.

A. CERCLA Extraterritoriality: *Pakootas v. Teck Cominco Metals*

1. Factual Origins of the Dispute

Teck Cominco Metals, Ltd. (TCM), a Canadian corporation, owns and operates one of the world's largest zinc and lead refining and smelting complexes in Trail, British Columbia, Canada.[269] TCM

263. *Id.* at 581 (Stevens, J., concurring).

264. *Id.* at 588–89. For example, § 8 authorizes the President to provide assistance to any foreign country with its consent for programs that are "necessary or useful for the conservation of any endangered species listed by the Secretary pursuant to section 1533 of this title." *Id.* at 588 (quoting 16 U.S.C. § 1537(a)). Also, § 9 "makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species 'in interstate or foreign commerce.'" *Id.* (quoting 16 U.S.C. § 1538).

265. No. 05-35153 (9th Cir. filed Feb. 24, 2005).

266. No. C 02-410 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

267. No. CV-04-256-AAM, 2004 WL 2578982, *1 (E.D. Wash. Nov. 8, 2004).

268. No. C 02-410 JSW, 2005 WL 2035596, *1 (N.D. Cal. Aug. 23, 2005).

269. Pl.'s Compl. ¶ 2.3, Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-0256-AAM

is located on the Columbia River, approximately 10 miles from the United States-Canada border, north of Lake Roosevelt, in Washington State.[270] The smelter discharged hazardous substances into the Columbia River in Canada for several decades.[271] Those substances allegedly flowed downstream into the United States, and allegedly polluted the Upper Columbia River and Lake Roosevelt in Washington State. This area, known as the Upper Columbia River Basin ("the site"), is mostly inhabited by Native American tribes and local farmers.[272]

The EPA estimated that TCM discharged approximately 12 million tons of "slag," a "black, glassy material which contains copper, lead, and zinc" as well as other heavy metals, into the Columbia River from 1940 through 1994.[273] Many consider the site toxic because studies have revealed elevated concentrations of trace elements above acceptable Canadian and U.S. standards such as arsenic, cadmium, copper, lead, mercury, and zinc in the water, bed sediment, and fish of Lake Roosevelt, and in the upstream reach of the river.[274] The Washington State Health Department supports local residents' contention that a range of illnesses in the area are attributable to the water pollution, including cancer, colitis, and leukemia.[275] Members of the Confederated Tribes of the Colville Reservation, who depend on the resources of the site, claim that the hazardous contaminants discharged by the smelter have impaired their "hunting, fishing, and gathering rights."[276]

In August 1999, the Colville Tribes petitioned the EPA to conduct a preliminary assessment to investigate the health and environmental risks of hazardous substances believed to be at the site.[277] By October 2002, the EPA had determined that the area

(E.D. Wash. filed July 21, 2004).

270. *Id.*

271. Pl.'s Compl. ¶ 4.1.

272. *U.S. EPA, Upper Columbia River Expanded Site Inspection Report Northeast Washington* at 2-3 (2003) [hereinafter EPA Columbia River Report], *available at* http://www.epa.gov/r10earth/offices/oec/UCR/Upper%20Columbia%20River%20ESI.pdf.

273. *Id.* at 2-11 to -12. The smelter discontinued routine slag discharge in 1995. *Id.* at 2-13.

274. *See* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 372 (2005).

275. *Id.* at 373.

276. Complaint at ¶¶ 4.6 to 4.7, *Pakootas*, No. CV-04-256-AAM (E.D. Wash. Nov. 8, 2004).

277. Brief for Appellees at 5, Pakootas v. Teck Cominco Metals, Ltd., No. 05-35153 (9th Cir. July 20, 2005).

qualified for potential listing under CERCLA, which is reserved for the country's most polluted sites.[278] The Canadian government responded by sending a diplomatic note to the U.S. State Department stating that the EPA does not have jurisdiction over TCM under CERCLA.[279] Negotiations and discussions between the EPA and TCM ended in late 2003, without any agreement.[280]

On December 11, 2003, the EPA issued a Unilateral Administrative Order (UAO) demanding that TCM complete a remedial investigation and feasibility study (RI/FS) consistent with CERCLA.[281] TCM offered to pay 13 million dollars for independent studies,[282] but refused to comply with the order, which authorized the EPA to either: 1) sue to compel compliance; or 2) fund the study itself and take remedial action, and then later sue TCM for costs incurred.[283] The EPA failed to file suit against TCM.[284]

Therefore, on July 21, 2004, members of the Confederated Tribes of the Colville Reservation, Joseph Pakootas and Donald R. Michel (collectively "Pakootas"), filed a complaint under CERCLA's citizen suit provision in the United States District Court for the Eastern District of Washington seeking to enforce the EPA's order.[285] TCM filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6), contending that the court lacked personal and subject matter jurisdiction, and that plaintiffs failed to state a claim upon which relief can be granted.[286] The court was presented with an issue of first impression, namely whether the EPA can compel a Canadian company, governed by Canadian environmental law, to comply with the terms of CERCLA.

278. *Id.* at 5–6.

279. *See* 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, 361–62 (2004).

280. Brief for Appellees at 6, *Pakootas*, No. 05-35153 (9th Cir. July 20, 2005).

281. *Id.*; *see also* Complaint at ¶ 4.8, *Pakootas*, No. CV-04-256-AAM (E.D. Wash. Nov. 8, 2004).

282. *See U.S. Has No Authority Over B.C. Smelter Operation*, NAT'L POST, Jan. 14, 2004, at FP07, 2004 WL 57228271.

283. Pl.'s Compl. ¶ 4.8–5.3.

284. *Id.* ¶ 4.10.

285. Pl's Compl. ¶ 1.1

286. Defendant's Memorandum in Support of Motion to Dismiss, *Pakootas*, No. CV-04-256-AAM (E.D. Wash. Nov. 8, 2004).

2. The District Court's Opinion

The district court denied TCM's motion to dismiss.[287] The court acknowledged that absent any congressional intent to the contrary, federal or state legislation is presumed not to have extraterritorial application.[288] The court determined that Congress unequivocally expressed its intent that CERCLA remedy "domestic conditions,"[289] but held that CERCLA can extend into Canada to deal with impacts resulting within the United States.[290] The court reasoned that environmental impacts to the site in the United States would not be remedied unless EPA's order could reach TCM in Canada.[291]

The court emphasized that the EPA was not trying to regulate or direct TCM's discharge of hazardous substances at its facility in Canada.[292] It further stated that the EPA was not trying to tell the Canadian government how to regulate the environmental aspects of businesses in Canada.[293] The court noted that although extending CERCLA to TCM might have an incidental or indirect impact on the way the company conducts its water discharges in Canada, such an indirect result did not conflict with Canadian regulatory authority.[294]

3. Parties' Arguments on Appeal to the Ninth Circuit Court of Appeals

TCM filed an appeal to the United States Court of Appeals for the Ninth Circuit seeking to reverse the district court's denial of its motion to dismiss.[295] TCM asserted that the court did not have jurisdiction over TCM or its operations in Canada for the purpose of enforcing the UAO.[296] TCM further argued that CERCLA was not intended to allow the EPA or U.S. courts to regulate Canadian corporations operating in Canada.[297] TCM asserted that forcing it to comply with CERCLA regulations would be an encroachment on

287. *Pakootas*, No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).
288. *Id.* at *5.
289. *Id.* at *9.
290. *Id.*
291. *Id.* at *12, 17.
292. *Id.* at *5.
293. *Id.* at *12.
294. *Id.*
295. Appellant's Opening Brief at 12, *Pakootas*, No. 05-35153 (9th Cir. June 2, 2005).
296. *Id.* at 11.
297. *Id.* at 13.

the Canadian government's authority to regulate TCM's operations, and would disrupt the regime of bilateral cooperation designed to address transboundary disputes.[298] TCM also maintained that CERCLA lacks the requisite clear expression of congressional intent to overcome the presumption and, therefore, the company should not be subject to CERCLA enforcement for its conduct outside of the United States.[299]

In opposition, the Plaintiffs argued that CERCLA may be applied to TCM's disposal actions under the "effects doctrine," which provides that U.S. law applies when a party's actions occur outside of the United States but cause adverse effects within the United States.[300] TCM's willful release of hazardous substances for almost 100 years caused substantial adverse effects in the Upper Columbia River Basin and Lake Roosevelt.[301] Because CERCLA is a remedial statute, these adverse effects bring TCM within CERCLA's broad remedial scope for the purpose of conducting RI/FS studies and implementing necessary cleanup in the United States.[302] Plaintiffs further argued that they were not attempting to regulate Canadian operations but instead sought to remedy a "domestic condition," so there is no risk that Canadian sovereign authority will be encroached upon.[303]

B. NEPA Extraterritoriality: *Friends of the Earth v. Watson*

1. Factual Origins of the Dispute

In an effort to persuade the Bush administration to take meaningful action on climate change, Friends of the Earth and Greenpeace filed a lawsuit to compel the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank of the United States (Ex-Im) to comply with federal environmental laws.[304] OPIC and Ex-Im combined have supported over 32 billion dollars in fossil fuel investments worldwide over the past 10 years.[305]

298. *Id.* at 30.
299. *Id.* at 32–33.
300. Brief of Appellees at 20–21, *Pakootas*, No. 05-35153 (9th Cir. July 20, 2005).
301. *Id.* at 4.
302. *Id* at 29.
303. *Id.* at 42.
304. Friends of the Earth v. Watson, No. CV-02-4106-JSW (N.D. Cal. filed Sept. 3, 2002).
305. *Id.* ¶ 48.

OPIC and Ex-Im supported projects are directly or indirectly responsible for 8% of the annual worldwide greenhouse gas emissions—the equivalent of 31.7% of annual U.S. greenhouse gas emissions.[306] The OPIC and Ex-Im projects include many of the largest new oil field developments in South America, Mexico, the Caspian region, Southeast Asia, and West Africa, and related infrastructure such as pipelines, gas processing plants, and oil refineries.[307] These agencies' projects will result in a combined 32 billion tons of carbon dioxide emissions.[308] These emissions will be released by the scores of fossil fuel power projects that these agencies back, or by the eventual burning of fuels that are being extracted and transported using Ex-Im and OPIC finances.[309]

Plaintiffs initiated this action pursuant to NEPA and the Administrative Procedure Act (APA)[310] seeking declaratory and injunctive relief.[311] The lawsuit challenges the agencies' decisions not to prepare an environmental assessment (EA) under NEPA. NEPA requires all federal agencies to conduct an environmental review of programs and project-specific decisions having a significant effect on the environment. This review requires all federal agencies to question first if an action will significantly affect the environment by performing an EA and, if the answer is affirmative, to prepare an environmental impact statement (EIS) detailing the effects and options for alternative actions.[312] The plaintiffs contend that because OPIC and Ex-Im support overseas energy development projects that result in the release of large quantities of greenhouse gas emissions, OPIC and Ex-Im are obligated to prepare an EA to determine whether a significant impact on the human environment is caused by these programs.[313]

2. Parties' Arguments to the District Court

On February 11, 2005, Defendants filed a motion for summary judgment. Defendants contended that Plaintiffs' claims fail for four reasons: 1) lack of standing; 2) lack of final agency action; 3)

306. Pl.'s Opp'n to Defs.' Mot. for Summ. Jdgmt at 1.
307. Pl.'s Compl. ¶ 148; ¶¶ 162–210.
308. *Id.* ¶ 148.
309. *Id.*
310. 5 U.S.C. §§ 701–706 (2005).
311. Pl.'s Compl. ¶¶ 212–214.
312. *Id.* ¶ 7–8.
313. *Id.* ¶ 38.

OPIC's organic statute precludes judicial review; and 4) OPIC is not subject to NEPA.[314]

First, Defendants asserted that Plaintiffs' concerns regarding the implications of climate change for the global environment do not amount to the type of injury that the Supreme Court requires to support Article III standing.[315] Defendants contended that Plaintiffs have not demonstrated an injury in fact, causation, or redressability. While some of the impacts alleged by Plaintiffs have been considered as possible results of climate change, there is no defined link, sufficient for standing purposes, between specific emissions of greenhouse gases to the atmosphere and the specific impacts that Plaintiffs alleged.[316] Defendants also argued that Plaintiffs' injuries are not sufficiently concrete or particularized to support standing because plaintiffs have not identified injuries that threaten any particular region of the United States[317] and because there is "no evidence that the specific impacts are likely to occur."[318]

Defendants further asserted that the chain of causation is too attenuated to confer standing because most projects would go forward without OPIC/Ex-Im's involvement, and that the projects' contribution to global greenhouse gas emissions is minimal.[319] Defendants also contended that Plaintiffs do not meet the redressability prong of the standing analysis because the greenhouse gas emissions are too minimal with respect to total man-made emissions to conclude that a decision by the agencies not to provide financing or export support for projects would have any impacts on Plaintiffs. Additionally, even if the agencies decided to stop financing or supporting the projects, the projects would likely still go forward with goods and services or financing from other countries.[320]

314. Def. Mot. for Summ. Jdgmt. at 1, Friends of the Earth, Inc. v. Watson, Civ. No. 02-4106 (N.D. Cal. filed Feb. 11, 2005). Friends of the Earth, Inc. v. Watson, No. C 02-410 JSW, 2005 WL 2035596, at *1 (N.D. Cal. Aug. 23, 2005).

315. *Id.* at 2.

316. *Id.* at 12. Among the impacts that Plaintiffs alleged were 1) rising sea levels, which causes loss of coastal wetlands and increased storm surges; 2) reduced snowpack, which affects the timing and quantity of water supplies; 3) forest decline due to the significant increase in and northward shift of insects that damage forests; and 4) a decline in coral reefs. Pl's Second Amended Complaint, ¶¶ 44–57.

317. *Id.* at 11.

318. *Id.* at 13.

319. Def. Mot. for Summ. Jdgmt at 14–21.

320. *Id.* at 21–22. *See* O'Boyle Decl. at ¶ 27; Himberg Decl. at ¶ 8.

In response, Plaintiffs maintained that Defendants' position that "the basic connection between human-induced greenhouse gas emissions and observed climate change itself has not been established" was rebutted by Defendants' own administrative record.[321] For example, in a recent study, OPIC acknowledged that "there is a strong and growing scientific consensus that these steady additions of [greenhouse gases] have tipped a delicate balance and begun to impact our climate and may be the dominant force driving recent warming trends."[322] Plaintiffs alleged particularized harm and responded with expert evidence demonstrating the reasonable probability of increased risk of harm.[323] Additionally, Plaintiffs' injuries were "actual" and not "remote" because Plaintiffs not only alleged that the impacts of global warming will occur in the future, but also that such impacts already affected Plaintiffs' interests.[324] The Defendants' assertion that the impacts were too attenuated has no support, because the entire purpose of financing oil field development is to bring oil to market for combustion. Combustion is not only foreseeable, but intended.[325]

Plaintiffs argued that OPIC and Ex-Im had taken specific final actions providing the basis for this lawsuit.[326] Plaintiffs sent demand letters requesting that OPIC and Ex-Im analyze in a NEPA document whether their respective actions to fund overseas energy projects contribute to global warming.[327] In response, each agency issued a finding in a final report that its actions, both individually (on a project-by-project basis) and cumulatively (as a portfolio of similar projects), do not have significant impacts.[328] Each finding is final: in reliance, OPIC and Ex-Im had not applied NEPA to their respective actions on either a portfolio-wide basis or in individual applications for energy projects. However, "neither agency

321. Defendants' Motion for Summary Judgment at 19, Friends of the Earth, Inc. v. Watson, Civ. No. 02-4106 (N.D. Cal. Feb. 11, 2005).

322. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 20, Friends of the Earth, Inc. v. Watson, Civ. No. 02-4106 (N.D. Cal. Apr. 29, 2005) (citing OPIC, *Climate Change: Assessing Our Actions* at 7, 28 (2000), *available at* http://www.opic.gov/pdf/publications/climate report.pdf.

323. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 20, Friends of the Earth, Inc. v. Watson, Civ. No. 02-4106 (N.D. Cal. Apr. 29, 2005).

324. *Id.*

325. *Id.* at 1.

326. *Id.*

327. *Id.*

328. *Id.* at 2.

prepared an EA to support its finding of no significant impact, nor did they follow required procedures, including response to public comments and consultation with other federal agencies."[329]

3. The District Court's Opinion

In the United States District Court for the Northern District of California, Judge Jeffrey White denied Defendants' motion for summary judgment on standing and other jurisdictional issues.[330] The court held that Plaintiffs had standing to bring their claims.[331] The court reasoned that "to demonstrate standing in cases raising procedural issues, environmental plaintiffs need not show that substantive environmental harm is imminent,"[332] nor do the plaintiffs need to present proof that the challenged federal project will have particular environmental effects.[333] Instead, the "'asserted injury is that environmental consequences might be overlooked' as a result of deficiencies in the government's analysis under environmental statutes."[334] Consequently, the court held that the Plaintiffs only needed to demonstrate that "it is reasonably probable that the challenged action will threaten their concrete interests."[335]

The court reasoned that while the impact of greenhouse gas emissions traceable to OPIC and Ex-Im supported projects was not known with absolute certainty, the only uncertainty Plaintiffs had was with respect to the severity of consequences, not whether there would be significant consequences.[336] Additionally, Plaintiffs presented evidence that demonstrated that projects supported by OPIC and Ex-Im were directly or indirectly responsible for one-third of the total carbon dioxide emissions from the United States in 2003.[337] The court noted that Plaintiffs' evidence, if true, further demonstrated that: 1) increased greenhouse gases are the major

329. *Id.*

330. Friends of the Earth, Inc. v. Watson, Civ. No. 02-4106, 2005 WL 2035596, *1 (N.D. Cal. Aug. 23, 2005).

331. *Id.* at *3.

332. *Id.* at *2 (citing Cantrell v. City of Long Beach, 241 F.3d 674, 679 n.4 (9th Cir. 2001)).

333. *Id.* (citing Citizens for Better Forestry v. United States Dept. of Agriculture, 341 F.3d 961, 972 (9th Cir. 2003)).

334. *Id.* (quoting *Citizens for Better Forestry*, 341 F.3d at 971–72).

335. *Id.* (citing *Citizens for Better Forestry*, 341 F.3d at 969–70).

336. *Id.* at *4.

337. *Id.* at *3 (citing Decl. of Richard Heede, ¶ 14).

factor that caused global warming in the twentieth century; 2) global warming that has already occurred has had significant environmental consequences; 3) continued increases in greenhouse gas emissions would continue to increase global warming with consequent widespread environmental impacts; and 4) that these impacts affected and will continue to affect areas used and owned by Plaintiffs.[338]

In cases involving an alleged procedural injury, the causation and redressability standards are relaxed once a plaintiff established an injury in fact.[339] The court rejected Defendants' arguments that the causation was too attenuated, despite evidence demonstrating that generally, "for the large energy-related projects referenced in Plaintiffs' complaint, third parties have already completed basic design and planning stages for the projects before applying for financial support from Ex-Im or OPIC."[340] Plaintiffs also submitted "evidence demonstrating a stronger link between the agencies' assistance and the energy-related projects." For example, Ex-Im stated that it "'supports export sales that otherwise would not have gone forward.'"[341] The court also held that Plaintiffs had sufficiently demonstrated redressability because, when a plaintiff asserts inadequacy of a government agency's environmental studies, that it is sufficient to show that "'the [agency's] decision *could be influenced* by the environmental considerations that [the relevant public statute] requires an agency to study.'"[342]

The court's decision was narrowly tailored. Judge White simply ruled that Plaintiffs have standing and that the climate change lawsuit may proceed. The court did not decide whether the federal agencies must perform environmental assessments on projects they fund that contribute to global greenhouse gas emissions.[343] That issue is likely to be litigated. Still, the decision marks the first time that a federal court has found standing in a lawsuit exclusively challenging the federal government's failure to evaluate how its actions contribute to climate change and how climate change

338. *Id.* (citing MacCracken Decl., ¶¶ 6, 12–39; Dr. Phillip Dustan Decl., ¶¶ 5–13; Randall L. Hayes Decl., ¶¶ 5–17; Brian Jeffrey Johnson Decl., ¶¶ 10–26; Mark Andre Decl., ¶¶ 5–14; Carol D. Ellinghouse Decl., ¶¶ 3–8).

339. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 at 572 n.7 (1992)).

340. *Id.* at *4 (citing Boyle Decl., ¶ 41; Harvey Himberg Decl., ¶ 19).

341. *Id.* (quoting Ex-Im Administrative Record, Tab 4 at 2 and Tab 5 at 2).

342. *Id.* (quoting *Citizens for Better Forestry*, 341 F.3d at 975 (emphasis in original)).

343. *Id.* at 8.

impacts affect U.S. citizens.

IV. A PROPOSAL FOR THE EXTRATERRITORIAL APPLICATION OF U.S. ENVIRONMENTAL STATUTES BASED ON THE CONTINUUM OF CONTEXT

There is a pressing need to apply an integrated judicial standard based on the continuum of context to future cases involving the extraterritorial application of U.S. environmental laws. The continuum of territorial and non-territorial contexts identified in *Massey* can be used as a means through which to understand the extraterritorial reach of environmental statutes. Reconciling why *Teck Cominco Metals* and *Watson* should yield different outcomes is perhaps the best vehicle through which to articulate this continuum of context theory as a reliable judicial standard.

The need for this integrated judicial standard stems first from the fact that cases addressing the extraterritorial application of U.S. environmental laws have yielded inconsistent outcomes in the lower federal courts. Courts have improperly permitted the extraterritorial application of substantive provisions of U.S. environmental statutes in territorial contexts[344] and have barred the extraterritorial application of procedural provisions of U.S. environmental statutes in non-territorial contexts.[345]

Second, international environmental law lacks adequate enforcement mechanisms, which creates a need for the aggressive protection that U.S. environmental laws can offer global commons resources. An integrated judicial standard would allow for enhanced protection of global commons resources because foreign policy concerns are not present when applying U.S. environmental statutes like NEPA and the ESA to U.S. agency activities that affect global commons areas. In this context, the extraterritorial application of U.S. law does not force the hand of a foreign sovereign.

An integrated judicial standard to govern future cases involving environmental extraterritoriality should include the following steps. First, courts must consider whether the statute at issue has a

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

345. *See, e.g.*, NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (holding that NEPA did not apply to activities at U.S. military bases in Japan because there was a substantial likelihood that treaty relations with Japan would be affected and because U.S. foreign policy interests outweighed the benefits of preparing a EIS).

domestic or international focus. For example, CERCLA has an unmistakable domestic focus, whereas NEPA and ESA each expressly embrace an international domain. Second, if the statute lacks an international focus, then the statute can be applied extraterritorially only if a) adverse environmental effects are felt in the U.S. and b) applying the law to another nation would not create international discord. Almost all environmental statutes that are domestic in focus like CERCLA would fail on this prong because, despite possible domestic effects from conduct beyond U.S. borders, the extraterritorial application of the statute to conduct that originated on foreign soil would cause international discord. It is at this juncture that the existing regime of international environmental law becomes relevant. Global environmental problems are best resolved in a multilateral, cooperative manner through international law instruments and principles, rather than by unilateral application of domestic laws beyond a nation's borders.

Third, if the statute has an international focus, the court must scrutinize the statutory provision in question. If the provision imposes a substantive mandate like the takings prohibition at issue in *Mitchell* under the MMPA, it should not be applied extraterritorially unless such substantive mandate is applied to a global commons area. If, however, the statutory provision at issue is procedural—like the consultation requirement under § 7 of the ESA or the EIS requirement under § 102(2)(C) of NEPA—then the mandate of the provision should be executed if the area in question is global commons, and may even be executed under appropriate circumstances to U.S.-sponsored activities on foreign soil.

A. The Territorial Context: Transboundary Disputes and Foreign Sovereign Areas

The United States District Court for the Eastern District of Washington improperly held that CERCLA may be applied extraterritorially to address the pollution from Teck Cominco's facility that migrated into the United States. CERCLA is a domestic statute that should not be applied to environmentally detrimental conduct that originated in Canada and is governed by Canadian environmental regulations. Even though the effects of the smelter's conduct have reached U.S. soil, applying CERCLA to resolve this

dispute would cause international discord between the United States and Canada and undermine the existing diplomatic and arbitral options available to resolve such disputes between the two nations.

The *Teck Cominco* case is just one of several transboundary pollution disputes brewing at the U.S.-Canada border. For example, Alaskan commercial fishermen have opposed a proposal by a Vancouver company to reopen the Tulsequah Chief mining complex across the border from Juneau, Alaska.[346] The commercial fishermen are concerned that mining waste could impact fisheries and that access roads would disturb wild lands.[347] Similarly, the sale of drilling rights for coal-bed methane gas in the Flathead River Basin north of the Montana border has prompted protests downstream.[348]

Canada is not always the cause of these transboundary pollution concerns, however. For example, a Canadian environmental organization and the Government of the Province of Manitoba challenged the North Dakota Department of Health's decision to grant a permit to Devils Lake Outlet in North Dakota.[349] The Outlet is a 208 million dollar project to pump excess water from Devils Lake, a 125,000-acre lake in northeastern North Dakota, into the Sheyenne River.[350] The project could contaminate rivers that feed Manitoba's Lake Winnipeg. The district court affirmed the Department of Health's decision to grant the permit for the Outlet.[351] The Supreme Court of North Dakota affirmed the district court, holding that the Department of Health adequately addressed issues concerning phosphorus, anti-degradation, and the risk of biota transfer in granting the permit.[352]

Extraterritorial application of U.S. environmental statutes—whether it be CERCLA or other environmental statutes—is an inappropriate mechanism to resolve transboundary pollution

346. *See* Todd Wilkinson, *US Clashes with Canada Over Pollution at the Border*, Christian Science Monitor, Aug. 6, 2004, at 2, *available at* http://www.csmonitor.com/2004/0806/p02s02-usgn.html.

347. *Id.*

348. *Id.*

349. People to Save the Sheyenne River, Inc. v. North Dakota Dep't of Health, 697 N.W.2d 319, 323 (N.D. 2005).

350. Brief of Appellant in People to Save the Sheyenne River, Inc. v. North Dakota Dep't of Health, 2005 WL 1520291 (N.D. Mar. 2005).

351. *People to Save the Sheyenne River*, 697 N.W.2d at 333.

352. *Id.* at 330–33.

disputes between bordering nations. The presumption against extraterritoriality is triggered where application of U.S. laws could result in international discord.[353] Consequently, U.S. environmental laws should not govern polluting activity that originates in and is regulated by sovereign regulatory authorities in Canada or Mexico because such efforts pose a threat of international discord. Moreover, the threat of international discord also is evident in that extraterritorial application of U.S. laws would trump existing diplomatic and arbitral mechanisms that are in place to resolve such disputes.

There also are compelling policy reasons for not applying U.S. environmental laws to our neighbors to the North and South. Such an approach is bad for U.S. business because it invites retaliation.[354] For instance, if CERCLA is found to apply to TCM's pollution in Canada that reached the United States, the floodgates of litigation would be opened for similar suits hauling U.S. businesses into Canadian courts for the effects of polluting activities that originate in the United States but have effects in Canada. Not only would such a scenario wreak havoc on U.S. and Canadian courts, but it also would cast a dark shadow on U.S. diplomatic relations with its neighbors.[355]

There are more appropriate solutions to transboundary

353. International discord is the overriding concern in evaluating extraterritoriality – that fact that adverse effects are felt in the United States is not sufficient by itself. The Ninth Circuit in *Subafilms* rejected an unlimited domestic effects test. Subafilms v. MGM-Pathe Communications Co., 24 F.3d 1088, 1096 (9th Cir. 1994). The court noted that "courts did not rest *solely* on the consequences of a failure to give a statutory scheme extraterritorial application." *Id.* (emphasis in original). The court further stated that the likelihood of unintended international discord if the copyright laws were applied to conduct abroad "fully justifies application of the *Aramco* presumption even assuming *arguendo* that [the foreign conduct had] 'adverse effects' within the United States." *Id.* at 1097 (cited *in* Brief for the National Mining Association and the National Association of Manufacturers as Amici Curiae Supporting Appellant at 29–30, Pakootas v. Teck Cominco Metals, *Inc.*, No. 05-35353 (9th Cir. June 14, 2005)).

354. *See* Brief for the National Mining Association and the National Association of Manufacturers as Amici Curiae Supporting Appellant at 22, Pakootas v. Teck Cominco Metals, Inc., No. 05-35353 (9th Cir. June 14, 2005).

355. Similarly, at least one court has addressed the importance of avoiding international discord between the U.S. and Canada as sovereign neighbors in a NEPA extraterritoriality case. *See* Hirt v. Richardson, 127 F. Supp. 2d 833, 849 (W.D. Mich. 1999) (refusing to grant preliminary injunction on extraterritorial application of NEPA to assess impact of transporting nuclear material to experimental reactor in Canada due to "the weighty considerations of United States foreign policy, nuclear non-proliferation, and the general interests of the Executive office in carrying out United States foreign policy").

pollution disputes that would avoid the extraterritorial application of U.S. environmental laws. The most appropriate solution to these disputes is through diplomatic negotiations between the governments of the nations in question. Other possible mechanisms for transboundary pollution disputes are the 1909 Boundary Waters Treaty (U.S.-Canada),[356] the Border Environmental Cooperation Agreement (U.S.-Mexico),[357] and the North American Free Trade Agreement's "Side Agreement" on Environmental Cooperation.[358] Principles of customary international law also may be relevant.[359]

For the above stated reasons, the appropriate outcome in *Teck Cominco* is for CERCLA not to apply to pollution that originated in Canada and is regulated by Canadian environmental law. Regardless of the outcome in *Teck Cominco*, companies operating in Canada, the United States, and Mexico would be wise to analyze the potential cross-border impacts of their operations and assess the extent to which regulatory authorities, citizen groups, or private parties in bordering countries may assert claims against them under applicable domestic laws.

Moving beyond extraterritoriality issues between bordering nations, the courts in *Amlon Metals* and *ARC Ecology* reached the correct results in considering the extraterritorial application of RCRA and CERCLA, respectively, because these courts were faced with straightforward scenarios that also presented a risk of international discord. In *Amlon Metals*, the requirements of RCRA were sought to be applied to a shipment of waste to England. Similarly, *ARC Ecology* involved the application of CERCLA to

356. *See* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 414–428 (2005).

357. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.–Mex., 235 U.S.T. 2916.

358. North American Agreement on Environmental Cooperation Between the United States, Canada, and Mexico, 32 I.L.M. 1480 (Sept. 14, 1993). The Side Agreement created the Commission on Environmental Cooperation, which established a process for citizens and non-governmental organizations to raise concerns about the enforcement of environmental laws in all three member countries.

359. *See* Brian R. Popiel, Comment, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447, 474 (1995) (proposing that the customary international law principle *sic utere*, which provides that no nation may permit the use of its territory to cause environmental damage to the territory of another state, may be applied in transboundary pollution disputes to find state responsibility).

activities in the Philippines; however, the facts were somewhat less clear cut than in *Amlon Metals* because *ARC Ecology* involved activities at a former U.S. military base on Filipino soil.

Amlon Metals and *ARC Ecology* were properly decided, however, because the United States did not have any degree of control over the areas in question. Moreover, both statutes do not contain language indicating that Congress intended them to apply outside the United States. Applying these U.S. environmental statutes to such contexts would amount to environmental imperialism and would cause international discord between the United States and the host nations.

The scenario in *Mitchell* under the MMPA was a closer call, but the court still reached the proper result. Although the dolphins sought to be protected were entitled to such protection under the MMPA, applying the MMPA to the taking of dolphins by an American citizen when the dolphins were in Bahamian territorial waters would cause international discord between the U.S. and the Bahamas. The Bahamian government has an indisputable right of sovereign control over the dolphins within its territorial waters, free from unwelcome intrusion from the command of U.S. environmental statutes.

B. The Non-Territorial Context: Global Commons Areas and the EEZ

Global commons areas are fundamentally different from the scenarios discussed above for transboundary pollution and foreign sovereign territory. Extraterritorial application of U.S. environmental laws to global commons areas like Antarctica, the high seas, and even the U.S. EEZ does not present international discord concerns. Antarctica and the high seas are not within another nation's sovereign control, and the U.S. has some degree of shared sovereign interest and control over these areas. Similarly, as discussed in *Navy*, extraterritorial application of NEPA in the EEZ also is appropriate because the degree of control that the U.S. has over this area is not territorial control but resembles the degree of interest and control that the U.S. may exert in global commons areas.

A more challenging issue is presented, as in *Watson*, when NEPA's effect will be felt within the territory of a foreign sovereign. Cases that have addressed this scenario have been limited to military contexts. Courts have held that because military contexts

involve such a heavy overlay of U.S. foreign policy interests, NEPA should not apply extraterritorially in such situations.[360] These cases represent a justifiably narrow exception to the continuum of context theory. When U.S. military interests are not at issue, however, NEPA's EIS requirement should apply extraterritorially only when global commons areas are at issue.

Watson should be resolved to confirm that NEPA is a procedurally focused statute that contains express congressional intent to have a worldwide reach. It should be applied to address the impacts of global climate change for the following reasons: 1) there is no concern about clashes with foreign sovereignty because the agency decisions are made on U.S. soil, and 2) even if sovereignty clashes are felt indirectly in the countries in which these projects are located, the extraterritorial application of NEPA should be permitted on policy grounds to help reduce the possible impacts of global climate change. The Earth's atmosphere can be considered a global commons like Antarctica and the high seas because it is an area in which all nations have a conservational interest, but no nation has territorial control from which to assert such a right. This conclusion is consistent with the *Massey* court's reasoning to allow NEPA to apply to address possible impacts to the fragile global commons environment of Antarctica.

Similarly, the applicability of the ESA consultation requirement in § 7 would pose minimal international discord, if any. Section 7 of the Act is intended to protect species worldwide by regulating U.S. agency consultation to ensure such protection, which, like NEPA, is an appropriate and non-invasive mechanism to protect global commons resources that are undeniably in the interest of all. The Eighth Circuit in *Lujan I* so held, but the U.S. Supreme Court declined to reach the merits of the extraterritoriality issue in *Lujan*

360. *See, e.g.*, Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n ("NRDC v. NRC"), 647 F.2d 1345 (D.C. Cir. 1981) (holding that NEPA did not apply to the NRC's approval of the export of a nuclear reactor to the Philippines because of the "unique foreign policy interests arising in the nuclear energy and non proliferation contexts"); NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (holding that NEPA did not apply to activities at U.S. military bases in Japan because there was a substantial likelihood that treaty relations with Japan would be affected and because U.S. foreign policy interests outweighed the benefits of preparing a EIS); Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (holding that NEPA did not apply to the removal of munitions from their stockpile and transportation within Germany because "extraterritorial application of NEPA . . . would result in a lack of respect for Germany's sovereignty, authority, and control over actions taken within its borders").

II because it dismissed the case for lack of standing.

CONCLUSION

The globalization of commerce requires an increasingly vigilant global environmental protection response. The extraterritorial application of U.S. environmental statutes can bootstrap international environmental protection goals if such statutes meet the elements of the integrated standard based on the continuum of context. To meet this standard, a court must conclude either that the statute at issue has an international focus, or that a domestically focused statute involves a situation that poses adverse domestic effects and no threat of international discord. If the statute has an international focus, the court also must scrutinize the statutory provision in question. If the provision imposes a substantive mandate like the takings prohibition at issue in *Mitchell* under the MMPA, it should not be applied extraterritorially unless such substantive mandate is applied to a global commons area. If, however, the statutory provision at issue is procedural—like the consultation requirement under the § 7 of the ESA or the EIS requirement under § 102(2)(C) of NEPA—then the mandate of the provision should be executed if the area sought to be protected is global commons, even if foreign sovereigns feel indirect effects from such an application of U.S. law.

Therefore, the continuum of context standard confirms that NEPA's EIS requirement and the ESA's § 7 consultation requirement should be applied extraterritorially because 1) they meet the criteria listed above, and 2) they provide much needed mechanisms to help promote international environmental protection objectives that are rarely more than aspirational as contained in international environmental law instruments.

The United States Court of Appeals for the Ninth Circuit will have the first opportunity to apply the continuum of context theory to hold that 1) CERCLA should not apply extraterritorially in *Teck Cominco* and, 2) if the case is appealed from the Northern District of California, that NEPA should apply extraterritorially in *Watson.* Both of these cases will likely be appealed to the U.S. Supreme Court. Thus, the U.S. Supreme Court may have an opportunity in the near future to embrace the continuum of context theory as a viable mechanism for resolving disputes involving the extraterritoriality of U.S. environmental statutes.