PAKOOTAS V. TECK COMINCO METALS, LTD.

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I. Introduction

The Columbia River flows from Canada through the United States to the Pacific Ocean, watering farmland and powering hydroelectricity along the way. Over the course of the past century, a mine located at Trail, British Columbia, has been dumping polluting slag into the Columbia River and causing environmental damage in the United States. In the case of *Pakootas v. Teck Cominco Metals, Ltd.*,[1] the Ninth Circuit held that the Canadian owner of the mine was potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), a statute requiring the cleanup of polluted land, for the environmental contamination in the United States caused by the mine. The court evaded the question of whether CERCLA is applicable to extraterritorial actions like the mine's dumping of hazardous chemicals by reasoning that the initial foreign pollution was a wholly separate action from the final domestic environmental contamination that it caused. The Ninth Circuit's strained legal fiction, which bifurcates an act of international pollution into two separate events in two countries, allowed the court to avoid evaluating the decision's ramifications for international law and comity. The decision thus creates an uncomfortable precedent for extending the scope of domestic laws without evaluating the effects on international comity. Fortunately, in the present case, a decision that had applied the presumption against extraterritoriality would have arrived at the same conclusion due to the extensive similarities between United States and Canadian environmental law.

II. Background

Defendant Teck Cominco Metals, Ltd., ("Teck") is a Canadian corporation that owns and operates a lead-zinc smelter in Trail, British Columbia ("Trail Smelter"), located about ten miles up the Columbia River on the Canada-United States border.[2] From 1906 to 1995, the Trail Smelter discharged up to 145,000 tons of waste annually into the Canadian portion of the Columbia River.[3]

In August 1999, the Colville Tribes petitioned the Environmental Protection Agency ("EPA") to study the contamination of the Columbia River in northeastern Washington, where they live.[4] The EPA assessed the site and

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[1] 452 F.3d 1066 (9th Cir. 2006).

[2] *Id.* at 1069; Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *12 (E.D. Wash. Nov. 8, 2004).

[3] *Pakootas*, 452 F.3d at 1069.

[4] *Id.*

found contamination that included "heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc."[5] The EPA completed its site assessment in March 2003, concluding that the Upper Columbia River Site ("Site") was eligible for listing on the National Priorities List ("NPL"), which qualified it for Superfund remedial action. The Site includes "all areas within the United States where hazardous substances from [defendant's] operations have migrated or materials containing hazardous substances have come to be placed."[6] A significant amount of slag has contaminated the Columbia River's waters, sediments, and biological ecosystem in the studied area.[7] The Trail Smelter was "the predominant source of contamination at the Site."[8]

Teck's American subsidiary approached the EPA and expressed a willingness to perform an independent, limited human health study if the EPA would delay proposing the Site for NPL listing. The EPA and Teck entered into negotiations, but the two sides stalemated over the scope and extent of the proposed investigation.[9] On December 11, 2003, the EPA issued a Unilateral Administrative Order for Remedial Investigation/Feasibility Study ("UAO") to Teck.[10] The UAO directed Teck to investigate and determine the full nature of contamination at the Site due to the Trail Smelter, including conducting activities like "project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives."[11] Teck did not comply with the Order, and the EPA did not seek to enforce the order.[12]

Plaintiffs Joseph A. Pakootas and Donald R. Michel, who are both enrolled members of the Colville Tribes, filed an action to enforce the UAO under the "citizen suit" provision of CERCLA[13] in the District Court of the Eastern District of Washington.[14] The plaintiffs sought a declaration that Teck had violated the UAO, injunctive relief enforcing it against Teck, and

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[5] In the Matter of: Upper Columbia River Site, Unilateral Administrative Order for Remedial Investigation/Feasibility Study, Docket No. CERCLA-10-2004-0018, at 2 (Dec. 11, 2003), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/82751e55bf4ef18488256ecb00835666/f0e551fb8a69dcd288256fac00064739/$FILE/uao%2012-10%20final.pdf.

[6] *Pakootas*, 2004 WL 2578982, at *1.

[7] *Pakootas*, 452 F.3d at 1070.

[8] *Id.*

[9] *Id.* at 1070 & n.7.

[10] *See generally supra* note 5.

[11] *Pakootas,* 452 F.3d at 1070 n.8.

[12] *Id.* at 1070. It is unclear why the EPA chose not to enforce the order. The EPA could have brought an action in federal district court to compel compliance and punish non-compliance with contempt powers, or impose daily fines for non-compliance. *Id.* The EPA could also have initiated cleanup of the facility itself under 42 U.S.C. § 9604(a) (2006) and then sought cleanup costs and treble damages from the responsible party. *Id.* § 9607(c)(3).

[13] 42 U.S.C. § 9659. Section 9659(a)(1) provides a cause of action for any person to commence a civil action "against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this [chapter]." Section 9659(c) gives a district court the power to order compliance with CERCLA and impose civil penalties for failure to comply.

[14] *Pakootas*, 452 F.3d at 1070.

penalties for non-compliance and recovery of costs and fees.[15] The complaint alleged that from approximately 1906 to mid-1995, defendant introduced hazardous substances directly into the Columbia River, which then carried the substances into the Upper Columbia River area of Washington State. The complaint further alleged that the defendant knew that the released substances were likely to cause harm to individuals, such as the plaintiffs Pakootas and Michel, who use the Upper Columbia River for recreation.[16]

Teck moved, *inter alia*, to dismiss plaintiff's suit for failure to state a claim upon which relief could be granted,[17] reasoning that CERCLA could not be applied to a Canadian corporation for actions taken by that corporation in Canada. The State of Washington became a plaintiff after it intervened in the litigation as a matter of right under CERCLA. The defendant's motion to dismiss applied to both Pakootas' complaint and the State of Washington's complaint-in-intervention.[18]

Senior Judge McDonald, writing for the district court, held that the present claim would require an extraterritorial application of CERCLA.[19] The Court first acknowledged that "there [was] some question whether this case really involve[d] an extraterritorial application of CERCLA,"[20] but ultimately dismissed as a "legal fiction" the idea that one could wholly separate the defendant's actions in Canada from the pollution of the Site in the United States and thus consider the pollution a wholly domestic action.[21] Even though the district court admitted that the contamination in the Upper Columbia River counted as a domestic release under CERCLA, the contamination releases in the United States would not exist without the original activity at the Canadian smelter.

The district court found that CERCLA could still be applied extraterritorially to the defendant because the statute overrides the strong presumption against extraterritorial application of domestic law. That presumption is the longstanding principle that American law is assumed to apply only within United States territorial jurisdiction unless a contrary Congressional intent is apparent.[22] Despite the lack of affirmative language in the statute and the "sparse" legislative history suggesting any intent for extraterritorial application, the district court held in this case that "CERCLA affirmatively ex-

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[15] *Id.*; *see also* 42 U.S.C. § 9606(b)(1) ("Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) [of this section] may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.").

[16] Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *3 (E.D. Wash. Nov. 8, 2004).

[17] FED. R. CIV. P. 12(b)(6).

[18] *Pakootas*, 452 F.3d at 1070.

[19] *Pakootas*, 2004 WL 2578982, at *5.

[20] *Id.* at *4.

[21] *See id.* at *5.

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

presses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S. . . . [and] that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."[23] The court noted that the case was not an attempt to regulate the defendant's actions in Canada, but merely their side effects in the United States.[24] Canadian environmental laws would apply to the Canadian mine, while American laws would apply to the contaminated areas in the United States.

The District Court next held that Teck was potentially liable under CERCLA for the Site. CERCLA liability requires that: (1) the party is a "person" under § 9601; (2) the site at issue constitutes a "facility" under § 9601(9); (3) there has been a "release" or "threatened release" under § 9607(a)(4); and (4) the party falls into one of the four possible liable parties under § 9607(a).[25] The district court concluded that Teck was a "person" under the meaning of CERCLA § 9601(21) where a "person" includes any corporation, regardless of nationality[26] and CERCLA had been previously applied to Canadian corporations for conduct occurring in the United States.[27] Teck was thus liable as a "generator" of hazardous waste and/or an "arranger" of the disposal of hazardous waste under § 9607(a)(3) for contamination at the Site.[28]

The district court therefore denied the defendant's motion to dismiss. The court *sua sponte* certified its order to allow Teck to immediately appeal to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). The Ninth Circuit reviewed *de novo* the district court's decision on a motion to dismiss for failure to state a claim under F.R.C.P. 12(b)(6), assuming that the facts as stated in the complaint were true and viewing them in the light most favorable to the plaintiffs.[29]

After the appeal was submitted, Teck and the EPA reached a settlement agreement in which the EPA agreed to withdraw the UAO at issue. Nevertheless, the Pakootas action was not rendered moot because the plaintiffs, both Pakootas and the State of Washington, were not parties to the settlement agreement and thus the plaintiffs still had outstanding claims for civil penalties for each day that Teck violated the UAO and for attorneys' fees.[30]

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[23] *Pakootas*, 2004 WL 2578982, at *9.

[24] *Id.* at *12.

[25] 42 U.S.C. §§ 9601-9607 (2006).

[26] *Pakootas*, 2004 WL 2578982, at *9.

[27] *See*, *e.g.*, U.S. v. Ivey, 747 F. Supp. 1235, 1239-40 (E.D. Mich. 1990) (holding that the court has personal jurisdiction over and can apply CERCLA to a Canadian corporation that formerly owned a Superfund site in Michigan).

[28] *Pakootas*, 2004 WL 2578982, at *10-*11. A CERCLA "facility" is any site where has a hazardous substance has been deposited or otherwise come to be located. 42 U.S.C. § 9601(9)(B) (2006).

[29] Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1069 n.2 (9th Cir. 2006).

[30] *Id.* at 1071 n.10.

Judge Ronald Gould, writing for the Ninth Circuit, affirmed the district court's decision that the plaintiffs stated a valid claim, but used different reasoning. The Ninth Circuit held that CERCLA was not being applied extraterritorially in the present case. Applying CERCLA in a purely domestic manner, the court found that Teck could be held liable under CERCLA for the environmental pollution.[31]

The court determined that holding Teck liable did not constitute an extraterritorial application of CERCLA because the release or threatened release of hazardous substances from the Site into the environment, the act that created liability under CERCLA, occurred within the United States. Unlike other environmental regulatory statutes directed toward controlling polluters' behavior,[32] CERCLA is a statute dealing with cleanup of sites on United States soil after pollution has occurred. Since CERCLA does not attempt to regulate the actual activities of the Canadian mine, the Court in the present case did not need to consider whether CERCLA had extraterritorial reach. The purely domestic and passive release of contamination from the Site to the surroundings was an act that could be considered distinct from the act of disposing or arranging for disposal of hazardous waste in Canada or the act of the waste escaping from Canada and entering the United States through the Columbia River.[33] To reach this conclusion, The Ninth Circuit used the "legal fiction" rejected by the District Court—separating the release of pollutants from the damage at the Site.

Next, the Ninth Circuit reasoned similarly to the district court in holding that the term "any person" in § 9607(a)(3) could extend to foreign persons and that Congress intended CERCLA to apply to foreign parties when necessary to further the goal of holding liable parties who release hazardous waste into the United States.[34] The court emphasized that the goal of CERCLA is to impose liability for cleanup costs surrounding releases or threatened releases of hazardous substances, not to regulate the original disposal of such substances in the United States or Canada.[35]

The Court restricted the area under issue to the Site as defined in the UAO, which includes the "extent of contamination *in the United States* associated with the Upper Columbia River."[36] This definition is consistent with CERCLA, which provides that a facility includes "'any site or area where a

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[31] *Id.* at 1068-69.

[32] *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7671(g); Clean Water Act, 33 U.S.C. §§ 1251-1387; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(k).

[33] *See Pakootas*, 452 F.3d at 1075.

[34] *See id.* at 1075-76 (citing ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1098 (9th Cir. 2005) (stating that application of CERCLA depends on contamination occurring on domestic soil)).

[35] *See Pakootas*, 452 F.3d at 1078 ("The location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially, because CERCLA imposes liability for releases or threatened releases of hazardous substances, and not merely for disposal or arranging for disposal of such substances.").

[36] *Id.* at 1074.

hazardous substance has . . . come to be located.'"[37] The Court next reviewed precedent and determined that the natural leaching of hazardous substances from slag deposited in the Upper Columbia River area into the surrounding environment could be considered a CERCLA "release,"[38] which is covered by the statute if there is any passive migration of hazardous substances into the environment from the area that the substance has come to be located.[39] This release was a wholly separate event from the Canadian discharge of waste from the Trail Smelter and from the escape of the waste from Canada into the American portion of the Columbia River and United States soil. CERCLA is a strict liability statute, so it is irrelevant that the polluter was unaware of how its waste came to be located at the facility from which there was a release.[40]

The Court held the defendant liable under 42 U.S.C. § 9607(a)(3) as a responsible party that had "arranged for disposal" of hazardous substances. Teck had argued that the act of arranging the waste disposal occurred in Canada, and that it could not be held liable under CERCLA when applied to an extraterritorial arranging action. The Court ruled that the location at which Teck arranged the disposal was not dispositive.[41] CERCLA does not impose liability for disposal or arranging of hazardous substances, but for releases or threatened releases of the hazardous substances. Since the release or threatened release of contamination was at a Site exclusively within the United States, CERCLA was not being applied extraterritorially. CERCLA does not regulate how Teck disposes of its waste within Canada.

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[37] 42 U.S.C. § 9601(9) (2006); *see also* 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1360 n.10 (9th Cir. 1990) ("[T]he term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there.") (internal quotation marks omitted).

[38] *Pakootas*, 452 F.3d at 1074-75. CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22).

[39] *See* A & W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1111 (9th Cir. 1998) (holding that wind blowing particles of hazardous substances from a pile of waste was a CERCLA release); United States v. Chapman, 146 F.3d 1166, 1170 (9th Cir. 1998) (affirming summary judgment where the Government presented evidence that corroding drums were leaking hazardous substances into the soil); Coeur D'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094, 1113 (D. Idaho 2003) ("Th[e] passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case."); United States v. Shell Oil Co., 841 F. Supp. 962, 969 (C.D. Cal. 1993), *vacated on other grounds*, 294 F.3d 1045 (9th Cir. 2002) (finding CERCLA release in acid sludge seeping through the soil).

[40] *See* O'Neil v. Picillo, 883 F.2d 176, 183 n.9 (1st Cir. 1989). The three statutory defenses enumerated in 42 U.S.C. § 9607(b), including defenses for contamination due to "an act of God," "an act of war," or "an act or omission of a third party [other than an employee or agent of the defendant]," are "the only [defenses] available, and . . . [the] traditional equitable defenses are not." California *ex rel.* Cal. Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 672 (9th Cir. 2004).

[41] *See Pakootas*, 452 F.3d at 1078.

III. Analysis

The Ninth Circuit decision relies on the strained legal fiction of bifurcating the pollution act, an analysis specifically rejected by the district court. The higher court held that Teck's waste disposal act in Canada was not regulated by CERCLA, even though Teck's extraterritorial action was the basis of Teck's domestic CERCLA liability. This extraterritorial application of CERCLA risks disrupting the bilateral environmental regulation treaty regime established between the United States and Canada. Under the facts in this particular case, however, the decision is unlikely to cause international discord due to the similarities between CERCLA and British Columbian law.

A. The Ninth Circuit Decision Is Essentially an Application of CERCLA to Foreign Entities

Though the Ninth Circuit affirmed the district court's application of CERCLA to Teck, it expressly rejected the lower court's finding that CERCLA could be applied extraterritorially or that it needed to be applied extraterritorially in this case. The Ninth Circuit decision relied on the distinction between regulating Teck's conduct in Canada before the pollution occurred and requiring cleanup of the effects of such pollution after the pollution has occurred.[42] However, this distinction is strained because while the relevant CERCLA "facility" is the Upper Columbia River Site in the United States, Teck is held liable because it "arranged for disposal" of the hazardous waste at the Trail Smelter in Canada. All of Teck's relevant actions occurred outside the United States. The Court's assertion that CERCLA does not purport to regulate the extraterritorial disposal of hazardous waste rings hollow when the only basis for Teck's liability was its act of waste disposal in Canada.

The original intent of CERCLA certainly does cover a situation in which waste is disposed of in one location and ultimately contaminates another site.[43] However, the fact that the original waste disposal was an extraterritorial activity means that CERCLA is being applied extraterritorially to a single action spanning two countries, which would make the presumption against extraterritoriality relevant. The district court sensibly dismissed the "legal fiction" that the Canadian act could be separated from the domestic environmental release. The Ninth Circuit adopted this "legal fiction" and extended the reach of CERCLA to virtually any foreign party whose actions cause effects in the United States. The end result is that the reach of CERCLA has been expanded to potentially reach numerous foreign parties. Despite the Court's assertions to the contrary, the *Pakootas* decision is

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[42] *See id.*

[43] See *supra* note 39 and accompanying text.

essentially an extraterritorial application of CERCLA to the foreign facility of a foreign party.

American laws can be applied extraterritorially, but only after careful consideration of whether the law should overcome the presumption against extraterritoriality. This canon of construction serves a useful purpose in limiting the unintended effects of domestic laws. Otherwise, Teck's fears may be realized in a world where "the vast net of CERCLA liability would supplant the source country's regulation of its industrial and municipal waste, wherever and however, such waste reached or threatened to reach the U.S. side of the United States/Canada border."[44]

A unilateral extension of CERCLA to a foreign party for a multi-country action, under the guise that the domestic portion of the action makes the dispute a purely domestic conflict, has significant international repercussions. There is no logical limit to the court's extension of CERCLA and the uncertainty regarding its effects will threaten business confidence, deter the continuation of existing projects or the beginning of new projects in the border region, and greatly increase operational costs as companies on both sides of the border will have to comply with both Canadian and U.S. environmental laws.[45] Imposing U.S. environmental standards to conduct on foreign soil in the future would be devastating to many industries currently only operating within the laws of their home countries.

B. The Ninth Circuit Should Have Considered More Seriously the Presumption Against Extraterritorial Application of Domestic Environmental Laws

The presumption against extraterritorial application of domestic laws is a judicial guideline designed to minimize international conflicts. The presumption is a not a rigid rule of law, but rather a guideline to weigh the conflicting interests of law enforcement and international accord. "Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders."[46] The extraterritoriality principle provides that "rules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States."[47] The presumption "serves to protect against unin-

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[44] Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *14 (E.D. Wash. Nov. 8, 2004).

[45] *See* Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendant Appellant Supporting Reversal at *14-*15, *18, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006) (No. 05-35153), 2005 WL 2175371.

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

[47] *Id.* (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. g (1987)).

tended clashes between our laws and those of other nations which could result in international discord."[48] Since "CERCLA's legislative history reflects a decidedly domestic focus"[49] and the *Pakootas* decision will have extraterritorial repercussions, the Ninth Circuit should have at least considered the ruling's effects on comity instead of dismissing the international repercussions outright by relying on the legal fiction that the polluting act could be bifurcated to leave a purely domestic portion covered by CERCLA.

In *Subafilms Ltd. v. MGM-Pathe Communications Co.*, the Ninth Circuit found that the "international discord" factor fully justified the application of the presumption against extraterritorial application of the Copyright Act and that evidence of adverse effects on the United States absent extraterritorial application of a statute would not prevent use of the presumption.[50] The court justified its reasoning by noting that extending the Copyright Act extraterritorially would disrupt the international regime that Congress had delicately assembled.[51] Similarly, domestic environmental regulations risk disrupting the delicate regime of international environmental rules. In *Environmental Defense Fund, Inc. v. Massey*, the D.C. Circuit reaffirmed the notion that the presumption against extraterritoriality protects against international discord.[52]

Environmental disputes between the United States and Canada have historically been regulated through diplomatic channels. The key bilateral agreement addressing transboundary environmental issues between the two nations is the Boundary Waters Treaty of 1909. Article IV of the treaty provides that "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."[53] The Treaty establishes an International Joint Commission of the United States and Canada ("IJC") with three commissioners appointed by the United States and three commissioners appointed by the Queen of the United Kingdom on the recommendation of the Canadian government.[54] The United States or Canada may request that the IJC examine and report on a matter.[55]

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[48] Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

[49] ARC Ecology v. U.S. Dep't of the Air Force, 294 F. Supp. 2d 1152, 1156 (N.D. Cal. 2003).

[50] 24 F.3d 1088, 1097 (9th Cir. 1994).

[51] *See id.*

[52] 986 F.2d 528, 530 (D.C. Cir. 1993) (citing *Aramco*, 499 U.S. at 248).

[53] Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada, U.S.-Gr. Brit., art. IV, Jan. 11, 1909, 36 Stat. 2448, 2450 [hereinafter Boundary Waters Treaty].

[54] *Id.* art. VII.

[55] *Id.* art. IX ("The . . . Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier . . . shall be referred from time to time to the International Joint Commission for examination and report, whenever either . . . shall request that such questions or matters of difference be so referred.").

The extraterritorial application of domestic environmental laws would affect the regime established by the Boundary Waters Treaty. Teck correctly noted that "the Treaty does not contain any provision" providing legal remedies for "private parties injured by transboundary pollution," even though the Treaty does provide "such remedies for diversion or interference with waters in their natural channel."[56] The Reporters' Notes to the Restatement of the Foreign Relations Law of the United States further clarify that transboundary environmental pollution issues are not to be addressed through unilateral action, even though water diversion issues can be addressed through unilateral remedies.[57]

The Boundary Waters Treaty provides several methods to address transboundary water pollution disputes between Canada and the United States. The IJC can issue nonbinding technical recommendations or binding international arbitrations.[58] Article X gives power to the IJC to "render a decision or finding" with regard to "any questions or matters of difference . . . involving the rights, obligations or interests" of the United States or Canada upon consent of the parties.[59] The IJC has issued over thirty-six nonbinding recommendations and successfully decided twenty arbitrations.[60] The usually unanimous IJC decisions do not divide along national lines and are considered "very influential in both the United States and Canada."[61]

The most significant arbitration decision of the Boundary Waters Treaty was made over seventy years ago, concerning the same smelting plant as the *Pakootas* case. The resolution of the dispute, known as the Trail Smelter Arbitration, became a landmark decision in international environmental law.[62] The decision held Canada liable for property damage in the United States caused by the Trail Smelter's release of sulfur dioxide from its tall smokestacks. The Trail Smelter Arbitration "is the only adjudicative deci-

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[56] Appellant's Opening Brief at *25, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006) (No. 05-35153), 2005 WL 2106416 [hereinafter Appellant's Opening Brief]. *Compare* Boundary Waters Treaty, *supra* note 53, art. IV *with id.* art. II.

[57] *See* Appellant's Opening Brief, *supra* note 56, at *25-*26.

[58] Boundary Waters Treaty, *supra* note 53, art. X.

[59] *Id.*

[60] 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, 419 (2005).

[61] *Id.*; *see also* Niva Telerant, *Riparian Rights Under International Law: A Study of the Israeli-Jordanian Peace Treaty,* 18 Loy. L.A. Int'l & Comp. L. Rev. 175, 196 (1995) (explaining that Canada and the United States follow the IJC's recommendations "most of the time").

[62] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938) (enjoining the Canadian company operating the Trail Smelter from causing further pollution in the State of Washington), *further proceedings at* 3 R.I.A.A. 1938 (1941) (holding Canada liable for the Trail Smelter pollution and in violation of its treaty obligations). *See generally* Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 Or. L. Rev. 259 (1971); Parrish, *supra* note 60.

sion of an international tribunal that speaks directly to the substantive law of transboundary pollution."[63]

The United States and Canada have an established system to address transboundary pollution. Circumventing international channels would significantly affect international relations for the worse. A regime of bilateral treaties is preferable to unilateral action due to fundamental problems with applying domestic laws to entities that do not participate in the democratic process behind those statutes. American case law has emphasized the political process as a safeguard for individuals and corporations, and there is no reason that this concept should apply with any less force in this context.[64] Canadian companies like Teck are nearly powerless to affect U.S. environmental regulations through political contributions or influence on the drafting of legislation. Canadian interests have more power to influence their own government's negotiations within an international regime through lobbying, voting, and other democratic methods.

Domestic defendants, through their ability to influence legislation, can push for statutory defenses available to them but not to foreign defendants. They can also fashion environmental laws to provide exceptions, subsidies, and other benefits that foreign entities cannot take advantage of. For example, under CERCLA, a site can apply for and receive a "federally permitted release," which is a defense to an action for certain response costs and damages, though not to a CERCLA cleanup order such as the UAO in the *Pakootas* case. The district court expressly noted that there may indeed be circumstances where there is unequal treatment of a facility in the United States discharging waste into a river that causes environmental harm on U.S. soil versus a facility located in Canada doing the same.[65] The court dismissed this concern with a non sequitur, suggesting that CERCLA-immune U.S. facilities would potentially be liable under another statute such as the Clean Air Act or the Clean Water Act.[66]

A bilateral treaty approach to pollution control is better suited to the reality that border pollution flows both ways. Complaints should be coordinated and resolved together instead of through a unilateral and provincial approach. Transboundary rivers are approximately evenly split between

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[63] Thomas W. Merrill, *Golden Rules for Transboundary Pollution,* 46 DUKE L.J. 931, 947 (1997).

[64] *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (upholding application of Fair Labor Standards Act to municipal transit authority and noting that "[t]he political process ensures that laws that unduly burden the States will not be promulgated").

[65] Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *14 (E.D. Wash. Nov. 8, 2004).

[66] *But see* Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA,* 14 N.Y.U. ENVTL. L.J. 233, 312 n.390 (2006) (arguing that Teck's arguments misunderstand the scope and applicability of the CERCLA permit exemption).

those flowing from the United States to Canada and vice versa,[67] and "[i]n matters of pollution, both [the United States and Canada] are 'sinners' and both are 'sinned against.'"[68] Half of Ontario's air pollution and eighty percent of the Great Lakes pollution comes from the United States.[69] Historically, the United States has been "concerned that Canada might successfully use legal rather than diplomatic means to punish U.S. polluters."[70] Such ongoing transboundary pollution issues have been resolved successfully by the IJC, as in disputes over coal development in British Columbia and the Garrison dam in North Dakota, demonstrating the long-term viability of this bilateral regime.[71] Conversely, various United States organizations have expressed serious concerns over retaliation by the Canadian government over the unilateral approach of the *Pakootas* case.[72]

The procedural rules in American courts may also be biased against foreign defendants. For example, under 42 U.S.C. § 9659(g), only the United States or the State where the facility is located, if it is not already a party to the case, may intervene in the CERCLA citizen's suit as a matter of right. The State of Washington duly took advantage of this right in *Pakootas*. CERCLA does not allow foreign countries or subnational entities, such as Canada or British Columbia, to intervene as a matter of right in a lawsuit against their own constituent. The district court recognized this disparity, but noted that the site at issue was within the United States and that the foreign parties could always seek permissive intervention.[73] Nevertheless, the inability to intervene as a matter of right means that foreign governmental authorities are less able to become involved and protect their substantial interests when an entity on their soil is being sued in an American court.

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[67] David G. Lemarquand, *Preconditions to Cooperation in Canada-United States Boundary Waters,* 26 NAT. RESOURCES J. 221, 223 (1986) ("About fifty-five percent of the ninety significant transboundary rivers flow from Canada to the United States.").

[68] John E. Carroll, *Water Resources Management as an Issue in Environmental Diplomacy,* 26 NAT. RESOURCES J. 207, 213 (1986).

[69] Stewart Elgie, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution,* 27 CAN.-U.S. L.J. 205, 215 (2001).

[70] *See* Parrish, *supra* note 60, at 410-11; *see, e.g.*, Michie v. Great Lakes Steel Div., 495 F.2d 213 (6th Cir. 1974) (denying a motion to dismiss in a case where thirty-seven residents of Ontario, Canada, filed a complaint against corporations that operate seven plants in the United States immediately across the Detroit River from Canada).

[71] See Lemarquand, *supra* note 67, at 223.

[72] *See, e.g.*, Brief of Amicus Curiae Chamber of Commerce of the United States, *supra* note 45, at *14-*20; Brief for Amici Curiae the National Mining Association and the National Association of Manufacturers Supporting Appellaint [sic] and Reversal at *22-*26, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (No. 05-35153), 2005 WL 2175372. *Cf.* Benz v. Compania Naviera Hidalgo, SA, 353 U.S. 138, 146-47 (1957) (declining to apply Labor Management Relations Act extraterritorially since to interfere "in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain").

[73] Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *15 (E.D. Wash. Nov. 8, 2004).

C. As Applied to the Facts in the Present Case, the Ninth Circuit Decision Conflicts Only Minimally with International Law

Fortunately for the Ninth Circuit, under the actual facts of the *Pakootas* case, the unilateral judgment does not pose a significant conflict with the laws of Canada. This specific application of CERCLA and unilateral bypass of the international regime is not problematic and is unlikely to create significant discord thanks to the similarities between American and Canadian laws on the subject.[74] The Trail Smelter operation is regulated by the British Columbian government's Environmental Management Act ("EMA")[75] and the related Contaminated Sites Regulation ("CSR").[76] Had the Ninth Circuit given consideration to these parallel Canadian environmental laws, it would have concluded that the extraterritorial application of CERCLA would not pose significant problems. The American judgment would be in accordance with Canadian laws and would not cause the international discord that the presumption against extraterritoriality is meant to avert.

The EMA of British Columbia is very similar to CERCLA. The British Columbia drafters used CERCLA as their model.[77] EMA has even been called the "Superfund Legislation of British Columbia."[78] For a pollution case like *Pakootas*, the EMA allows the provincial authority to undertake a preliminary or detailed investigation if the authority reasonably suspects that the site may be contaminated, and the authority may "issue a remediation order to any responsible person."[79] The ordered person may be required to remediate, reimburse another party's remediation costs, or pay damages.[80] Both the EMA and CERCLA impose liability on current and previous owners and operators, as well as generators and transporters.[81] Under the EMA, a company like Teck is "absolutely, retroactively, and jointly and separately liable to any person or governmental body for reasonably incurred costs of

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[74] *See* Robinson-Dorn, *supra* note 66, at 309-10.

[75] Environmental Management Act, R.S.B.C., ch. 53 (2003), *available at* http://www.qp.gov.bc.ca/statreg/stat/E/03053_00.htm.

[76] Contaminated Sites Regulation, B.C. Reg. 375/96 (2005), *available at* http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375_96/375_96.htm.

[77] Robinson-Dorn, *supra* note 66, at 310; *see also* WALDEMAR BRAUL, MINISTRY OF ENV'T, PROVINCE OF B.C., NEW DIRECTIONS FOR REGULATING CONTAMINATED SITES: A DISCUSSION PAPER 20-21 (1991), *available at* http://www.env.gov.bc.ca/epd/epdpa/contam_sites/reports/pdf/new_directions.pdf (using CERCLA as a model to determine the appropriate regime for environmental joint and several liability).

[78] William K. McNaughton & Craig Godsoe, *Importing Cercla into Canada: The British Columbia Experience*, INTERNATIONAL ENVIRONMENTAL LAW COMMITTEE NEWSLETTER (Am. Bar Ass'n Section of Env't, Energy & Res., Chicago, Ill.), July 2000, *available at* http://www.abanet.org/environ/committees/intenviron/newsletter/july00/mcn.html.

[79] *See* EMA, R.S.B.C., §§ 41, 48 (2003).

[80] *Id.* § 48(2).

[81] *Compare* EMA, R.S.B.C., § 45 (2003) *with* 42 U.S.C. § 9607(a)(3) (2006). *See also* EMA, R.S.B.C., § 45(2)(c) (2003) (imposing liability for "a person who produced the substance and by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that . . . caused the substance to migrate to the contaminated site.").

remediation."[82] The EMA does differ from CERCLA in some areas, such as alternative dispute resolution, liability capping mechanisms, standards to determine contaminated sites, and other areas, but none of these are applicable to the present case.[83]

Environmental regulation in Canada is a task of the provincial government, but there are also relevant Canadian federal law doctrines. The application of CERCLA to the Trail Smelter's historical discharges is consistent with key principles generally underlying Canadian federal environmental laws. For example, the Supreme Court of Canada has recognized the application of the "polluter pays" principle in Canadian law.[84]

Canadian courts have even enforced CERCLA judgments obtained in the United States against Canadian companies for pollution actions in the United States. In *United States v. Ivey,*[85] the Ontario Court of Appeals upheld a lower court's ruling enforcing two judgments that the United States had obtained against Canadian defendants who held ownership interests in an American corporation that conducted a waste disposal business outside of Detroit. The court noted the similarity of CERCLA to Ontario's Environmental Protection Act, opining that "[w]hile the measures chosen by our legislature do not correspond precisely with those chosen by the Congress of the United States, they are sufficiently similar in nature to defeat any possible application of the public policy defence."[86] In the case of *United States v. The Shield Development Co.*, the Ontario court noted that "enforcement of a judgment pursuant to CERCLA is not, in itself, contrary to [Canadian] public policy."[87] Because of this precedent, the judgment in the present case would probably be ultimately enforceable against Teck since the American judgment would not be imposing an undue and unexpected burden.[88]

The Ninth Circuit decision sets a dangerous precedent for the extension of CERCLA and possibly other statutes to extraterritorial actions without the proper evaluation of the potential effects on international comity. Fortunately, the facts in *Pakootas* support the application of CERCLA to the Trail Smelter since the outcome would likely have been very similar under the British Columbian CERCLA-inspired environmental statutes. Teck cannot

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[82] EMA, R.S.B.C., § 47(1) (2003).

[83] McNaughton & Godsoe, *supra* note 78.

[84] Imperial Oil Ltd. v. Quebec (Minister of Environment), [2003] 2 S.C.R. 624, 641-42.

[85] [1995] 26 O.R. (3d) 533.

[86] *Id.* at 554.

[87] [2004] 74 O.R. (3d) 583, 593-94. *Shield* involved an action to enforce a CERCLA judgment for response costs incurred in removing hazardous substances from a copper processing plant in Utah.

[88] The similarities between CERCLA and EMA suggest that the authorities of the two countries do not have to modify their behaviors in enforcing each other's laws. *Cf.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law as codified in the Restatement to consider, in good faith, moderating the exercise of its enforcement jurisdiction.

claim that liability for its polluting actions at the Trail Smelter was unexpected. Even if Teck had prevailed in the present case, the *Pakootas* plaintiffs could have sought a similar remedy through the international treaty regime or applicable Canadian laws.

However, looking beyond this particular case, the Ninth Circuit does not impose any limits on the causal connection required between the defendant and the ultimate environmental release in the United States. Given the global nature of environmental pollution, entities anywhere can be held liable for their actions anywhere as long as the act ends up contaminating a parcel of American land. While Canadian industries operate under standards similar to those of the United States and likely have sufficient funds to cover costs of Superfund cleanups, polluters in less developed nations are in a very different situation. Even in Canada, the quantitative standards for determining whether a site is sufficiently contaminated may be different from the "less prescriptive" standard set by CERCLA.[89] As courts continually refine the jurisprudence of environmental laws, they should be careful not to infringe on the established regime of international environmental regulation.

Mexico, for example, does not have robust environmental laws similar to CERCLA.[90] An extraterritorial application of CERCLA to a Mexican company may be beneficial from an environmental standpoint, but it would affect the sovereignty of and international comity with Mexico. If Mexico has not achieved the level of development that renders it ready to handle strict environmental regulations, its domestic policy should not be overruled by a unilateral court action, especially from a court that did not consider its decision's extraterritorial implications. If a court wishes to extend its judgment to foreign activities of a foreign company, it should first carefully evaluate Congressional intent and the risk of international discord.

IV. Conclusion

Overall, the Ninth Circuit arrived at the right result but through tortuous and unsound reasoning. Teck should be held responsible for the environmental contamination it caused in the United States, but the court should have more carefully considered the effects of CERCLA on extraterritorial behavior and the international regime of pollution controls. Instead of noting that Teck was being considered liable because of its active pollution activities in Canada, the Ninth Circuit pretended that the only relevant activity under consideration was the passive release of contaminants in the United States to the surrounding environment. This incomplete analysis of a delicate aspect of transnational law risks creating a precedent that would unilaterally disrupt comity and friendly trade relations.

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[89] McNaughton & Godsoe, *supra* note 78.

[90] *See generally* Robert Varady et al., *Managing Hazardous Materials Along the U.S.-Mexico Border*, Environment, Dec. 2001, at 22.