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Suing U.S. Corporations in Domestic Courts for Environmental Wrongs Committed Abroad Through the Extraterritorial Application of Federal Statutes

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SUING U.S. CORPORATIONS IN DOMESTIC COURTS FOR ENVIRONMENTAL WRONGS COMMITTED ABROAD THROUGH THE EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES

JENNIFER M. SIEGLE*

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I. INTRODUCTION

Multinational corporations (MNCs)¹ exist in a vacuum of environmental liability. Host states, typically developing nations, rarely have the environmental laws in place needed to remedy the vast quantity of damage many corporations inflict. Further, since developing countries are typically dependent on the MNCs located within their borders, even if they did have the structure in place to prosecute the corporations for environmental wrongdoing, they would probably be unwilling to do so, for fear of losing such an important economic asset. Therefore, the United States should apply existing environmental statutes extraterritorially for foreign plaintiffs seeking redress for environmental wrongs MNCs commit abroad. This prospect has recently become somewhat of a reality; however, significant

¹ A multinational corporation is a "national company in two or more countries operating in association, with one controlling the other in whole or in part." THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 30 (1992).

barriers remain in place that prevent the total vindication of foreign victims of environmental abuse.

The number of MNCs has increased dramatically over the second half of the twentieth century.² Their numbers will continue to rise as long as "trade barriers diminish, communications systems improve, and transportation becomes cheaper and more efficient."³ Forty-one percent of MNCs conduct some part of their operations in developing nations.⁴ In those developing nations, MNCs function in a myriad of "pollution-intensive and hazardous industries," which have the potential to harm the environment and human health.⁵ MNCs also participate in industries that develop natural resources, such as "mining, petroleum, and agri-business," all of which have the capability of endangering environmentally sensitive areas,⁶ such as the rainforest. The World Bank conducted a study on MNCs, which concluded "polluting industry activities are being dispersed internationally, [but] the dispersion is greatest in the direction of developing countries."⁷

MNCs control the economy of many of the developing nations in which they operate, as they are often the primary source of income for the state.⁸ However, a MNC's top priority is generally the "financial health of the corporation and its shareholders, [not the] environmental needs of the host country."⁹ In accordance with these priorities, MNCs then commit acts, which, if performed in the United States, would be considered illegal,

² Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 262 (1997).

³ *Id.* at 263.

⁴ U.N. Conference on Trade and Dev., Programme on Transnational Corporations, World Investment Report 1993: Transnational Corporations and Integrated International Production at 19-22, U.D. Doc ST/CTC/15b, U.N. Sales No. E.93.II.A.14 (1993).

⁵ Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 8 (Winter, 1995).

⁶ *Id.* Today, an increasing number of countries are exporting increased amounts of hazardous waste for disposal in foreign nations. Lauren Levy, *Stretching Environmental Statutes to Include Private Causes of Action and Extraterritorial Application: Can It Be Done?*, 6 DICK. J. ENVTL. L. & POL'Y 65 (Winter, 1997). Recent changes in the domestic waste disposal markets of the world's industrialized nations, "including increased waste generation, reduced disposal capacity, tighter regulation of the environment, increased disposal costs, and greater public concern over the disposal of hazardous wastes, have stimulated the export of hazardous waste for disposal." *Id.*

⁷ Patrick Low & Alexander Years, *Do "Dirty" Industries Migrate?*, INTERNATIONAL TRADE AND THE ENVIRONMENT 89, 88 (World Bank Discussion Papers, No. 159) (1992).

⁸ Scott Holwick, Note & Comment, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183, 192 (Winter, 2000).

⁹ *Id.* at 192.

including those that destroy the environment.¹⁰ These actions in turn “threaten indigenous cultures, unique ecosystems, and many people’s lives.”¹¹

To exacerbate the situation, MNCs escape liability under international law, as treaties or other international agreements, which are written to guarantee the rights of nations, do not regulate MNCs.¹² Furthermore, those corporate codes of conduct on environmental protection that do exist are insufficient, as they typically require only “self-regulation, and thus capture only the lowest common denominator of a duty of care.”¹³ Finally, host governments must struggle to balance the economic and environmental needs of the country.¹⁴ When the host governments attempt to negotiate with MNCs about environmental regulations, and industrial and pollution practices, the MNCs possess an enormous amount of negotiating leverage due to their ability to simply leave that country for another with more favorable regulations.¹⁵ In fact, developing countries may “ease, or fail to increase, domestic environmental controls to prevent polluting industries from migrating,”¹⁶ for fear of losing the income they generate for the host government.

Regulation of MNCs by foreign states is even more difficult, “not solely for lack of will, but also for lack of capacity.”¹⁷ The United States has the capability to do so, although it is reluctant to enforce its regulations for a multitude of reasons. Very few domestic statutes explicitly state that they are meant to be applied extraterritorially, and there is a general presumption against extraterritorial application without express intent from Congress. Furthermore, none of these statutes attempts to regulate the environmental practices of MNCs operating in foreign countries.¹⁸ Thus, since MNCs are not subject to international agreements, and the host country rarely imposes its own regulations, U.S. corporations are “essentially able to operate in a completely lawless manner.”¹⁹ If U.S. environmental statutes are applied

¹⁰ Gregory G.A. Tzeuschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 361 (Spring, 1999).

¹¹ *Id.* at 361-62.

¹² Holwick, *supra* note 8, at 193.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Fowler, *supra* note 5, at 16.

¹⁷ Holwick, *supra* note 8, at 193.

¹⁸ Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT’L & COMP. L.J. 123, 139 (Spring, 1996).

¹⁹ *Id.*

extraterritorially, MNCs will no longer be able to operate without fear of liability.

II. GENERAL EXTRATERRITORIAL APPLICATION OF STATUTES & RELEVANT CASE LAW

The Supreme Court has gone through several stages in interpreting the extraterritorial application of statutes, beginning in the early 1900s. The mode of thinking has shifted from essentially denying all extraterritorial statutory applications because of their foreign affairs implications, to presumptions against statutory application without express intent from Congress, to its current application – a presumption against extraterritoriality, with many exceptions.

A. *American Banana Co. v. United Fruit Co.*²⁰

American Banana was one of the first U.S. cases to examine the extraterritorial application of domestic statutes. In *American Banana*, the Costa Rican government seized banana plantations, which were owned by a U.S. corporation in Panama – American Banana.²¹ American Banana then filed suit against its rival, United Fruit, another U.S. corporation operating in the area, for violations of the Sherman Antitrust Act and damage inflicted upon the business, alleging it solicited the Costa Rican government to seize the plantation, railway, and supplies in a conspiracy to force the plaintiff out of business.²² The Supreme Court found the injury to the plaintiff unactionable under U.S. law.²³

The Court considered prior case law on the extraterritorial application of laws to the high seas, legislative intent, the doctrine of comity,²⁴ and tort law.²⁵ Furthermore, it reasoned that since the government of Costa Rica condoned the acts, albeit instigated by United Fruit, any interference by the U.S., or application of U.S. laws, would violate Costa Rica's sovereignty.²⁶ The Court also added that whether an act was lawful was something that

²⁰ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

²¹ *Id.* at 354.

²² *Id.* at 354-55.

²³ *Id.* at 359.

²⁴ The doctrine of comity, or deference to other nation's sovereignty, is discussed in detail in Part V(B) of this comment. See *infra* notes 289-300 and accompanying text.

²⁵ See generally, *American Banana*, 213 U.S. 347.

²⁶ *Id.* at 356.

needed to be determined in the country where the act was committed.²⁷ Finally, the Court noted that, in cases where there is ambiguity, or no indication at all from Congress, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."²⁸ This holding against the extraterritorial application of statutes became the pillar for assessment of extraterritorial antitrust law for the next thirty-five years.²⁹

B. *Foley Bros., Inc. v. Filardo*³⁰

Another case of importance in the area of extraterritorial application of U.S. laws is *Foley*. In *Foley*, an American citizen working in the Middle East alleged his employer, an American contractor operating under the U.S. government to build public works there, failed to adhere to the Eight-Hour Law.³¹ The Supreme Court applied a three-prong test to determine whether Congress intended the statute to be applied extraterritorially. First, the Court explained that Congress intends for all U.S. laws to apply only domestically, unless there is express intent in the language of the statute mandating its application abroad.³² The Eight-Hour Law had no such expression.³³ Second, the legislative history of the law showed no evidence Congress had implied intent for its extraterritorial application.³⁴ Finally, administrative interpretations of the law also showed no indication it should be applied outside of the United States.³⁵ The Court concluded the law should not be applied extraterritorially, and enscinded the presumption against extraterritorial application of statutes "as a canon of statutory construction."³⁶

²⁷ *Id.* at 357-58.

²⁸ *Id.* at 357.

²⁹ Lee I. Raikan, *Extraterritorial Application of RCRA: Is Its Exportability Going to Waste?*, 12 VA. ENVTL. L.J. 573, 591 (Summer, 1993).

³⁰ *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

³¹ *Id.* at 283. The Eight-Hour Law is set forth in 40 U.S.C.S. §§ 321-326 (2002), and limits the regular work day to eight hours. Filardo was hired as a cook for the construction site, and demanded he be paid overtime for the days he worked in excess of eight hours. Foley Brothers refused, and Filardo filed suit.

³² *Id.* at 285.

³³ *Id.* at 286.

³⁴ *Id.* at 287-88.

³⁵ *Id.* at 288.

³⁶ Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 607 (Winter, 1990).

C. *Benz v. Compania Naviera Hidalgo, S.A.*³⁷

In *Benz*, the Supreme Court found the Labor Management Relations Act of 1947 did not apply to damages caused by union members picketing a foreign ship, operated entirely by foreign seamen, while temporarily in an American port.³⁸ Losses suffered during the two months of picketing, therefore, were not recoverable under U.S. law.³⁹ The Court examined the language of the Act itself, as well as the legislative history to ascertain congressional intent. The Court combined two different approaches to determining the extraterritoriality of the statute.⁴⁰ By first looking to the language and legislative history of the Act, the Court adopted the "clear indication by Congress" test.⁴¹ Finding the Act lacking congressional intent, the Court then performed "a functional balancing test," similar to the one used in *American Banana*, which took into consideration the lack of "American connections and interests in the case"⁴² and the "delicate field of international relations."⁴³

D. *McCulloch v. Sociedad Nacional de Marineros de Honduras*⁴⁴

McCulloch furthered Supreme Court theory on extraterritorial application of statutes. The Court held the National Labor Relations Act did not apply to vessels sailing between the U.S. and Latin America.⁴⁵ The ships in question were owned by a foreign subsidiary of an American corporation, flew flags of foreign nations, and operated by a foreign crew.⁴⁶ The Court,

³⁷ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

³⁸ *Id.* at 139. The picketing went through four distinct segments: the first was instigated over a wage dispute, after which the Master discharged everyone who went on strike, and lasted approximately two weeks; the second strike included the Sailor's Union of the Pacific and the striking crew, and lasted approximately three weeks; third, the local chapter of the National Organization of Masters, Mates and Pilots (NOMMP) set up their picket line, which lasted approximately two months; fourth, the Atlantic and Gulf Coast District of the NOMMP picketed for two days, until forced to leave under an injunction. *Id.* at 140. "None of the crew were members of any of the three unions" picketing. *Id.* at n.3.

³⁹ See generally, *id.*

⁴⁰ Suzanne B. Krolikowski, *A Sovereign in a Sovereignless Land? The Extraterritorial Application of United States Law: EDF v. Massey*, 19 N.C. J. INT'L L. & COM. REG. 333, 338 (Winter, 1994).

⁴¹ *Id.*

⁴² *Id.* Neither the boat, nor the crew were American; they simply happened to be at a U.S. port. *Benz*, 353 U.S. at 142.

⁴³ *Id.* at 147.

⁴⁴ *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

⁴⁵ *Id.* at 21-22.

⁴⁶ *Id.* at 12.

similar to its analysis in *Benz*, examined the statutory language and the legislative history of the Act.⁴⁷ The Court also emphasized the relatively minor U.S. connection, the policy that the U.S. “should not become involved in the internal affairs of foreign flag ships,” as to do otherwise may violate a treaty, and held that to apply U.S. law to the ships would conflict with Honduran law.⁴⁸

The Court, in *Benz* and *McCulloch*, applied a broader approach to determining the extraterritorial application of a statute than in previous cases.⁴⁹ In some ways, the new test could be construed as more strict, because not only did the Court look to the statute’s language and legislative history, it also considered the foreign policy implications.⁵⁰

E. Equal Opportunity Employment Commission v. Arabian American Oil Co. (*Aramco*)⁵¹

In *Aramco*, the Supreme Court also addresses the extraterritorial application of U.S. laws. In *Aramco*, an American citizen, Boureslan, worked for an American corporation abroad.⁵² Allegedly, during his four years of employment abroad before being discharged, he was harassed because of his race and religion.⁵³ Boureslan filed a petition with the Equal Employment Opportunity Commission (EEOC) and in Texas (Arabian Oil’s place of business) state court, under Title VII of the Civil Rights Act of 1964.⁵⁴ The Court again, as in *Foley*, looked to the language, legislative history, and administrative interpretations of the Act to determine if Congress intended it to be applied extraterritorially, concluding it did not.⁵⁵ Then, relying on *Benz* and *McCulloch*, the Court rationalized that to uphold the claim would interfere with an issue governed by another country’s laws and policies.⁵⁶

However, much of the insight in *Aramco* comes from the strong dissent by Justices Marshall, Blackmun, and Stevens. They argued that the presumption against extraterritorial application was simply that – a presumption – and not a clear rule, as the majority indicated.⁵⁷ The dissent

⁴⁷ Krolikowski, *supra* note 40, at 338.

⁴⁸ *Id.*

⁴⁹ *Id.* at 339.

⁵⁰ *Id.*

⁵¹ EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

⁵² *Id.* at 247.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 248, 246–47.

⁵⁶ *Id.* at 255.

⁵⁷ *Id.* at 261.

explained the two different categories of presumptions against extraterritoriality: the strict rule, requiring clear congressional statement before applying domestic policy to an issue that may have foreign policy implications, such as in *Benz* and *McCulloch*; and the weaker rule, which does not take into account sensitive issues of foreign affairs, such as in *Foley*.⁵⁸ The dissent argued that since extraterritorial application of Title VII would not affect the sovereignty of other nations, the weaker *Foley* test should have been used.⁵⁹ The *Aramco* decision "established a significant threshold that must be satisfied before reaching more substantive and subjective tests" of extraterritoriality.⁶⁰

F. Environmental Defense Fund, Inc. v. Massey⁶¹

After *Aramco*, it seemed clear that the test for whether a statute should be applied extraterritorially was dependent upon Congress making a clear statement of intent for such application. However, the strong dissent and Congress's reaction⁶² to the opinion seems to leave open this question. Although not a Supreme Court case, *Massey* sheds light on the principles of extraterritorial application post-*Aramco*. The D.C. Circuit, in addressing the extraterritorial application of the National Environmental Policy Act (NEPA)⁶³ in Antarctica, described three exceptions to the presumption against extraterritoriality.⁶⁴ The court indicated the exceptions it was considering were well established in previous case law; however, the earlier cases did not explicitly describe any of the exceptions.⁶⁵ The "court's exceptions are actually an interpretation and distillation of the pre-*Aramco* case law, brought together in a cohesive manner."⁶⁶ Hence, the case's enlightening effect on the presumption against extraterritoriality.

⁵⁸ *Id.* at 265.

⁵⁹ *Id.* at 265-66.

⁶⁰ Raikan, *supra* note 29, at 584.

⁶¹ *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

⁶² Congress later amended the Civil Rights Act to ensure its extraterritorial application to American citizens.

⁶³ 42 U.S.C.S. §§ 4321-4370 (2002).

⁶⁴ The lower court denied the request, explaining NEPA does apply extraterritorially, despite the broad language Congress used to describe the statute's purpose. The lower court also failed to examine the legislative history of the Act, although they relied on *Aramco* for their reasoning.

⁶⁵ Krolikowski, *supra* note 40, at 348.

⁶⁶ *Id.*

1. CLEAR INTENT EXCEPTION

The D.C. Circuit court relied explicitly on *Aramco* in formulating this exception, stating, "the presumption [against extraterritoriality] will not apply where there is an 'affirmative intention of . . . Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations."⁶⁷ Thus, a court should not contravene Congress's intent to apply a statute extraterritorially.⁶⁸ Conversely, a court should not apply a statute extraterritorially if the statute is ambiguous regarding its reach.⁶⁹

2. ADVERSE EFFECTS EXCEPTION

The second exception is involved "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."⁷⁰ The court extrapolated this exception from previous Supreme Court cases that permitted the "application of a statute extraterritorially when there would have been effects within the U.S. borders if the statute was not applied."⁷¹

3. LOCATION OF CONDUCT EXCEPTION

The final exception is implicated when the "conduct regulated by the government occurs within the United States."⁷² The court extended this to include instances where the significant effects of the conduct are felt outside of the U.S., as long as the conduct itself largely takes place within the United States.⁷³ This "raises the threshold question of whether the action is [actually] extraterritorial in nature."⁷⁴ The presumption against a statute of this nature's extraterritoriality is not exercised unless foreign policy implications are present.⁷⁵ Thus, "executive, legislative, and agency decisions [that] take place in the United States would fall under this

⁶⁷ *Massey*, 986 F.2d at 531 (citing *Aramco*, 499 U.S. 244, quoting *Benz*, 353 U.S. at 147).

⁶⁸ Kourtney Twenhafel, Comment, *Freeport McMoran's Midas Touch: Testing the Application of the National Environmental Policy Act to Federal Agency Action Governing Multinational Corporations*, 4 TUL. J. INT'L & COMP. L. 303, 309 (Summer, 1996).

⁶⁹ *Id.*

⁷⁰ *Massey*, 986 F.2d at 531.

⁷¹ Krolikowski, *supra* note 40, at 348.

⁷² *Massey*, 986 F.2d at 531.

⁷³ *Id.*

⁷⁴ Twenhafel, *supra* note 68, at 311.

⁷⁵ *Id.*

exception, subject to the first two exceptions,⁷⁶ as would the actions of a MNC.

The court held the incinerator proposed for use in Antarctica fell under the ambit of the *location of conduct* exception, requiring an Environmental Impact Statement (EIS) before implementation.⁷⁷ The court explained that since NEPA was intended to apply to a federal agency's decisionmaking process, and agency decisions are typically made in the U.S., the actual conduct NEPA regulates often occurs in the U.S. as well.⁷⁸ The court also explained Antarctica presented a unique problem in that it is not under the sovereign rule of any one particular nation.⁷⁹ This eliminated any conflict of laws or analysis of effects on foreign affairs tests typically applicable to determining whether a statute should be applied extraterritorially. The *sovereignless exception* has been referred to as the implied fourth exception to the presumption against extraterritoriality.⁸⁰ Furthermore, the court considered Congress's concern about worldwide problems, indicated in the language of the statute.⁸¹ The court's approach in *Massey* seems to move away from the *Aramco* rules of extraterritoriality and return to the weaker standard, as used in *Foley*. Although the explicit descriptions of exceptions to the presumption against extraterritoriality are helpful to understanding the doctrine, the conflict between the process used in deciding the *Massey* case and the process used in *Aramco* only illuminate the disparity in interpretation and application of the presumption.

G. Hartford Fire Insurance Co. v. California⁸²

In the same year as the *Massey* decision, the Supreme Court addressed extra-territoriality yet again in *Hartford Fire*. The Court, in analyzing the antitrust claims, abandoned the interest-balancing test cemented in the Restatement⁸³ shortly before the decision, indicating balancing should only be applied in instances where there is "a true conflict between domestic and foreign law."⁸⁴ The case involved several U.S. states and private parties who

⁷⁶ *Id.*

⁷⁷ NEPA requires all federal agencies complete an EIS before implementing any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.S. § 4332(2)(C) (2002).

⁷⁸ *Massey*, 986 F.2d 528, 532-33.

⁷⁹ *Id.* at 529.

⁸⁰ Krolikowski, *supra* note 40, at 347, 349. Additionally, this exception may be construed so as to control the government's actions in outer space, or on the high seas.

⁸¹ *Massey*, 986 F.2d at 532-33.

⁸² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

⁸³ Restatement (Third) of the Foreign Relations Law of the United States (1987).

⁸⁴ *Hartford Fire*, 509 U.S. at 799. A true conflict would only exist when the U.S. party is required

sued a London-based insurance firm for refusing to offer reinsurance to cover pollution damage claims.⁸⁵ The defendants did not deny the conduct, which primarily took place in England, and instead argued it was legal under English law.⁸⁶ The Court ruled in favor of the plaintiffs, finding no true conflict existed.⁸⁷ *Hartford Fire* “has left a troubling legacy . . . [leaving] future lower courts [to] address the nature of a true conflict,”⁸⁸ which was not fully explained in the decision.

III. AREAS IN WHICH EXTRATERRITORIALITY IS SUPPORTED & WHY

Extraterritorial application of statutes is accomplished either through Congress or the courts. In some instances, Congress has demonstrated express intent for extraterritoriality, such as in legislation addressing terrorism and clean air. The courts have found extraterritorial application necessary for drug enforcement and copyright protection. Additionally, both the courts and Congress have addressed the need for extraterritorial application of security and antitrust statutes.

A. Congressional Intent for Extraterritorial Application

1. ANTI-TERRORISM

The Hostage Taking Act⁸⁹ and the Biological Weapons Anti-Terrorism Act⁹⁰ have express language indicating extraterritorial application is appropriate.

The Hostage Taking Act provides:

by foreign law to violate U.S. law, or when it is impossible for the party to comply with the laws of both the United States and the foreign state. Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, 10 FLA. J. INT'L L. 487, 507, n.92 (Spring/Summer, 1996).

True conflict is similar to, if not the same as, foreign compulsion theory. Under foreign compulsion, a state would not require a person to act in a foreign state in a manner prohibited by the law of the foreign state, or to refrain from acting in compliance with a requirement of that foreign state. However reasonable it may sound, it has not been uniformly accepted or applied.

See *United States v. Davis*, 767 F.2d 1025, 1034 (2d Cir. 1985) (rejecting foreign compulsion); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345-46 (7th Cir. 1983) (accepting foreign compulsion).

⁸⁵ *Hartford Fire*, 509 U.S. at 764.

⁸⁶ *Id.* at 798.

⁸⁷ *Id.* at 799.

⁸⁸ Gordon, *supra* note 84, at 509.

⁸⁹ 18 U.S.C.S. § 1203 (2002).

⁹⁰ 18 U.S.C.S. § 175 (2002).

- (a) [W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act . . . shall be punished by imprisonment for any term of years or for life.
- (b) it is not an offense under this section if the conduct required for the offense occurred outside the United States unless:
- (c) the offender or the person seized or detained is a national of the United States;
- (d) the offender is found in the United States; or
- (e) the governmental organization sought to be compelled is the government of the United States.⁹¹

The Biological Weapons Anti-Terrorism Act is even more explicit, stating, "There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States."⁹²

2. CLEAN AIR

The Clean Air Act⁹³ (CAA) has limited extraterritorial implications, primarily addressing the acid rain problem suffered along the U.S.-Canadian border. The language of the statute indicates intent to apply only certain provisions extraterritorially. Section 7415 addresses the situation caused when air emissions in the U.S. induce or contribute to air pollution in foreign countries that "may reasonably be anticipated to endanger public health or welfare" in that country.⁹⁴ The CAA's extraterritoriality is restrained, however, since only countries that offer reciprocal rights receive the benefits of Section 7415.⁹⁵ Thus, the Act's extraterritoriality only applies to a few nations.

⁹¹ 18 U.S.C.S. § 1203 (2002).

⁹² 18 U.S.C.S. § 175(a) (2002).

⁹³ 42 U.S.C.S. §§ 7401-7515 (2002).

⁹⁴ 42 U.S.C.S. § 7415(a) (2002), states:

Whenever the Administrator [of the EPA]... believes that any air pollutant or pollutants emitted in the United States causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country, [he or she] shall give formal notification thereof to the Governor of the State in which such emissions originate.

⁹⁵ Jeffrey B. Groy & Gail L. Wurtzler, *International Implications of U.S. Environmental Law*, 8 NAT.

B. Court-Derived Extraterritorial Application

1. COPYRIGHT

*Steele v. Bulova Watch Co.*⁹⁶ is one of the few cases in which the Supreme Court recognized the extraterritorial application of a statute, and is the seminal case in extraterritorial application of copyright law. In *Steele, Bulova*, an American corporation, sued a U.S. citizen for trademark infringement and unfair competition that took place in Mexico.⁹⁷ The Court read the statute broadly, finding the U.S. could make laws that governed its own citizens, even if their actions took place in another country,⁹⁸ such as in the case at hand. The Court emphasized its ability to make such laws, as long as they did not encroach upon the sovereignty of another jurisdiction.⁹⁹ Key to the decision was the fact that Mexico had already ruled against the defendant and nullified his registration in Mexico.¹⁰⁰ The Court concluded that since the U.S. had an interest in the outcome as well, because some of the watches made in Mexico had found their way into the U.S. stream of commerce,¹⁰¹ and its decision would not interfere with the sovereignty of another nation,¹⁰² the finding of a copyright violation would be upheld.

2. DRUG ENFORCEMENT

Drug enforcement is one area in which the courts have routinely applied statutes extraterritorially. This is typically justified under the adverse effects or seriousness of the harm exception, although not typically referred to explicitly.

⁹⁶ *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

⁹⁷ *Id.* at 281.

⁹⁸ *Id.* at 283-84.

⁹⁹ *Id.* at 285-86.

¹⁰⁰ *Id.* at 288.

¹⁰¹ *Id.* at 286-87.

¹⁰² *Id.* at 289.

a. *United States v. Egan*¹⁰³

Egan again looked at the seriousness of the harm to the United States in determining whether a statute should be applied extraterritorially.¹⁰⁴ In *Egan*, the U.S. Coast Guard found marijuana on a ship forty miles south of Long Island, beyond the U.S. territorial limit.¹⁰⁵ The defendants were indicted, although the applicable statutes showed no express intent to be applied extraterritorially.¹⁰⁶ The court held the charges were valid, reasoning that although the defendants were apprehended outside of the U.S., the impact of their actions would have been felt inside.¹⁰⁷ Furthermore, the court reasoned, in light of the drug problem plaguing the U.S., drug smuggling was a threat to national security.¹⁰⁸

b. *United States v. Benitez*¹⁰⁹

Benitez was a Colombian fugitive.¹¹⁰ Benitez discovered two agents conducting a Drug Enforcement Agency investigation in Columbia, held them prisoner, and shot them repeatedly, although not fatally.¹¹¹ The U.S. federal court rationalized jurisdiction was proper because the victims were U.S. citizens.¹¹² Their status satisfied the conduct test.¹¹³ In addition, sufficient American interests existed because the operation had national security implications, and was directly connected to the "governmental functions of the nation."¹¹⁴

¹⁰³ *United States v. Egan*, 501 F.Supp. 1252 (S.D.N.Y. 1980).

¹⁰⁴ Joan R. Goldfarb, *Extraterritorial Compliance With NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543 (Spring, 1991).

¹⁰⁵ *Egan*, 501 F.Supp. at 1256.

¹⁰⁶ *Id.* at 1256, 1258.

¹⁰⁷ *Id.* at 1257-61.

¹⁰⁸ Goldfarb, *supra* note 104, at 550.

¹⁰⁹ *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1315.

¹¹² Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1255 (April, 1992).

¹¹³ *Id.*

¹¹⁴ *Id.*

c. United States v. Noriega¹¹⁵

General Noriega was indicted by a federal grand jury in Miami, Florida for racketeering and various drug law violations.¹¹⁶ Almost two years later, U.S. troops were sent into Panama City to seize Noriega.¹¹⁷ The court found jurisdiction under the extraterritorial application of U.S. laws, reasoning that, “even if extraterritorial conduct produces no effect in the U.S., a defendant can still be reached if he *intended to produce* an effect in the U.S., or is part of a conspiracy in which some co-conspirator’s activities occurred in American territory.”¹¹⁸

C. Both Congressional and Court-Enforced Areas of Extraterritoriality

1. SECURITIES

Congress enacted the Securities Exchange Act of 1933¹¹⁹ to guarantee fair play in the securities market. The Act specifically governs foreign securities exchanges as well as domestic. The language of the statute provides in part:

The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.¹²⁰

Additionally, the Foreign Corrupt Practices Act of 1977 (FCPA)¹²¹ prohibits bribery of foreign government officials by U.S. citizens subject to the jurisdiction of the Securities and Exchange Commission.¹²² The FCPA

¹¹⁵ United States v. Noriega, 746 F.Supp. 1506 (S.D. Fla. 1990).

¹¹⁶ *Id.* at 1510.

¹¹⁷ *Id.* at 1511.

¹¹⁸ Brilmayer & Norchi, *supra* note 112, at 1257 (emphasis added).

¹¹⁹ 15 U.S.C.S. §§ 77b-m (2002).

¹²⁰ 15 U.S.C.S. § 78dd(b) (2002). However, courts have declined to apply this provisions as broadly as the language implicates, finding extraterritoriality in only the most narrow of circumstances.

¹²¹ 15 U.S.C.S. §§ 78m(a)-(h) (2002).

¹²² *Id.* at § 78m(a), 78b(6).

also applies to non-U.S. companies who either issue securities in the United States, or are subsidiaries of a U.S. company.¹²³

a. *Schoenbaum v. Firstbrook*¹²⁴

Schoenbaum involved a stockholder's derivative action on behalf of a Canadian corporation.¹²⁵ The plaintiffs, suing under U.S. securities laws, alleged the defendants knew of oil discoveries and the consequent increase in stock value, but conspired and sold the stock at very low prices to "affiliates, business associates, and friends."¹²⁶ These actions affected the price of the stock on the American Stock Exchange (ASE), thereby causing harmful effects in the United States to American citizens buying foreign stocks listed on the ASE.¹²⁷ The court concluded the only way to protect these American investors would be through extraterritorial application of U.S. securities regulations.¹²⁸ The court "extracted jurisdiction from the express purposes of the Act, recognizing the congressional intent to protect national public interests."¹²⁹

b. *Bersch v. Drexel Firestone*¹³⁰

In *Bersch*, a Canadian corporation that sold and managed mutual funds was accused of misrepresentation and omissions in prospectuses used in offering stock.¹³¹ *Bersch*, an American citizen, sued, alleging some of the preparatory acts for the fraud were committed inside the United States, although the fraud itself occurred outside of its borders.¹³² The appellate court ruled the acts were in and of themselves not of a sufficient magnitude to justify jurisdiction, but since the effects of the fraud were borne by U.S. citizens, jurisdiction was proper.¹³³ The court acknowledged that its interpretation of the law might extend the scope to greater or less than what

¹²³ Robert A. Bassett, *Canadian Companies Beware: The U.S. Foreign Corrupt Practices Act Applies to You!*, 36 ALBERTA L. REV. 455, 458 (1998).

¹²⁴ *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968).

¹²⁵ *Id.* at 217.

¹²⁶ *Id.* at 218.

¹²⁷ Raikan, *supra* note 29, at 603.

¹²⁸ *Schoenbaum*, 405 F.2d at 219.

¹²⁹ Raikan, *supra* note 29, at 603.

¹³⁰ *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

¹³¹ *Id.* at 974, 978.

¹³² *Id.* at 974, 985.

¹³³ *Id.* at 987, 992-94.

Congress intended, but its decision was based on its "best judgment as to what Congress would have wished if these problems had occurred to it."¹³⁴

c. SEC v. Kasser¹³⁵

Two corporations, one American, the other Canadian, accused Kasser, a U.S. citizen, of fraud and misrepresentation regarding a Canadian incorporated fund, owned by a Canadian province, in *Kasser*.¹³⁶ The fraudulent inducement led to the bankruptcy of the two companies.¹³⁷ The SEC sought an injunction against Kasser, and the court found jurisdiction since significant conduct occurred in the United States.¹³⁸ The court followed the reasoning used in a prior case (*IIT v. Vencap*),¹³⁹ which distinguished itself from *Bersch* by stating, "Our ruling on this basis of jurisdiction is limited to the perpetration of fraudulent acts themselves, and does not extend to mere preparatory activities, or the failure to prevent fraudulent acts, where the bulk of the activity was performed in foreign countries, such as in *Bersch*."¹⁴⁰

The disparity between *Bersch* and *Kasser* illustrates the different applications of the conduct test among different circuit courts, especially in the securities context.¹⁴¹

2. ANTITRUST

Multiple U.S. statutes grant extraterritorial jurisdiction over antitrust suits, including the Sherman Antitrust Act,¹⁴² the Wilson Tariff Act,¹⁴³ and the Clayton Act.¹⁴⁴ However, the majority of extraterritorial antitrust suits and prosecutions are brought under the Sherman Act, and occasionally under the Wilson Act.¹⁴⁵ The Clayton Act is not often utilized, as its various

¹³⁴ Gordon, *supra* note 84, at 516.

¹³⁵ SEC v. Kasser, 548 F.2d 109 (3d Cir. 1977).

¹³⁶ *Id.* at 111.

¹³⁷ *Id.*

¹³⁸ *Id.* at 110-12.

¹³⁹ IIT v. Vencap, 519 F.2d 1001 (2d Cir. 1975), on remand at 411 F.Supp. 1094.

¹⁴⁰ *Id.* at 1016-17.

¹⁴¹ Raikan, *supra* note 29, at 608.

¹⁴² 15 U.S.C.S. §§ 1-7 (2002).

¹⁴³ 15 U.S.C.S. §§ 8-11 (2002).

¹⁴⁴ 15 U.S.C.S. §§ 12-27 (2002).

¹⁴⁵ Russell J. Davis, Annotation, *Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce*, 40 A.L.R. Fed. 343, n.1 (2001).

substantive provisions are not phrased as broadly as the jurisdictional provision.¹⁴⁶

- The first two sections of the Sherman Antitrust Act provide as follows:

1. Restraint of trade; resale price maintenance; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.¹⁴⁷

2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.¹⁴⁸

- The two salient portions of the Wilson Act provide:

1. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations

¹⁴⁶ Kintner and Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce – Variations on American Banana since 1909*, 15 B.C. INDUS. & COM. L. REV. 343 (Nov. 1973).

¹⁴⁷ 15 U.S.C.S. § 1 (2002).

¹⁴⁸ *Id.* at § 2.

either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.¹⁴⁹

2. Jurisdiction of courts; duty of United States attorneys; procedure

The several [circuit courts] district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act and it shall be the duty of the several [district attorneys of the United States] United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .¹⁵⁰

- The Clayton Antitrust Act provides as follows:

1. Suits by persons injured

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by

¹⁴⁹ *Id.* at § 8.

¹⁵⁰ *Id.* at § 9.

him sustained, and the cost of suit, including a reasonable attorney's fee.¹⁵¹

a. *United States v. Aluminum Co. of America (Alcoa)*¹⁵²

The Second Circuit decided *Alcoa*, the first case addressing the extraterritorial application of U.S. antitrust law.¹⁵³ Aluminum Company was accused of monopolizing interstate and foreign commerce, specifically in the manufacture and sale of virgin aluminum ingot.¹⁵⁴ The court applied a lengthy reasoning test to whether a monopoly was present, and concluded it was.¹⁵⁵ Aluminum Company was also accused of forming an illegal subsidiary corporation in Canada, which then conspired with European aluminum producers to set prices.¹⁵⁶ The court concluded U.S. antitrust laws applied to the Canadian corporation, although no American agent was involved in price fixing.¹⁵⁷

The court based this conclusion on the presumption that the price fixing had both intended to affect and did affect American commerce.¹⁵⁸ Judge Learned Hand wrote the opinion, and utilized a two-part test, which eventually became known as the *effects test*.¹⁵⁹ The implementation of this test by later courts permitted antitrust plaintiffs to file "suit when there is almost any effect on U.S. commerce," and seemed to disregard foreign affairs implications.¹⁶⁰

b. *Laker Airways, Ltd. v. Saben*¹⁶¹

In *Laker*, several European airlines attempted to drive Laker Airways out of the market, as it offered flights at a rate substantially lower than that set

¹⁵¹ *Id.* at § 15(a).

¹⁵² *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. Ct. App. 1945).

¹⁵³ The Supreme Court could not establish a quorum of justices who were not disqualified from hearing the case, so they remanded the case to the Second Circuit on certification. J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 6.04 146 (2d ed. 1981).

¹⁵⁴ *Alcoa*, 148 F.2d at 421.

¹⁵⁵ *Id.* at 423-39.

¹⁵⁶ *Id.* at 440-41.

¹⁵⁷ *Id.* at 444-45.

¹⁵⁸ *Id.*

¹⁵⁹ Raikan, *supra* note 29, at 592 ("As it evolved, this test was translated into various standards of impact on the United States, including 'direct and substantial effect,' 'direct and influencing effect,' and 'intent and actual effect,' but few cases specific the standard's underlying components.").

¹⁶⁰ *Id.*

¹⁶¹ *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

by the International Air Transport Association.¹⁶² Although Laker Airways maintained operations for a few years, the price fixing, alleged commissions paid to travel agents to send travelers to other airlines, and pressure put upon lenders to withhold financing eventually took its toll, and Laker was forced into liquidation.¹⁶³ Laker sued under U.S. antitrust laws against a number of foreign and domestic airlines.¹⁶⁴ Several of the British airlines filed for injunctions in British courts, which were awarded.¹⁶⁵ Laker then filed for injunctions in U.S. courts to prevent the remaining defendants from exercising their right to file for injunctions in other countries.¹⁶⁶ The *Laker* court – after acknowledging the complexity of the case, its manifestation of inherently conflicting domestic laws from several countries, and the procedural difficulties intrinsic in cases involving injunctions preventing access to courts of foreign jurisdiction – found the effect on U.S. commerce substantial enough to warrant extraterritorial application of U.S. antitrust laws.¹⁶⁷

c. *Timberlane Lumber Co. v. Bank of America*¹⁶⁸

In *Timberlane*, an American lumber company was attempting to expand its business into Honduras by milling wood there and shipping it back to the United States and Puerto Rico.¹⁶⁹ Similar to the accusations in *American Banana*, the plaintiff claimed the Bank of America, through its Honduras subsidiaries and the Honduras government, were involved in a conspiracy to shut the plaintiff out of Honduras.¹⁷⁰ The plaintiff filed suit under the Sherman Act and the Wilson Tariff Act, alleging the actions of the defendants adversely affected competition in the United States.¹⁷¹

The court claimed the act of state doctrine illustrated in *American Banana* was not applicable to this case because *Timberlane's* facts were clearly

¹⁶² *Id.* at 916. The International Air Transport Association (IATA) was a "trade organization of the world's largest air carriers" who met annually to set fares. Laker Airways' fares were approximately one-third the price of those set by the IATA.

¹⁶³ *Id.* at 917.

¹⁶⁴ *Id.* at 915.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 918.

¹⁶⁷ *Id.* at 916, 938.

¹⁶⁸ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976). The case was remanded for further proceedings, which awarded more time for discovery, and was later dismissed for inability to show a serious harm to U.S. commerce, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

¹⁶⁹ *Timberlane*, 549 F.2d at 601.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 600.

distinguishable, and Honduras's sovereign acts were instigated by a private individual.¹⁷² The court then examined the case under the effects test, stating that the "substantiality" element of the test was too arbitrary given the requirements of comity.¹⁷³ The court then readdressed the principle of comity by implementing a *jurisdictional rule of reason*, three-part test. The test considered: first, the effects of the defendant's actions on United States commerce; second, whether the scope of U.S. antitrust law covered the act in question; and third, the interests of the U.S. in applying its antitrust law, when balanced against the interests of the foreign nation.¹⁷⁴

The third prong of the *Timberlane* test exemplifies the "unique contribution to the principle of extraterritorial application" this opinion made.¹⁷⁵ Through utilization of a balancing test, the court "emphasized strong antitrust enforcement, while at the same time assuring respect for the legitimate concern of foreign states in guarding their sovereignty."¹⁷⁶

Federal courts remain divided over jurisdictional aspects of antitrust law, between those still applying the *pure effects test* and those using the *jurisdictional rule of reason test*.¹⁷⁷ Nevertheless, under either approach, "antitrust jurisprudence still appears to be a champion of the expansive extraterritorial application of U.S. law."¹⁷⁸

Based on the forgoing examples, it is clear courts have the ability to authorize *necessary* extraterritorial regulation, even without clear congressional intent, even when doing so may implicate foreign affairs issues. However, the question of whether environmental regulation abroad is *necessary* is yet to be answered definitively.

IV. ENVIRONMENTAL STATUTES AND THEIR EXTRATERRITORIAL APPLICABILITY

Courts have examined the extraterritoriality of a wide range of environmental statutes since *Aramco*, including the National Environmental Policy Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Resource Control and Liability Act, the Toxic Substances Control Act, and the Marine Mammal Protection Act. The results of these cases have varied. The diverse range of outcomes leaves

¹⁷² *Id.* at 608.

¹⁷³ *Id.* at 610.

¹⁷⁴ *Id.* at 613.

¹⁷⁵ Raikan, *supra* note 29, at 596.

¹⁷⁶ *Id.* at 596-97. "*Timberlane* quickly developed a following and is considered one of the most influential antitrust standards in foreign commerce litigation." *Id.* at 597.

¹⁷⁷ *Id.* at 599.

¹⁷⁸ *Id.* at 600.

the question of extraterritorial application of environmental statutes ripe for Supreme Court review.

A. *The National Environmental Policy Act*

Post-*Massey*, two cases have tested the waters as to the extraterritorial application of NEPA.¹⁷⁹ The results vacillated from complete distinguishment based on the location of *Massey* (i.e. Antarctica), to full extraterritorial application to any NEPA-implicated actions.

1. *NEPA COALITION OF JAPAN V. ASPIN*¹⁸⁰

Shortly after *Massey*, the D.C. District Court held the Defense Department need not prepare an EIS under NEPA for U.S. military installations in Japan.¹⁸¹ The court looked to the language of the statute strictly, and emphasized the presumption against extraterritorial application of statutes absent clear congressional intent.¹⁸² The court distinguished this case from *Massey* by noting Antarctica was not a foreign country, but a global common, analogous to outer space.¹⁸³

2. *HIRT V. RICHARDSON*¹⁸⁴

In *Hirt*, individuals sought a temporary restraining order and preliminary injunction, alleging violations of NEPA, to prevent the shipment of nuclear reactor material to Canada.¹⁸⁵ The plaintiffs claimed the Department of Energy failed to complete an Environmental Assessment, as required by law, which considered every aspect of the transfer.¹⁸⁶ The

¹⁷⁹ For the perspective on extraterritorial application of NEPA pre-*Massey*, see *Sierra Club v. Atomic Energy Comm'n*, 433 F.2d 524 (D.C. Cir. 1970); *Comm. For Nuclear Responsibility v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971); *People of Enewetak v. Laird*, 353 F.Supp. 811 (Haw. D. 1973); *People of Saipan v. Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974); *Wilderness Soc'y v. Morton*, 594 F.2d 1026 (D.C. Cir. 1974); *Nat'l Org. for the Reform of Marijuana Laws v. U.S. Dep't of Justice*, 497 F.2d 654 (D.C. Cir. 1974); *Sierra Club v. Coleman*, 421 F.Supp. 63 (D.C. D. 1976); *Sierra Club v. Adams*, 578 F.2d 289 (D.C. Cir. 1978); *NRDC v. NRC*, 647 F.2d 1345 (D.C. Cir. 1981); and *Greenpeace USA v. Stone*, 924 F.2d 175 (9th Cir. 1991).

¹⁸⁰ *NEPA Coalition of Japan v. Aspin*, 837 F.Supp. 466 (D.C. D. 1993).

¹⁸¹ *Id.* at 467.

¹⁸² *Id.* at 468.

¹⁸³ *Id.* at 467.

¹⁸⁴ *Hirt v. Richardson*, 127 F.Supp. 23 833 (W.D. Mich., SD 1999).

¹⁸⁵ *Id.* at 837.

¹⁸⁶ *Id.* The Department of Energy only analyzed the "fabrication and transport accident scenarios for the American" mixed oxide (MOX) fuel, and did not consider the Russian fabrication of MOX,

court held the facts of the *Hirt* case warranted the extraterritorial application of NEPA, due mostly in part to the significant role the federal government was to have in the transfer.¹⁸⁷ They also considered the cross-border affects an accident would cause.¹⁸⁸ Nevertheless, the court contemplated these factors in light of the “weighty considerations of U.S. foreign policy, nuclear non-proliferation, and the general interests of the Executive in carrying out U.S. foreign policy,” and declined to issue the injunction.¹⁸⁹

B. *Resource Conservation and Recovery Act (RCRA)*¹⁹⁰

RCRA governs hazardous waste from cradle to grave; it also governs the import and export of hazardous waste.¹⁹¹ Through RCRA, regulatory power is granted to the Environmental Protection Agency (EPA) to control all pollution from hazardous and non-hazardous wastes.¹⁹² RCRA was intended to regulate hazardous waste material throughout its entire life cycle – from the time of generation, through its transportation, to its final disposal.¹⁹³ However, courts have frustrated this objective by refusing to apply RCRA extraterritorially.¹⁹⁴ Thus, RCRA is said to apply “only from cradle to shore.”¹⁹⁵

RCRA provides government regulation over hazardous waste.¹⁹⁶ It also allows citizen suits.¹⁹⁷ Although RCRA’s citizen suit provision provides

which was simultaneously being shipped to Canada.

¹⁸⁷ *Id.* at 844-45.

¹⁸⁸ *Id.* at 845.

¹⁸⁹ *Id.* at 849.

¹⁹⁰ 42 U.S.C.S. §§ 6901-6992(k) (2002).

¹⁹¹ Martha E. Candiello, Symposium, *Fifty-Seventh Judicial Conference of the Third Circuit: Looking Forward to the Next Millenium: The Extraterritorial Reach of Environmental Laws*, 70 TEM. L. REV. 1235, 1235-36 (Winter, 1997).

¹⁹² Levy, *supra* note 6, at 87.

¹⁹³ *Id.*

¹⁹⁴ Raikan, *supra* note 29, at 576.

¹⁹⁵ *Id.*

¹⁹⁶ 42 U.S.C. §§ 6911-6917 (2002).

¹⁹⁷ 42 U.S.C. §§ 6972(a)-(g) (2002);

Citizen suits in environmental law allow private enforcement of a statute, either against a polluter in cases where the government has failed to prosecute or against the EPA for failure to perform non-discretionary duties. Plaintiffs in citizen suits [under RCRA] can recover damages upon a finding that the defendant contributed to the mishandling of hazardous wastes which “present an imminent and substantial endangerment” to health or the environment.

Raikan, *supra* note 29, at 578-79.

citizens the right to sue the EPA for failure to perform a non-discretionary duty, this type of suit has never been brought successfully.¹⁹⁸

The singular case addressing the extraterritoriality of RCRA is *Amlon Metals, Inc. v. FMC*.¹⁹⁹ In *Amlon Metals*, FMC's pesticide plant in Baltimore, Maryland, created waste containing copper, which it then contracted to be sent to a United Kingdom recycling company for recovery.²⁰⁰ Some time after the initial entrance into the contract, FMC sent twenty containers holding the waste to the United Kingdom.²⁰¹ Upon delivery in Leeds, England, the receiving company's personnel noticed a strong odor emanating from the containers.²⁰² After multiple indications by FMC that the waste might contain varying amounts of xylene, Amlon rejected the containers remaining at the port, and demanded FMC remove the containers which had already been brought to the Amlon facility.²⁰³ Thereafter, Amlon notified the British government, which then conducted its own tests, revealing high levels of xylene (higher than FMC ever admitted previously), organic chemicals, and chlorinated phenols.²⁰⁴

Amlon originally sued FMC in the U.K.'s Commercial Court, where it was dismissed because "all the actions claimed to be taken by FMC took place in the United States and U.S. law would apply."²⁰⁵ Subsequently, Amlon sued in U.S. federal court under RCRA, the Alien Torts Claims Act, strict liability, breach of express and implied warranty, and negligence.²⁰⁶ The court quickly disposed of the Alien Tort claim on the premise that "the matter failed to meet the preliminary jurisdictional requirement of . . . violat[ing] a treaty or the law of nations."²⁰⁷

The court, assuming RCRA would have to be applied extraterritorially, accepted jurisdiction under RCRA, but declined to apply it, stating that there is a presumption against the extraterritorial application of laws, and to overcome that presumption requires congressional intent.²⁰⁸ "Having examined the relevant legislative history and structure and language of RCRA, this Court is unpersuaded by [the] plaintiffs' [contention] Congress

¹⁹⁸ Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*,

17 BERKELEY J. INT'L LAW 95, 113 (1999).

¹⁹⁹ *Amlon Metals, Inc. v. FMC Corp.*, 775 F.Supp. 668 (S.D.N.Y. 1991).

²⁰⁰ *Id.* at 669.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 669-70.

²⁰⁴ *Id.* at 670.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Raikan, *supra* note 29, at 581.

²⁰⁸ Belenky, *supra* note 198, at 115.

desired RCRA[’s citizen suit provision] to apply extraterritorially.”²⁰⁹ Consequently, absent the court finding Congress’s express or implied intent for RCRA to apply extraterritorially, the plaintiff attempted to parallel their claims to those often found in securities cases, i.e. where extraterritorial application is warranted under the conduct test.²¹⁰ The court found this argument to be without merit, and dismissed the RCRA claims, leaving only the contract claims remaining.²¹¹

It is “this type of conclusion, where no court accepts or can find jurisdiction, that, in a sense, eviscerates [a] statute that has been used to argue in favor” of the extraterritorial application of U.S. laws.²¹² Additionally, this case of first impression “brought to light a dangerous loophole in the regulation of hazardous waste and its transnational shipment.”²¹³ Thus, although foreign plaintiffs may use RCRA as a means to bring suit against MNCs, according to the statute’s language, at least one court has indicated the impossibility of this.

1. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, & LIABILITY ACT (CERCLA)²¹⁴

CERCLA contains express and implied provisions regarding a foreign party’s right to legal relief.²¹⁵ Section 9611 expressly grants a limited cause of action for foreign plaintiffs, allowing them to sue if:

1. the release of a hazardous substance occurred
 - A. in the navigable waters of the United States, or
 - B. in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;
2. the claimant is not otherwise compensated for his loss,
3. the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters . . . ; and
4. recovery is authorized by a treaty or executive agreement between the United States and foreign country involved, or if the . . .

²⁰⁹ *Amlon*, 775 F.Supp. at 676.

²¹⁰ *Id.* at 672-73.

²¹¹ *Id.* at 676.

²¹² *Candiello*, *supra* note 191, at 1236.

²¹³ *Raikan*, *supra* note 29, at 614.

²¹⁴ 42 U.S.C.S. §§ 9601-9675(c) (2002).

²¹⁵ *Levy*, *supra* note 6, at 90.

appropriate official certifies that such country provides a comparable remedy for U.S. claimants.²¹⁶

Section 9607 demonstrates an unconditional implied extraterritoriality, stating:

[N]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in . . . this section . . . any person [who owned or operated] a vessel or facility . . . at which . . . hazardous substances were disposed . . . or any person who [contracted to dispose, treat, or transport] hazardous substances owned or possessed by [the owner or operator of a facility] . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . costs of response incurred by any other party [including the United States], as well as damages for injury to, destruction of, or loss of natural resources . . . and the costs of any health assessment. . . .²¹⁷

Section 9611 “shows congressional intent to give CERCLA limited application outside the territory of the United States, [as foreign claimants] are limited to the scenarios set forth in the provision.”²¹⁸ Nevertheless, the two sections have complementary roles, allowing foreign parties “limited legal relief under Section 9607, unless they meet the restrictions of Section 9611.”²¹⁹

No court has ruled specifically on the extraterritorial applicability of CERCLA.²²⁰ However, in *United States v. Ivey*,²²¹ the court came close to addressing the question while considering the extraterritorial enforcement of subpoenas issued under the act.²²² In *Ivey*, after the EPA cleaned a Superfund site in Michigan, it sought “cost recovery against a Canadian defendant who was alleged to have owned and operated the [cleanup] site.”²²³ The EPA served the defendant in Canada.²²⁴ He admitted to receiving the subpoena, but argued “service was not valid because the

²¹⁶ 42 U.S.C.S. § 9611(f) (2002).

²¹⁷ 42 U.S.C.S. § 9607(a) (2002).

²¹⁸ Levy, *supra* note 6, at 90-1.

²¹⁹ *Id.*

²²⁰ Candiello, *supra* note 191, at 1235.

²²¹ *United States v. Ivey*, 747 F.Supp. 1235 (E.D. Mich. 1990).

²²² Candiello, *supra* note 191, at 1235.

²²³ *Id.*

²²⁴ *Id.*

nationwide service of process provisions of CERCLA did not extend to Canada.²²⁵ The court agreed, but then examined the Michigan long-arm statute, stating the defendant “had sufficient ties with Michigan to warrant limited personal jurisdiction.”²²⁶ The court entered a default judgment against the defendant, which was later enforced by the Canadian Court of Justice, possibly constituting “the first time a non-U.S. court has enforced a judgment for CERCLA cost recovery.”²²⁷

2. TOXIC SUBSTANCES CONTROL ACT (TSCA)²²⁸

TSCA grants the EPA the authority to regulate the development and production of chemicals that may present unreasonable health risks.²²⁹ Although the issue of its extraterritoriality has never been addressed by a court, *per se*, the Environmental Health Coalition (EHC) did test its implications on plants in Mexico.²³⁰ When it discovered evidence that the bank of the New River, which runs between Mexico and the U.S., was being contaminated by maquiladoras,²³¹ the EHC filed a petition with the EPA under the TSCA.²³² In it, they alleged that “the EPA had the jurisdiction and extraterritorial authority to address violations of improper management of chemical substances by U.S. owned maquiladoras operating in the Border Region.”²³³ The EHC premised its petition on the theory that U.S. parent corporations operating in Mexico were responsible for “illegally dumping hazardous chemicals into the New River,” and thus, were illegally transporting and importing hazardous substances under the TSCA.²³⁴ The petition was eventually withdrawn as part of a settlement agreement, but not before the EPA issued over ninety subpoenas to U.S. companies “requiring responses to significant internal operational and scientific inquiries.”²³⁵

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ 15 U.S.C.S. §§ 2601-2692 (2002).

²²⁹ Jack I. Garvey, *A New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 UCLA J. INT'L L. & FOREIGN AFF. 1, 39 (2000).

²³⁰ Elia V. Pirozzi, *Compliance Through Alliance: Regulatory Reform and the Application of Market-Based Incentives to the United States-Mexico Border Region Hazardous Waste Problem*, 12 J. ENVTL. L. & LITIG. 337, 364 (1997).

²³¹ Maquiladoras are companies or factories situated on the border between the United States and Mexico.

²³² Pirozzi, *supra* note 230, at 364.

²³³ *Id.*

²³⁴ *Id.* at 364-65.

²³⁵ *Id.* at 365. The subpoenas achieved the primary goal of the EHC, which was to ascertain information concerning the materials used and disposed of in the industrial operations of the

3. MARINE MAMMALS PROTECTION ACT (MMPA)²³⁶

The MMPA was enacted to reduce the number of incidental dolphin killings in commercial fishing operations.²³⁷ However, it is perhaps most well known for inciting the U.S.-Mexico dolphin-tuna conflict. The MMPA limits the number of dolphins American fisherman can take, and "imposes an obligation on each country that exports fish to the U.S. to demonstrate it has a regulatory program governing the taking of marine mammals that is comparable to [the MMPA]."²³⁸ The provision that caused the tuna controversy included a requirement that the U.S. place a trade embargo against countries unable to make the required showing.²³⁹

However, two decades prior, an important clarification of the extraterritoriality principle for an environmental statute was made in *United States v. Mitchell*.²⁴⁰ Here, the court reversed the criminal conviction of an American under the MMPA for capturing dolphins within three miles of the Bahamas.²⁴¹ The court noted Congress's ability to reach beyond U.S. territory and dictate the action of its citizens; however, Congress must first explicitly state its intention to do so in the statute.²⁴² The court held the MMPA "was firmly grounded in the recognition of a sovereign's power to regulate the natural resources within its territorial jurisdiction, which operated against an extraterritorial application of the Act," thereby overruling the conviction.²⁴³

After the General Agreement on Tariffs and Trade (GATT) was signed, Earth Island Institute, an NGO, sued the Secretary of State, asking that he be required to enforce an embargo against all tuna products not certified as dolphin safe.²⁴⁴ Consequently, the U.S. banned the importation of tuna from several countries, including Mexico, costing the Mexican tuna industry between \$30 and \$57 million each year.²⁴⁵ Mexico filed a retaliatory suit,

Maquiladora factories.

²³⁶ 16 U.S.C.S. §§ 1361-1421(h) (2002).

²³⁷ Stanley M. Spracker, *Sovereignty and the Regulation of International Business in the Environmental Area: An American Viewpoint*, 20 CAN.-U.S. L.J. 225, 227 (1994).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

²⁴¹ Twenhafel, *supra* note 68, at 307.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 99 (Fall, 1999).

²⁴⁵ *Id.*

requesting a GATT panel settle the dispute as to whether the embargo was inconsistent with several different provisions of the agreement.²⁴⁶

The panel concluded the U.S. was in violation of the GATT, and the embargo had to be lifted.²⁴⁷ Their reasoning was essentially based on the language of the agreement that indicated any extraterritorial application of laws not specifically addressed in the agreement had to be necessary; e.g. those protecting human life or health.²⁴⁸ The opinion was criticized on many levels. Environmentalists thought the decision's implications were too broad, and had "dropped a wide net over decades of environmental treaties and laws."²⁴⁹ Others criticized the MMPA for its extraterritoriality in general, although this argument is often met with disagreement.²⁵⁰

As indicated by its complicated history, the MMPA is considered by some to have extraterritorial effects; it is considered by others to not.

V. OBSTACLES FOREIGN PLAINTIFFS FACE

"Although courtroom doors are cracking open, numerous jurisdictional and other barriers remain for lawsuits brought by foreign claimants against U.S. MNCs in U.S. courts."²⁵¹ These barriers include dismissal for forum non conveniens and/or comity.

A. *Forum Non Conveniens*

Even when courts find subject matter jurisdiction, foreign plaintiffs still stand for dismissal based on the doctrine of forum non conveniens.²⁵² "Claims brought by foreign plaintiffs are routinely rejected by U.S. courts" based on this doctrine.²⁵³ Forum non conveniens is promulgated through

²⁴⁶ *Id.*

²⁴⁷ Peter Hayes, Book Note, *Freer Trade, Protected Environment*, 35 COLUM. J. TRANSNAT'L L. 213, 240 (1997).

²⁴⁸ *Id.*

²⁴⁹ Steve Charnovitz, *Trade and the Environment: The Environment vs. Trade Rules: Defogging the Debate*, 25 ENVTL. L. 475, 481-82 (Winter, 1992).

²⁵⁰ *Id.* at 496.

²⁵¹ Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 146 (June, 1999).

²⁵² Joanna E. Arlow, Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L. J. 93, 132 (Winter, 2000).

²⁵³ Garvey, *supra* note 229, at 27.

common law, not the Federal Rules of Civil Procedure.²⁵⁴ The doctrine provides courts with a means to decline jurisdiction when it believes the case could be "more appropriately or conveniently tried elsewhere."²⁵⁵ Courts are afforded broad discretion to dismiss an action, which is applied frequently to preclude foreign claimants from using the "procedural advantages presently available to U.S. plaintiffs bringing suit against U.S. corporations."²⁵⁶

A dismissal under *forum non conveniens* typically leaves the victim the option of filing suit in another forum.²⁵⁷ Appellate courts have limited review power, as the decision may only be reversed upon a finding of a clear abuse of discretion.²⁵⁸ *Forum non conveniens* is intended to be used as a means to eliminate harassing, vexatious suits, while advancing the "convenience and interests of both the parties and the forum."²⁵⁹ Only the defendant may invoke the doctrine of *forum non conveniens*, and MNCs in the U.S. "constitute the main group of defendants who currently benefit from the doctrine."²⁶⁰ MNCs frequently are able to evade liability under the doctrine, as the suit is rarely filed in the alternative forum.²⁶¹ However, by

²⁵⁴ Rosencranz & Campbell, *supra* note 251, at 180.

²⁵⁵ *Id.*

²⁵⁶ Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 516 (Summer, 1996).

²⁵⁷ Rosencranz & Campbell, *supra* note 251, at 180.

²⁵⁸ Garvey, *supra* note 229, at 27.

²⁵⁹ Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 653 (Mar. 1992).

²⁶⁰ *Id.* at 651.

²⁶¹ *Id.*

A foreign plaintiff may be unable to bring the suit in the alternative forum for a variety of reasons. Plaintiffs may lose their United States attorney, either because of the alternative forum's specific professional requirements or because the attorney cannot afford the time and expense of travelling to a foreign country for trial. Even if plaintiffs can find an attorney to represent them in the alternative forum, many countries do not allow fees payable on a contingency basis. In addition, many plaintiffs cannot afford attorneys on retainer, especially since some countries cap tort awards, which further limits plaintiffs' recovery.

Moreover, differences in procedural law may preclude refiling the suit. The foreign country's statute of limitations may have expired during the *forum non conveniens* inquiry in the United States. In addition, a foreign forum may not provide discovery rules as liberal as those in the United States. Although many judges now make *forum non conveniens* dismissals conditional on the defendant waiving procedural prohibitions, such as the relevant statute of limitations, jurisdiction, or restrictive discovery rules of the foreign country, this is generally not enough to ensure that the plaintiffs will obtain justice in their home countries. Political pressures may affect the plaintiffs and the court system, especially if the defendant MNC exerts great economic power in the country. Finally, plaintiffs simply may not want to endure the costs and inconvenience of starting a new trial.

granting forum non conveniens dismissals in a wide variety of cases, "United States courts are tacitly condoning the potentially hazardous activities of MNCs by allowing injured plaintiffs' claims to go unanswered."²⁶² Furthermore, forum non conveniens "acts largely as a barrier to holding U.S. multinational corporations accountable for their environmentally destructive behavior abroad."²⁶³

1. *GULF OIL CORP. V. GILBERT*²⁶⁴

Two cases set forth the doctrine of forum non conveniens. The first is *Gilbert*, in which a Virginia resident sued a New York corporation from damages arising from an explosion.²⁶⁵ The doctrine of forum non conveniens was originally used in state courts,²⁶⁶ but in *Gilbert*, the Supreme Court recognized its application to the federal system. The Court described a test to be used when determining whether a motion for dismissal should be granted under forum non conveniens.²⁶⁷ The first prong took into consideration whether there was an adequate alternative forum.²⁶⁸ Then the court considered the private²⁶⁹ and public²⁷⁰ interests involved.²⁷¹ After taking into account all of these factors, a balancing test was applied.²⁷² The Court indicated unless the balance of these factors is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.²⁷³

²⁶² *Id.* at 673.

²⁶³ Clagett, *supra* note 256, at 516.

²⁶⁴ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

²⁶⁵ *Id.* at 502-03.

²⁶⁶ Forum non conveniens began as a method of transferring cases from state to federal court when a federal question was involved. *Id.* at n.4.

²⁶⁷ *Id.* at 508.

²⁶⁸ *Id.*

²⁶⁹ *Id.* The court suggested the private factors to be considered are: the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of the premises if that be appropriate, and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Id.*

²⁷⁰ *Id.* at 508-09. Further, the public factors to be considered are: the undesirability of piling up litigation in congested centers, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home and the unnecessary injection of problems in conflict of laws. *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 508.

²⁷³ *Id.*

2. PIPER AIRCRAFT CO. V. REYNO²⁷⁴

Piper Aircraft is the second leading case regarding the doctrine of forum non conveniens, and is often cited for supporting dismissals of suits brought by foreign plaintiffs against MNCs.²⁷⁵ In *Piper Aircraft*, Scottish plaintiffs sued an American corporation for its involvement in an airplane crash that took place in Scotland.²⁷⁶ *Piper Aircraft* indicates foreign plaintiffs are to be given less deference to their forum selection than domestic plaintiffs, particularly when they are filing suit in a specific court due to differences in the substantive law that would be applied.²⁷⁷ The Court explained that plaintiffs are able to elect a forum whose choice-of-law rules are most advantageous to them, thus "if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper."²⁷⁸ The Court did not mean, however, that the possibility of unfavorable substantive law should never be considered.²⁷⁹ "If the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."²⁸⁰

According to *Piper Aircraft*, an adequate alternative forum is not required; the only thing necessary is that the "defendant be amenable to service in the alternative forum it proposes."²⁸¹ The result of *Piper Aircraft's* holding is that "alternative fora have been considered adequate in the absence of 'rare circumstances,'" or if the remedy is "so clearly inadequate or unsatisfactory that it is no remedy at all," which has worked to the severe detriment of foreign plaintiffs.²⁸²

A stricter standard of forum non conveniens would limit the MNCs' evasion of responsibility for their actions.²⁸³ Because the United States has an interest in preserving the global environment, and because it has a moral

²⁷⁴ Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

²⁷⁵ Garvey, *supra* note 229, at 29.

²⁷⁶ Piper Aircraft, 454 U.S. at 238-39.

²⁷⁷ *Id.* at 238, 243. This is slightly inapposite to *Gilbert*, which produced more preferential treatment for the plaintiff than the *Piper Aircraft* Court afforded.

²⁷⁸ *Id.* at 250.

²⁷⁹ Clagett, *supra* note 256, at 521.

²⁸⁰ Piper Aircraft, 454 U.S. at 255.

²⁸¹ Arlow, *supra* note 252, at 133. Again, a stricter standard was applied here than in *Gilbert*, making it more difficult for foreign plaintiffs to avoid dismissal.

²⁸² *Id.*

²⁸³ Duval-Major, *supra* note 259, at 673.

interest in controlling the behavior of domestic corporations in developing nations, the doctrine of forum non conveniens should be relaxed or abandoned in cases involving suits by foreign plaintiffs against U.S. corporations for environmental injuries suffered in foreign countries.²⁸⁴ While this simple change in doctrine will not completely solve the problems foreign plaintiffs face when suing MNCs, "it is preferable to the present system in which multinational corporations are able to recklessly destroy the natural environment in developing nations without fear of judicial reproach."²⁸⁵

B. Comity

United States courts have extended their jurisdiction to allow adjudication of disputes that meet an intent, conduct, or effects test,²⁸⁶ as set out in *Massey*. Satisfaction of any of these tests "establishes that the acts in dispute sufficiently affect U.S. interests and therefore warrant exporting and applying U.S. law."²⁸⁷ However, in order to balance the "negative response from foreign nations encountering this encroachment by U.S. courts, principles of comity must also be weighed."²⁸⁸ Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens, or of other persons who are under the protection of its laws."²⁸⁹ The result is the same under comity as "when forum non conveniens is the talisman – application of the doctrine . . . leads to dismissal."²⁹⁰ As the Ninth Circuit noted, "Comity is not [a] dispositive [factor] because if it were, it would always prevent suit [by] foreigners in United States courts."²⁹¹ Nonetheless, the doctrine of comity has led to the dismissal of a number of cases brought by foreign plaintiffs against U.S. corporate defendants.²⁹²

²⁸⁴ Claggett, *supra* note 256, at 534.

²⁸⁵ *Id.* at 517.

²⁸⁶ Raikan, *supra* note 29, at 611.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Levy, *supra* note 6, at 84-85.

²⁹⁰ Garvey, *supra* note 229, at 31.

²⁹¹ *Id.*

²⁹² *Id.*

1. *TORRES V. SOUTHERN PERU COPPER CO.*²⁹³

For example, in *Torres*, Peruvian citizens filed suit against a MNC in U.S. federal court for environmental injuries the companies inflicted in Peru. The government of Peru had participated substantially in the activities at issue, through granting various licenses, and via extensive regulation of the subject industries.²⁹⁴ It asserted the extraterritorial application of U.S. environmental statutes would undermine the government's ability to conduct its own internal affairs.²⁹⁵ The court agreed with the government and affirmed the lower court's dismissal on grounds of comity.²⁹⁶ The opinion did not offer a detailed explanation of the decision, other than reflecting the court's belief that the infringement on the Peruvian government outweighed the U.S. interest in environmental protection.²⁹⁷

2. *JOTA V. TEXACO*²⁹⁸

A counterexample is *Jota*, in which residents of Ecuador filed suit against a U.S. corporation for allegedly dumping toxic substances into local rivers, contaminating local property, and for the physical injuries resulting therefrom.²⁹⁹ The Ecuadorian government initially objected to the lawsuit, but after a change in the control of the government, reversed its position, declaring the U.S. was the proper forum.³⁰⁰ The lower court dismissed the suit on the basis of comity, failure to join an indispensable party (the Ecuadorian government), and forum non conveniens.³⁰¹ The Second Circuit reversed the ruling, stating the government's participation would be dependent on its waiver of sovereign immunity, which it had not clearly done at that time.³⁰² Furthermore, the dismissal based on forum non conveniens and comity was erroneous, as there was nothing requiring Texaco to submit to jurisdiction in Ecuadorian courts.³⁰³ Thus, the court

²⁹³ *Torres v. S. Peru Copper Co.*, 113 F.3d 540 (5th Cir. 1997).

²⁹⁴ *Id.* at 543.

²⁹⁵ Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893, 894 (Aug. 1998).

²⁹⁶ *Torres*, 113 F.3d at 544.

²⁹⁷ Ramsey, *supra* note 295, at 895.

²⁹⁸ *Jota v. Texaco*, 157 F.3d 153 (2d Cir. 1998).

²⁹⁹ *Id.* at 155-56.

³⁰⁰ *Id.* at 157.

³⁰¹ *Id.*

³⁰² *Id.* at 163.

³⁰³ *Id.* at 155.

looked to whether an alternative forum was available not only in determining whether the forum was proper, but also whether comity would outweigh the plaintiff's interests.

VI. CONCLUSION

Suing MNCs in U.S. courts has presented a difficult problem for courts and plaintiffs alike. However, the recent decisions of the Supreme Court and the D.C. Circuit court have not completely barred the application, and have provided insight into its environmental uses. The three exceptions presented in *Massey* provide insight into what a successful suit against a MNC by a foreign plaintiff would require. Primarily, if the plaintiff could prove that decisions pertaining to the act in question took place in the United States, the location of conduct exception would apply. The plaintiffs might also try to prove some sort of harm felt in the United States, which would invoke the seriousness of the harm exception. Finally, as Congress has done so in the past, and is clearly able to do so in the future, it is possible an environmental statute might be drafted with a clear intent to be applied extraterritorially. Assuming foreign plaintiffs can overcome jurisdictional issues, and other problems, such as forum non-conveniens and comity, the world of litigation may soon be available as a remedy to environmental harms suffered at the hands of MNCs.

