ARC ECOLOGY V. UNITED STATES DEPARTMENT OF THE AIR FORCE: EXTENDING THE EXTRATERRITORIAL REACH OF DOMESTIC ENVIRONMENTAL LAW

BY

ANNA D. STASCH*

The Ninth Circuit determined in ARC Ecology v. United States Department of the Air Force (ARC Ecology) *that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not extend to address contamination on former U.S. military bases in the Philippines. As* ARC Ecology *illustrates, U.S. laws that prevent and remediate domestic environmental harms committed by American government agencies, corporations, and individuals rarely extend outside of U.S. borders. Consequently, environmentally damaging activities carried out by American actors abroad may go unchecked.*

The judicial presumption against extraterritorial application of domestic laws plays a major role in limiting the scope of U.S. environmental laws to domestic territory. With the general understanding that congressional legislation is domestically focused, and with the objective of preventing the application of U.S. laws in ways that would give rise to a conflict of laws, courts readily apply the presumption to environmental laws and thus disallow their extraterritorial use. In contrast, the presumption has eroded in the realm of securities and antitrust laws and courts have developed alternative tests that more leniently allow for the extraterritorial application of such laws in order to avoid harms to American markets. The inconsistency between how courts apply the presumption in environmental law as compared to in market law, combined with the reality of ever increasing American activities overseas, signals both an opportunity and a necessity to overcome the presumption in the context of environmental law.

This Chapter examines ARC Ecology *and three other contemporary cases from the Ninth Circuit to create an overview of the analysis courts typically employ to apply the presumption against extraterritorial application of environmental laws. This chapter then assesses how to preempt a standard presumption analysis to avoid*

* Anna D. Stasch, 2006. Member, *Environmental Law*, 2005–2006; J.D. and Certificate in Environmental and Natural Resources Law expected May 2007, Northwestern School of Law of Lewis & Clark College; B.A. 2002, Reed College. The author wishes to thank Professor Chris Wold for his guidance, Jon Tucker for his hard work, Taylor Aglipay for his support, and the dedicated staff of *Environmental Law*.

application of the presumption and to achieve extraterritorial application of suitable environmental provisions.

I. INTRODUCTION

Upon withdrawing from the Philippines in 1992, the U.S. military conveyed to the Filipino government all remaining structures at Clark Air Force Base (Clark) and Subic Naval Base (Subic)[1] Along with facilities that now accommodate thriving residential and business communities, the U.S. military also left behind something not foreseen by the Filipino government: hazardous waste. Clark and Subic, located approximately fifty miles apart in the Philippines, presently contain "contaminated sites and facilities that would not be in compliance with U.S. environmental standards" and reportedly pose serious health and safety risks.[2]

ARC Ecology and the Filipino/American Coalition for Environmental Solutions, two U.S. non-profit organizations, along with thirty-six residents of the Philippines filed a citizens' suit[3] against the United States Department of Defense, seeking an order compelling both assessment and cleanup at the bases under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[4] That is, ARC Ecology sought to apply CERCLA to actions of the United States government in a foreign country.[5] On appeal in *ARC Ecology v. United States Department of Air Force* (*ARC Ecology*),[6] the Ninth Circuit concluded that CERCLA does not overcome the presumption against applying U.S laws extraterritorially (the presumption).[7]

The presumption stipulates that absent explicit congressional authorization a statute may not apply extraterritorially to enforce laws against anyone, be it an individual, business entity, or government actor.[8] The presumption finds justification in the principles that Congress 1) hesitates to authorize the application of laws that conflict with the laws of

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1 "Non-removable buildings or structures . . . the right of use of which shall revert to the Philippines upon termination of [the] [a]greement." Military Bases Agreement Review, U.S.-Phil., art. VII, ¶2, Oct. 17, 1988, Temp. State Dep't No. 88-353, 1988 WL 409746; *see also* Susan Kreifels, *Business Storms Ashore: Former U.S. Bases in the Philippines are the new Promised Land*, HONOLULU STAR-BULLETIN, May 28, 2005, *available at* http://starbulletin.com/97/05/28/news/story2.html (describing the growing economy at Clark and Subic).

2 U.S. GEN. ACCOUNTING OFFICE, MILITARY BASE CLOSURES: U.S. FINANCIAL OBLIGATIONS IN THE PHILIPPINES, GAO/NSIAD-92-51, at 3, 27–28 (1992).

3 "[A]ny person may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order [under the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA)], or (2) against the President or any other officer of the United States" for failing to adhere to nondiscretionary duties under CERCLA. 42 U.S.C. § 9659(a) (2000).

4 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000).

5 ARC Ecology v. United States. Dep't of the Air Force, 294 F. Supp. 2d 1152 (N.D. Cal. 2003).

6 Id.

7 411 F.3d 1092 (9th Cir. 2005).

8 *See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 286 (1949) (establishing the rebuttable presumption against the extraterritorial application of federal legislation: "[T]o regulate . . . conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose").

another sovereign,[9] and 2) is "primarily concerned with domestic conditions."[10] In *ARC Ecology*, the Ninth Circuit examined section 105(d)'s language, and CERCLA's purpose, legislative history, and scope, to determine that Congress did not supply "clear evidence" of an intent that section 105(d) of CERCLA apply extraterritorially.[11] The court supported this conclusion by determining that application of the presumption would prevent the extension of potentially conflicting U.S. law into the sovereign territory of another nation, and that Congress designed CERCLA specifically to address domestic concerns.[12] The Ninth Circuit's reasoning and application of the presumption in *ARC Ecology* typifies courts' use of the presumption in the environmental law realm.[13]

In contrast to the express congressional intent required for an environmental law to overcome the presumption, securities and antitrust laws frequently avoid the presumption, even absent a demonstration of congressional intent, because failure to apply such market laws abroad may pose a threat to the American economy.[14] Courts have developed flexible alternatives to the presumption that allow extraterritorial application of securities and antitrust laws.[15] First, under the effects test, courts apply market laws extraterritorially to avoid negative economic effects in the United States[16] and second, under the conduct test, courts regulate market conduct in the United States.[17] The effects and conduct tests allow for frequent extraterritorial application of market laws, regardless of whether

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9 *See, e.g.*, Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804) (noting that a conflict with foreign laws should be avoided when possible: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

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

11 *ARC Ecology*, 411 F.3d at 1098 n.2 (quoting Smith v. United States, 507 U.S. 197, 204 (1993)).

12 *Id.* at 1098.

13 *See, e.g.*, Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) (applying the presumption to the National Environmental Policy Act, and the Nuclear Non-Proliferation Act); United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977) (applying the presumption to the Marine Mammal Protection Act).

14 *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2nd. Cir. 1968) (stating "[w]e believe that Congress intended the [Securities Act] to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities markets from the effects of improper foreign transactions in American securities."). *See also* United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87 (1913) (extending jurisdiction over a Canadian corporation accused of conspiring to monopolize transportation in the United States).

15 *See, e.g.*, *In re* Simon, 153 F.3d 991, 995 (9th Cir. 1998) (affirming district court conclusion that Congress had clearly intended extraterritorial application of the Bankruptcy Code: "If Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case.").

16 *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2nd Cir. 1975) (applying effects test to charge a Canadian corporation for securities violations that had direct and foreseeable effects on the United States' securities market).

17 *See, e.g.*, Grunenthal GMbH v. Hotz, 712 F.2d 421 (9th Cir. 1983) (applying the conduct test to assert jurisdiction over a foreign corporation based on negotiations and telephone conversations held within the United States).

those laws satisfy the stringent requirements of the presumption. Meanwhile the presumption persistently prevents extraterritorial application of environmental laws. The inconsistency between how courts apply the presumption in the environmental law context versus the market law context underlines both a need and an opportunity to develop means for overcoming the presumption in the environmental law realm.

This Chapter draws out tactics for overcoming or avoiding the presumption in order to enforce U.S. environmental laws against American actors responsible for environmental harm abroad. Three recent cases from district courts within the Ninth Circuit demonstrate approaches to overcoming the presumption. First, *Okinawa Dugong v. Donald Rumsfeld* (*Dugong*)[18] offers an example of sufficiently expressed congressional intent that straightforwardly overcomes the presumption. Plaintiffs in *Dugong* brought a creative claim under a lesser-known provision of the National Historic Preservation Act (NHPA),[19] which requires consultation prior to activities that may harm a World Heritage Site or the domestic equivalent thereof, to challenge United States Department of Defense activities that posed a threat to the habitat of Okinawa's population of the dugong (*Dugong dugon*), an endangered marine mammal. Second, *Pakootas v. Teck Cominco Metals, Ltd.* (*Pakootas*),[20] in which U.S. citizens sought to enforce a contamination clean-up order that the United States issued to a Canadian corporation, demonstrates how a showing of harmful effects on U.S. territory can enable the extraterritorial application of an environmental law. Finally, *Friends of the Earth v. Watson* (*FOE*),[21] in which plaintiffs challenged U.S. agency non-compliance with the National Environmental Policy Act (NEPA)[22] in deciding to fund overseas projects that contribute disproportionately to worldwide greenhouse gas emissions, illustrates how a claim involving extraterritorial elements may nonetheless avoid discussion of the presumption by focusing on domestic conduct. These cases reveal present weaknesses in the presumption that open the door to extraterritorial application of environmental laws.

Part II of this Chapter first scrutinizes the presumption, its justifications, and how it generally applies in the environmental realm. Part III discusses *ARC Ecology* and how that case highlights the challenges to overcoming the presumption that environmental provisions face. Part IV examines *Dugong* and the guidance the case provides for determining which environmental provisions have a greater likelihood of achieving extraterritorial application. Part V considers the erosion of the presumption in securities and antitrust law and how the claims in *Pakootas* and *FOE* mirror approaches in the market law realm, and successfully avoid the presumption in the environmental realm. Finally, Part VI summarizes the approaches to overcoming the presumption introduced in prior sections. By

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18 No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

19 National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6 (2000).

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

21 No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

22 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2000).

analyzing several approaches to overcoming the presumption, set forth in these cases, this chapter highlights potentially successful strategies for making claims against American actors for environmental harms perpetrated abroad.

II. AN OVERVIEW OF THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF DOMESTIC LAW AS IT APPLIES IN ENVIRONMENTAL LAW

The presumption against extraterritorial application of domestic laws is a judicial tool that assists courts in deciphering congressional intent regarding the reach of statutes.[23] Under the presumption, courts assume that a statute does not have extraterritorial reach unless Congress indicates otherwise. Thus, courts engage in statutory interpretation to assess whether Congress has affirmatively indicated its intent that a particular statute apply extraterritorially. This process of statutory interpretation is often influenced by the principles underlying the presumption. As Justice Blackmun of the United States Supreme Court, drawing on prior cases, summarized: "[t]he primary basis for the application of the presumption[,] besides the desire . . . to avoid conflict with the laws of other nations[,] is the commonsense notion that Congress generally legislates with domestic concerns in mind."[24] To determine whether a provision applies extraterritorially, courts may not only apply tools of statutory construction to assess congressional intent, but often also consider these two main principles underlying the presumption.

A. Congressional Intent Dictates Whether an Environmental Law Applies Extraterritorially

Although courts have not adhered to a uniform test to assess whether Congress intends a statute to apply extraterritorially, courts do consistently begin their assessments of whether a statute reaches outside the United States by examining the language of the act in question.[25] The United States Supreme Court formerly required a "clear statement" from Congress in order to allow a statute to apply extraterritorially.[26] Consequently, some lower courts held that if a statute's language alone did not unequivocally allow for

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23 The presumption "is a valid approach whereby unexpressed Congressional intent may be ascertained." Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

24 Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 206 (1993) (Blackmun, J., dissenting). *See also* United States v. Corey, 232 F.3d 1166, 1185 (9th Cir. 2000) (citing Supreme Court cases for the principles that the presumption "has a foundation broader than the desire to avoid conflict with the laws of other nations" and is also "based on the understanding that Congress 'is primarily concerned with domestic conditions'").

25 "In applying this rule of construction, we look to see whether language in the relevant Act gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (internal quotations omitted).

26 *Id.* at 258.

extraterritorial application then the presumption applied.[27] The D.C. Circuit, for instance, in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* (*NRDC*),[28] accepted the Nuclear Regulatory Commission's position that "federal statutes apply only to conduct within, or having effect within, U.S. territory unless the contrary is *clearly indicated in the statute*,"[29] and held that NEPA's requirements did not apply to the commission's grant of a permit to export a nuclear reactor. *NRDC* provides an example of how, in the environmental law context, some courts have construed the presumption to yield only to explicit statutory language.

The Supreme Court has since relaxed the requirement of a "clear statement" to a requirement of "clear evidence" of congressional intent,[30] and as a result lower courts have "greater leeway in determining whether Congress intended to override the presumption against extraterritoriality."[31] This leeway enables courts to employ a range of tools of statutory construction such as, consideration of the structure of the overall statute, legislative history, similarly-phrased legislation, and administrative interpretations of the law.[32] These additional tools can inform a court's decision concerning application of the presumption, but are themselves subject to issues of clarity and availability.[33]

In the face of persistent ambiguities regarding whether Congress intends a statute to apply extraterritorially, courts thus turn to the two primary reasons behind the presumption and ask whether applying the statute extraterritorially would either give rise to conflicts with the laws of another sovereign or undermine the principle that Congress generally legislates with a domestic focus.

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27 *See, e.g.*, Smith v. United States, 932 F.2d 791 (9th Cir. 1991) (applying the Supreme Court rule of a necessary clear expression in order to allow extraterritorially application).

28 647 F.2d 1345 (D.C. Cir. 1981) (affirming that the Nuclear Regulatory Commission could grant a permit to export a nuclear reactor to the Philippines (to be placed coincidentally twelve miles from Subic and forty-two miles from Clark)).

29 *In re* Westinghouse Elec. Corp., 11 N.R.C. 631, 637 (1980) (emphasis added).

30 Smith v. United States, 507 U.S. 197, 204 (1993).

31 *ARC Ecology*, 411 F.3d 1092, 1098 n.2 (9th Cir. 2005) (quoting *Smith*, 507 U.S. at 201–03).

32 Foley Bros. v. Filardo 336 U.S. 282, 286–88 (1949). *See also Smith*, *supra* note 30 at 201–03 (considering sources such as the structure of the act and legislative history).

33 As the Supreme Court stated:

> There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision [of the Alien Tort Statute], or about any need for further legislation to create private remedies; there is no record even of debate on the section. Given the poverty of drafting history, modern commentators have necessarily concentrated on the text.

Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004); "[T]here is no agency interpretation [of the Consumer Product Safety Act provisions on penalties for reporting violations, 15 U.S.C. §§ 2064(b), 2068(a)(4), 2069(a)(1)] to which we may defer . . . . We therefore interpret the statute de novo." United States v. Mirama Enterprises, Inc., 387 F.3d 983, 986 (9th Cir. 2004).

B. The Presumption Prevents the Extraterritorial Application of Laws that Give Rise to Conflicts with the Laws of Other Sovereigns

Courts frequently refer to the presumption's objective of avoiding conflicts with the laws of other sovereigns to support a decision to apply the presumption. This objective was the original motivation behind the presumption as it emerged in 1904 in *American Banana Co. v. United Fruit Co.* (*American Banana*)[34] In that case, the Supreme Court declined to apply the Sherman Antitrust Act[35] to two American corporations operating in Central America and introduced a virtual ban on extraterritorial application of U.S. law, based on the reasoning that the lawfulness of an act "must be determined wholly by the law of the country where the act is done."[36] Since *American Banana*, the presumption has relaxed and allows some domestic laws to apply abroad, but the modern presumption, like its earlier counterpart, seeks to prevent "unintended clashes between our laws and those of other nations which could result in international discord."[37]

Given the presumption's initial purpose, courts support application of the presumption by concluding that allowing extraterritorial application of a particular statute may result in conflicts with another nation's laws. In 1991, for example, the Supreme Court denied the application of Title VII employment discrimination laws[38] to a U.S. corporation employing U.S. citizens in Saudi Arabia, because doing so could have potentially resulted in the statute's application to foreign as well as American employers, thus giving rise to a conflict between foreign and domestic employment laws.[39] In sum, concerns over conflicts between laws provide courts with a balance-tipping justification for applying the presumption where the statutory language may be ambiguous or even suggest that extraterritorial application is appropriate.

C. The Presumption Rests on the Principle that Congress Legislates Primarily to Address Domestic Concerns

To justify applying the presumption courts also frequently invoke a second principle behind the presumption, the "commonsense notion" that Congress legislates primarily to address domestic concerns.[40] In 1949, in

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34 213 U.S. 347 (1909).

35 15 U.S.C. §§ 1–7 (2000).

36 *American Banana*, 213 U.S. at 356.

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

38 42 U.S.C. §§ 2000e(g)–2000e(h), 2000e(1)–2000e(3) (2000).

39 *Aramco*, 499 U.S. at 255. *See also* Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (providing international conflict justification); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1963) (same).

40 "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

Foley Bros. v. Filardo (*Foley Bros.*),[41] the Supreme Court announced the modern presumption, stating that "based on the assumption that Congress is primarily concerned with domestic conditions . . . legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[42] Since *Foley Bros.*, courts have relied on the view that Congress by default intends legislation to have a domestic focus to support their applications of the presumption. By drawing attention to statutory language, structure, or legislative history that suggests a statute is domestically focused, courts are able to "resolve restrictively any doubts concerning the extraterritorial application of a statute."[43] Thus, where statutory language and other indicators of congressional intent do not justify application of the presumption, a court can draw on evidence that the statute has a domestic purpose to nevertheless support application of the presumption.

In summary, the first question for a court deciding whether or not to apply an environmental statute extraterritorially is whether or not Congress communicated its intent that the statute apply extraterritorially. Absent clear statutory language, or other indications of intent courts frequently answer this question by assessing whether extraterritorial application of the statute would contravene the principles behind the presumption. In the end, courts frequently justify application of the presumption by concluding that extraterritorial application of the statute could conflict with the laws of another sovereign, or that the statute is domestically focused.

III. *ARC ECOLOGY V. UNITED STATES DEPARTMENT OF THE AIR FORCE*: A CASE STUDY ON HOW COURTS APPLY THE PRESUMPTION IN THE ENVIRONMENTAL LAW CONTEXT

ARC Ecology provides a revealing example of how the method of looking to the purposes behind the presumption allows a court to easily justify application of the presumption in the environmental law context. To remediate the hazardous waste left by the U.S. military at Subic Naval Base and Clark Air Force Base in the Philippines, the nongovernmental organization ARC Ecology attempted to use U.S. hazardous waste law—CERCLA—to compel the government to address the contamination.[44] section 105(d) of CERCLA reads "[a]ny person who is, or may be, affected by a release . . . may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release."[45] Pursuant to this provision, ARC Ecology petitioned the U.S. Navy and Air Force to preliminarily assess the contamination at Clark and Subic in the Philippines. The Navy and Air Force refused, asserting, "CERCLA does not apply to . . . property located outside the territorial

41 336 U.S. 281 (1949).

42 *Id.* at 285 (1949).

43 *ARC Ecology*, 411 F.3d 1092, 1097 (9th Cir. 2005) (citing *Smith*, *supra* note 40, at 204).

44 *Id.* at 1095–96.

45 42 U.S.C. § 9605(d) (2000).

boundaries of the United States."[46] In December of 2002, ARC Ecology commenced a CERCLA citizens' suit seeking both an order compelling the United States to conduct assessments and cleanups at Clark and Subic, and a declaratory judgment asserting that section 105(d) of CERCLA applied extraterritorially to the bases.[47] On appeal, the Ninth Circuit concluded that although the language of the CERCLA provision does not limit the locations and persons eligible to make use of the provision, Congress did not provide "clear evidence" that it intends section 105(d) of CERCLA to apply outside the United States.[48]

The Ninth Circuit in *ARC Ecology* determined that despite the broad language of section 105(d) of CERCLA, the section did not apply extraterritorially because Congress did not intend for the statute to apply extraterritorially.[49] CERCLA is a comprehensive statute that ensures both the clean up of sites contaminated with hazardous materials and the allocation of costs onto parties responsible for the contamination.[50] CERCLA is especially wide-reaching because it may impose strict,[51] joint and several liability[52] upon responsible parties, and may also apply retroactively to impose liability for contamination that occurred prior to the statute's existence.[53] Despite CERCLA's versatility, however, and despite the particularly expansive language of section 105(d), the Ninth Circuit limited the application of the CERCLA provision by asking whether extraterritorial application of CERCLA would either cause conflict with the laws of another sovereign or defy the notion that Congress legislates with domestic purposes in mind.[54]

ARC Ecology illustrates how courts apply the presumption to environmental statutes by first narrowly reading congressional intent, both in a specific provision and in the overall statute, and then reasoning that extraterritorial application of the statute would be contrary to the interests that the presumption serves. The Ninth Circuit's treatment of these interests—avoiding conflicts with other sovereigns' laws, and adherence to the principle that Congress legislates with a domestic focus—demonstrates the malleability of the presumption that allows its frequent application and prevents the extraterritorial application of environmental laws.

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46 *ARC Ecology*, 411 F.3d at 1096.

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

48 *ARC Ecology*, 411 F.3d at 1098.

49 *Id.*

50 *See, e.g.*, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997) (stating "all [potentially responsible parties] are liable under the statute").

51 *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1052–53 (2d Cir. 1985) (imposing strict liability on the current owner of contaminated property who was not responsible for contamination).

52 *See, e.g.*, United States v. Chem-Dyne Corp. 572 F. Supp. 802, 808–10 (S.D. Ohio 1983) (finding CERCLA imposes joint and several liability to be consistent with the common law); O'Neil v. Picillo, 883 F.2d 176, 179 (1st Cir. 1989) (same).

53 *See, e.g.*, United States v. Olin Corp., 107 F.3d 1506, 1511–15 (11th Cir. 1997) (finding liability for clean up costs extends to perpetrators of disposals that occurred prior to CERCLA's enactment).

54 ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d at 1094 (9th Cir. 2005).

A. A Typical Narrow Interpretation of Congressional Intent

ARC Ecology shows how courts may deny the extraterritorial application of an environmental provision despite relatively persuasive congressional language permitting its extraterritorial application. ARC Ecology argued that Congress clearly intends CERCLA to apply extraterritorially to former U.S. military bases because the statute's definition of "United States," expansively includes "any . . . territory or possession over which the United States has jurisdiction."[55] As further evidence of Congress's intent, ARC Ecology referred to the Defense Environmental Restoration Program (DERP), which requires the Secretary of Defense to respond, in accordance with CERCLA, to releases from sites that were "possessed by the United States at the time of actions leading to contamination."[56] ARC Ecology contended that Congress meant for CERCLA to apply to bases like Clark and Subic because they were U.S. possessions at the time of the alleged contamination.[57] The court acknowledged that this language "may be interpreted as bringing [the bases] within the geographic reach"[58] of CERCLA but concluded that the necessary "clear evidence" of congressional intent that claimants like ARC Ecology have a cause of action under CERCLA, was nonetheless lacking.[59] The court supported its conclusion by interpreting the silence of CERCLA's legislative history on the issue of extraterritorial application to mean that "it is unlikely that Congress intended for CERCLA to provide relief to [ARC Ecology]."[60] The Ninth Circuit thus conceded that CERCLA's affirmatively expressed language and context are suggestive of an extraterritorial intent, but nonetheless went on to justify application of the presumption by looking to the purposes behind the presumption.

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55 42 U.S.C. § 9601(27) (2002).

56 10 U.S.C. § 2701(c)(1)(B) (2004).

57 The expansive language in DERP section 2701(c)(1)(A) and (B) is virtually identical to language that has been interpreted to express Congress's clear intent that a statute apply extraterritorially. In *Foley Bros. v. Filardo*, 336 U.S. 282, 285 (1949), the Supreme Court affirmed that "by specifically declaring that the [Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000)] covered 'possessions' of the United States, Congress directed that the [Fair Labor Standards Act] applied beyond those areas over which the United States has sovereignty . . . ." *Foley Bros.*, 336 U.S. at 285 (citing Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948)).

58 *ARC Ecology*, 411 F.3d at 1098.

59 *Id.* The court stated: "Applying the presumption against extraterritoriality to the case at bar, we can find no evidence that Congress expressly (or implicitly) intended to authorize suits under CERCLA by foreign claimants allegedly affected by contamination occurring on a U.S. military base located in a foreign country." *Id.*

60 *Id.* at 1101. As an example the court provided the quote: "[C]itizen suits by aliens rest on a slim foundation. Even if allowed, such lawsuits would be limited to conduct occurring within the U.S . . . ." *Id.* at 1101 (citing Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95, 135 (1999)).

B. The General Principle of Avoiding Conflict with the Laws of Other Nations Justifies Application of the Presumption

The Ninth Circuit demonstrated in *ARC Ecology* how the presumption's underlying policy of preventing conflicts with other nations' laws may support a restrictive reading of an environmental statute. The court concluded that the United States lacked authority to address contamination on the bases without interfering with the laws and sovereignty of the Philippines. The court stated that the "interpretation that CERCLA applies to other countries may result in . . . intrusion on the affairs of foreign sovereigns and international discord."[61] As the court's use of the word "may" reflects, the court did not reference any specific concerns about how U.S. law might interfere with Filipino law or sovereignty. This approach stands in contrast to the Supreme Court's determination in a 1993 case, that absent an articulated conflict with foreign law the presumption did not apply to the Sherman Antitrust Act.[62] In that case the Court stated:

> Since the [defendants] do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.[63]

Under this rationale, a court is not bound by the principle of avoiding conflict with the laws of other nations, to apply the presumption, and could even require a demonstration of conflict before applying the presumption. The Ninth Circuit's prompt and generalized application of the principle is, however, typical when it comes to determining the extraterritorial reach of environmental laws.[64] By beginning and ending its analysis of the potential conflicts between CERCLA and Filipino law with the simple suggestion that applying CERCLA abroad could result in international discord, the Ninth Circuit revealed how conveniently the policy of avoiding conflicts with international laws facilitates application of the presumption.

C. The "Commonsense Notion" that Congress Legislates with a Domestic Focus Justifies Application of the Presumption

ARC Ecology also provides an example of how the commonsense notion that Congress legislates with domestic concerns in mind grants

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61 *ARC Ecology*, 411 F.3d at 1103.

62 Hartford Fire Ins. Co. v. California, 509 U.S. 764 , 798–99 (1993) (indicating that no conflict of laws exists if a person can comply with the regulations of two countries simultaneously).

63 *Id.* at 799 (internal citations omitted).

64 *See, e.g.*, NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466, 467 (D.D.C. 1993) (finding NEPA does not apply where there is a substantial likelihood that treaty relations would be affected).

courts latitude in applying the presumption despite congressional language supporting a statute's extraterritorial application. The Ninth Circuit determined that section 105(d) of CERCLA is limited to domestic applications by concluding that CERCLA is a domestically focused statute. The court arrived at this conclusion by using standard tools of statutory construction, much like the court did in assessing whether Congress indicated its intent that CERCLA apply extraterritorially.

First, the court referred to several CERCLA provisions that focus specifically on releases within the United States. The Ninth Circuit singled out the following provisions as direct evidence of the statute's domestic focus: The President must "consult with the affected State or States;"[65] a citizen suit under CERCLA "shall be brought in the district court for the district in which the alleged violation occurred"[66] and notice in a citizen suit must be given to the "State in which the alleged violation occurs."[67] The court then added that some provisions of CERCLA specifically indicate that they are available for use by foreign claimants and concluded that where Congress intends foreign parties to be able to make a claim, it affirmatively says so.[68] Lastly the court mentioned academic commentary suggesting CERCLA is domestically focused.[69]

Once the court determined that CERCLA is domestically focused, application of the presumption followed because the presumption takes root in the commonsense notion that Congress legislates with a domestic focus. That is to say, because the presumption is based on the principle that Congress legislates with a domestic focus, once the court concludes that it is dealing with a statute that adheres to that principle, the presumption applies. This dynamic allows a court to focus its statutory interpretation on whether Congress wrote a statute with domestic concerns in mind rather than on whether Congress indicates that a particular provision has extraterritorial reach. The presumption's underlying notion that Congress legislates with a

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65 Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9604(c)(2) (2000).

66 *Id.* § 9659(b)(1).

67 *Id.* § 9659(d)(1); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1094, 1100 (9th Cir. 2005).

68 To illustrate its point that Congress explicitly designated CERCLA's extraterritorially reaching provisions, the *ARC Ecology* court cited the following CERCLA provision:

> To the extent that the provisions of this charter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if—(1) the release . . . occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident; (2) the claimant is not otherwise compensated for his loss; (3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act . . . or the Deepwater Port Act . . . ; and (4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved . . . .

42 U.S.C. § 9611(*l*) (2000); *ARC Ecology*, 411 F.3d at 1099.

69 ARC Ecology, 411 F.3d at 1101.

domestic focus thus paves the way for the presumption's application by allowing courts to base application of the presumption to a particular provision, on whether the court can interpret an entire statute as having a domestic focus.

ARC Ecology demonstrates how courts may override a specific provision's indications that Congress intended the provision to apply extraterritorially first by looking more generally to the intent manifested in the statute as a whole, and then by considering whether extraterritorial application of the statute comports with the principles behind the presumption: avoiding conflicts with the laws of other sovereigns and conforming to the notion that Congress legislates with a domestic focus. The Ninth Circuit first construed the language of section 105(d) narrowly, then construed that language of CERCLA narrowly, and finally conducted a limited analysis of the presumption's justifications to validate the narrow reading of the statute and consequent application of the presumption. *ARC Ecology* typifies courts' treatment of the extraterritorial application of environmental statutes, and thus underscores many of the foreseeable obstacles to applying U.S. law to environmentally harmful activities of U.S. actors overseas.

IV. *OKINAWA DUGONG V. RUMSFELD*: FACTORS THAT ENABLE AN ENVIRONMENTAL PROVISION TO OVERCOME THE PRESUMPTION

Although the extraterritorial application of environmental statutes is, in general, restricted, a limited number of environmental statutory provisions contain such express language of extraterritoriality that their extraterritorial application is difficult to deny. Such provisions include, for example, the aforementioned provisions of CERCLA specifically designated for foreign claimants[70] and section 470a-2 of the National Historic Preservation Act (NHPA),[71] aimed at helping the United States observe its obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).[72] These provisions exhibit the kind of explicit language typically required to achieve extraterritorial application. Other provisions with less explicit yet still persuasive language may arguably also apply extraterritorially, especially those that possess statutory characteristics that limit their potential to cause conflicts with the laws of other nations. These provisions include section 7 of the Endangered Species Act (ESA), requiring federal agencies to undertake consultations and biological assessments to avoid harming listed species or their habitat in carrying out federal actions,[73] and the NEPA provision requiring federal

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70 *Id.* at 1099.

71 *See infra* note 81 and accompanying text (describing the requirements of federal agencies to avoid harming listed species and their habitats).

72 Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 15 U.N.T.S. 511 (entered into force Dec. 17, 1975), *available at* http://whc.unesco.org/world_he.htm [hereinafter World Heritage Convention].

73 16 U.S.C. § 1536(a)(2) (2000) provides:

agencies to assess environmental impacts when undertaking major actions.[74] *Okinawa Dugong v. Rumsfeld*[75] presents an opportunity to analyze an environmental provision with both straightforward language of extraterritoriality, and statutory characteristics that ease extraterritorial application: section 470a-2 of the NHPA.

A. Okinawa Dugong v. Rumsfeld

In *Okinawa Dugong v. Rumsfeld*,[76] a number of activist groups sought to prevent the construction of a U.S. air station offshore of Okinawa, Japan that would require boring holes in the underwater habitat of a an isolated segment of the endangered marine mammal species, the dugong.[77] The dugong is significant in the folklore and traditions of Okinawan culture, but according to the United Nations Environment Programme, will soon be extinct in all of Japan unless efforts are made to protect the species in the Okinawa region.[78] The United States has also listed the dugong as endangered under the ESA.[79] Plaintiffs in *Dugong* brought a claim asserting that the dugong was protected foreign property and as such was entitled to special consideration under section 470a-2 of the NHPA. The United States Department of Defense moved for summary judgment on the basis that the NHPA was extraterritorially inapplicable, but the court denied this motion because section 470a-2 of the NHPA reveals Congress's intent that certain

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Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

74 42 U.S.C. § 4332(C) (2000) directs federal agencies to:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . . .

75 No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

76 *Id.*

77 *Id.* at *3.

78 *Id.*

79 *See* 50 C.F.R. § 17.11 (2004) (listing in the table as endangered).

NHPA obligations extend abroad if an undertaking of the U.S. government threatens to have adverse effects on protected foreign properties.[80]

B. Statutory Characteristics that Lead to Extraterritorial Application

An analysis of the *Dugong* court's treatment of section 470a-2 of the NHPA provides an example of express congressional intent, demonstrates the usefulness of NHPA section 470a-2, and also highlights statutory characteristics that may ease extraterritorial application.

1. Clear Statutory Language

The purpose, language, and guidelines for implementation of section 470a-2 of the NHPA all explicitly indicate that the provision has extraterritorial reach. Congress added section 470a-2 to the NHPA in 1980, to facilitate U.S. compliance with the World Heritage Convention, which aims to ensure that member states protect selected natural and cultural sites worldwide.[81] Article 6 of the World Heritage Convention places an obligation on member states to cooperate to identify and conserve world heritage sites, and prohibits "deliberate measures which might damage directly or indirectly" cultural or natural heritage located in any country.[82] In accordance with these obligations, section 470a-2 of the NHPA requires U.S. agencies to assess the effects of undertakings on foreign properties listed as world heritage sites, or on another country's equivalent of the United States' National Register. The provision reads:

> Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such

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80 *Dugong*, at *18–19.

81 H.R. REP. NO. 96-1457, at 23 (1980).

82 Article Six reads in full:

> 1 Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.
>
> 2 The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.
>
> 3 Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

World Heritage Convention, *supra* note 72, at art. 6.

> undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.[83]

In 1998, the Secretary of the Interior published guidelines for implementation of this provision, advising that "[e]fforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country's historic preservation authorities, with affected communities and groups, and with relevant professional organizations."[84] The Federal Registry guidelines, although not binding, assist federal agencies in complying with the amended act. NHPA section 470a-2 is thus explicitly extraterritorial in its purpose, in its language, and in its guidelines for implementation.

Despite the explicit extraterritorial nature of section 470a-2 of the NHPA, however, defendants in *Dugong* argued that the NHPA "does not apply extraterritorially to matters of foreign policy."[85] Defendants raised the familiar argument that applying the NHPA extraterritorially would "thrust the court into the midst of sensitive issues of foreign affairs between the United States and Japan."[86] The defendants' attempt to make this argument indicates again that this argument is a standardized means of preventing the extraterritorial application of an environmental law regardless of the intent expressed in the statutory language. In this case, however, the court rejected this argument because the NHPA, "explicitly demonstrates Congress's intent that it apply abroad."[87] The NHPA provision thus includes an undeniable expression of congressional intent that it applies extraterritorially, and so not only contributes to an understanding of the level of congressional intent required to overcome the presumption, but also enables extraterritorial claims that fit within the purview of the clause.

The court in *Dugong* provided a helpful discussion of the NHPA provision's scope: 1) by explaining the requirements that a plaintiff must meet in order to make use of the provision, and 2) by pointing out the flexibility of some of the seemingly restrictive terms in the provision. Concerning the NHPA requirements, plaintiffs must address U.S. agency action.[88] Additionally, they must seek to protect: 1) "property" 2) that is listed as a world heritage site or on another country's equivalent of the National Register.[89] The court in *Dugong* clarified that under the NHPA, "property" includes a "district, site, building, structure, or object" and the term "object" broadly encompasses any "material thing of functional aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment."[90] The court then concluded that the dugong was a property and the listing of the dugong on Japan's Law for

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83 16 U.S.C. § 470a-2 (2000).

84 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998).

85 *Dugong*, 2005 WL 522106, at * 18.

86 *Id.*

87 *Id.*

88 *See* 16 U.S.C. § 470a-2; *see also* text at note 82.

89 *Dugong*, 2005 WL 522106, at * 18.

90 *Id.* at * 9 (quoting 36 C.F.R. § 60.3(j) (2005)).

the Protection of Cultural Properties was equivalent to a listing on the National Register.[91] The court generously construed "equivalent," reasoning that, although the National Register does not list individual animal species as the Japanese law does, the laws are nonetheless sufficiently similar because both are concerned with the cultural relevance of properties.[92] Given the broad scope of both the term "property" and the term "equivalent" the NHPA provision may thus reach a wide-range of U.S. activities that cause harm to species and habitats overseas.

2. Government Focus, Consultative Requirements, and Preemptive Obligations

The NHPA provision in *Dugong* differs in at least three ways from the CERCLA provision in *ARC Ecology* that minimize the NHPA provision's capacity to conflict with the laws of another nation, thus rendering it more feasible for a court to permit its extraterritorial application. The NHPA provision and guidelines address federal undertakings, impose consultative requirements,[93] and require compliance before allowing action.

ARC Ecology attempted to apply CERCLA to U.S. Department of Defense activities abroad. The provisions of CERCLA that ARC Ecology invoked were not specifically geared towards government agencies unlike the provision of the NHPA at issue in *Dugong* that applies exclusively to U.S. agencies. A statute that imposes obligations uniquely on U.S. agencies may be easier to apply in an extraterritorial context because the statutes cannot impose direct obligations on non-U.S. actors.

The NHPA provision may also be more amenable to extraterritorial application because it merely requires the agency to engage in an effects-weighing consultation. The provision's companion guidelines indicate that an agency can ensure compliance with the provision by consulting "with the host country's historic preservation authorities . . . affected communities and . . . relevant professional organizations."[94] The NHPA provision imposes straightforward and limited requirements that actually aim to ensure compliance with a host nation's laws and policies and thus presents a lesser possibility of conflicting with the laws of another sovereign.

Another aspect of the NHPA clause that softens the blow of its

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91 *Id.*

92 Article VIII ¶ 8 of Japan's law for the Protection of Cultural Properties provides: "[T]he cultural properties of the country are indispensable to the correct understanding of its history, culture, etc., and that they form a foundation for its cultural development for the future." *Id.* at * 6. The court in *Dugong* noted that out of respect for cultural differences it is not reasonable to require the properties that are listed as culturally significant to one nation to be identical in kind to the properties that are listed as culturally significant on the United States National Register. *Id.*

93 The requirements of NHPA section 470a-2 impose a "dual obligation on federal agencies: the substantive duty to 'weigh effects' in deciding whether to undertake the federal action and the procedural duty to consult with the Advisory Council." *Id.* at *5. The requirements of NHPA section 470a-2 are thus not purely procedural but rather involve a process of consultation, hence the term "consultative."

94 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998).

extraterritorial application is its preemptive nature. As the guidelines for implementation of section 470a-2 of the NHPA explain the consultations and considerations required by the provision "should be undertaken early in the planning stage of any Federal action that might affect historic properties."[95] The provision at issue in *Dugong* aims to avoid harms before they occur rather than assessing and remediating past and indeterminate harms like the CERCLA provision in *ARC Ecology*. The preemptory character of the NHPA provision thus arguably serves the purpose of avoiding conflicts with the laws of another sovereign because it requires U.S. agencies to avoid interfering with properties that a host country has placed under legal protection.

As the court in *Dugong* noted, the plaintiffs' claim did not seek "to thrust [the] court into issues of foreign affairs; rather, it summon[ed] the court's attention to matters under the control of the United States Department of Defense."[96] Concerns over causing conflicts with the laws of another nation may emerge from application of a statute like CERCLA but a provision such as section 470a-2 of the NHPA does not present such a conflict since the burden that it imposes is consultative, preemptive, and falls solely upon U.S. agency actors.

C. Other Statutes with Extraterritorial Potential: the Endangered Species Act and the National Environmental Policy Act

Considering the characteristics of the extraterritorially applicable NHPA provision and then searching among other environmental statutes for similar characteristics immediately reveals two other provisions that have the potential to achieve extraterritorial application, NEPA's Environmental Impact Statement provision[97] and section 7 of the ESA.

Extraterritorial application of NEPA has "remained an open question in the courts."[98] Many courts have ruled against the extraterritorial application of NEPA[99] despite arguably including extraterritorial language.[100] The D.C.

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95 *Id.*

96 *Dugong*, 2005 WL 522106, at *18.

97 42 U.S.C. § 4332(C) (2000) mandates agencies to prepare an Environmental Impact Statement for "major Federal actions significantly affecting the quality of the human environment."

98 Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1384 (D.C. Cir. 1981).

99 *See, e.g.*, NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (holding NEPA does not apply to U.S. military operations in Japan because of the potential interference with treaty relations between the United States and Japan).

100 Courts have repeatedly taken note of the broad scope of NEPA. *See, e.g.*,"[T]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1122 (D.C. Cir. 1971) (holding that the Atomic Energy Commission's rules precluding consideration of nonradiological environmental issues did not comply with NEPA). But in the extraterritorial context, courts have repeatedly denied NEPA's extraterritorial reach. *See, e.g.*, "Although the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems, it does not

Circuit, however, diverged from previous case law in 1993 to rule in favor of NEPA's extraterritorial application to U.S. agency activities in Antarctica.[101] The D.C. Circuit distinguished past cases in which other courts found NEPA did not apply extraterritorially to U.S. agency action in other countries because U.S. foreign policy interests outweighed the benefits of NEPA's application. The D.C. Circuit found that applying NEPA to U.S. agency activities in Antarctica, a global commons, "would result in no conflict with foreign law or threat to foreign policy."[102] NEPA is evidently an extraterritorially applicable statute but the presumption will likely still apply to NEPA unless a plaintiff can demonstrate that extraterritorial application of the statute poses no threat to the laws of another nation. This is easier when the U.S. government action that is potentially subject to NEPA takes place in an area that is not under the jurisdiction of a particular government, such as Antarctica. However, even if the U.S. government undertakes action in the territory of another government the argument that NEPA should apply to that action because it does not conflict with the laws of the host nation could have merit. NEPA, like the NHPA provision in *Dugong*, is preemptive, agency-focused, and procedural, and thus limited in its ability to conflict with local laws.

Section 7 of the ESA is another preemptive, agency-specific, and consultative statutory provision that has extraterritorial potential. Section 7 expansively provides:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[103]

The Eighth Circuit in *Defenders of Wildlife v. Lujan*,[104] unambiguously held that this requirement applies to federally funded projects abroad.[105] The court arrived at this conclusion based on clear expressions of congressional intent that the ESA apply extraterritorially, contained in section 7 and throughout the remainder of the ESA.[106] The Supreme Court, hearing

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explicitly provide that its requirements are to apply extraterritorially." Greenpeace USA v. Stone, 748 F. Supp. 749, 759 (D. Haw. 1990) (holding "that defendants have not violated NEPA by failing to consider the transoceanic shipment of chemical munitions . . . in the same comprehensive EIS as the incineration of those munitions"). *Id.* at 763.

101 Envtl. Def. Fund v. Massey, 986 F.2d 528, 528 (D.C. Cir 1993). For a discussion of *Massey* see *infra* part V.C.

102 *Envtl. Def. Fund*, 986 F.2d at 536.

103 16 U.S.C. § 1536(a)(2) (2005).

104 911 F.2d 117 (8th Cir. 1990).

105 *Id.* at 125. "Congress intended for the consultation obligation to extend to all agency actions affecting endangered species, whether within the United States or abroad." *Id.*

106 The Eighth Circuit surveyed the ESA and pointed out, for example:

> "[i]n the Act, Congress declared that 'the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction.' 16 U.S.C. § 1531(a)(4) . . . [and]

Defenders of Wildlife v. Lujan on appeal, did not reach the issue of the ESA's extraterritoriality because it decided the plaintiffs lacked standing to bring the suit. In his concurrence, however, Justice Stevens took the position that the ESA is strictly domestically focused.[107]

The extraterritoriality of section 7 of the ESA is thus unsettled and the possibility of making a successful argument in favor of its extraterritorial application remains. By emphasizing that section 7 of the ESA only imposes preemptive, agency-focused, consultative obligations a plaintiff may override concerns that the ESA will conflict with the laws of another nation. Arguably, applying section 7 abroad and charging U.S. government actors with an obligation to ensure they are not going to jeopardize an endangered species or its habitat before carrying out an activity actually demonstrates respect for the sovereignty of other nations. The preemptive, agency-focused, consultative character that section 7 shares with the extraterritorially applicable NHPA and NEPA provisions, along with the explicit language of section 7 that the Eighth Circuit relied upon in *Lujan*, make section 7 an especially promising candidate for extraterritorial application.

In summary, *Dugong* first exhibits the kind of statutory language courts require to straightforwardly overcome the presumption. Second, *Dugong* introduces a specialized but extraterritorially reaching provision of the NHPA that may suit a variety of claims. Finally, the case provides an example of the sort of provision that may feasibly apply extraterritorially because of its minimal potential to conflict with the laws of another sovereign.

V. *PAKOOTAS V. TECK COMINCO METALS, LTD.* AND *FRIENDS OF THE EARTH V. WATSON*: TAKING LESSONS FROM MARKET LAW TO AVOID THE PRESUMPTION IN ENVIRONMENTAL LAW

To avoid the challenge of overcoming the presumption, which entails demonstrating not only congressional intent that an environmental provision apply extraterritorially, but also that the policy of avoiding conflicts with the laws of other sovereigns and the notion that Congress legislates with a domestic purpose do not override indications of congressional intent, a plaintiff may be able to frame a claim as domestic. That is, a plaintiff may, given the appropriate situation, present a claim involving extraterritoriality issues in such a way as to invoke alternative tests rather than the presumption. These tests, known as the effects test and the conduct test

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that the United States' commitment to worldwide protection of endangered species will be backed by financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs. 16 U.S.C. § 1537."

Id. at 122–23.

107 "I am persuaded that the Government is correct in its submission that [ESA] § 7(a)(2) does not apply to activities in foreign countries." Lujan v. Defenders of Wildlife, 504 U.S. 555, 585 (1992) (Stevens, J., concurring).

developed to allow extraterritorial application of market laws where the presumption would not. This part considers these tests and how they have virtually eliminated the presumption in the securities and antitrust realm, and then analyzes two recent environmental law cases from district courts within the Ninth Circuit that illustrate how the alternative tests may allow claims under environmental laws, despite extraterritoriality issues.

A. The Erosion of the Presumption in Securities and Antitrust Law

While the presumption remains very strong against applying environmental laws abroad, market laws have seen a virtual dissolution of the presumption. Early in the twentieth century domestic antitrust laws began applying to transactions occurring outside U.S. boundaries for the sake of preventing transboundary monopolies.[108] For example, in 1927, just eighteen years after the Supreme Court's *American Banana* decision not to apply the Sherman Antitrust Act to U.S. companies in Central America, the Court, in *United States v. Sisal Sales Corp.*[109] applied the act to U.S. actors that conspired to monopolize sisal[110] imports abroad. Antitrust laws, like the Sherman Antitrust Act, have applied extraterritorially hundreds of times since then.[111] Extraterritorial application of the Sherman Antitrust Act has become so common, in fact, that in 1993, in *Hartford Fire Insurance Co. v. California*,[112] the Supreme Court applied the act to an alleged conspiracy in London without providing particularized justification. The majority simply stated, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[113] Market laws are evidently subject to limited scrutiny when it comes to extraterritorial application.

The Court's leniency regarding the extraterritorial application of the Sherman Antitrust Act in *Hartford* stands in stark contrast to the Court's strict application of the presumption in a labor law case only two years earlier, *Equal Employment Opportunity Commission v. Arabian American Oil Co.* (*Aramco*).[114] In *Aramco*, the Court applied that presumption to Title VII employment discrimination laws despite weighty evidence of congressional intent that Title VII apply extraterritorially. In the face of strong language in the statute, in the legislative history, and in agency

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108 *See, e.g.*, United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87 (1913) (extending jurisdiction over a Canadian corporation accused of conspiring to monopolize transportation in the United States).

109 274 U.S. 268 (1927).

110 Sisal is a hemp fiber typically used for making rope and rugs.

111 "Up to May 1973, the Department of Justice filed some 248 foreign trade antitrust cases; not one was lost for want of jurisdiction over the activities claimed to violate the law." Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 n.12 (9th Cir. 1976) (citing W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 498 app. B. (2d ed. 1973)).

112 509 U.S. 764 (1993).

113 *Id.* at 796.

114 499 U.S. 244 (1991).

interpretations that indicated Congress intended Title VII to apply abroad,[115] the Court concluded that only a "clear statement" in the language of the statute itself would be sufficient to overcome the presumption.[116] The harshness of the Court's application of the presumption in *Aramco* became even more evident when Congress amended Title VII shortly after the case, sending the unmistakable message that it intended Title VII law to apply extraterritorially.[117]

Securities and antitrust laws' freedom from the presumption is inconsistent with the application of the presumption in cases like *Aramco* where the court based its application of the presumption in part on concerns over causing conflicts with the laws of another nation[118] because extraterritorial application of market laws often conflicts with the laws of other nations. As one scholar comments, "In almost no other area has the extraterritorial application of U.S. law sparked as much protest from other nations as it has in the area of antitrust."[119] Where concerns over conflicts between laws may cement a court's decision to apply the presumption to a labor law or an environmental law, courts overlook analogous concerns in securities and antitrust.[120]

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115 Confirmation that Congress did *in fact* expect Title VII's central prohibition to have an extraterritorial reach is supplied by the so-called "alien exemption" provision. The alien exemption provision states that Title VII "shall not apply to an employer with respect to the employment of aliens *outside any State*." 42 U.S.C. § 2000e-1(a) (2000) (emphasis added). Absent an intention that Title VII *apply* "outside any State," Congress would have had no reason to craft this extraterritorial exemption. And because only discrimination against aliens is exempted, employers remain accountable for discrimination against United States citizens abroad.

116 *Aramco*, 499 U.S. at 258. *See also id.* at 261 (Marshall, J., dissenting) (criticizing the majority for treating the presumption as a clear statement rule).

117 "With respect to employment in a foreign country, ['employee'] includes an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f) (1994). Title VII now also applies to foreign companies controlled by American companies. 42 U.S.C. § 2000e-1(c) (2000). Congress specified however, that American companies abroad are not required to comply with Title VII if doing so would entail a violation of foreign law. *Id.* § 2000e-1(b).

118 The court refused to apply "a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *Aramco*, 499 U.S. at 255.

119 William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 99 (1998). Dodge explains:

> The extraterritorial application of U.S. antitrust laws has led a number of other countries to enact retaliatory legislation in the form of blocking and clawback statutes. . . . The Netherlands, the United Kingdom, Germany, France, Norway, Belgium, Sweden, Australia, Canada, and South Africa have all enacted blocking legislation. For a listing of these statutes and the extraterritorial applications of U.S. law in response to which they were passed, see Restatement (Third) of Foreign Relations Law § 442 reporters' note 4 (1987). For a collection of blocking statutes in English, see A.V. Lowe, Extraterritorial Jurisdiction 79–143 (1983).

William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 164 & n.357 (1998)).

120 *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) ("We believe that Congress intended the [Securities Act] to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to

Courts admittedly forgo the analysis of congressional intent and the purposes behind the presumption and apply two alternative tests to determine whether a market law applies extraterritorially. Courts concede that determining whether to extend the reach of U.S. market laws is a "dubious but apparently unavoidable task of discerning a *purely hypothetical* legislative intent,"[121] and consequently, they employ the effects test and the conduct test.

Under the effects test, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States."[122] The D.C. Circuit has noted that two prime examples of this exception are the Sherman Anti-Trust Act[123] and the Lanham Trade-Mark Act,[124] which "have both been applied extraterritorially where the failure to extend the statute's reach would have negative economic consequences within the United States."[125] A market law may thus apply extraterritorially if negative effects could occur in the United States as a result of the non-application of the statue.

Under the conduct test, the presumption does not apply when (mis)conduct that contributes substantially to a statutory violation occurs within the United States. The Second Circuit introduced the conduct test in 1972 when it applied the Securities Exchange Act to transactions abroad because "substantial misrepresentations were made in the United States."[126] The Ninth Circuit has applied a narrow version of the conduct test. The Ninth Circuit has held, for example, that "[u]nder the conduct test, a district court has jurisdiction over securities fraud suits by foreigners who have lost money through sales abroad *only* where conduct within the United States *directly caused the loss*."[127] Even under the Ninth Circuit's restrictive conduct test, a statute may apply extraterritorially—even absent explicit congressional intent—so long as the challenge conduct occurred in the United States and directly gave rise to the alleged harms.

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protect the domestic securities market from the effects of improper foreign transactions in American securities.").

121 Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987) (emphasis added).

122 Envtl. Def. Fund. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

123 15 U.S.C. §§ 1–7 (2000).

124 15 U.S.C. §§ 1051–1141n (2000).

125 *Massey*, 986 F.2d at 531 (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952)) (holding that the Lanham Trade-Mark Act applies extraterritorially when defendant is a United States national); United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (applying U.S. antitrust laws extraterritorially).

126 Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336–37 (2d Cir. 1972).

127 Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir. 2002) (internal citations omitted) (emphasis added); *see also* Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1091 (9th Cir. 1994) (holding a claim for relief under the Copyright Act does not exist when the only alleged misconduct is domestic authorization of acts that occur entirely abroad); Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004) (finding cruise ship patrons may claim Racketeer Influenced and Corrupt Organizations Act violations by cruise ship operators, where operators allegedly "engaged in substantial fraudulent activity in the United States, involving and affecting United States citizens and commerce").

Although these alternative mechanisms for avoiding the presumption have developed in the area of market laws, environmental plaintiffs may be able to make use of the theories behind the effects test and the conduct test to achieve extraterritorial application of an environmental provision. *Pakootas.* and *FOE* provide examples of how an environmental plaintiff may pursue these alternative approaches.

B. Pakootas v. Teck Cominco Metals, Ltd*.: Harm at Home*

Pakootas demonstrates how a plaintiff may make use of the effects test to achieve extraterritorial application of a U.S. environmental law by alleging harmful effects on U.S. soil. In *Pakootas*, a U.S. citizen brought a CERCLA claim against a Canadian corporation because the company's Canada-based smelter released pollutants that flowed downstream and settled at a site in Washington State.[128] For years, Teck Cominco's smelter has been discharging slag and liquid effluent into the Columbia River resulting in deposits of heavy metals, like mercury and cadmium, and chemicals, like dioxins, in Washington State.[129] The suit successfully sought to compel Teck Cominco to comply with a U.S. Environmental Protection Agency (EPA) administrative order demanding that the Canadian corporation address the contamination.[130] Teck Cominco appealed the suit to the Ninth Circuit following a district court's determination that CERCLA applies extraterritorially to the Canadian corporation since harm occurred in the United States.[131]

The district court began its analysis of whether CERCLA should apply extraterritorially by assessing how the Ninth Circuit approaches extraterritoriality questions. The district court stated that according to the Ninth Circuit:

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128 Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at *1 (E.D. Wash. Nov. 8, 2004).

129 EPA Region 10, Upper Columbia River Investigation, Frequently Asked Questions 1 (Apr. 2005), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Fact+Sheets (last visited July 9, 2006) (follow "Frequently Asked Questions" hyperlink).

130 Lindsey Rowe, *Colville Tribes File Lawsuit Over Sludge in Lake Roosevelt*, SEATTLE POST-INTELLIGENCER, July 22, 2004, *available at* http://seattlepi.nwsource.com/local/183109_lake roosevelt22.html; EPA Region 10, Upper Columbia River Site Unilateral Administrative Order for Remedial Investigation/Feasibility Study, CERCLA-10-2004-0018 (Dec. 11, 2003), *availible at* http://yosemite.epa.gov/R10/CLEANUP.NSF/82751e55bf4ef18488256ecb00835666/f0e551fb8a69d cd288256fac00064739/$FILE/uao%2012-10%20final.pdf.

131 As this chapter was going to press, a three-judge panel of the Ninth Circuit issued a July 3, 2006, opinion, considering Teck Cominco's interlocutory appeal. Pakootas v. Teck Cominco Metals, Ltd., No. 05-35153, 2006 WL 1821197 (9th Cir. Jul. 3, 2006). The panel affirmed the district court's denial of Teck Cominco's motion to dismiss by focusing in on the effects in the United States and interpreting the pollution as a purely domestic problem subject to CERCLA. *Id.* at *1 The court indicated that because the contamination at issue is in the United States the "facility" and the "release" required to trigger CERCLA both lie in the United States. *Id.* at *5–6. The Ninth Circuit's analysis, although expressly denying extraterritorial application, focused on the United States-based effects, just as the district court's analysis did, and arrived at the same result, applying CERCLA to the pollution of the Canadian corporation. The district court's effects analysis thus remains instructive.

> If Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case. First, the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.[132]

The *Pakootas* court acknowledged that CERCLA does not convey clear congressional intent that the statute apply to conduct occurring outside the United States, but stressed the fact that the harm occurred in the United States and that CERCLA aims to remedy "domestic conditions."[133] This purpose of CERCLA, coupled with the effects test principle that a statute may apply extraterritorially to prevent adverse effects within the United States, led the court to conclude that extraterritorial application of CERCLA was appropriate.[134] In *ARC Ecology,* the domestic focus of CERCLA supported application of the presumption, but in *Pakootas*, due to the principle behind the effects analysis, the domestic purpose of CERCLA supported the statute's extraterritorial application. *Pakootas* thus illustrates how the effects analysis has migrated into the environmental law realm to allow for extraterritorial application of an environmental provision even if the provision has an express domestic purpose and could not overcome the presumption under other circumstances. The effects test thus opens the door to extraterritorial application of environmental laws even if they do not manifest a clear congressional intent to apply extraterritorially.

C. Friends of the Earth v. Watson*: Translating Environmental Harms Abroad into Domestic Misconduct to Avoid the Presumption*

Like the effects test, the conduct test originated in the market law arena[135] as an alternative to the presumption and has since become

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132 *Pakootas*, 2004 WL 2578982, at *7 (quoting *In re Simon*, 153 F.3d 991, 995 (9th Cir. 1998)) (internal citations omitted). The *Pakootas* court allowed the extraterritorial application of CERCLA in "an attempt [not] to regulate the discharges at the Trail smelter, but rather simply to deal with the effects thereof in the United States." *Id.* at *5. *See also* Envtl. Def. Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993) ("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.").

133 *Pakootas*, 2004 WL 2578982, at *9.

134 The court stated:

> "There is . . . no doubt that Congress intended CERCLA to clean up hazardous substances at sites within the jurisdiction of the United States. That fact, combined with the well-established principle that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, leads the court to conclude that extraterritorial application of CERCLA is not precluded in this case."

Id. at *16.

135 *See supra* notes 121–122 and accompanying text (citing cases concerning the conduct of private companies that occurs at least in part on U.S. soil).

applicable in the environmental law realm. In 1993, for example, in *Environemntal Defense Fund v. Massey*,[136] an environmental group brought suit to enjoin the National Science Foundation (NSF) from permitting incineration of food waste in Antarctica without observing NEPA procedural requirements. The D.C. Circuit found that extraterritoriality was not at issue in that case because "the presumption . . . does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States . . . ."[137] In arriving at this conclusion, the court emphasized that NEPA does not prescribe substantive action overseas but regulates United States-based exercises of agency discretion.[138] *Massey* shows that even where extraterritorial factors exist, an environmental claim may avoid the presumption if the regulable conduct occurs in the United States.

FOE,[139] a more recent case from within the Ninth Circuit, provides an example of how focusing on domestic conduct may preempt any discussion of extraterritoriality in a suit with extraterritorial elements. In *FOE*, American plaintiffs survived summary judgment with their claim that the Overseas Private Investment Corporation (OPIC)[140] and the Export-Import Bank of the United States (Ex-Im),[141] made decisions in the United States to finance overseas projects that contribute disproportionately to climate change, without undertaking the procedures required of government agencies under NEPA.[142] Plaintiffs claimed that several greenhouse gas emitting, energy-related projects overseas would not have gone forward without the contributions of Ex-Im and OPIC. Even though the projects that allegedly contributed to climate change were based overseas, the court did not discuss the issue of extraterritoriality or the presumption because the claims challenged the agency conduct in the United States that allegedly enabled the environmentally harmful activities abroad.[143] *FOE* did not involve a conducts analysis or a discussion of extraterritoriality, and thus provides an example of how an environmental claim with elements of extraterritoriality can be cast as domestic.[144]

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136 986 F.2d 528 (D.C. Cir 1993).

137 *Id.* at 531. "Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." *Id.*

138 NEPA "would never require enforcement in a foreign forum or involve 'choice of law' dilemmas." *Id.* at 533.

139 No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

140 OPIC is an "independent government corporation [that] offers insurance and loan guarantees for projects in developing countries. 22 U.S.C. § 2197(a). OPIC provides political risk insurance covering currency inconvertibility, expropriation or political violence, financing through loan guarantees, and direct loans. 22 U.S.C. § 2194." *Id.* at *1.

141 "Ex-Im, an independent governmental agency and wholly-owned government corporation, provides financing support for exports from the United States. To support exports, Ex-Im provides a variety of products, including export credit insurance and guarantees." *Id.* (internal citations omitted).

142 Plaintiffs sought review of the agency's actions under the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2000). *Id.*

143 *Id.*

144 The court's domestically-focused analysis meant the plaintiffs faced challenges, such as

The persistent concern over causing conflicts with the laws of another sovereign limits the usefulness of the conduct test however. In *NEPA Coalition of Japan v. Aspin*,[145] for example, the D.C. Circuit refused to apply NEPA to United States-based Department of Defense activities concerning military installations in Japan because of the "substantial likelihood that treaty relations w[ould] be affected."[146] That court distinguished the decision to apply NEPA extraterritorially under a conduct analysis, in *Massey* because in *Massey* the D.C. Circuit had simultaneously based its holding on the fact that "the alleged extraterritorial effect of the statute [would] be felt in Antarctica, a continent without a sovereign, and an area over which the United States has a great measure of legislative control."[147] The *Massey* court expressly noted that it had not decided "how NEPA might apply to actions in a case involving an actual foreign sovereign."[148] Thus, although the *Massey* court focused in part on U.S. agency conduct to justify non-application of the presumption the court also considered the fact that requiring U.S. agencies to comply with NEPA before carrying out projects in Antarctica would not conflict with the laws of other sovereigns. Similarly, the plaintiffs in *FOE* not only alleged U.S. agency misconduct in the United States but also "injury to their members [of their organizations] throughout the country."[149] The plaintiffs maintained a domestic focus both in targeting United States-based conduct and in alleging United States-based harms. In sum, attempts to challenge United States-based conduct that causes environmental harm uniquely in a foreign sovereign will likely still wrestle with the issue of whether application of a U.S. law will give rise to a conflict with the laws of another nation.

D. Combining the Conduct and Effects Tests to Take the "Extra" out of "Extraterritorial"

The conduct and effects tests are especially useful for challenging the environmentally harmful activities of American actors abroad if applied in conjunction with one another. Applying the effects test alone, as in *Pakootas*, may potentially generate the awkward result of extraterritorially applying a domestically focused statute and contravening the laws and sovereignty of another nation, thus truly violating the legitimate principles for which the presumption against extraterritoriality stands. Consequently,

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proving that the U.S. based decision-making processes of OPIC and Ex-Im were not too attenuated from the environmentally harmful activities occurring overseas. *Id.* at *2–*6.

145 837 F. Supp 466 (D.D.C. 1993).

146 *Id.* at 467.

147 986 F.2d at 529. The court noted that where the United States "has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker" and enforcing the accountability of the federal agencies would result in no conflict with foreign law or a threat to foreign policy. *Id.* at 533.

148 *Id.* at 537. *See also* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (asserting doubt that the court would assert jurisdiction over domestic conduct that causes loss to foreign investors).

149 *FOE*, No. C 02-4106 JSW, 2005 WL 2035596, at *1 (N.D. Cal. Aug. 23, 2005)..

some transboundary pollution disputes may find better resolution in international forums.[150] Simultaneously applying the conduct test prevents extraterritorial application of domestic law where international measures may be preferable, by guaranteeing that the challenged activity originates in the United States. Such a circumstance might arise, for example, along the U.S.-Mexican border if pollution from an American owned production facility in Mexico migrated across the border into the United States.[151] An effects analysis supported by a conduct analysis is thus an emerging tool for holding U.S. actors accountable to domestic law for their environmentally harmful activities in other nations.

A conduct analysis accompanied by an effects analysis is similarly useful. The claim in *FOE* focused primarily on the conduct of American actors in the United States but also recognized the consequences of that conduct to the environment of the United States. Such application of the conduct test and subsidiary application of the effects test may facilitate claims against the foreign activities of U.S. actors that are partially orchestrated in the United States and contribute to global environmental problems, such as ozone depletion, persistent bioaccumulative toxic substance (PBTs) buildup,[152] "circle of poison" transactions involving the export of harmful chemicals from the United States that return as residue on imported products,[153] and so on. As global environmental threats and their

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150 The North American Agreement on Environmental Cooperation Between the United States, Canada, and Mexico, Sept. 14, 1993, 32 I.L.M. 1480 (1994) presents one potential forum for addressing transboundary pollution disputes. This Side Agreement to the North American Free Trade Agreement (NAFTA) established the Commission on Environmental Cooperation, one of the functions of which is to address concerns raised by citizens and non-governmental organizations about the enforcement of environmental laws in countries that are party to NAFTA. *Id.* at 1485–87.

151 *See, e.g.*, Tyche Hendricks, *Much of the Energy Produced in Northern Mexico Goes to U.S. Market*, S.F. CHRON, Dec, 10, 2005, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/10/MNG3OG620R1.DTL.

> [Power] plants, which are owned by American companies and send three-quarters of all the electricity they generate to the United States, are building blocks in a new and growing energy network that stretches from [Mexicali] to Mexico's Pacific coast 120 miles to the west. There, near Tijuana and Ensenada, U.S. companies are building terminals to import natural gas, also mainly for American consumption . . . [A]ctivists call the plants "energy maquiladoras," comparing them to foreign-owned factories in Mexico in which products for the U.S. market are assembled at low cost, and they have fought to make them more environmentally friendly.

Id.

152 "PBT pollutants are chemicals that are toxic, persist in the environment and bioaccumulate in food chains and, thus, pose risks to human health and ecosystems. The biggest concerns about PBTs are that they transfer rather easily among air, water, and land, and span boundaries of programs, geography, and generations." U.S. Envtl. Prot. Agency, About PBTs, http://www.epa.gov/pbt/pubs/aboutpbt.htm (last visited July 16, 2006).

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> Pesticide exports create a circle of poison, disabling workers in American chemical plants and later returning to us in the food we import. Drinking a morning coffee or enjoying a luncheon salad, the American consumer is eating pesticides banned or restricted in the United States, but legally shipped to the third world.

causes become more recognized and pressing, the conduct and effects analyses can support application of domestic environmental laws in situations that may otherwise appear extraterritorial and incontestable. The conduct and effects tests provide useful reminders to plaintiffs to seek to frame complaints as domestic rather than extraterritorial to avoid the presumption. Despite the domestic focus of such claims, foreign nations and foreign environments can "incidentally" benefit.

As the history of market law attests, demonstrating effects or conduct on U.S. territory is a potential means of avoiding the presumption. *Pakootas* and *FOE* illustrate how environmental plaintiffs may borrow these market law approaches and frame issues as domestic in order to apply environmental laws in situations with elements of extraterritoriality. A plaintiff may further increase the chances of applying an environmental statute despite elements of extraterritoriality by making claims that combine the two tests and thus benefit from the domestic focus of a statute and avoid concerns over conflicting with the laws of other nations.

VI. CONCLUSION

The presumption against extraterritorial application of domestic laws is a tool that emerged to prevent U.S. laws from interfering with the laws of other nations, thus exemplifying United States responsibility and sensitivity to international and foreign concerns. In its modern form, however, the presumption has become, in some cases, a shield from such responsibility and sensitivity that allows U.S. actors to cause unchecked environmental harm in other nations. This distortion of the original principle requires creativity from claimants to either make innovative claims under clearly extraterritorial provisions or to construe a potential extraterritoriality claim as a domestic effects or domestic conduct claim or a hybrid of the two. Creativity is also necessary to turn the principles that courts typically apply to justify application of the presumption, in support of a statute's extraterritorial application.[154]

In deciding whether to apply the presumption a court will first look for evidence of congressional intent. Only statutes that have explicit language indicating that extraterritorial application is appropriate, such as the NHPA clause in *Dugong*, may straightforwardly apply.[155] If a statute arguably applies extraterritorially, courts tend to inquire whether applying the statute abroad would cause a conflict with the laws of other sovereigns. If no conflict is apparent, a court may nonetheless use the general policy of avoiding conflicts with the laws of other sovereigns to justify application of the presumption. Claimants seeking extraterritorial application of an

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DAVID WEIR & MARK SCHAPIRO, CIRCLE OF POISON 3 (1981).

154 For a discussion on how the presumptions application should change to accommodate interdependent economies and environments, see generally Jonathan Turley, *"When in Rome:" Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

155 For a discussion of *Dugong* see *supra* Part IV.A.

environmental provision thus increase their chance of success by choosing a provision carefully to avoid conflicts with the laws of another nation and emphasizing that factor. Statutes that exclusively address U.S. agency activity, or only impose consultative and procedural obligations, or require compliance before action, may have a greater likelihood of extraterritorial application because of their minimal capacity to interfere with the laws of another sovereign.[156]

Courts also frequently support application of the presumption based on the rationale that Congress legislates with a domestic focus. That the statute in question is domestically focused is usually an easy conclusion for courts, reached simply by employing the same tools of statutory construction used to assess whether Congress expressed its intent that a statute apply extraterritorially, such as the language of the statute and its legislative history. Once a court ascertains that a statute is domestically focused the presumption applies. Consequently, rather than arguing against a statute's domestic focus, a claimant may prefer to take advantage of a statute's domestic focus by alleging effects in U.S. territory. The domestic focus of a statute then turns in favor of the claim, despite elements of extraterritoriality, because the claim serves the domestic purposes of the statute, as in *Pakootas*.[157] Claiming effects in U.S. territory may require creativity, as in *FOE* where plaintiffs alleged energy projects abroad caused global warming and thus caused effects in the United States.[158] Lastly, where a claim of effects in U.S. territory is attenuated, a plaintiff can strengthen the claim by challenging United States-based conduct as a cause of the effects.

ARC Ecology provides an example of the obstacle the presumption poses to extraterritorial application of domestic environmental statutes, while other contemporary cases from within the Ninth Circuit provide examples of how some claims have weakened the presumption.[159] The challenges to claims against U.S. actors' environmentally harmful activity abroad are admittedly many, but by being aware of the potential barriers as well as the potential avenues for overcoming and avoiding those barriers environmental claimants increase their chance of success. Successes, in turn establish further precedents that extend the extraterritorial reach of U.S. environmental laws in this era of flourishing American activity abroad.

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156 For a discussion of statutes with a lesser capacity to interfere with the laws of another sovereign see *supra* Part IV.B–IV.C.

157 For a discussion of *Pakootas* see *supra* Part V.B.

158 For a discussion of *FOE* see *supra* Part V.C.

159 For a discussion of *ARC Ecology* see *supra* Part III.