# *ARTICLES*

# THE TRAIL SMELTER: IS WHAT'S PAST PROLOGUE? EPA BLAZES A NEW TRAIL FOR CERCLA

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To facilitate additional research and investigation of matters raised in this paper, I have created a webpage on the University of Washington School of Law that contains links to many of the articles, references, technical documents, pleadings and other documents cited in this paper. *See* Michael Robinson-Dorn, Trail Smelter–Lake Roosevelt Documents, http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter (last visited Feb. 16, 2006).

## I. INTRODUCTION

> *Teck Cominco can't send highly toxic pollution across the Canadian border and then insist that border protects them from liability. They created one big mess here in the U.S., and they should clean it up, not Washington taxpayers.*[1]

It is by now axiomatic to note that pollution respects no borders. Pollution doesn't recognize nation states, and it cares not about territorial sovereignty. Pollution is ubiquitous. Discharges to a river may be transported hundreds, even thousands, of miles before being deposited downstream.[2] Emissions from smokestacks may follow prevailing winds, or even enter the atmospheric cycle, before being deposited far from their source.[3] Sometimes the sources of the pollution and the pathways taken are readily identifiable; other times they are surprisingly difficult to discern. Scientific advances continue to improve our ability to fingerprint

[1] Then-State Attorney General (now-Governor) Christine Gregoire announcing that the State of Washington was joining the citizens' suit to enforce a U.S. EPA order against the Canadian mining and smelting conglomerate Teck Cominco Metals Ltd. Press Release, Wash. State Office of the Att'y Gen., Washington State Joins Lawsuit to Force Lake Roosevelt Cleanup (Aug. 31, 2004), *available at* http://www.atg.wa.gov/releases/rel_epa_083104.html.

[2] *See, e.g.*, HANFORD HEALTH INFO. NETWORK, WASH. STATE DEP'T OF HEALTH, RADIONUCLIDES IN THE COLUMBIA RIVER (2004), http://www.doh.wa.gov/hanford/publications/overview/columbia.html (noting that plutonium from the Hanford Nuclear Reservation has been transported down the Columbia River to reach the Pacific Ocean).

[3] *See, e.g.*, Douglas J. Steding & A. Russell Flegal, *Mercury Concentrations in Individual Rain Events on the West Coast of North America: A Study of Local and Long Range Inputs of Mercury to Rain*. 107 J. GEOPHYSICAL RESEARCH ACH 11-1, 11-6 ( 2002).

sources and better understand complex pathways, while global commerce expands at an ever faster rate and economies like those of the United States and Canada continue to become more integrated. Combined with the public's concern over shared resources and the environment, these changes make the issue of transboundary pollution—and the concomitant tensions relating to assigning responsibility for it—increasingly acute and apparent.

In the 1920s, smoke and emissions from a smelter in Trail, British Columbia, traveling on the prevailing winds into the Columbia Valley, caused damage[4] in Washington State. The resulting international arbitration between the United States and Canada became one of the foundations of international law: the *Trail Smelter Arbitration*.[5] More than a half century later, that same smelter in Trail[6] has again ascended to center stage in a second major transboundary pollution dispute. Remarkably, for decades[7] after the *Arbitration*, the Trail Smelter continued to discharge huge quantities of the byproducts of its smelting and related operations into the Columbia River, where they were transported downstream into the United States—creating one of the most contaminated hazardous waste sites in the United States. Rather than resorting to international diplomacy and an arbitral panel, however, the United States, through the U.S. Environmental Protection Agency ("EPA"), issued an administrative order under the Comprehensive Environmental Response, Compensation, and

[4] As explained more fully in Part III *infra*, alleged damages sounded in nuisance and trespass for injury to agriculture (crops, timber, orchards), livestock and dairy, improvements, business income and taxation, human health, and U.S. sovereignty, among other interests.

[5] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938); Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938 (Trail Smelter Arb. Trib. 1941). The complete *Trail Smelter Arbitration* can also be found in *Report of International Joint Commission—United States and Canada: Smelting Co. Case in British Columbia*, 25 AM. J. INT'L L. 540 (1931).

[6] Today's "Trail Smelter" is one of the world's largest integrated lead and zinc smelter and refining complexes. Production capacity totals approximately 290,000 ton per year of zinc and 120,000 tons per year of lead. Twenty other metal and chemical products are also produced. *See* Teck Cominco, Trail Lead Zinc Smelter Operations, http://www.teckcominco.com/operations/trail (last visited Feb. 16, 2006).

[7] The Trail Smelter's direct discharges to the Columbia River ended in mid-1995. *See* SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, TD: 01-02-0028, UPPER COLUMBIA RIVER EXPANDED SITE INSPECTION REPORT 2-13 (2003), *available at* http://www.epa.gov/r10earth/offices/oec/UCR/Upper%20Columbia%20River%20ESI.pdf.

Liability Act ("CERCLA")[8] to Teck Cominco Metals, Ltd., the Canadian mining company that owns and operates the Trail Smelter. This is the first time that the United States has attempted to use CERCLA to impose liability on an entity relating to discharges that originated entirely outside the United States.[9]

This Article focuses on the ensuing litigation, *Pakootas v. Teck Cominco Metals, Ltd.*,[10] currently pending before the Ninth Circuit Court of Appeals, and, in particular, uses *Pakootas* as a lens through which to view the broader issues relating to the application of CERCLA to transboundary pollution and the extraterritorial application of U.S. law. The paper also examines the history of place that has paradoxically produced both the *Trail Smelter Arbitration*, and now, more than a half century later, *Pakootas*—a case in which the Trail Smelter is alleged to have continued to violate the very principle for which its *Arbitration* is so often said to stand: that one nation may not use its territory to cause substantial harm to another nation.[11]

## II. SUMMARY

Canada and the United States share more than 5,500 miles of border, including many lakes, rivers, and ecosystems.[12] The two nations also share the largest bilateral trading relationship in the world.[13] Indeed, there is perhaps no better example of two more

[8] 42 U.S.C. §§ 9601–9675 (2000).

[9] *See* Karen Dorn Steele, *Canadians Say Smelter Beyond Superfund Reach*, SPOKESMAN REV. (Spokane, Wash.), Jan. 14, 2004, at A1; Austen Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 379–80 (2005). As explained in Parts V and VI *infra*, while the discharges from Teck Cominco originated in Canada, the statutorily defined events that triggered EPA's issuance of the Unilateral Administrative Order (a release of hazardous substances from a facility causing or threatening imminent and substantial harm to human health or the environment) all took place within the United States.

[10] Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, (E.D. Wash. Nov. 8, 2004).

[11] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1965 (Trail Smelter Arb. Trib. 1941).

[12] *See* Richard B. Bilder, *Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation*, 70 MICH. L. REV. 469, 473 (1971) ("The [5000 mile long] United States-Canadian boundary is one of the longest in the world . . . . About 2000 miles of this boundary is water . . . .").

[13] U.S. DEP'T OF STATE, CANADA-UNITED STATES RELATIONS (2005), http://www.usembassycanada.gov/content/textonly.asp?section=can_usa&docum

closely integrated modern economies. Not coincidentally, the two nations share a long history of urbanization and development along these shared watercourses, airsheds, and ecosystems,[14] and consequent efforts to resolve transboundary pollution issues.[15] Included among these efforts, as nearly every initiate to international law soon learns, is the famous *Trail Smelter Arbitration*.[16] Providing a near-perfect foil for this Article, the very facility involved in that oft-cited (indeed by now legendary) arbitration—the Trail Smelter—has again ascended to center stage in a transboundary pollution dispute between the U.S. and Canada. For decades after the *Arbitration*, the Trail Smelter is alleged to have continued to discharge vast quantities of pollutants,[17] the byproducts of its smelting and related operations (including heavy-

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> The United States and Canada have the world's largest bilateral trading relationship. In 2003, total merchandise trade between the two countries was $394 billion, translating into over $1 billion in goods crossing the border every day. The two-way trade that crosses the Ambassador Bridge between Michigan and Ontario equals all U.S. exports to Japan. Canada's importance to the United States is not just a border-state phenomenon: Canada is the leading export market for 39 of the 50 U.S. States.

*Id.* *See also* Canadian Dep't of Foreign Affairs and Int'l Trade, The Canada-U.S. Trade and Investment Partnership, http://www.dfait-maeci.gc.ca/can-am/main/trade_and_investment/trade_partnership-en.asp (last visited Feb. 16, 2006).

> The United States represents roughly 4/5 of Canada's exports and 2/3 of [Canada's] imports. Canada, in return, represents 23.5% of America's exports and 17.4% of its imports. In 2004, Canada was the number one foreign market for goods exports for 39 of the 50 states, and ranked in the top three for another 8 states. In fact, Canada is a larger market for U.S. goods than all 25 countries of the European Union combined, which has more than 15 times the population of Canada.

*Id.*

[14] *See* U.S. CIA, World Factbook, http://www.odci.gov/cia/publications/factbook/geos/ca.html (last visited Feb. 16, 2006) ("[A]pproximately 90% of the population is concentrated within 160 km of the US border.").

[15] "[T]he United States and Canada have a tradition of cooperative resolution of issues of mutual concern which is nowhere more evident than in the environmental area." United States-Canadian Negotiations on Air Quality, Pub. L. No. 95-426, 92 Stat. 990 (1978).

[16] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938); Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938 (Trail Smelter Arb. Trib. 1941).

[17] *See* SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7.

metal laden slag, and mercury),[18] into the Columbia River,[19] where they were transported directly downstream into the United States, coming to rest in Franklin D. Roosevelt Lake (more commonly known as "Lake Roosevelt"), in Washington State.

Acting upon a 1999 petition from the Confederated Tribes of the Colville Indian Reservation ("Colville Tribes"),[20] EPA conducted an assessment of contamination in Lake Roosevelt. Based upon that assessment and other studies, the EPA determined in early 2003 that the area of contamination ("Upper Columbia River Site," or "Site"[21]) was eligible to be listed under CERCLA as one of the nation's most hazardous waste sites.[22] Later in 2003, following rounds of failed informal and formal negotiations between the EPA and Teck Cominco Metals, Ltd. (Teck Cominco),[23] EPA issued a Unilateral Administrative Order ("UAO")[24] under section 106 of CERCLA[25] ordering the Canadian

[18] Upper Columbia River Site, Docket No. CERCLA-10-2004-0018, at 2-3 (EPA Dec. 11, 2003) (Unilateral Administrative Order for Remedial Investigation/Feasibility Study), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement (follow "scanned Unilateral Administrative Order" hyperlink) [hereinafter UAO].

[19] The Columbia River is the fourth largest river in North America, and the largest river in North America that empties into the Pacific. *See* FISH MANAGEMENT OFFICE, U.S. ARMY CORPS OF ENGINEERS, COLUMBIA RIVER BASIN: FISH AND SALMON, http://www.nwd.usace.army.mil/ps/colrvbsn.htm (last visited Mar. 8, 2005).

[20] Petition for Assessment of Release from Richard A. Du Bey, Special Envtl. Counsel, Confederated Tribes of the Colville Reservation to Reg'l Adm'r, U.S. EPA, (Aug. 5, 1999) (on file with author). Section 105 of CERCLA provides that "[a]ny person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release or threatened release." 42 U.S.C. § 9605(d) (2000).

[21] The Upper Columbia Site comprises "the areal extent of contamination in the United States associated with the Upper Columbia River . . . ." UAO, *supra* note 18, at 2.

[22] Pursuant to CERCLA's Hazard Ranking System, the Upper Columbia River Site received a score high enough to make it eligible for the National Priorities List. *Id.* at 3. *See also* Hazard Ranking System, 55 Fed Reg. 51,532 (Dec. 14, 1990).

[23] On October 10, 2003, EPA issued a Special Notice Letter requiring formal negotiations on settlements for cleanups in the contaminated area. Letter from David Croxton, Unit Manager, U.S. EPA Region 10, to Teck Cominco Metals, Ltd. (Oct. 10, 2003), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement (follow "Cover letter for Special Notice Letter" hyperlink).

[24] *See generally* UAO, *supra* note 18.

[25] 42 U.S.C. § 9606.

corporation to conduct a Remedial Investigation/Feasibility Study[26] of the contamination. Teck Cominco refused to subject itself to EPA's jurisdiction,[27] and sought the assistance of the Canadian government. Canada voiced its strong objection to what it saw as EPA's attempt to impose U.S. domestic law on a Canadian company, and requested that the parties seek to resolve the dispute without resort to U.S. courts, pointing to (among other precedents) the *Trail Smelter Arbitration.*[28] The United States declined Canada's invitation to rescind the UAO,[29] and thereafter two private citizens (both enrolled members of the Colville

[26] A "Remedial Investigation/Feasibility Study" or "RI/FS" is a step in Superfunds's cleanup process. The remedial investigation ("RI") is the mechanism used to collect information and data to characterize the nature and extent of contamination and risks, including the risks to human health and the environment. The feasibility study ("FS") provides the mechanism to develop and evaluate the feasibility of alternate remedial measures. *See* U.S. EPA, Superfund Acronyms, http://cfpub1.epa.gov/superapps/index.cfm/fuseaction/acronyms.viewLetter/alpha_id/18/drillAcronyms.cfm (last visited Mar. 8, 2006); OFFICE OF EMERGENCY & REMEDIAL RESPONSE, U.S. EPA, EPA 540/G/89/004, OSWER Directive 9355.3-01, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATION AND FEASIBILITY STUDIES UNDER CERCLA, INTERIM FINAL 1-3 (1988), *available at* http://www.epa.gov/superfund/resources/remedy/pdf/540g-89004-s.pdf.

[27] Teck Cominco, through its American affiliate, did offer to pay up to $13 million for studies (and remediation) to determine the scope of contamination and the costs of addressing it. Letter from G. Leonard Manuel, Vice President & General Counsel, Teck Cominco Metals, Ltd., to Michael F. Gearhead, Dir., Envtl. Cleanup Office, U.S. EPA Region 10 (Jan. 12, 2004), *available at* http://www.teckcominco.com/articles/roosevelt/motion-attach-b-040112.pdf. In affidavits on behalf of Teck Cominco, two environmental consulting firms estimated the cost of such activities to total approximately $13 million. Affidavit of Rick D. Cardwell ¶ 6, Pakootas v. Teck Cominco Metals, Ltd, No. CV-04-0256-AAM (E.D. Wash. Aug. 24, 2004), *available at* http://www.teckcominco.com/articles/roosevelt/motion-cardwell-04824.pdf; Affidavit of Bill A. Williams ¶ 6, *Pakootas*, No. CV-04-0256-AAM, *available at* http://www.teckcominco.com/articles/roosevelt/motion-williams-040824.pdf.

[28] *See* Diplomatic Note, Embassy of Can. to U.S. Dep't of State (Jan. 8, 2004), *available at* http://www.teckcominco.com/articles/roosevelt/motion-attach-c-040102.pdf (voicing Canada's concern regarding EPA's attempt to impose CERCLA liability on a Canadian company, and seeking to resolve the dispute without resort to U.S. courts); Letter from Bruce Levy, Dir., U.S. Transboundary Div., Foreign Affairs Canada to Terry A. Breese, Dir., Office of Canadian Affairs, U.S. Dep't of State (Nov. 23, 2004) (on file with author).

[29] The U.S. State Department did respond that it was interested in working cooperatively and proposed a working solution. *See* Letter from Terry A. Breese, Dir., Office of Canadian Affairs, U.S. Dep't of State to Bruce Levy, Dir., U. S. Transboundary Div., Foreign Affairs Canada, (Sept. 14, 2005) (on file with author).

Confederated Tribes), filed a citizen's suit action under CERCLA to enforce the UAO against Teck Cominco.[30] With Canada's attempts to resolve the matter diplomatically having failed, and facing a lawsuit to enforce the UAO, Teck Cominco moved to dismiss the case, arguing that EPA lacked jurisdiction over activities in Canada (Teck Cominco's operations and discharges).[31] The State of Washington subsequently intervened, also seeking to enforce the UAO against Teck Cominco.[32] On November 11, 2004, the district court denied Teck Cominco's motion to dismiss, finding that the court had both subject matter and personal jurisdiction, but *sua sponte* certified an immediate appeal to the Ninth Circuit.[33] The Ninth Circuit agreed to hear the appeal, and at the time of writing, the case awaits final briefing and argument.[34]

## III. WHAT'S PAST IS PROLOGUE

As early as 1909, in one of the earliest treaty commitments addressing environmental pollution, the United States and Canada agreed in the Boundary Waters Treaty that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property of the other."[35] The fact that nearly a century

[30] Complaint for Injunctive and Declaratory Relief and for Civil Damages, *Pakootas*, No. CV-04-256-AAM, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/PakootasComplaintSummons.pdf.

[31] Memorandum in Support of Motion to Dismiss at 1–2, *Pakootas*, No. CV-04-256-AAM, *available at* http://www.teckcominco.com/articles/roosevelt/motion-dismiss-memo-0408.pdf [hereinafter Motion to Dismiss].

[32] State of Washington's Motion to Intervene, *Pakootas*, No. CV-04-256-AAM, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/WashMotionIntervene.pdf; State of Washington's Complaint in Intervention at 8, *Pakootas*, No. CV-04-256-AAM, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/WashComplaint.pdf. Environmental groups also submitted an amicus brief in opposition to the motion to dismiss. Amicus Brief in Opposition to Motion to Dismiss, *Pakootas*, No. CV-0256-AAZM, *Pakootas*, No. CV-04-256-AAM, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/RidellAMICUSBRIEF.pdf.

[33] The presiding district court judge allowed an interlocutory appeal of jurisdiction pursuant to 28 U.S.C. § 1292(b), which the Ninth Circuit granted. *See* Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *54 (E.D. Wash. Nov. 8, 2004).

[34] *Id*.

[35] Treaty Relating to Boundary Waters between the United States and Canada, art. IV, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

later the two countries (and their citizens) are still struggling with how to address transboundary pollution of shared watercourses like the Columbia River is just one of the historical ironies raised in the *Pakootas* case. Another, as already mentioned, is that the source of pollution in this latest battle is, yet again, the Trail Smelter. As alluded to already, the moniker "Trail Smelter" is well known among those with even only a passing familiarity with international environmental law. Indeed, the *Trail Smelter Arbitration* is perhaps the most famous case in international environmental law.[36] As such, the *Arbitration* has been the subject of many articles and analyses.[37] Rather than repeating the full history of the *Arbitration* here, this section will briefly summarize the history of the *Arbitration* in order to provide context for understanding the current dispute—a context that is particularly important in light of the assertions by Teck Cominco and the

[36] *See, e.g.*, Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 259 (1970–71) ("Every discussion of the general international law relating to pollution starts, and must end, with a mention of the *Trail Smelter Arbitration* between the United States and Canada."). While undoubtedly intentionally overstated for effect, the *Trail Smelter* decision is still considered as the foundational case for the law of transboundary pollution. *See* TOUMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME 89 (2002) ("The Trail Smelter case is one of the landmarks of the traditional period to which scholars constantly refer."). *But see* PATRICIA W. BIRNIE & ALAN E. DOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 145 (1992) (stating that the significance of Trail Smelter and other related cases has been exaggerated); PETER H. SAND, TRANSNATIONAL ENVIRONMENTAL LAW: LESSONS IN GLOBAL CHANGE 87 (1999) ("[*Trail Smelter*] seems to have been elevated to a level of scholarly beatification that is grossly out of proportion with its real and potential relevance to future environmental disputes.").

[37] *See, e.g.*, John E. Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. INT'L L. 213 (1963); D.H. Dinwoodie, *The Politics of International Pollution Control: The Trail Smelter Case*, 28 INT'L J. 219 (1971–72); Karin Mickelson, *Rereading* Trail Smelter, 31 CAN. Y.B. INT'L L. 219 (1993); Rubin, *supra* note 36. There are also at least three recent law review articles addressing, to one degree or another, the *Pakootas* case. *See* Neil Craik, Trail Smelter *Redux: Transboundary Pollution and Extraterritorial Jurisdiction*, 14 J. ENVTL. L. & PRAC. 139 (2004); Parrish, *supra* note 9; Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617 (2004). Attorneys on each side of the *Pakootas* case have also authored articles: for the plaintiffs, Richard A. Du Bey & Jennifer Sanscrainte, *The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-up the Boundary Waters of the United States: A Case Study of the Upper Columbia River and Lake Roosevelt Environment*, 12 PENN. ST. ENVTL. L. REV. 335 (2004); for the defendant, Gerald F. George, *Over the Line—Transboundary Application of CERCLA*, 34 ENVTL. L. REP. 10,275 (2004).

Government of Canada, among others, that the *Trail Smelter Arbitration* should serve as a guide to resolving the current dispute without resort to the courts.

## A. *The* Trail Smelter Arbitration

### 1. *The Factual and Procedural Background*

The Trail Smelter is located in Trail, British Columbia, approximately ten miles[38] from the U.S.-Canada border. Now one of the largest integrated lead and zinc smelting and refining complexes in the world,[39] its beginnings were much more humble. The Trail Smelter began as one of two small smelters that competing American interests built in the late 1890's just miles apart alongside the banks of the Columbia River: one in the U.S. at Northport, Washington, and one in Canada, at Trail, British Columbia[40] Though their starts were temporally coincidental and their pursuits intertwined, their destinies were quite different. Founded by F. Augustus Heinze in 1896, the Trail Smelter started as a processing station for gold and copper ores from the nearby Rossland mines. Heinze soon built a railway connection to the mines supplying the smelter with ore, which in turn attracted the interest of the Canadian Pacific Railway ("CPR").[41] It was not until World War I, however, that Trail Smelter became more than

[38] Documents referencing the distance vary due in part to the fact that the distance from the smelter to the U.S. border is approximately seven miles in a straight line and just over ten miles by river. *See* UAO, *supra* note 18, ¶ 9; Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1913 (Trail Smelter Arb. Trib. 1938).

[39] *See* Teck Cominco, *supra* note 6.

[40] *See* Rossland Mining Museum, Brief History of Rossland, http://www.rosslandmuseum.ca/history.html (last visited Feb. 16, 2006).

[41] In approximately 1898, the Canadian Pacific Railway ("CPR") purchased the smelter and the related railway from Heinze. Trail Historical Society, History of Trail, http://www.trailhistory.com/history.php (last visited Jan. 25, 2006); *see also* D.M. Wilson, *Trail, B.C.: History*, *in* CROWSNEST HIGHWAY, http://www.crowsnest-highway.ca/cgi-bin/citypage.pl?city=TRAIL (last visited Jan. 25, 2006) (providing an entertaining history of Trail). Subsequently, in 1906 the smelter was a part of the newly amalgamated Consolidated Mining and Smelting Company of Canada Ltd. ("Consolidated"), in which the CPR held a controlling interest. *See* Trail Historical Society, *supra*. Consolidated was officially renamed Cominco Ltd. in 1966, and merged with Teck Ltd. in 2001 to become Teck Cominco Metals, Ltd. Teck Cominco Ltd., A Brief History of Teck & Cominco, http://www.teckcominco.com/company/history.htm (last visited Jan. 20, 2006).

a modest operation.[42] The Le Roi smelter in Northport, on the other hand, grew quickly to become by 1908 one of the West Coast's largest smelters.[43] Almost as quickly, however, the smelter in Northport fell on hard times. Due in part to its inability to secure favorable freight rates,[44] the Northport smelter finally closed in 1921.[45] In contrast, the Trail Smelter, with substantial backing from the CPR and access to good supplies of ore in B.C., became an industrial center for the entire region.[46]

As the Trail Smelter grew, so too did its emissions. The smelter emitted thousands of tons a month of sulfur dioxide fumes that harmed crops and animals in Trail.[47] Consolidated Mining and Smelting Co., the Trail Smelter's owner, was well aware that lawsuits against other smelters were not uncommon in the United States,[48] and as early as 1916, Consolidated considered a strategy

[42] Trail Historical Society, *supra* note 41.

[43] SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-8; U.S. EPA REGION 10, FREQUENTLY ASKED QUESTIONS: SOIL TESTING AND CLEANUP OF LE ROI SMELTER AND RESIDENTIAL AND COMMON-USE AREAS, NORTHPORT, WASHINGTON 1 (2004), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/sites/leroi (follow "Frequently Asked Questions" hyperlink).

[44] Lead bullion produced at Northport was refined in Pennsylvania. University of Idaho, Northport Smelting and Refining Company, Records, 1898–1936 (1996), http://www.lib.uidaho.edu/special-collections/Manuscripts/dmginv/mg234.htm. Historian John Wirth also suggests that the Northport smelter's failure to secure sources of ore (with the Trail Smelter having become the destination of choice) caused the downfall of the Northport Smelter. JOHN D. WIRTH, SMELTER SMOKE IN NORTH AMERICA: THE POLITICS OF TRANSBORDER POLLUTION 9 (2000).

[45] The Le Roi smelter in Northport was purchased in 1899 by a British or Canadian Company, renamed the Northport Refining and Smelting Company, and operated from approximately 1897 to 1921. *See* University of Idaho, *supra* note 44. The Le Roi smelter emitted lead and arsenic through its smokestack, which were carried to adjacent properties in town. The smelter also discharged wastes directly into the Columbia River. *See* U.S. EPA, REGION 10, *supra* note 43, at 1. *See also* SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-7 to -10. Recently the Le Roi/Northport Smelter was the site of a multi-million dollar, accelerated CERCLA property cleanup that started in 2004. *See* Karen Dorn Steele, *Cleanup Met Some Opposition*, SPOKESMAN REV. (Spokane, Wash.), Nov. 26, 2004, at B1.

[46] WIRTH, *supra* note 44, at 9.

[47] *Id*. at 15.

[48] *See, e.g.*, American Smelting & Refining Co. v. Godfrey, 158 F. 225, 227 (8th Cir. 1907); American Smelting & Refining Co. v. Riverside Dairy & Stock Farm, 236 F. 510, 511 (8th Cir. 1916); Anderson v. American Smelting and Refining Co., 265 F. 928 (D. Utah 1919); Bliss v. Anaconda Copper Mining Co., 167 F. 342 (D. Mont. 1909).

of purchasing covenants and easements (so called "smoke easements") on timber stands in Trail to preempt litigation.[49] Invariably, as emissions continued and damages mounted, land owners on the Canadian side of the border near Trail sought redress.[50] While Consolidated was able to settle about half of the Canadian land owners' claims, the remaining half went through an extended arbitration process under British Columbian law.[51] In 1924, Judge John A. Forin, a respected Canadian jurist, ruled against Consolidated.[52] As a result, Consolidated wound up both paying Canadian plaintiffs economic damages and purchasing smoke easements in order to avoid future damages.[53]

The Trail Smelter's emissions were also carried by prevailing winds into the Columbia Valley in Washington State. Improvements to the smelter's infrastructure in 1925 and 1927 led to significantly increased outputs of zinc and lead ores and consequent emissions of sulfur dioxide fumes.[54] Additionally, and in part related to the settlements of the lawsuits in Trail, the

[49] Letter from S.G. Blaylock, Assistant General Manager, Consol. Mining & Smelting Co. to James J. Warren, Managing Dir., Consol. Mining and Smelting Co. (July 4, 1916) (on file with the Provincial Archives and Records Service of British Columbia (British Columbia Archives), Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/4JUL1916BlaylocktoWarren.pdf (noting that if Consolidated "could acquire, by purchase, easements on all the lands in the vicinity we would be further ahead than if we bought the land outright, in many cases, as the owners of the land would carry the taxes"). *See also* Letter from S.G. Blaylock, Assistant General Manager, Consolidated Mining & Smelting Co., to James J. Warren, Managing Dir., Consolidated Mining & Smelting Co. (Dec. 6, 1917) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/6DEC1917BlaylocktoWarren.pdf.

[50] *See* Dinwoodie, *supra* note 37, at 220; WIRTH, *supra* note 44, at 14.

[51] *See* WIRTH, *supra* note 44, at 14.

[52] *See* Letter from R.C. Crowe, Solicitor, Consol. Mining & Smelting Co. to S.G. Blaylock, General Manager, Consol. Mining & Smelting Co. (Sept. 1, 1926) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/14SEPT1926CrowetoBlaylock.pdf (noting the Arbitration award of Forin).

[53] Consolidated was required to pay $60,000. *See* WIRTH, *supra* note 44, at 14.

[54] *See* R.C. CROWE, ABSTRACT AND ANALYSIS OF UNITED STATES GOVERNMENT STATEMENT AND REPLY AND APPENDICES THERETO 8 (1939), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/TrailSmelterQuestionAbstractAnalysis.pdf; WIRTH, *supra* note 44, at 14–15.

smelter also raised its stacks to just over 400 feet.[55] Whether as the result of the increased smoke stack height[56] and increased production, the fact that Trail was growing while Northport was declining, the fact that Canadian farmers' claims against the Trail Smelter had succeeded where American land owners' claims against the Le Roi Smelter largely failed,[57] or some combination of all of the above, the residents of Stevens County, Washington, including Northport, found the smell and taste of the increasingly polluted air less palatable.[58] Before long, the first American farmer's claim against the Trail Smelter was filed. [59] Soon, additional claims were filed, and the seeds of the *Trail Smelter Arbitration* had been sown.

U.S. farmers pushed hard for their interests and, after a halting start,[60] the Smelter sought to settle the few claims that it viewed as

[55] *See* CROWE, *supra* note 54, at 4; WIRTH, *supra* note 44, at 14–15; Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1917 (Trail Smelter Arb. Trib. 1938); Letter from S.G. Blaylock, General Manager, Consol. Mining & Smelting Co., to Whom It May Concern (Sept. 28, 1925) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/28SEPT1925BlaylocktoWhomItMayConcern.pdf (certifying construction of a new 409 feet tall stack).

[56] Consolidated's experts contended that the stack height had no relation to pollution in Stevens County, arguing instead that the increased height lessened impacts by increasing dispersion. *See* CROWE, *supra* note 54, at 4, 108.

[57] U.S. farmers had also filed several claims against the Le Roi/Northport smelter, and several went to trial. Although one case appears to have ended in the purchase of a smoke easement, two others ended in verdicts in favor of the smelter, and pending cases were apparently dismissed. *See* University of Idaho, *supra* note 44; WIRTH, *supra* note 44, at 14.

[58] Brief for Citizens' Protection Association, Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/22JAN1930OpeningBriefSubmittedbyRaftis.pdf.

[59] The first American claim against the Trail smelter was filed in late 1926. *See* CROWE, *supra* note 54, at 4; Letter from S.G. Blaylock, General Manager, Consol. Mining & Smelting Co. to James J. Warren, President, Consol. Mining & Smelting Co. (Jan. 13, 1926) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/13JAN1926BlaylocktoWarren.pdf (explaining that the "smelter smoke agitation . . . has been pushed very vigorously," and noting that there were claims of "100-odd people who have signed a petition to the Washington State Government" and that they "have a real live smoke campaign well launched . . . .").

[60] Consolidated was advised early on that rather than pay damages to farmers it should instead seek to purchase smoke easements but if the farmers resisted selling easements, "it may be necessary to educate them by fighting them to a

legitimate, without admitting liability.[61] As other legal commentators have noted, several obstacles stood in the way of both litigation and settlement.[62] First, Consolidated's preferred remedies of purchasing either the affected lands or smoke easements[63] were unavailable because Washington law at the time prohibited foreign ownership of lands in the state.[64] Second,

standstill, in order to get a reasonable settlement." J.W. BLANKINSHIP, REPORT ON SMOKE CONDITIONS ABOUT TRAIL, B.C. 16 (1918), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/SEPT1918ReportofSmokeConditionsbyBlankinship.pdf.

[61] *See* Letter from James J. Warren, President, Col. Mining & Smelting Co. to S.G. Blaylock, General Manager, Consol. Mining & Smelting Co. (Sept. 27, 1926) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/27SEPT1926WarrentoBlaylock.pdf. Warren, the President of Consolidated explained that:

> We are in a very difficult position, because, while I am not yet convinced that the damage will be either uniform or continuous, the fact that any damage is done opens the door to all kinds of unreasonable claims for losses which in all probability are occasioned more through the character of the soil an climactic conditions than from smoke. On the other hand, if we refuse to entertain claims at all, the agitation will increase and multiply and ultimately we may have much more difficult situation to deal with than we have at the present. Therefore, I think a middle course of meeting and discussing and negotiating without admitting liability should be pursued . . . .

*Id.* Blaylock, the General Manager of Consolidated responded, noting that smoke on the Trail side of Northport had been "very severe in the last week or two," and that "[t]his damage is to such an extent that we will have to make good on our statements that when there was damage we were prepared to pay for it." Blaylock also sought $60,000 for purchase of these lands. Letter from S.G. Blaylock, General Manager, Consol. Mining & Smelting Co., to James J. Warren, President, Consol. Mining & Smelting Co. (Sept. 15, 1926) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/15SEPT1926BlaylocktoWarren.pdf. The request for $60,000 was approved in a Sept. 30 telegram from Warren to Blaylock. Telegram from James J. Warren, President, Consol. Mining & Smelting Co. to S.G. Blaylock, General Manager, Consol. Mining & Smelting Co. (Sept. 30, 1926) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/30SEPT1926WarrentoBlaylock.pdf.

[62] *See, e.g.*, Read, *supra* note 37, at 222.

[63] *See* Letter from S.G. Blaylock to James J. Warren (Sept. 27, 1926), *supra* note 61, at 1 (explaining that refusing to "entertain claims at all," that "agitation will increase and multiply").

[64] WASH. CONST. art. II, § 33 (repealed 1966). *Cf.* Terrace v. Thompson, 263 U.S. 197, 222 (1923) (holding that Washington State's constitutional provision did not violate Fourteenth Amendment).

Canadian law at the time likely barred American farmers' claims in a Canadian court because the harms alleged occurred outside of British Columbia, and would have required exhaustion of local (U.S.) remedies.[65] In the meantime, Consolidated continued to research how to reduce or control its emissions.[66]

Frustrated and facing hard times, many of the American farmers organized themselves into an association, the Citizens Protective Association ("CPA").[67] Members of the CPA eschewed individual settlements,[68] enlisted the help of their Congressional delegation,[69] and ultimately received the assistance of the U.S. State Department.[70] In June 1927, the U.S. State Department forwarded an official complaint to the Government of Canada.[71] In turn, Consolidated requested that the Canadian government intercede on its behalf. What essentially started out as a private nuisance suit by private parties against a private company had been transformed into an international dispute.[72]

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[65] Read, *supra* note 37, at 222 ("It was the general opinion of the lawyers concerned at the time that the British Columbia courts would be compelled to refuse to accept jurisdiction in suits based on damage to land situated outside of the province.").

[66] As the President of Consolidated wrote to the Trail Smelter,

> I think the time has come, though when we must turn to our Research Department for some method of preventing the smoke damage or reducing it if it is possible to do so . . . . If we are going to increase the emission of smoke, as it is altogether likely we will do, we should lose no time in starting an investigation as to whether or not there are means of reducing, controlling or moderating the emission of $SO_2$.

Letter from James J. Warren to S.G. Blaylock (Sept. 27, 1926), *supra* note 61, at 2.

[67] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1917 (Trail Smelter Arb. Trib. 1938).

[68] *Id.*

[69] *See* WIRTH, *supra* note 44, at 3, 16–17, 22; Dinwoodie, *supra* note 37, at 221, 224, 229. The CPA also petitioned the State. Petition from John Leader et al. to the Hon. Governor and Legislature of the State of Washington (Dec. 1, 1925), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/JohnLeaderPetition.PDF.

[70] *See* Dinwoodie, *supra* note 37, at 221–22. As the State Department explained, it was "not interested alone in the matter of damages in this instance. It was interested in the principles providing a remedy for losses suffered by property owners in this country from acts committed by corporations located across the border in contiguous countries." WIRTH, *supra* note 44, at 22 (internal quotation marks omitted).

[71] Dinwoodie, *supra* note 37, at 222.

[72] *Id.* HANQIN XUE, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 115 n.1 (2003) ("Prime Minister R.B. Bennett expressed the view: 'This is not a

Later in 1927, the United States proposed that the dispute be referred to the International Joint Commission ("IJC").[73] The IJC, made up of three members from each nation, had been created in 1909 under the Boundary Waters Treaty to address issues relating to transboundary waters between the U.S. and Canada.[74] Pursuant to Article IX of the Treaty, either nation could refer any matter involving "the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier," to the Commission for investigation and report.[75]

At first, Canada was understandably hesitant to agree to such a referral. The Canadian government had been working closely with Consolidated[76] who, as the Canadian External Affairs Undersecretary at the time described, saw the whole dispute as little more than "an attempt at holdup by farmers in a nearly hopeless section who have come to think that they can get much more out of farming this rich corporation across the boundary than from farming their farms . . . ."[77] Moreover, Canada was also concerned, of course, that a decision reached outside of diplomatic circles would have the potential to require the Trail Smelter to curtail its operations, or even shut down; an outcome simply unacceptable to Canadian interests. With American pressure for a diplomatic solution strengthening,[78] the Canadian Prime Minister ultimately concluded that "Canada as the smaller country st[ood] in the ling run to gain more than the United States."[79] Even still, it was not until August 7, 1928, some two years after the first claims

dispute between two Governments, and it does not come within any of the ordinary well-known categories of international arbitration. I have pointed out that it would have been open to the Canadian Government to disclaim international responsibility.'") (citation omitted).

[73] *See* Karin Mickelson, *Rereading Trail Smelter*, 31 CAN. Y.B. INT'L L., 219, 225 (1993); Dinwoodie, *supra* note 37, at 223–24, 230.

[74] Boundary Waters Treaty, *supra* note 35, art. VIII.

[75] *Id.* art. IX.

[76] *See* Read *supra* note 37, at 228 (noting that to prevent difficulties in addressing the issue in the IJC "the Company and the government were yoked together as a team with two major objectives: [including] the protection of the Smelter, and the community dependent upon it . . . "); WIRTH *supra* note 44, at 19–22; Dinwoodie, *supra* note 37, at 222–24.

[77] Dinwoodie, *supra* note 37, at 222. *See also* WIRTH *supra* note 44, at 20 (O.D. Skelton went on to summarize, "[t]here may be some truth in both [the farmers' and Consolidated's] views, but from what I have been able to see of the situation I think the Company's case is much stronger").

[78] *See* WIRTH *supra* note 44, at 21–22; Dinwoodie, *supra* note 37, at 222–24.

[79] WIRTH *supra* note 44, at 21–22 (quoting O.D. Skelton).

had been made, that the two nations agreed to submit the matter to the IJC.[80]

2. *The International Joint Commission's 1931 Report*

Hundreds of claims were submitted to the IJC totaling several million dollars. As John Read[81] has explained in his seminal work on the *Trail Smelter Arbitration*, "[t]he Commission made an exhaustive investigation."[82] The Commission appointed scientists,[83] heard from interested parties, accepted evidence in multiple locations, and heard witnesses and arguments from counsel.[84] In 1931, three years after the matter had been referred to the IJC and seven years after the first U.S. claims had been made, the IJC Tribunal found that the Trail Smelter had caused serious harm, and recommended[85] an award in the amount of $350,000.[86] The IJC's recommendation was expressly premised on the expectation that Consolidated would be employing and continuing to operate technology that by 1931 would cut the emissions of sulfur from the stacks by approximately one third.[87]

[80] Read, *supra* note 37, at 214; Mickelson, *supra* note 73, at 225.

[81] Mr. Read was a former member of the International Court of Justice, Legal Advisor to the Prime Minister of Canada, one of Canada's top lawyers, and was "directly concerned with the Trail Smelter dispute at all stages: the settlement of the terms of reference to the [IJC], as counsel before the Commission, the negotiation and drafting of the [Convention], and the special problems which arise and the way in which they were dealt with . . . ." *Id.* at 213.

[82] *Id.* at 214.

[83] For an interesting recent account of the role of science before the IJC and the Arbitration panel see WIRTH, *supra* note 44. For an equally interesting account and critique from that time, see CROWE, *supra* note 54, at 4.

[84] *See* Read, *supra* note 37, at 214; Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1918 (Trail Smelter Arb. Trib. 1938).

[85] Under Article IX of the Boundary Waters Treaty, *supra* note 35, the IJC was to conduct an investigation and present a recommendation, not decide the matter. *See* discussion *infra* Part VII.

[86] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1918 (Trail Smelter Arb. Trib. 1938). Not coincidentally, this is the same amount that Consolidated had indicated to the Canadian authorities that it was willing to pay to settle the case. Letter from James J. Warren to W.N. Tilley (Feb. 21, 1931) (agreeing to settle the case for "$50,000 to $100,000 more than the $250,000," that Consolidated already had authorized to settle the matter).

[87] Read, *supra* note 37, at 214.

### 3. *The* Trail Smelter Arbitration *Decision*

Despite being in the depths of the Great Depression, the United States (at the behest of the claimants) rejected the $350,000 award, and for the next two years the two nations engaged in often less than diplomatic discussions regarding the case. Finally, in 1935, the countries agreed to submit the dispute to a three member arbitration panel under an agreed upon, or *compromis*, Convention.[88] The Convention required the Canadian Government to pay the $350,000 for damages from emissions from the Trail Smelter prior to 1932, and established a three person tribunal to determine post-1932 damages to come to a result that was "just to all parties concerned."[89] Of particular importance to the United States, the Convention provided the Tribunal with the authority to set emissions levels.[90]

The Tribunal then embarked on a multi-year journey. It conducted site investigations of the Trail Smelter and the allegedly damaged agricultural and timber lands in Washington state, and heard evidence (including extensive scientific expert testimony[91])

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[88] Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, British Columbia, U.S.-Can., Apr. 15, 1935, 1935 U.N.T.S. 74, *reprinted in* 1 INT'L ENVTL L. REP. 244 [hereinafter the Convention].

[89] *Id.*; Read, *supra* note 37, at 220.

[90] Indeed, Canada apparently only agreed under significant overt political pressure that included U.S. indications that a free trade agreement hinged upon whether Canada would agree to give the arbitrator authority to set emission levels. *See* Dinwoodie, *supra* note 37, at 232. Article III of the Convention, set out a number of questions for the Tribunal to answer including: (1) in the event damages were shown, "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?"; (2) "[i]n light of the answer to the preceding Question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?"; and (3) "[w]hat indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?" The Convention, *supra* note 88.

[91] Consolidated received support from the smelting industry in the United States which was concerned with "setting a rule as to the frequency, duration and amount of concentration permissible without causing damage or injury." WIRTH, *supra* note 44, at 80 (quoting Letter from R.C. Crowe, to Read (May 3, 1934) (on file with the Canada National Archives); *see also* Letter from R.C. Crowe, Solicitor, Consol. Mining & Smelting Co., to Dr. H.M. Tory, President, Nat'l Research Council of Canada (July 20, 1934) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/20JUL1934CrowetoTory.pdf.

> The American Smelting and Refining Co. has decided that it is highly interested in the issue between the United States Government and the

from the countries, the smelter and the claimants in Ottawa, Washington, D.C., and Spokane, Washington.[92] The U.S submitted claims totaling more than $2 million for damages.[93] Bound as it was by the *compromis* Convention, the Tribunal found that an additional $78,000 was owed for damages accruing between 1932 and 1937, a "decided victory" for Consolidated.[94] The Tribunal did so by applying "the law and practice" followed in

> Canadian Government over the Trail Smelter Smoke problem because principles are involved such as the invisible injury theory and the attempt to establish a yardstick of maximum concentrations permissible and said company has instructed its General Counsel, E.M. Bagley, to prepare its case and to present it to any tribunal that may be appointed.

*Id*.; Letter from R.C. Crowe to S.G. Blaylock, Vice President & General Manager, Consol. Mining & Smelting Co. (Sept. 23, 1937) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/23SEPT1937CrowetoBlaylock.pdf (listing a week of helpful testimony financed by various American interests, explaining that "these interests have spent a lot of money in this work—work which, for the protection of American smelters and industry, is still continuing, and they sent their evidence to us through very competent witnesses who stood up well on the stand").

[92] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1918 (Trail Smelter Arb. Trib. 1938).

[93] CROWE, *supra* note 54, at 16 (claims totaled $2.1 million including $500,000 in interest); *but see* WIRTH, *supra* note 44, at 70 (stating only that claims exceeded $1 million).

[94] Letter from James J. Warren to F. H. Brownell, Chairman of the Board, Am. Smelting and Ref. Co. (Apr. 20, 1938) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/20APR1938WarrentoBrownell.pdf, (noting that Consolidated considered the Tribunal's award "as a decided victory, not only theoretically but practically, because the amount is so small that we feel we will not be attacked any more as $78,000 is not enough to attract the avarice or greed of the blackmailing fraternity"). Warren also noted that, "[t]he regulations governing the operation of the plant are not heavy. We will have no difficulty in complying with them and practically no expense." *Id.* Indeed, prior to the Tribunal's decision, Consolidated's papers indicate that it would have settled for nearly twice that amount. Letter from W. Lon Johnson, Attorney, to James J. Warren, President, Consol. Mining & Smelting Co. (Apr. 21, 1938) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/21APR1938JohnsontoWarren.pdf, (explaining that at the inception of the hearing Consolidated would have paid $150,000); Letter from S.G. Blaylock to James J. Warren (July 24, 1937) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/24JUL1937BlaylocktoWarren.pdf ("I think we will be able to settle for $150,00 and write our own regime in the end.").

the U.S. as well as international law and practice,[95] while taking into account the desire of the parties to reach a solution "just to all parties concerned"[96] and concluded, in a now famous passage:

> [U]nder principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[97]

The Tribunal also found, owing in large measure to the scientific evidence presented,[98] (including evidence relating to new control technologies that Consolidated had developed and employed) that there was *no* damage for the years 1937–1940, and ruled that "if any damage . . . shall occur in the future, whether through failure on the part of the Smelter to comply with regulations herein prescribed or notwithstanding the maintenance of the regime, an indemnity shall be paid for such damage."[99] Thus, the Trail Smelter would be permitted to operate under a new, stricter regime, and if landowners in Washington State experienced material damage in the future, they could be compensated up to a maximum of $7,500 per annum.[100]

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[95] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1964–65 (Trail Smelter Arb. Trib 1941).

[96] *Id*. at 1965; *see* Read, *supra* note 37, at 226–27 (citing Trail Smelter, 3 R.I.A.A. 1905, 1908 (Trail Smelter Arb. Trib. 1938)). Ironically, having found no cases concerning air pollution and no international decisions to rely upon, the Tribunal turned to the decisions of the U.S. Supreme Court involving interstate water pollution. *Id*.

[97] Trail Smelter, 3 R.I.A.A. 1938, 1965 (Trail Smelter Arb. Trib. 1941). The Tribunal itself remarked that the investigations undertaken during its three years of consideration were "probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke." *Id.* at 1973–74.

[98] *Id.*

[99] *Id*. at 1980. Thus, the IJC recognized that harm could befall farmers in the U.S. even if the smelter adhered to the regime of air controls that was being imposed.

[100] *Id.* at 1980. The Tribunal explained that:

> Progress has been made in breaking up the long winter fumigations and in reducing their intensity . . . there is a sound basis for confidence that the winter fumigations will be kept under control at a level well below the threshold of possible injury to vegetation. Likewise, for the growing season a regime has been formulated which should throttle at the source the expected diurnal fumigations to a point where they will not yield concentrations below the international boundary sufficient to cause injury to plant life. This is the goal which this Tribunal has set

## B. *Litigation Heirlooms*

While the above quoted passage from the Tribunal regarding the limits on a nation's use of its territory has proven to be the Arbitration's most widely known legacy, it was not the only important legacy. The narrative of the Trail Smelter dispute reads like a "how to" manual for defense of large scale "bet the company" litigation. Indeed, Consolidated's actions demonstrate a level of sophistication in environmental litigation that eludes many corporations still today. Moreover, Consolidated seems to have handed down this sophistication and "know how," like a cherished family heirloom, through its successive corporate generations, and the echoes can certainly be heard in the current dispute.

### *Define the Players and the Playing Field*

As any observer of modern politics can tell you, perception, or "spin," is often reality. Consolidated plainly understood this; facing claims from the local residents of both Trail and Stevens County, the Smelter quickly staked out their own position (denying harm as a general matter, while agreeing to pay "reasonable" claims that could be demonstrated to have resulted from smelter emissions[101]) and defined their opponents as either individuals

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out to accomplish.

*Id.* at 1974.

[101] Letter from S.G. Blaylock to James J. Warren (Sept. 15, 1926), *supra* note 61 (noting that smoke on the Trail Side of Northport "has been very severe in the last week or two" and that "this damage is to such an extent that when there was damage we were prepared to pay for it." ). As Warren explained,

> We are in a very difficult position, because, while I am not yet convinced that the damage will be either uniform or continuous, the fact that any damage is done opens the door to all kinds of unreasonable claims for losses which in all probability are occasioned more through the character of the soil and climactic conditions than from smoke. On the other hand, if we refuse to entertain claims at all, the agitation will increase and multiply and ultimately we may have a very much more difficult situation to deal with than we have at the present.

Letter from James J. Warren to S.G. Blaylock (Sept. 27, 1926), *supra* note 61. Letters to the editor of the local Northport newspaper by Consolidated's then local counsel, Lon Johnson, also reflect Consolidated's public position. Lon Johnson, Letter to the Editor, *Story of the Smelter Smoke: Attorney Discloses Procedure for Ascertaining Damages*, COLVILLE EXAMINER, Apr. 28, 1928. Johnson explained that the general manager of the Trail Smelter advised:

> that if any damages were being caused by the smelting operations, the company was willing to make settlement. . . . [and] he did not want his company to be robbed, but that his company ought to pay, and was

looking to "farm the company"[102] or as terribly naïve or uniformed. Similarly, as the investigation and matter progressed, Consolidated kept the focus of the claims, and its willingness to resolve them, on damage to crops and timber, while successfully fighting off attempts to obtain redress for (1) economic damages, (2) generalized (or as Consolidated preferred "invisible") claims relating to cumulative ecological damages; (3) adverse effects on human health, and (4) damages relating to anything other than its air emissions.

*"Use" Science*

Almost as soon as Consolidated realized the potential for damages, it began collecting scientific information concerning climactic conditions, the extent of smoke damage, and farmers' yields for use in its defense.[103] Consolidated enlisted the help of the Canadian Research Council and hired experts that had been involved in prior smelter cases in the U.S. In 1919, Consolidated established an experimental garden downwind in order to demonstrate to all who wanted to challenge the smelter, "what could be done to crops by proper culture and fertilization."[104] Ultimately, Consolidated presented much of this scientific evidence to the IJC which was, as Professor Dinwoodie has

> willing to pay, in all fairness, any damage that it might cause. . . . [The smelter] has admitted damage, is willing to pay, but will not be filched by any fraudulent claims of damage. It has authorized payment for smoke damage that has been estimated on crops, and it has done so in the best of faith, and without prejudicing the rights of any land owner.

*Id.*

[102] *See, e.g.*, Dinwoodie, *supra* note 37, at 222; *see also* Letter from S.G. Blaylock, Assistant General Manager, Consol. Mining & Smelting Co., to E.A. Haggen, Editor, Mining & Eng'g Record (June 30, 1919) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/30JUL1919BlaylocktoHaggen.pdf ("There is no doubt that we have some of the real original smoke farmers in this community.")

[103] *See* generally BLANKINSHIP, *supra* note 60 (using sensitive species of plants to map geographical extent of smoke injury). Article II of The Convention provided that "[t]he Governments may each designate a scientist to assist the Tribunal." The Convention, *supra* note 88.

[104] Letter from S.G. Blaylock to James J. Warren, Managing Dir., Consol. Mining & Smelting Co. (July 3, 1919) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/3JUL1919BlaylocktoWarren.pdf; *see* WIRTH, *supra* note 44, at 14.

written, "stymied by contradictory expert opinion."[105] Not surprisingly, Consolidated's experts blamed the alleged damages to agriculture on "a variety of causes unrelated to the Trail emissions: earlier smelter operations at Northport, forest fires, insect infestations, inadequate soil composition, and poor farming practices."[106]

The extensive "use" of science did not go unnoticed by the Tribunal, which itself remarked that the investigation undertaken during its three years of consideration was "probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke."[107] At the same time, the Tribunal went out of its way to explain that the "number of experiments was still too limited to warrant in all cases so positive conclusions as witnesses were inclined to draw from them."[108] Further, the Tribunal explained that it believed that expert witnesses may well have been influenced by the position of the governments that had hired them.[109] According to Prof. Wirth, the United States' science case—which was largely focused on so called invisible, cumulative and chronic damages—largely fell apart, and the failure resulted in the small $78,000 award.[110]

*Get a Little Help From your Friends*

Further demonstrating that little today is new, Consolidated enlisted the assistance of the Canadian Government,[111] American

[105] Dinwoodie, *supra* note 37, at 226.

[106] *Id.* at 226–27.

[107] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1973 (Trail Smelter Arb. Trib 1941).

[108] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1921 (Trail Smelter Arb. Trib 1938).

[109] *Id.* at 1922. The U.S. brief derided the "so-called smelter smoke experts injected into the case to protect the general smelter interests." U.S. DEP'T OF STATE, PUBL'N NO. 43, TRAIL SMELTER REFERENCE 12 (1930), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/TrailSmelterReference.pdf. Professor Wirth has argued that much of the science was controlled and carefully directed through Consolidated's and Canada's lawyers. *See, e.g.*, WIRTH, *supra* note 44, at 66–67. Of course, had each side not been well armed to present their side, the result might well have been different.

[110] *See generally* WIRTH, *supra* note 44, at 42.

[111] *Compare* BCFacts.org, Campaign Contributions, http://www.bcfacts.org/campaign-contributions (last visited Mar. 14, 2006) (reporting that Teck Cominco is the largest contributor to British Columbia's governing Liberal Party, having contributed nearly $750,000 from 1996 through 2004); ELECTIONS BC, ELECTION FINANCING REPORT 185 (2005), *available*

smelters, and industry interests, to lobby the U.S. government and to present supportive scientific evidence to the Tribunal.[112] Indeed, recognizing that the possibility existed that the Tribunal might seek to shut down or significantly curtail operations at Trail, Consolidated conducted studies at Fort Erie and Windsor (Canadian cities across the border from Buffalo and Detroit, respectively) to demonstrate to the Tribunal and U.S. lawmakers that emissions *from* the United States to Canada were much greater than the other way around.[113] The not-so-subtle message was that

*at* http://142.36.252.26/cgi-bin/bcimg/?PTY-LIB-1995 (follow hyperlink for "100105767" under "2005 General Election Financing Report") (reporting Liberal Party receiving $112,210 from Teck Cominco Ltd. and $60,000 from Teck Cominco Metals, Ltd. during the 2005 Election Reporting period).

[112] *See supra* note 91; U.S. DEP'T OF STATE, *supra* note 109, at 12 (noting names of American interests that assisted Consolidated); Letter from James J. Warren to W.L.M. King, Prime Minister of Canada (Nov. 2, 1937) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/2NOV1937WarrentoPremier.pdf (explaining how valuable Mr. Read of External Affairs and the staff of the National Resource Council were in the hearings); Letter from James J. Warren to Hon. N.S. Lougheed, Minister of Lands (Dec. 30, 1932) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/30DEC1932WarrentoLougheed.pdf (asking that the Minister write a "few lines" to the new American Administration in support of the Trail Smelter and noting that "[i]t simply won't do to have anyone threaten the livelihoods of the 4,500 men and their families who are supported by our operation"). Records also indicate that among the considerations for hiring W.L. Johnson as Consolidated's local U.S. counsel was the belief that "Johnson would be the next Governor of the state of Washington" and the concern "about the influence he might bring to bear against us if we did not retain him . . . ." Letter from R.C. Crowe, Solicitor, Consol. Mining & Smelting Co. to S.G. Blaylock, General Manager, Consol. Mining & Smelting Co. (Oct. 27, 1926) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/27OCT1926CrowetoBlaylock.pdf.

[113] Letter from James J. Warren to W.H. Aldridge, President, Texas Gulf Sulphur Co. (May 17, 1934) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/17MAY1934WarrentoAldridge.pdf (explaining that percentages of $SO_2$ crossing the border to Windsor and Fort Erie from U.S. plants were in excess of that near Trail). In the letter Warren asked whether Aldridge had "some friends" who could discuss this matter with

> Senator Cousins of Michigan and . . . Senators Wagner and Copeland of New York State so that they might if they felt so disposed, to make representations in the proper quarter, that if effect be given to [Washington] Senator Dill's insistence it might result in complications and very large claims for damages [at Windsor and Fort Erie].

*Id.* Teck Cominco has also contributed $150,000 to the Eastern Washington Council of Governments (comprised of several northeastern Washington

if the Trail Smelter could be shut down for transboundary pollution, so too could the automobile industry in Detroit, located just across the Canadian border from Windsor.[114] That message was delivered to American elected officials, and plainly understood by the Tribunal, which stated:

> For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian interests might be claimed to be injured by an American corporation. As has well been said, "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally it would not be to the advantage of the countries that the agricultural community should be oppressed to advance the interest of industry."[115]

The sharing of information was a two-way street. In 1929, R.C. Crowe, Consolidated's lawyer through the *Arbitration*, edited a two volume compendium totaling more than 400 pages that contained an abstract of the U.S. position, evidence in support, a critical analysis of some of the evidence prepared by Consolidated's Legal Department, and materials prepared for the use of Canadian counsel in their arguments before the Tribunal.[116] This compendium was "given confidentially to those smelters, industries and other parties who were interested in the outcome of the case because certain principles of sulfur dioxide injury were being advanced which, if sustained, would have had a material bearing upon sulphur dioxide nuisance litigation generally."[117]

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counties in the proximity of the Canadian border), which is on record as opposing the listing of Lake Roosevelt under Superfund. Karen Dorn Steele, *Officials Upset Over Source of Funding*, SPOKESMAN REV. (Spokane, Wash.), Oct. 22, 2003, at B3. Three of Washington's Republican members of the U.S. House of Representatives also opposed listing. Karen Dorn Steele, *GOP Legislators Oppose Superfund Status*, SPOKESMAN REV. (Spokane, Wash.), Nov. 21, 2003, at B3.

[114] John Read has written that "[t]he acceptance of the principle of absolute cessation of damage might have shut down the Trail Smelter; but it would have also brought Detroit, Buffalo and Niagara Falls to an untimely end." Read, *supra* note 37, at 224–25; *see also* Letter from James J. Warren to W.H. Aldridge (May 17, 1934), *supra* note 113.

[115] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1938–39 (Trail Smelter Arb. Trib 1941).

[116] *See generally* CROWE, *supra* note 54.

[117] *Id.* at 3–4.

*Plan, and Execute the Plan*

The narrative of the *Trail Smelter Arbitration* also demonstrates the importance of a unified, well-funded and well executed litigation strategy. Consolidated worked very closely with the Canadian government, and Consolidated's public-private partnership ensured that Canada's efforts remained well funded. On the other side, funding for U.S research was being reduced, and there were inherent divisions on the U.S. side between those who supported the effort, and those who were more closely aligned with extractive industries.[118]

The Trail Smelter and the CPR were of course of vital interest to Canada. The CPR was (and still is) one of Canada's most influential entities and the Trail Smelter had long been proving its worth providing jobs, tax revenues, and more.[119] At the time the first U.S. claims were being heard, Canada's economy was ailing,[120] and by 1939, when the nations were debating the scope of the regime to impose, the Trail Smelter was supplying important munitions for the war effort.[121]

*Look for Alternative Solutions, Innovate*

Consolidated's ability to innovate to reduce emissions should also be of interest not only to admirers of broad litigation strategies, but to supporters of free market environmentalism and green services. Recognizing that its continued growth and vitality depended on reducing its emissions, Consolidated invested heavily in the development of controls to reduce sulfur dioxide emissions.[122] This decision turns out, in hindsight, to have been a shrewd business decision. The use of the control technology was a

[118] *Compare* WIRTH, supra note 44, at 41–79 *with* CROWE, *supra* note 54.

[119] *See, e.g.*, Letter from James J. Warren to Hon. N.S. Lougheed (Dec. 30, 1932), *supra* note 112.

[120] "From 1929 to 1933, the gross national product fell 43%, and exports plummeted by 50%." Gov't of Can., Key Economic Events: 1939–1945-World War II: Transformed the Canadian Economy, http://canadianeconomy.gc.ca/english/economy/1939ww2.html (last visited Jan. 25, 2006).

[121] Canada entered World War II on Sept. 10, 1939. *Id.*

[122] *See, e.g.*, Letter from S.G. Blaylock, Assistant General Manager, Consol. Mining & Smelting Co., to B.A. Stimmel, Assistant Manager, Zinc Plant (June 24, 1919) (on file with the British Columbia Archives, Cominco Papers), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/26JUL1919BlaylocktoStimmel.pdf; Letter from James J. Warren to S.G. Blaylock (Sept. 27, 1926), *supra* note 61.

critical limiting factor on the size of the damage awards,[123] and allowed the Tribunal to rest (in reaching a "just decision") upon an emissions regime that Consolidated had already undertaken.[124] In addition, the scientific effort that led to a process for recapturing sulfur also led Consolidated to develop processes that converted the resulting sulfuric acid and captured dusts into a variety of fertilizers.[125] Another important, lucrative but little reported on "by-product" of Consolidated's sulfur recovery process was electrolytic hydrogen. Electrolytic hydrogen can be used to produce deuterium oxide (or as it is better known "heavy water'), which turned out to be a key component for the hydrogen bomb. In the early 1940's the Trail Smelter was one of only a very small number of sources of electrolytic hydrogen in the world, and as a result Consolidated contracted to build and operate a heavy water plant, known as "Project 9," for the Manhattan Project in the middle of its fertilizer complex.[126] Thus, despite having spent many millions of dollars[127] to install control technology, the company not only withstood the expense, but went on to make quite a profit by selling the products of its abatement program.[128]

[123] Read, *supra* note 37, at 214. For example, the Commission report was predicated on the assumption that the control regime would "bring about the cessation of damage." *Id.* Essentially this approach can be seen as a precursor to the use of the Best Available Control Technology (BACT). *See* WIRTH, *supra* note 44, at 87–88.

[124] *See* Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1939 (Trail Smelter Arb. Trib 1941).

[125] These are the famous Elephant Brand fertilizers. *See* Read, *supra* note 37, at 221; WIRTH, *supra* note 44, at 13, 35.

[126] *See* U.S. DEP'T OF ENERGY, *Nuclear Weapons Production Processes and History*, *in* LINKING LEGACIES: CONNECTING THE COLD WAR NUCLEAR WEAPONS PRODUCTION PROCESSES TO THEIR ENVIRONMENTAL CONSEQUENCES 11, 21 (1997), *available at* http://legacystory.apps.em.doe.gov/pdfs/linking/011_030.pdf; The Manhattan Project Heritage Pres. Ass'n, Inc., Consolidated Mining and Smelting Company Ltd., Trail B.C.—Canada, Project '9'—Heavy-Water (Deuterium) Production, http://www.childrenofthemanhattanproject.org/CP/Canada/CM&S-01.htm (last visited Mar. 14, 2006); *see also* Wilson, *supra* note 41.

[127] Read reported that the cost of compliance was "of the order of twenty million dollars." Read, *supra* note 37, at 221; *see also* CROWE, *supra* note 54, at 108 (stating that Consolidated spent $10 million on remedial works by 1929).

[128] *See* Read, *supra* note 37, at 221. Of course, there are echoes from the past that aren't nearly as favorable, but are enlightening nonetheless. For example, Consolidated was advised early on that rather than pay damages to farmers it should instead seek to purchase smoke easements. Had smoke easements been available and widely purchased, it likely would not have lead to the reductions in sulfur dioxide emissions, nor the benefits described above (at that time). *See*

And, to those who decry the cost of litigation,[129] it is worth noting that the company itself acknowledged that it is highly unlikely that these innovations would have been pursued, but for the claims of nuisance and trespass.[130]

### C. *Missed Opportunity, Costs (Plenty)*

Presaging by nearly seventy years what was to come, Stewart W. Griffin, a chemist with the United States Department of Agriculture's ("USDA") submitted an eighty-five page report to the Tribunal regarding large quantities of slag discharged by the Trail Smelter that had "formed, or accumulated upon, a bank or bar more than 100 acres in area extending from the northwest bank of the Columbia several miles upstream from Northport."[131] Griffin had undertaken investigations from 1928 to 1935 "based on complaints of residents that progressive diminution of fish population and wild fowl ha[d] occurred in the past ten years, also that horses grazing in the low banks in the Northport region ha[d] sickened, and that persons became ill after drinking the water."[132] Samples taken in 1935 showed that the slag contained zinc and lead.[133]

The Canadian Government argued that slag discharges were irrelevant to the case, and Consolidated's response was

BLANKINSHIP, *supra* note 60, at 15–16. *See also* CROWE, *supra* note 54, at 108.

[129] Professor Wirth includes a chart of expenditures of the investigations. WIRTH, *supra* note 44, at 65 (showing that expenditures total more that a half a million dollars).

[130] *See* CROWE, *supra* note 54, at 108 (noting that if IJC had not approved of the regime, the "large expenditure and risk might have been avoided"); A.F. SNOWBALL, CONSOL. MINING AND SMELTING CO. LTD., PROFIT OR LOSS BY SMOKE CONTROL 6 (1952), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/26_27MAR1952ProfitorLossbySmokeControlbySnowball.pdf ("In persuading any industrial management, however enlightened, of the necessity for smoke removal equipment, an incentive must be shown clearly. There are two typical incentives, one is the profit the other, threat of outside legal action against a nuisance.").

[131] CROWE, *supra* note 54, at 8 (referencing the U.S. Statement to the Tribunal). *See also* Chemical Character of Waters in the Columbia River in Northeastern Washington (Dec. 15, 1937), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/1937GriffinChmicalCharacterofWatersofColumbiaRiver.pdf. WIRTH, *supra* note 44, at 101–03.

[132] CROWE, *supra* note 54, at 161.

[133] *Id.*

multilayered. In addition to arguing irrelevance, Consolidated pointed at others, arguing that that the Northport smelter had also discharged into the Columbia River, and that a slag pile one half mile north of Northport was still polluting the Columbia. Consolidated also argued that "pollution by slag has no effect on the quality of water," that unlike sulfide mine wastes of the Coeur d'Alene, "slag is to all intents and purposes the same as basalt rock which is very inert to decomposing agencies,"[134] that the "present slag contains a negligible amount of lead and zinc," and that "no evidence is offered to show that the presence of slag in the Columbia River has anything to do with the fish or wild fowl population."[135] Consolidated also noted that "stream pollution by raw sewage was known to obtain in the Northport area—this would account for any illness noted, if indeed this was not entirely imaginary."[136]

In response, the Tribunal barely paused long enough to note that whether part of the agreed upon Convention or not, no evidence had been presented to prove the U.S. claims of harm from slag discharges.[137] The failure to address the issue at that time, or even to require further study the issue, must stand as one of the great failings of the *Arbitration.* It also stands as a reminder of the accidents of history and the importance of timing, and of the way environmental law develops and harms are addressed—careening from one issue to the next, with little sense of the whole. Having failed to take up the challenge in the late 1930's, the issue largely remained lost to history for the next half century.

## IV. PLUS ÇA CHANGE, PLUS C'EST LA MÊME CHOSE[138]

Given the result and the seminal importance of the *Trail Smelter Arbitration* to the development of international environmental law, it may be somewhat stunning to the uninitiated[139] to learn that for the next half-century following the

[134] *Id.* at 161–62.

[135] *Id.* at 162.

[136] *Id.* at 161.

[137] *See* Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1977 (Trail Smelter Arb. Trib 1941).

[138] Alphonse Karr, *Les Guêpes*, Jan. 31, 1849 ("The more things change, the more they stay the same.").

[139] The sophisticates of international environmental law, on the other hand, are undoubtedly all too familiar with such histories to be surprised that the

*Arbitration*, the Trail Smelter continued to dump vast quantities of slag, metals, and mercury into the Columbia River, where they were transported downstream and ultimately came to rest on the beaches, and in the sediments, of Lake Roosevelt, Washington.[140]

### A. *Lake Roosevelt: Geography, History, and Uses*

The Trail Smelter is located along the banks of the Columbia River approximately 10 miles upstream of the Canada-U.S. border.[141] In 1940, the year before the end of the *Trail Smelter Arbitration*, the U.S. completed construction of the Grand Coulee Dam. A federal reclamation project[142] sometimes referred to as the eighth wonder of the world,[143] the Grand Coulee is the largest hydroelectric facility in North America.[144] The Grand Coulee blocks the free flow of the Columbia River as it flows downstream from Canada and across into Washington State. The resulting lake, Lake Roosevelt, stretches some 135 miles behind the Grand Coulee Dam to within approximately fifteen miles of the international border with Canada.[145]

system failed to discourage the continuation of the same behavior at the same facility (albeit in a different environmental medium—trading an airshed for a watershed), let alone that the system failed to become an effective enforced standard.

[140] For a discussion of the operation and history of the Upper Columbia River in relation to the Teck Cominco lawsuit, authored by counsel to both the Colville Tribes and the named plaintiffs in *Pakootas*, see Du Bey & Sanscrainte, *supra* note 37, at 342–50.

[141] *See supra* note 38.

[142] The Grand Coulee Dam was authorized in 1935. Act of August 30, 1935, Pub. L. No. 74-409, § 2, 49 Stat. 1028, 1040 (1935).

[143] *See, e.g.*, Grand Coulee Dam, http://www.grandcouleedam.com/gcdam.html (last visited Jan. 23, 2006). The Columbia River flowing downstream from the Canadian border is the principal inflow to Lake Roosevelt (contributing approximately ninety percent of the flow). Stephen E. Cox et al., *Vertical Distribution of Trace-Element Concentrations and Occurrence of Metallurgical Slag Particles in Accumulated Bed Sediments of Lake Roosevelt, Washington, September 2002*, at 2 (U.S. Geological Survey, Scientific Investigations Report 2004-5090, 2005), *available at* http://pubs.usgs.gov/sir/2004/5090/pdf/sir20045090.pdf. Remarkably, Lake Roosevelt receives enough inflow to refill the entire lake approximately seven times in an average water year. Lake Roosevelt Forum, About Lake Roosevelt: Operations, http://www.lrf.org/AboutLR/ALR-Operations.html (last visited Jan. 23, 2006).

[144] Lake Roosevelt Forum, *supra* note 143. It has a generating capacity of 6,809 megawatts of electricity. *Id.*

[145] *See, e.g.*, Cox, *supra* note 143 .

Though originally constructed primarily to provide irrigation water, the Grand Coulee Dam is now operated for several purposes: hydro-electric power generation, irrigation,[146] flood control,[147] recreation,[148] and supporting downstream fisheries.[149] To meet these competing demands, in an average year, water levels in Lake Roosevelt fluctuate up to eighty feet, with the Lake remaining filled during summer.[150]

Lake Roosevelt is also designated a National Recreation Area and is one of the most popular recreation areas in Washington state. Drawing up to 1.5 million visitors a year, the Lake is a center for recreational use, including camping, boating, fishing, and swimming.[151] Along its shores, visitors enjoy many beautiful areas and encounter surprisingly and deceptively enchanting black sand (mining slag) beaches.

The Lake Roosevelt National Recreation Area also lies within the ancestral homelands of the Colville and Spokane Tribes.[152] The current Colville Indian Reservation borders Lake Roosevelt on the North and West for approximately 93 river miles.[153] The Spokane Indian Reservation borders the Lake to the East for about 8 miles north of the confluence of the Spokane River with the

[146] *See* Lake Roosevelt Forum, *supra* note 143 (explaining that "[a]nnually, about 2.5 million acre feet (or over 814 billion gallons) of water is pumped from Lake Roosevelt into Banks Lake to support irrigation").

[147] *See id.* ("By making up to 5 million acre feet of space available for flood control, Lake Roosevelt is the system's primary American storage area.").

[148] *See id.*

[149] *See id.*; *see also* Du Bey & Sanscrainte, *supra* note 37, at 344–45.

[150] *See* Lake Roosevelt Forum, *supra* note 143.

[151] *Id*.

[152] SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-3. Accordingly, the Secretary of the Interior designated an area termed the "Indian Zone" which comprises essentially all of the freebar, draw down, and water inside the original boundaries of the reservation except the areas immediately around the dam. The bed of the Columbia River was not designated for the project, and the tribes were not compensated for any taking of the riverbed. Consequently, the Secretary has held that each tribe has full equitable title to that part of the riverbed that is within the exterior boundaries of its reservation. *Id.* at 2-2; Du Bey & Sanscrainte, *supra* note 37, at 343.

[153] The Lake Roosevelt National Recreation Area ("LRNRA") also contains some other lands originally part of the so called "North-Half" of the Colville Reservation (north of the reservation to the Canadian border, where the Colville Confederated Tribes reserved hunting, gathering, fishing and water rights). *See* SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7 at 2-3.

Columbia River.[154] Because the area taken for the Grand Coulee Project included traditional tribal lands, Congress required approximately one quarter of the reservoir area above the Dam to be reserved for the paramount use of the Colville Confederated Tribes and the Spokane Tribe for hunting, fishing, and boating purposes.[155]

### B. *Historical Discharges to the Columbia from the Trail Smelter*

By any measure, the quantity of hazardous substances discharged from the Trail Smelter is staggering.[156] It has been reported, for example, that the smelter discharged well over 100,000 tons of slag annually into the Columbia River.[157] EPA has estimated that the smelter discharged more than 13 million tons of

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[154] *Id.*

[155] *See id*. at 2–4; Du Bey & Sanscrainte, *supra* note 37, at 343.

[156] EPA and the United States Geological Survey assert that Lake Roosevelt has high levels of hazardous substances and that the Trail Smelter is the source. Teck Cominco has argued that the slag is "sand and iron" with "very little heavy metal in it," and has disputed claims of potential health effects. Second Quarter 2004 Teck Cominco Ltd. Earnings Conference Call, held by Teck Cominco, Ltd. (July 28, 2004) (transcript available at 7/27/04 FINDISCLOSURE 13:00:00 (Westlaw)). Teck also offered to pay for up to $13 million, and the Canadian government has suggested that an enforceable contract be entered into with promises also being made to the government of Canada. *See* Letter from Bruce Levy to Terry A. Breese, *supra* note 28. On Dec. 17, 2003, during the Teck Cominco Investor Conference Call, Teck indicated that it "would remediate wherever the study said that there was an unacceptable level of risk consequent on material put into the lake attributable to our site, attributable to Trail." Conference Call regarding U.S. EPA & Lake Roosevelt, held by Teck Cominco Ltd. 7 (Dec. 17, 2003) (transcript on file with author).

[157] SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-13. "Slag" is a black glassy material that is a by-product of smelting that contains among other metals, copper, lead, and zinc. SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-10. *See also* Conference Call: U.S. EPA & Lake Roosevelt, *supra* note 156, at 2.

> Slag is one of the final products of the smelting process. All physically available metals have been removed. The glassiest substance in which the remaining metal, something under 3%, are generally not bio-available and not releasable to the environment. Slag is designated a non-hazardous substance in both the United States and Canada . . . . Mercury has been raised as an issue but there is virtually no mercury in slag . . . . The EPA is putting out information, some of it we believe misleading, some of it wrong, in respect to both pollution in Lake Roosevelt and the level of risk associated with Lake Roosevelt.

*Id.*

heavy metals-tainted slag into the Columbia.[158] Further, a 1996 Report from Teck Cominco indicates that its discharges into the Columbia River from 1980-1996 averaged as high as 18 kg/day of arsenic, 62 kg/day of cadmium, 200 kg/day of lead, 4 kg/day mercury, and 7400 kg/day of zinc into the Columbia. Additionally, Teck Cominco's related fertilizer plant operations contributed up to an additional 4 kg/day of mercury.[159] By way of context, as late as 1994 and 1995, the Trail Smelter was discharging more copper and zinc into the Columbia River than the cumulative totals of all permitted U.S. discharges for those materials.[160]

Environmental studies have demonstrated elevated levels of arsenic, cadmium, lead, zinc, and organochlorines in sediments and fish in Lake Roosevelt. The United States Geological Survey ("USGS") has reported that the Trail Smelter is the source of most of the contaminants found, and that slag from the smelter is weathering and breaking down and metals in slag are contaminating the river both on the surface, and deeper into bed sediments.[161] Materials released in this weathering and decaying process include arsenic, cadmium, copper, zinc and lead.[162] Characteristics of liquid metal wastes and mercury are also present in sediments.[163]

Studies further show that these contaminants pose a risk to aquatic life including benthic organisms.[164] Once in the food

[158] The EPA estimates that the Trail Smelter discharged 13.4 million tons of slag and that since completion of the Grand Coulee Dam in 1940 (which blocked the free flow of the river) Teck produced and discharged up to 11.8 million tons of slag. SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-12, 2-22 tbl.2-1; Karen Dorn Steele, *B.C. Smelter Dumped Tons of Mercury; Records Show Scope of River Pollution*, SPOKESMAN REV. (Spokane, Wash.), June 20, 2004, at A1.

[159] SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 8-3. *See also* Met Soc, Cominco's Trail Operations, http://www.metsoc.org/virtualtour/processes/zinc-lead/cominco.asp (last visited Jan. 20, 2006).

[160] Steele, *supra* note 158 (also reporting on a 6,300 pound spill in March 1980).

[161] *See* Cox et al., *supra* note 143, at 1.

[162] *Id.* at 6.

[163] *Id.*

[164] Benthic organisms are animals that reside in or on the bottom of rivers and lakes. *See* N. Am. Benthological Soc'y, What is the "Benthos" and What Do Benthologists Do?, http://www.benthos.org/AboutNABS/Whatisbenthos.htm (last visited Jan. 24, 2006).

chain, these contaminants biomagnify as they work their way up the food chain, posing risks to fish species, and humans.[165] In fact, the Washington State Department Health issued an advisory against consumption of walleye from the Upper Columbia River Basin due to elevated levels of mercury.[166] In addition to human exposure pathways from deposition in sediments, bio-uptake by fish, plants, and other organisms and direct ingestion of water from the Columbia River and Lake Roosevelt, scientific reports indicate that when the sediments become exposed to air (as they often do as a result of the Grand Coulee Dam's operations)[167] they threaten human health via fugitive air emissions.[168]

### C. Pakootas*: Procedural Background*

Following up on earlier studies that demonstrated elevated levels of certain metals in Lake Roosevelt sediments,[169] on August 2, 1999, the Colville Tribes petitioned the EPA to conduct a preliminary assessment to investigate the human health and environmental risks associated with the presence of hazardous substances in the Upper Columbia River south of the Canadian

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[165] *See* Du Bey & Sanscrainte, *supra* note 37, at 348–49. Harm also includes increased "scouring of plants and animals from river substrate, damage to the soft tissues of aquatic insects and fish, [and the] smothering of habitat." G3 CONSULTING LTD., TECK COMINCO METALS LTD., ASSESSMENT OF COLUMBIA RIVER RECEIVING WATERS v (2001), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/2001Recievingwaterstudy.pdf.

[166] *See* WASH. STATE DEP'T OF HEALTH, FISH AND SHELLFISH CONSUMPTION ADVISORIES IN WASHINGTON STATE, http://www.doh.wa.gov/ehp/oehas/EHA_fish_adv.htm (last visited Jan. 23, 2006).

[167] The Bureau of Reclamation releases water through the Grand Coulee Dam in late winter through early summer for flood control which results in seasonal fluctuations of Lake Roosevelt of more than eighty feet. Lake Roosevelt Forum, *supra* note 143. *See* Du Bey & Sanscrainte, *supra* note 37, at 347.

[168] *See, e.g.*, *id.*; Sue Kahle & Michael Majewski, U.S. Geological Survey, Presentation at Lake Roosevelt Natural Resources Managers Meeting: Trace Elements in Air at Lake Roosevelt (Mar. 16 2004) (PowerPoint presentation available at http://wa.water.usgs.gov/projects/roosevelt/data/Forum_mar-04.pdf); Michael S. Majewski et al., *Concentrations and Distribution of Slag-Related Trace Elements and Mercury in Fine-Grained Beach and Bed Sediments of Lake Roosevelt, Washington, April–May 2001* (U.S. Geological Survey, Water-Resources Investigations Report 03-4170, 2003), *available at* http://pubs.usgs.gov/wri/wri034170/pdf/wri034170_ver1.10.pdf.

[169] For a summary of some of the studies see SUPERFUND TECHNICAL ASSESSMENT & RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 2-12 to 2-14.

border to the Grand Coulee Dam (the UCR Site).[170] In early 2000, EPA granted the Colville Tribes' Petition, and began multiple preliminary assessments.[171]

In early 2003, EPA completed its assessments of the UCR Site, and pursuant to CERCLA's Hazard Ranking System found that the Site was eligible for listing on the National Priorities List—as one of the nation's most contaminated sites.[172] At the same time, EPA initiated informal settlement discussions with Teck Cominco in an effort to enter an Administrative Order on Consent ("AOC") whereby Teck Cominco's American subsidiary would conduct a Remedial Investigation and Feasibility Study.[173]

Within six months, EPA concluded that informal negotiations were not progressing as hoped, and it issued a Special Notice triggering formal negotiations.[174] In response, Teck Cominco offered to pay up to $13 million for independent studies,[175] but refused to submit itself to the Superfund process. Following the break-down of these formal negotiations, on Dec. 11, 2003, EPA issued a Unilateral Administrative Order under section 106 of CERCLA directing that Teck Cominco investigate the extent of contamination throughout the site and develop alternatives to remediate the contamination.[176]

Consistent with its early position that it was not subject to CERCLA liability that resulted from its activities in Canada, Teck Cominco soon enlisted the assistance of the Canadian

[170] UAO, *supra* note 18, at 2; Du Bey & Sanscrainte, *supra* note 37, at 359.

[171] *See* SUPERFUND TECHNICAL ASSESSMENT AND RESPONSE TEAM, REGION 10, U.S. EPA, *supra* note 7, at 1-1.

[172] *See* UAO, *supra* note 18, at 3.

[173] *See* Matthew Preusch, *Pollution Dispute in Northwest Straddles the Border*, N.Y. TIMES, Mar. 20, 2004, at A8; *see also* EPA Region 10, Draft Administrative Order on Consent for Upper Columbia River Study 8-15, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/EPAOrderOnConsentREColumbiaRiverSite.pdf.

[174] The Special Notice was issued on October 10, 1003 informing Teck Cominco of the beginning of a 60 day period of formal negotiations. *See* Letter from David Croxton to Teck Cominco, *supra* note 23, at 1.

[175] In a November 14, 2003 letter, Teck Cominco represented to EPA that Teck Cominco was willing "to enter into an agreement with [EPA], fully enforceable under the laws of the United States, to fund the analysis and pay for the remediation required." Letter from Teck Cominco Metals, Ltd., to U.S. Environmental Protection Agency, *available at* http://www.teckcominco.com/articles/roosevelt/dt-letter-031114.htm (last visited Mar. 14, 2006).

[176] UAO, *supra* note 18.

Government. On January 8, 2004, Canada sent a diplomatic note to the U.S. State Department, in which the Canadian Embassy requested that EPA rescind the UAO and instead work with Teck Cominco toward a "mutually acceptable cleanup plan."[177] The diplomatic note also made clear Canada's position that the U.S. had overstepped its authority, stating: "Canada does not believe that CERCLA applies to Teck Cominco Metals."[178] While Teck Cominco continued to reiterate its offer to have its wholly owned, U.S.-based corporate affiliate address potential risks and investigate and fund appropriate cleanup related to the company's operations, it refused to comply with the UAO. At the same time, Teck Cominco remained engaged in the war for hearts and minds, asserting that its discharges of slag presented no real problem and that EPA and others have misrepresented the risks.[179]

[177] Diplomatic Note, Embassy of Can. to U.S. Dep't of State, *supra* note 28, at 1; *see also* Steele, *supra* note 9.

[178] Diplomatic Note, Embassy of Can. to U.S. Dep't of State, *supra* note 28, at 1.

[179] *See* Press Release, Teck Cominco Metals Ltd., EPA Takes Unprecedented Step to Impose U.S. Law in Canada (Dec. 11, 2003), http://www.teckcominco.com/news/03-archive/03-24-tc.htm ("Teck Cominco regards this unilateral action by of the US EPA as inflammatory [sic] precipitous and unnecessary."); Press Release, Teck Cominco Metals Ltd., Teck Cominco Responds to Misleading Reports on Trail Smelter (June 21, 2004), www.teckcominco.com/news/04-archive/04-18-tc.htm ("'Recent media reports on Teck Cominco's discharges into the Columbia River centres on 24 year-old information and are extremely misleading,' said Doug Horwsill, Senior Vice President, Environment and Corporate Affairs for Teck Cominco Limited."); Teck Cominco Metals Ltd., Teck Cominco's Response to EPA Region 10's Briefing Note of December 3, 2003 (Dec. 10, 2003), http://www.teckcominco.com/articles/roosevelt/update-031210.htm ("The EPA Region 10's presentation misconstrues Teck Cominco's proposal and is inaccurate in every material aspect . . . ."); Letter from Bill A. Williams and Richard Cardwell to Dr. Dave Croxton, U.S. EPA Region 10 (Feb. 20, 2004) (on file with author) ("EPA's public statements about our proposal are incomplete, incorrect, and misrepresent the proposal for evaluating risks associated with Lake Roosevelt."); Chris Brown, *A Century of Slag*, CBC NEWS, Dec. 15, 2003, www.cbc.ca/news/background/environment ("My own children swim in the river. They spent many, many days in the river. I have absolutely no concerns about my children doing that,…[t]he facts as we know them [are] slag has not had a detrimental effect—the water quality the metals have not impacted the fish in the lake," quoting Mark Edwards, Environmental Manager at the Trail smelter.).

### D. *The Battle is Joined: The* Pakootas *Citizen Suit*

Faced with Teck Cominco's refusal to comply with the UAO, two individual members of the Colville Tribes, Joseph Pakootas and D.R. Michel, initiated a citizen's suit under section 310(a)(1) of CERCLA[180] to enforce the UAO.[181] Teck's response was predictably hostile,[182] and after diplomatic and lobbying efforts failed to convince EPA to rescind the UAO, Teck moved to dismiss the case.[183] Arguing that that EPA's actions were "extraterritorial," "unsupported by [CERCLA's] language, and inconsistent with its provisions," Teck argued that the court lacked subject matter and personal jurisdiction,[184] and in the alternative, that the plaintiffs had failed to state a claim for relief under CERCLA.[185] In sum, Teck Cominco argued that CERCLA

[180] 42 U.S.C. § 9659(a)(1) (2000).

[181] It has also been reported that in 2003, EPA requested permission to obtain background samples at lakes upstream of Teck Cominco and Canada Refused. Karen Dorn Steele, *Pollution Dispute May Be Mediated; State Department Wades Into Teck Cominco Issue*, SPOKESMAN REV. (Spokane, Wash.), Sept. 24, 2004, at B3.

[182] "The solution should come from cooperation, not litigation. In the meantime, however, Teck Cominco will vigorously defend itself in this action." Press Release, Teck Cominco, Ltd., Teck Cominco Reiterates $13 Million Commitment to U.S. Environmental Protection Agency in Response to Tribes' Suit (July 21, 2004), *available at* http://www.teckcominco.com/news/04-archive/04-21-tc.htm (last visited Jan. 20, 2006) (quoting Doug Horswill, Senior Vice President, Environment and Corporate Affairs, for Teck Cominco Ltd., reacting to the filing of the citizen suit).

[183] *See* Motion to Dismiss, *supra* note 31.

[184] *See id.* at 1–2. Although Teck Cominco challenged personal jurisdiction as well, *see id.*, Teck wisely does not seem to have raised that issue on appeal. Washington's long-arm statute, WASH. REV. CODE § 4.28.185, is coextensive with the limits of the U.S. Constitution. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Hanson v. Denckla, 357 U.S. 235 (1958). Teck Cominco has wholly owned affiliates in the U.S., and the Trail Smelter continues to smelt concentrates from, among other places, mines in British Columbia, Washington State, and Alaska. TECK COMINCO, 2004 ANNUAL REPORT 14 (2005), *available at* http://www.teckcominco.com/investors/reports/ar2004/tc-2004-fullreport.pdf (describing current operations). Teck Cominco also sells materials from the Trail Smelter in the U.S., and a Teck Cominco owned Hydro facility that helps power the Trail Smelter also generates surplus power that Teck Cominco exports to the U.S. by a company-owned transmission line. Teck Cominco, Trail Power Sales, http://www.teckcominco.com/operations/power/index.htm (last visited Jan. 20, 2006). Moreover, the UAO implies that Teck Cominco directed pollution at the state, which would itself be sufficient to confer jurisdiction under the Washington long arm statute. UAO, *supra* note 18, at 3.

[185] Motion to Dismiss, *supra* note 31, at 4.

has no reach to parties whose conduct took place outside of the U.S., even if the effects of those actions created a Superfund site in the United States.[186] The State of Washington subsequently intervened in support the citizen's suit enforcement of the UAO, and to defend against Teck Cominco's motion to dismiss.[187]

### E. *The District Court's Decision*

The district court heard argument on November 4, 2004 and four days later delivered its decision. In a lengthy opinion, the court concluded that through CERCLA Congress had unequivocally expressed its intent that Superfund remedy "domestic conditions."[188] The district court made clear that EPA was not trying to regulate conduct in Canada or requiring the Canadian government to regulate in any particular fashion, and that there was no direct conflict between Canadian sovereignty and the application of CERCLA to Teck Cominco.[189]

While the Court acknowledged that that there was some question regarding whether the case really involved extraterritorial

[186] Quite apart from its arguments relating to extraterritorial application of U.S. law, in light of the Supreme Court's recent decision in Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004), Teck Cominco's decision to not agree to an AOC or "voluntarily" comply with the UAO under section 106 may have been strategically wise. In *Availl*, the Court overturned what appeared to be well settled and fairly uniform jurisprudence in the lower Courts regarding CERCLA's right of contribution. It now appears that a potentially responsible party ("PRP") may seek contribution under section 113(f) of CERCLA for response costs only if: (1) it has been the subject of a "civil action" under section 106 or 107 of CERCLA or (2) if it has resolved its liability to the United States or a State for those response actions or costs in an "administrative or judicially approved settlement" within the meaning of section 13(f)(3)(B). *Availl*, 543 U.S. at 167. While the Court left open the question of whether a AOC issued under section 106 and/or 122 of CERCLA would constitute an "administrative or judicially approved settlement" or whether there were other implied rights of contribution elsewhere in CERCLA, it is not immediately obvious that a party seeking contribution from other PRPs would be well served to assume that an AOC or a UAO constitutes a civil action for purposes of contribution rights. *See, e.g.*, Pharmacia Corp. & Solutia, Inc v. Clayton Chem. Acquisition LLC, 382 F.Supp.2d 1079 (S.D. Ill. 2005). *See* Richard O. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution actions under CERCLA*, 18 TUL. ENVTL. L.J. 323 (2005) (explaining the state of confusion and uncertainty concerning PRP's contribution actions following the Supreme Court's decision).

[187] *See* State of Washington's Motion to Intervene, *supra* note 32.

[188] Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *39–41 (E.D. Wash. Nov. 8, 2004).

[189] *Id.* at *15–16.

application of CERCLA, it found that it was extraterritorial because to find otherwise "would require reliance on a legal fiction that the 'releases' of hazardous substances . . . are wholly separate from the discharge . . . ."[190]

With respect to personal jurisdiction, the Court considered Washington State's long-arm statute[191] and concluded that it gives personal jurisdiction over any person who commits a tort within the territorial boundaries of the state.[192] The Court also found that plaintiffs had alleged that the smelter had intentionally and expressly aimed their discharge at Washington State and that Defendant knew or should have known that the discharges were likely to cause harm downstream.[193]

The Court stressed that EPA's 106 UAO was not equivalent to regulating conduct in Canada, and that Canada remained free to establish its own discharge limits.[194] The Court focused on the effects caused by Teck Cominco, effects that were wholly within the United States, and found that Teck Cominco, like any company in the U.S., having caused harm in the U.S., could be held liable for the cost of cleanup.[195]

In denying Teck Cominco's motion, the Court reasoned that the standard presumption against extraterritorial application of U.S. law was not available to the company.[196] A presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord,"[197] the opinion stated, but the presumption does not apply "where the failure to extend the scope

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[190] *Id.* at *16.

[191] CERCLA has no long-arm of its own. District courts have jurisdiction and look to the state long-arm statutes for service of process abroad. *See* United States v. Ivey, 747 F. Supp. 1235, 1238–39 (E.D. Mich. 1990). As noted above, Washington State's long-arm statute is coextensive with the limits of federal Due Process. *See* WASH. REV. CODE § 4.28.185.

[192] *Pakootas*, 2004 U.S. Dist. LEXIS 23041, at *6–10.

[193] *Id.* at *10.

[194] *See id.* at *15–16.

[195] Teck Cominco also took exception to the application of CERCLA because, like many CERCLA sites, contamination in the Upper Columbia River may come from additional sources. The UAO indicates that sources of releases may include "mining and milling operations, fertilizer production, smelting operations, pulp and paper production, sewage treatment plants, and other industrial activities." UAO, *supra* note 18, at 3.

[196] *Pakootas*, 2004 U.S. Dist. LEXIS 23041, at *27–28.

[197] *Id.* at *17 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

of the statute to a foreign setting will result in adverse effects within the United States."[198] Because CERCLA was intended by Congress to "remedy 'domestic conditions' within the territorial jurisdiction of the U.S.," the Court concluded that "the extraterritorial application of CERCLA [was] appropriate" to Teck Cominco.[199] The Court also certified the case for immediate appeal, and at Teck Cominco's request, the Ninth Circuit agreed to hear the case. As of writing, the case has been fully briefed and argued..

## V. DOES CERCLA APPLY TO THE LAKE ROOSEVELT UPPER COLUMBIA RIVER SITE?

Not surprisingly, Teck Cominco and the international law scholars who have written about the *Pakootas* case[200] have decried EPA's use of CERCLA. The reactions run the gamut from the assertion that application of CERCLA "is an affront to Canadian sovereignty"[201] and "would turn . . . principles of sovereignty and international law on their head,"[202] to using the case as possible evidence of the Bush Administration's "increased willingness to exert unilateral pressure rather than engage internationally"[203] and "a significant departure from common practice surrounding transboundary pollution issues . . . ."[204] Likewise, the U.S. and Canadian Chambers of Commerce, the nations' respective national mining associations, and the Canadian Government have filed amicus briefs in the Ninth Circuit in support of Teck Cominco, arguing, to varying degrees, that EPA's actions are: contrary to Congressional intent,[205] an unwarranted expansion of territorial

[198] *Id.* at *19 (quoting Envtl. Defense Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993)).

[199] *Id.* at *27–28.

[200] *See* discussion *infra* Part IX. Admittedly, Canadian Professor Neil Craik's article is less critical. While noting that EPA's actions were "unilateral and highly provocative," he also acknowledges that the use of CERCLA "has the potential to be an effective mechanism for imposing liability against transboundary polluters in accordance with the polluter pays principle, something the *Trail Smelter* approach and the harm principle in general have been criticized for failing to do." Craik, *supra* note 37, at 141 (citation omitted).

[201] Parrish, *supra* note 9, at 403.

[202] *Id*. at 405.

[203] Brunnée, *supra* note 37, at 632.

[204] *Id*. at 633. See *supra* note 37 for articles written by counsel on both sides of this case.

[205] *See, e.g.*, Brief of *Amicus Curiae* Chamber of Commerce of the United

sovereignty,[206] contrary to the presumption against extraterritorial application of law,[207] and interfering with diplomatic and other government to government efforts and mechanisms.[208] These amici also argue that CERCLA will have a global reach if the district court's decision is affirmed,[209] and that American companies will face retaliation in Canada[210] (and presumably elsewhere) as a consequence. Before reaching such policy arguments, however, it is necessary to first determine whether, irrespective of the border, CERCLA properly applies in light of the facts alleged. If the answer is no, then of course the court need go no further. If the answer is yes, then it is appropriate to inquire whether application of CERCLA is otherwise precluded or unwise given the transboundary context.

### A. *CERCLA: A Summary*

As Professor Lazarus explains in his recent book, *The Making of Environmental Law*, CERCLA is the statute that most transformed environmental law and the environmental law profession in the 1980s.[211] Born of the public outcry over the Love Canal incident[212] coupled with a lame-duck president and

States of America in Support of Defendant-Appellant at 3, Pakootas v. Teck Cominco Metals, Ltd., No. 05-35135 (9th Cir. June 13, 2005), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/AmicusBriefUSChamberCommerce.pdf.

[206] *See, e.g.*, Government of Canada's *Amicus Curiae* Brief in Support of Appellant and For Reversal of the Order of the District Court at 9–10, *Pakootas*, No. 05-35135, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/AmicusBriefGovCanada1.pdf [hereinafter Canada's *Amicus* Brief].

[207] *Id.*

[208] *See, e.g.*, Brief *Amici Curiae* of Canadian Chamber of Commerce and The Mining Association of Canada in Support of Defendant-Appellant at 3–4, 21–28, *Pakootas*, No. 05-35135, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/AmicusBriefCanadaMiningAssocChofComm.pdf.

[209] Brief for *Amici Curiae* The National Mining Association and the National Association of Manufacturers Supporting Appellant and Reversal at 5, *Pakootas*, No. 05-35135, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/AmicusBriefNatlMiningAssoc.pdf [hereinafter Mining and Manufacturers Associations' *Amicus* Brief].

[210] *Id*. at 22–26.

[211] RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 107 (2004).

[212] I use "born" rather than "conceived" in light of Professor Bill Rodgers' quite correct admonition that "[c]areful historians should acknowledge that the Superfund law was well along the evolutionary path towards enactment before

Congress,[213] CERCLA (or "Superfund" as it is popularly known) is a comprehensive remedial liability statute.[214] Unlike many of its predecessor environmental statutes, "CERCLA is not a regulatory standard-setting statute."[215] CERCLA's focus is remediation and cleanup of the many abandoned and inactive hazardous waste sites in the U.S.[216] CERCLA's legislative history (or lack thereof), general statutory scheme, and application to cleanup of hazardous waste sites have been explored in many articles and treatises.[217] Accordingly, this section only briefly summarizes these CERCLA concepts to provide context for the discussion of *Pakootas*.

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Love Canal burst into public prominence." WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 682 (2d ed. 1994). With respect to the Love Canal itself, on the twentieth anniversary of Love Canal disaster, the Spring 2001 issue of the *Buffalo Environmental Law Journal* also contained a number of articles addressing the events surrounding the Love Canal debacle. *See, e.g.*, David Hahn-Baker, *Reflections on Love Canal*, 8 BUFF ENVTL. L.J. 225 (2001); A. Theodore Steegmann, Jr., *History of Love Canal and SUNY at Buffalo's Response: History, The University Role, and Health Research*, 8 BUFF ENVTL. L.J 173 (2001). *See also generally* ADELINE GORDON LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE (1982).

[213] CERCLA was signed into law on December 11, 1980, in the last days of the Carter Administration. *See* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1405–06 (1997) ("The usual explanation for CERCLA's poor drafting blames the hurry with which the lame-duck Ninety-sixth Congress passed the hazardous waste law in December 1980 before President-elect Reagan and a Republican Senate majority assumed office."); Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL L. 1, 19 (1982) ("[T]he actions of the Senate in November and December of 1980 were distinctly the transactions of a lame duck legislature.").

[214] *See infra* note 282.

[215] New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985); Westfarm Assocs. v. Washington Suburban Sanitary Comm'n, 66 F.3d 669 (4th Cir. 1995).

[216] *See Westfarm*, 66 F.3d at 677 (Congress enacted CERCLA "to protect public health and the environment from inactive hazardous waste sites" (citing H.R. REP. NO. 96-1016(I) at 17, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120–24)). CERCLA compliments, and in some cases overlaps with, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2000). CERCLA does not regulate industrial operations, sources or discharges, but generally addresses remediation of inactive sites. RCRA regulates ongoing hazardous waste handling and disposal. Rather, CERCLA is designed to address the cleanup of historical pollution, and in particular the cleanup of the most serious hazardous waste sites in the United States. *See, e.g.*, U.S. Envtl. Prot. Agency, About Superfund, http://www.epa.gov/superfund/about.htm (last visited Feb. 20, 2006).

[217] *See, e.g.*, Grad, *supra* note 213; RODGERS, *supra* note 212 §§ 8.1–8.8; Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733 (1990).

Perhaps CERCLA's most recognizable feature is its establishment of extremely broad liability for the cleanup of hazardous waste sites.[218] Interested in promoting prompt and effective cleanups and ensuring that the parties that created the hazards paid for the cleanup and response costs (i.e., the "polluter pays" principle),[219] Congress created four broad categories of covered parties (or Potentially Responsible Parties, (PRPs), as they are often called) that may be held liable for response costs:[220]

- Current owners or operators of a facility or vessel where hazardous substances were disposed;[221]
- Previous owners or operators of a facility or vessel where hazardous substances were disposed;[222]
- Individuals that generated or arranged for the disposal of the hazardous substances disposed at the site;[223]
- Transporters of hazardous substances for a disposal at a site/facility that they selected.[224]

Because CERCLA imposes strict liability,[225] the United States need not prove negligence, and all PRPs may be held jointly and severally liable.[226] Moreover, CERCLA applies retroactively; a PRP may be liable for actions that took place prior to CERCLA's enactment.[227]

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[218] *See* United States v. Best Foods, 524 U.S. 51, 55 (1988) (CERCLA gives the President "broad power to command government agencies and private parties to clean up hazardous waste sites") (quoting Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994)).

[219] Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989) (CERCLA "imposes the costs of cleanup on those responsible for the contamination"); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997) (stating that CERCLA's primary objectives are to ensure that hazardous waste sites are cleaned promptly and that the parties responsible for the hazardous conditions pay related costs); *Best Foods*, 524 U.S. at 55–56 ("[T]hose actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions' . . . .") (quoting S. REP. NO. 96-848).

[220] *See* 42 U.S.C. § 9607(a) (2000).

[221] *Id.* § 9607(a)(1).

[222] *Id.* § 9607(a)(2).

[223] *Id.* § 9607(a)(3).

[224] *Id.* § 9607(a)(4).

[225] *See* RODGERS *supra* note 212, at 783–86.

[226] *Id.* at 785; New York v. Shore Realty, 759 F.2d 1032, 1053 (2d Cir. 1985).

[227] *See, e.g.*, United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 732–33 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S. Ct. 146, 98 L.Ed.2d 102 (1987) ("[I]t is manifestly clear that Congress intended CERCLA to have retroactive effect."). *But cf.* Levin Metals Corp. v. Parr-Richmond Terminal Co.,

Defenses under CERCLA are few and limited. A responsible party may avoid CERCLA liability if the release was caused by an act of God,[228] war,[229] a third party (not the PRP's agent or employee) not connected by a contractual relationship if the PRP otherwise exercised due care and took precautions against the foreseeable acts and omissions of the third party with respect to the hazardous substance,[230] or any combination of the above.[231]

Section 106(a) of CERCLA authorizes the President, after notice to the affected state, to take any necessary abatement action, including the issuance of such orders as may be necessary to protect public health, welfare, and environment.[232] A party who fails to comply with such an order may face civil penalties (up to $32,500 per day),[233] and potential treble damages for any cleanup costs incurred.[234] Further, CERCLA authorizes both states and citizens to initiate a citizen suit against a party who fails to comply

817 F.2d 1448, 1450–51(9th Cir. 1987) (no cause of action against a company that dissolved nine years before CERCLA was enacted).

[228] 42 U.S.C. § 9607(b)(1).

[229] *Id.* § 9607(b)(2).

[230] *Id.* § 9607(b)(3).

[231] *Id*. § 9607(b)(4).

[232] *Id.* § 9606(a).

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney general of the United States to secure such relief as may be necessary . . . . The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect pubic health and welfare and the environment.

*Id.* For these purposes, the Administrator of the EPA is the President's delegate, and as provided in operative Executive orders and subject to certain limits, the Regional Administrators of EPA have been delegated this authority. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), *amended by* Exec. Order No. 13,016, 61 Fed. Reg. 45,871 (Aug. 30, 1996) (delegating authority from the President to the EPA Administrator); Office of Solid Waste and Emergency Response Directive from J. Winston Porter, Assistant Adm'r, Office of Solid Waste and Emergency Response to Henry L. Longest II, Dir., Office of Emergency and Remedial Response et al. 14-14-A (May 25, 1988), *available at* 1988 WL 492148 (OSWER) (further delegating authority from the EPA Administrator to regional administrators and allowing for further redelegation to the division director level).

[233] *Id.* § 9606(b)(1); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004).

[234] 42 U.S.C. § 9607(c)(3).

with an EPA administrative order.[235] Alternatively, EPA may undertake response actions itself[236] and then sue to recover costs and damages for the emergency cleanup, removal or remedial actions, including health assessments or effects studies, indirect costs and interest.[237]

Generally, the party (the EPA, a state, or a PRP) that proceeds with cleanup conducts an investigation of the risks posed by the site and the potential remedies to address those risks. This investigation is known as a Remedial Investigation and Feasibility Study ("RI/FS").[238] The EPA then approves a preferred remedy, plans are developed, and work is undertaken consistent with the plan.

In addition to actions by the federal or state government to recover costs, CERCLA provides mechanisms for private parties to recover their own response costs.[239] Section 107(a)(4)(B) provides a federal cause of action that allows "any other person" who undertakes a response action to recover costs from any PRP.[240] And section 113(f) provides that a PRP may seek contribution from another PRP either "during or following" a section 106 or 107(a) civil action, or following the entry of an administrative or judicially approved settlement with either the state or federal authorities.[241]

CERCLA provides a limited exemption for releases that are in accordance with a federal permit.[242] The limitations inherent in this so-called federally permitted shield are significant, and indeed,

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[235] Such actions must be brought in federal district court and only where EPA is not itself enforcing the administrative order. *Id.* §§ 9659(a), (b)(1).

[236] *Id.* § 9604(a)(1). This is the route taken by the EPA in *Pakootas*. *See* UAO, *supra* note 18.

[237] *Id*. § 9607(a)(4).

[238] For a discussion of RI/FS, see *supra* note 26.

[239] *See* 42 U.S.C. §§ 9607(a)(4)(B), 9613(f). *But see* Faulk & Bishop, *supra* note 186 (explaining the state of confusion and uncertainty concerning PRP's contribution actions following the Supreme Court's decision in Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004)).

[240] 42 U.S.C. § 9607(a)(4)(B).

[241] 42 U.S.C. §§ 9613(f)(1), 9613(f)(3)(B). As discussed *supra* note 186, the Supreme Court's recent decision in *Aviall* has both provided some clarity and created some uncertainty regarding whether PRPs have a cause of action outside of these scenarios. *Compare* Faulk & Bishop, *supra* note 186 *with* Wm. Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution under CERCLA After* Cooper Industries v. Availl Services, 18 TUL. ENVTL. L.J. 339 (2005).

[242] *See* 42 U.S.C. § 9607(j).

often preclude its usefulness. For example, the exemption from liability does not apply when the releases of the hazardous substances in question were not expressly permitted, exceeded the limitations established in the permits, or occurred during a time when there were no permits.[243]

### B. *Applicability of CERCLA to the Lake Roosevelt UCR Site*

As all parties in *Pakootas* agree, the application of CERCLA to the facts alleged in *Pakootas* is a relatively straight-forward affair. Section 106 of CERCLA provides that in the case of an "imminent and substantial endangerment to the public health or welfare or the environment" from an "actual or threatened release of a hazardous waste from a facility," the EPA may issue "such orders as may be necessary to protect public health, welfare and the environment."[244] EPA Region 10 issued such an order to Teck Cominco ordering it to undertake an RI/FS of the Lake Roosevelt UCR site. In defense of the subsequent citizen suit to enforce EPA's order against Teck Cominco, Teck asserts in the first instance that it is not subject to CERCLA and that the complaint fails to state a claim upon which relief can be granted.

To present a prima facie case under CERCLA, a party must generally show that there is an actual or threatened "release"[245] of a "hazardous substance"[246] from a "facility"[247] that causes the incurrence of "response costs,"[248] and that the defendant falls within one of the four categories of PRPs as these terms are used in section 107 of CERCLA.

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[243] *See* Idaho v. Bunker Hill, 635 F. Supp. 665, 674 (D. Idaho 1986); *see also* Carson Harbor Village, Ltd. v. Unocal Corp., 287 F. Supp.2d 1118, 1183 (C.D. Cal. 2003) ("Where a defendant establishes that certain releases were 'federally permitted,' a plaintiff may nonetheless recover if it shows that 'non-federally permitted releases contributed to the natural injury.'"); United States v. Iron Mountain Mines, 812 F. Supp. 1528, 1540–41 (E.D. Cal. 1992), ("permit defense" unavailable where the terms of the permit had been breached by the polluter).

[244] 42 U.S.C. § 9606(a).

[245] *Id.* § 9607(a)(4).

[246] *Id.* § 9601(14). CERCLA's definition of hazardous substance incorporates by reference materials regulated under the Clean Air and Water Acts, RCRA and the Toxic Substances Control Act ("TSCA"). *Id.* § 9601(14).

[247] *See id.* § 9601(9).

[248] In the context of a section 106 order, the requirement with respect to response costs is lowered. *Id.* § 9606(b)(2)(C)–(E).

1. *Facility: The Lake Roosevelt UCR Site*

As noted above, the Lake Roosevelt UCR Site consists of "the areal extent of contamination *in the United States* associated with the Upper Columbia River."[249] In addition to structures such as buildings, lagoons, pits, and landfills, CERCLA defines "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed[250] of, or placed, or *otherwise come to be located.*"[251] "The key to this definition is the use of the passive sense—some place where the hazardous substances have 'come to be located'—that suggests the term is used to define conditions or places that need fixing rather than the circumstances that resulted in the placement of the materials there."[252] In *Pakootas*, EPA defined the facility as the Lake Roosevelt UCR Site, including Lake Roosevelt.

2. *Release or Threatened Release of Hazardous Substances*

Congress broadly defined the term "release" to mean: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment ."[253] Case law further clarifies that "releases" include passive "leaking . . . emitting . . . escaping [or] leaching into the environment"[254] of hazardous substances.[255] Once the Lake Roosevelt UCR Site is defined as the facility, there is little

[249] UAO, *supra* note 18, at 2 (emphasis added).

[250] Disposal under CERCLA is given the same definition as in section 1004 of the Solid Waste Disposal Act, 42 U.S.C.A. § 6903, which was amended by the Resource Conservation and Recovery Act ("RCRA"), to mean: "the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water . . . ." 42 U.S.C. § 9601(29).

[251] 42 U.S.C. § 9601(9)(B) (emphasis added). *See* New York v. Gen. Elec. Co., 592 F. Supp. 291, 296 (N.D.N.Y. 1984) ("[I]t appears that Congress sought to deal with every conceivable area where hazardous substances come to be located . . . .").

[252] RODGERS, *supra* note 212, at 759. *See* NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 783 n.1 (7th Cir. 2000).

[253] 42 U.S.C. § 9601(22)

[254] *Id*.

[255] *See, e.g.*, Coeur d'Alene Tribe v. ASARCO Inc., 280 F. Supp. 2d 1094, 1112–13 (D. Idaho 2003). *Accord* A & W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1111 (9th Cir. 1998) (hazardous substances blown from ore pile constituted a release); Carson Harbor Village, Ltd., v. Unocal Corp., 270 F.3d 863, 882 (9th Cir. 2001) (construing "disposal" and "release" as including both active and passive events).

real dispute that there has been a "release or threatened release" of "hazardous substances" from that facility into the environment (in the United States) that poses a threat to public health and welfare. EPA has determined that the presence of "black sand" slag and other hazardous substances in the sediments and shores of Lake Roosevelt constitutes a continuing release of hazardous substances[256] into the environment.[257] The slag contains heavy metals, including copper, lead, mercury and zinc, which exceed CERCLA standards.[258]

Thus, the current and ongoing "releases" of hazardous substances in question are not the Trail Smelter's original discharges to the Columbia River in Canada, but the continuing releases of secondary contamination from slag, sediments and metals, and the weathering and breakdown of the slag in Lake Roosevelt, which are current and ongoing releases of hazardous substances[259] from the facility within United States. Because there have been and continue to be "releases" of a "hazardous substances" from a "facility" under CERCLA, the focus must turn to whether Teck Cominco is a covered party subject to liability under section 107 of the Act.

3. *Is Teck Cominco a Potentially Responsible Party?*

> **Court:** If you had a company that hauled it down there in the truck.
>
> **[Teck]:** The company down in here would be liable. The

[256] Lead and other heavy metal bearing slag has previously been found to be a hazardous substance for the purposes of CERCLA. *See* A&W Smelter & Refiners 146 F.3d 1107, 1113 (9th Cir. 1998).

[257] UAO, *supra* note 18, at 5–6. As noted above, "releases" from the site must be to the "environment," which is defined as "the navigable waters, the waters of the contiguous zone and ocean waters of which the natural resources under the or under the exclusive management authority of the United States" and "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States" or under its jurisdiction. 42 U.S.C. § 9601(8).

[258] UAO, *supra* note 18, at 3.

[259] CERCLA's definition of hazardous substance incorporates by reference materials regulated under the Clean Air and Water Acts, RCRA and TSCA. 42 U.S.C. § 9601(14). Lead and other heavy metal bearing slag has previously been found to be a hazardous substance. *See* A&W Smelter & Refiners 146 F.3d 1107, 1113. Moreover, in investigating the Lake Roosevelt UCR Site, EPA and USGS have found high concentrations of arsenic, cadmium, copper, lead, mercury, and zinc. UAO, *supra* note 18, at 2.

transporter would be liable.

**Court:** What's the difference —

**[Teck]**: Here – (indicating)

**Court**: What's the difference here? Here you're going to use the river to haul it down here.

**[Teck]:** Well, Your Honor, the difficulty is, the river is not a person; it's a transporter. It is— You're dumping this into a river. . . .

*******

**Court:** But the point, though, is that I do think that it's a lead pipe cinch that if they dumped it into this river ten miles away from this huge American repository, that that's where it's going to wind up.

What conceivably could be the difference between that and their hauling it down here by some other means?

**[Teck]:** The difference is that if they put it in a truck to be hauled down there, they intended to haul it down here. If they dump it into this river, they don't really care if it stops in Canada or goes anywhere else. It is the action of nature that is taking this over—taking this across the border.

And what we're talking about here is a specific statute. We're not saying there is no remedy for this sort of thing; typically they are handled through bilateral negotiations. What we are saying is that when Congress passed CERCLA, that it didn't intend—didn't write CERCLA in a way [that] would cover this kind of conduct.[260]

As the foregoing colloquy between the district court and counsel for Teck Cominco indicates, Teck Cominco not only asserts that CERCLA should not be applied extraterritorially, but also that it is not an "arranger" under section 107(a)(3).

[260] Transcript of Oral Argument 13–15, Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *39–41 (E.D. Wash. Nov. 8, 2004), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/DistrictCourtTranscript.pdf.

a. *Does it Take Two to "Arrange"?*

In a statute already infamous for its poor draftsmanship,[261] section 107(a)(3)'s generator/arranger liability provision stands apart as a particularly poorly drafted subsection.[262] Section 107(a)(3) provides that CERCLA liability attaches to:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, *by any other party or entity*, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances[263]

The term "person" is defined broadly to include "an individual, firm, corporation, association, partnership, consortium, joint venture [or] commercial entity,"[264] without a geographic[265] or citizenship limitation.[266]

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[261] *See* RODGERS, *supra* note 212, at 680–95 (describing CERCLA as "hurried" legislation filled with "gaps and ambiguities," "obvious malapropisms," and "half-laws, teasers and sleepers," and describing the later amendments as replete with "complexity, obscurity and mind-numbing detail," resulting in a "loss of coherence" and in "potential contradiction"); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir.1989) (describing CERCLA as a "vaguely-drafted," and "indefinite, if not contradictory" product of a "last minute compromise." which has "acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history")

[262] United States v. New Castle County, 727 F. Supp. 854, 871 (D. Del. 1989) ("Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability."). United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989) (legislative history "sheds little light on the meaning of the intended phrase").

[263] 42 U.S.C. § 9607(a)(3) (emphasis added).

[264] *Id.* § 9601(21).

[265] *See* Transcript of Oral Argument, *supra* note 260, at 13–15.

[266] Indeed, American courts expressed no hesitation in finding that Canadian corporations can be held liable under CERCLA for conduct occurring in the United States. *See* United States v. Ivey, 747 F. Supp. 1235, 1240 (E.D. Mich. 1990) (finding Canadian former owner of Michigan hazardous waste site liable under CERCLA); Canron, Inc. v. Fed. Ins. Co., 918 P.2d 937, 939 (Wash. Ct. App. 1996) (finding Canadian generator that shipped waste to the United States liable under CERLA); *see also* Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, as Amended; Enviropur West Corporation Site, 62 Fed. Reg. 19321, 19321–22 (Apr. 21, 1997) (Canadian corporation Barrick Gold settling CERCLA action brought by EPA). Were it otherwise, foreign corporations doing business in the United States, whether as owners, operators, transporters or arrangers would escape liability based solely on their nationality. There is

Problematically, CERCLA itself contains no further definition of "arranger," and the arranger liability provision, itself, is arguably subject to at least two vastly differing interpretations concerning the number of parties that need to be involved to trigger arranger liability. The first, advanced in Teck Cominco's briefing[267] and reflected in the foregoing colloquy between the district court and Teck's counsel, is grounded in the sentence structure of section 107(a)(3). Teck Cominco argues that the clause, "by any other party or entity" modifies the words "disposal or treatment"—thereby making the sentence read: "any person who . . . arranged for disposal or treatment . . . by any other party or entity."[268] Thus, Teck argues that it cannot be an arranger because it simply discharged directly into the Columbia itself, rather than arranging with a third party to do so.[269] In other words, Teck argues that it can only be held liable if it arranged for "another party or entity" to dispose of its hazardous wastes.[270]

EPA, the State of Washington and the *Pakootas* plaintiffs, on the other hand, read the clause "by any other party or entity" to modify the preceding words "owned or possessed by such person," which would trigger arranger liability for any person who arranged for the disposal of a hazardous substance "owned or possessed by such person [or] by any other party or entity."[271] This reading is consistent with the Ninth Circuit's interpretation of section 107's arranger liability provisions.[272]

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nothing in the language of the Act, its legislative history or subsequent case law that suggests that Congress intended to restrict "person" to "domestic" corporations, and to provide an exemption to "foreign" corporations and entities who dispose of their hazardous wastes in the United States.

[267] *See, e.g.*, Appellant's Reply Brief at 21, Pakootas v. Teck Cominco Metals, Ltd., No. 05-35135 (9th Cir. Aug. 19, 2005), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/TeckReply.pdf.

[268] Motion to Dismiss, *supra* note 31, at 30–31.

[269] Given the long and complex history of discharges and emissions at the Trail Smelter, it is unclear whether the record is sufficiently developed at this time to determine whether subsidiary or other relationships would warrant a finding that there were, in fact, other parties or entities involved.

[270] Teck Cominco's interpretation is supported, at least in part, by the First Circuit's decision in *Am. Cyanamid v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004). *See* discussion *infra*, Part V(B)(3)(b).

[271] Brief of Appellees at 33–35, *Pakootas*, No. 05-35153, *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/9thCircuitAppelleesOpeningBrief.pdf.

[272] While not explicitly addressing the issue in any of its opinions, the Ninth

The practical difference between these competing interpretations is significant. Taking Teck Cominco's interpretation at face value, a generator of hazardous wastes that disposes of those wastes by itself may not be held liable as a generator/arranger: if that generator of hazardous wastes was lucky or "smart" enough to have disposed of those wastes at an off-site facility, (or have disposed of those wastes into a medium such as a river where the wastes were washed off-site resulting in secondary contamination) then that "generator dumper" could escape CERCLA liability altogether.[273] In other words, under Teck Cominco's interpretation of section 107, a generator who in good faith and with the best of intentions contracted with another party for disposal of the generator's waste believing that the waste would be disposed of properly, may be held liable for cleanup if that waste is released to the environment from an off-site facility, while that same generator would escape liability if that generator had simply disposed of the hazardous wastes itself. As explained below, this is an unwarranted and unnecessarily narrow reading of section 107(a)(3).

A touchstone of statutory interpretation is Congressional intent. Tools of statutory construction simply serve to assist the decision maker to understand what Congress intended, or serve as a proxy for Congress's intent.[274] Primary among these tools is the canon that in determining the meaning of a statute or statutory

Circuit has inserted the missing "or," finding that the language of section 107(a)(3) explicitly extends liability to persons "otherwise arrang[ing] for disposal or treatment of hazardous substances whether owned by the arranger or by any other party of entity, at a facility or incineration vessel, owned or operated by another party or entity." Cadillac Fairview/California, Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994); *accord* United States v. Atlas Manufacturing & Chems., Inc. 1993 WL 518421, at *2 (E.D. Pa 1993).

[273] The generator-dumper would not be a current or past owner operator of the facility as required by 42 U.S.C. §§ 9607(a)(1), (2). Nor would it be a person who "accepted any hazardous substances for transport to disposal or treatment facilities." *Id.* § 9607(a)(4).

[274] "Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application in a given case, where that intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law." HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 1 (1896), *quoted in* BLACK'S LAW DICTIONARY 308 (7th ed. 1999).

phrase, a court must look first to the words of the statute itself.[275] The corollary to that rule of statutory construction is the "strong presumption that Congress expresses its intent through the language it chooses."[276]

Where, as here, the language chosen is less than clear, reliance upon the plain meaning of the words or sentence structure obviously cannot end the inquiry. Instead, a court should examine the overall structure and intent of both the provision and the statute.[277] The words in such a case are best understood in "light of the purposes Congress sought to serve."[278] This is particularly true where, as in the case of CERCLA, the statute is remedial in nature.[279] And, given the well known drafting issues,[280] this is perhaps even more the case with CERCLA.[281] Indeed, for these

[275] United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1999) ("Before looking at any legislative history, we first look at the rule itself. If the meaning of the rule is perfectly plain from its language, that ends the inquiry."). *See also* Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Rubin v. United States, 449 U.S. 424, 430 (1981).

[276] I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987); Shoshone Indian Tribe of Wind River Reservation v. United States, 364 F.3d 1339, 1347 (Fed. Cir. 2004); United States v. Fiorillo, 186 F.3d 1136, 1146 (9th Cir. 1999).

[277] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

> It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.

*Id.*

[278] Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979).

[279] NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 60.1 (6th ed. 2005) ("Remedial statutes are generally liberally construed to suppress the evil and advance the remedy.").

[280] *See supra* notes 261–262; *see also* United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (construing owner/operator in the disjunctive and noting the "careless drafting"); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) ("Proper usage dictates that the phrase 'the owner and operator' include only those persons who are both owners or operators. But by no means does Congress always follow the rules of grammar when enacting the laws of this nation.").

[281] *See* Nagle, *supra* note 213, at 1410 ("CERCLA confounds every theory of statutory interpretation."); *see also* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 294 (1996) ("CERCLA is a very close (but not perfect) fit to the 'best-case scenario' for the application of the remedial purpose canon.").

reasons, Courts have consistently found that CERCLA should be construed broadly to effectuate its purposes.[282]

Setting aside for the moment the fact that the original discharges from the Trail Smelter took place in Canada, the result of Teck's interpretation is that a generator of a hazardous substance, which itself owned and possessed the substance, determined how it would dispose of the substance, was in the best position to know the substance's toxicity and characteristics, and decided how the material would be disposed of, would escape liability if it was clever or fortunate enough to have done the disposal itself rather than having contracted with or otherwise arranged for the disposal by a third party. Such an outcome makes little sense in light of CERCLA's goal that "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the costs of their actions."[283] Teck Cominco's interpretation undermines CERCLA's "impos[ition] of the costs of cleanup on those responsible for the contamination."[284]

With respect to legislative history, there is very little specific to point to concerning section 107(a)(3)s' arranger liability provision. However, several large themes emerge. For example, there is no question that the Senate proposal which became law

[282] Atlantic Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 570 (10th Cir. 1996); *accord* Colorado v. Idarado Mining Co., 916 F.2d 1486, 1492 (10th Cir. 1990). For a comprehensive discussion and analysis of the purposes of CERCLA and its remedial nature see Watson, *supra* note 281. *See also* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989) (Section 107(a)(3) must be given "a liberal judicial interpretation . . . consistent with CERCLA's overwhelming remedial statutory scheme."); *accord* Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990) (CERCLA does not define "arranged for," but courts applying § 9607(a)(3) should interpret that phrase broadly to effectuate CERCLA's remedial goals.); United States v. Ne. Pharm & Chem, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S. Ct. 146, 98 L. Ed. 2d 102 (1987); CPC Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1277 (W.D. Mich. 1991) (Courts applying "arranged for" have given it an expansive interpretation "to give effect to [C]ongressional intent that all who participate in the generation and disposal of hazardous wastes should share in cleaning up the harm from their activity.") (quoting THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION § 14.01(5)(d)(ii) (Susan M. Cooke & Christopher P. Davis, eds., 1999)).

[283] United States v. Bestfoods, 524 U.S. 51, 55–56 (1998) (quoting S. REP. NO. 96-848 (1980)).

[284] Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989), *quoted in Bestfoods*, 524 U.S. at 56 n.1.

was focused on liability of responsible parties. More pointedly, the legislative history of 107(a)(3), sparse as it is, does indicate that Congress intended arranger liability to apply to generators of hazardous waste.[285] The following statement in Senate Report No. 848, for example, explained the importance:

> In correcting the historic neglect of hazardous substance disposal, it is essential that this incentive for greater care focus on the initial generators of hazardous wastes since they are in the best position to control the risks. Generators create the hazardous wastes and know how to avoid the, and they determine whether and how to dispose of these wastes—on their own site or at locations controlled by others.[286]

Moreover, Teck Cominco's interpretation is difficult, if not impossible, to reconcile with Congress's well known and oft-expressed concern with midnight dumpers—dumpers who, under cover of darkness, dispose of wastes by dumping onto the property of others, on roads, into lakes and rivers, or remote and clandestine locations.[287] Under Teck's reading of the statute, midnight dumpers could be held liable as responsible parties under CERCLA only if they arranged with the generator or some other party, but not if they dumped their own hazardous substances. Nothing in CERCLA's history, nor in the provisions of section 107(a)(3), suggests that Congress intended such a result.

As the Eighth Circuit succinctly concluded, arranger liability should be interpreted to ensure that parties cannot "simply 'close their eyes' to the method of disposal of hazardous substances."[288]

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[285] *See* Jeffrey M. Gaba, *Interpreting Section 107(a)(3) of CERCLA: When has a Person "Arranged for Disposal?"*, 44 SW. L.J. 1313, 1327 (1991).

[286] S. REP. NO. 96-848, at 15 (1980).

[287] *See, e.g.*, H.R. REP. NO. 96-1016, at 18–21 (1980) *reprinted in* 1980 U.S.C.C.A.N. 6121 (describing various practices at selected sites); 126 CONG. REC. 23, 30941 (1980) (remarks of Sen. Tsongas) (describing practices of "'midnight dumpers' who dispose of toxic chemicals and hazardous materials in quarries, in streams, in forests, or spread them on open roads"); *id.* (remarks of Sen. Ford); 126 CONG. REC. 20, 26781 (1980) (remarks of Rep. Martin) ("[B]ecause of the nature of clandestine dumping operations [a] State . . . which does not generate a large volume of toxic waste, has been victimized as a dumping ground for waste from other States."); 126 CONG. REC. 27, 31977 (1980) (remarks of Rep. Edgar) ("'[M]idnight dumpers' [have] trucked wastes from all over the Eastern Seaboard and dumped them illegally at various sites through [Pennsylvania].").

[288] United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1382 (8th Cir. 1989).

Teck Cominco should be held responsible as an arranger under section 107(a)(3) because the substances that it owned, that it controlled, that it decided how and where to discharge, and that it ultimately did discharge, "came to be located"[289] in a facility located in the United States.

b. American Cyanamid v. Capuano

The *Pakootas* plaintiffs chided Teck Cominco for failing to provide a single case in support of its interpretation of arranger liability, an omission the district court noted in its opinion.[290] Before the parties began briefing *Pakootas*[291] the First Circuit decided American Cyanamid v. Capuano.[292] In holding that arranger liability attached to a party that "brokered" the timing, movement, and location of disposal while never itself owning or possessing the hazardous substance, the First Circuit concluded that the sentence structure of section 107(a)(3) demonstrated that the clause "by any other entity" modified the phrase "any person who . . . arranged for disposal or treatment" rather than "owned or possessed by such person."[293] Ironically, in support of its interpretation, the First Circuit explained that were it to hold otherwise, it would be creating a "loophole through which brokers and middlemen could escape liability by arranging to have hazardous waste picked up and deposited at an illegal site,"[294] which would have been inconsistent with CERCLA's broad remedial purpose.[295]

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[289] *See* 42 U.S.C. § 9601(9) ("The term 'facility' means . . . any site or area where a hazardous substance has . . . otherwise come to be located . . . ."); *see also supra* note 252 and accompanying text.

[290] *See* Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *33 (E.D. Wash. Nov. 8, 2004) ("Defendant, however, does not cite a single case or any legislative history that has held that the involvement of another party or entity in the disposal is required for there to be 'generator' or 'arranger' liability.").

[291] *See* Brief of Appellees, *supra* note 271.

[292] Am. Cyanamid v. Capuano, 381 F.3d 6, 29 (1st Cir. 2004). Two weeks before oral argument began in *Pakootas*, Teck Cominco submitted a supplemental letter to the court referring the court to *American Cyanamid*. Letter from Kevin M. Fong, Attorney for Appellant Teck Cominco Metals, Ltd. to Cathy A. Catterson, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Nov. 22, 2005), *available at* http://www.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/TeckSupplementalAuthorities9thCircuit22nov2005.pdf.

[293] *Am. Cyanamid*, 381 F.3d at 23–24.

[294] *Id.* at 25.

[295] *See id.* The court stated that:

It is far from clear, however, that the First Circuit's reasoning in *American Cyanamid* should be applied to *Pakootas*. First, the interpretation of section 107(a)(3), asserted by EPA and the State in Pakootas, and adhered to in the Ninth Circuit[296] need not result in the loophole that the First Circuit feared.[297] Indeed, the reading of section 107(a)(3) urged by the plaintiffs in *Pakootas*, which would allow arranger liability to attach to a third party who contracts with transporter, casts a wider net than the First Circuit's interpretation. Second, given the facts of the case before it and the perceived need to hold broker's liable, the First Circuit was likely neither informed nor aware that its reading of section 107(a)(3) would be relied upon by parties such as Teck Cominco, to create an even larger loophole in CERCLA—a loophole large enough for generators of hazardous substances to drive their own trucks through. Indeed, it is hard to conceive that Congress intended for section 107 to be interpreted to authorize generators to dispose of hazardous wastes on another person's property, as long as such activity is done without the assistance of a third party. There is nothing in the legislative history that indicates that Congress

> Were we to interpret CERCLA not to impose liability on a party that constructively possessed hazardous waste and arranged for its illegal disposal, then the statute would be subject to a loophole through which brokers and middlemen could escape liability by arranging to have hazardous waste picked up and deposited at an illegal site. In addition to escaping liability, the broker would also profit by charging a fee for his services. Indeed, the Capuanos earned most of their profits in this manner. The Capuanos found a site, the Picillo pig farm, where hazardous waste could be dumped illegally. They then arranged for the waste to be picked up from various waste generators across New England and dumped on the illegal site. A broker should not be able to profit from such activity, much less escape liability. We therefore hold that a broker can be liable as an arranger if the broker controls the disposal of the waste.

*Id.* at 52–53.

[296] *See supra* notes 271–72 and accompanying text (reading the clause to impose liability on any person who otherwise arranged for disposal or treatment of hazardous substances owned or possessed by such person or by any other party).

[297] *See generally* United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987) (finding plant supervisor and company's chief executive officer liable where they made the decision to dispose of hazardous substances; broker that acted as "middle man" between chemical manufacturer and disposal company also found liable where it had authority to choose disposal facility to be used); California Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069, 1077 (E.D. Cal. 2005) (noting a "classic arranger situation, where for example, the owner of a hazardous substance directly disposes of it").

intended to absolve a directly responsible party from liability while foisting all of the liability on the current owner or operator of the facility. In the case of the Lake Roosevelt site, this would mean transferring all liability and responsibility for cleanup to the American taxpayers. Ultimately, this difference in interpretation between the First and Ninth Circuits may well invite Supreme Court review.

## VI. A BORDER SHIELD? DOES THE TRAIL SMELTER'S LOCATION IN CANADA BAR THE APPLICATION OF CERCLA TO TECK COMINCO?

Teck Cominco and several of its amici supporters[298] argue that even if CERCLA would apply were the smelter located just ten miles downstream, on the American side of the border, the presumption against extraterritorial operation of United States' law precludes its application in *Pakootas*.[299] Taking the path of least resistance, the opponents of the EPA's action string together quotations and canons of construction annunciated in varied cases to create the appearance of a unbroken decisional line from *American Banana Co. v. United Fruit Co.*[300] in 1909, to *Foley Brothers v. Filardo*[301] in the 1949 and *E.E.O.C. v. Arabian Oil Co.* ("*Aramco*")[302] in the 1991, and the recent Supreme Court decision *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[303] The opponents argue that, absent a clear congressional statement to the contrary, U.S. law must be interpreted to apply only to conduct occurring domestically, in order to avoid unintended clashes with international law and the sovereignty of other nations. Then,

[298] The Government of Canada's brief, by contrast, rests largely on comity concerns. *See generally* Canada's *Amicus* Brief, *supra* note 206.

[299] *See, e.g.*, Appellant's Reply Brief, *supra* note 267, at 6–8; Mining and Manufacturers Associations' *Amicus* Brief, *supra* note 209, at 6–11.

[300] 213 U.S. 347, 356–57 (1909) (no application of the Sherman Act to actions in Central America with no effects in the U.S.).

[301] 336 U.S. 281, 285 (1949) (no application of the Eight Hour law abroad (Iran/Iraq)).

[302] 499 U.S. 244, 248 (1991) (no application of Title VII of the Civil Rights Act of 1964 abroad (Saudi Arabia)); *see also* Smith v. United States, 507 U.S. 197, 203–04 (1993) (Federal Tort Claims Act doesn't apply to claims arising in Antarctica).

[303] 542 U.S. 155 (2004) (no application of the Foreign Trade Antitrust Improvements Act of 1982 where Plaintiffs' injuries related only to foreign effects).

asserting that CERCLA is being applied extraterritorially to the Trail Smelter's discharges, Teck and its supporters argue that: (i) CERCLA and its legislative history lack any clear statements indicating that CERCLA should apply to conduct in Canada; and (ii) holding Canadian companies liable for discharges in Canada, even where such discharges migrate to cause harm in the United States, threatens to create discord between the nations.[304] In short, they argue that the border shields Teck Cominco from CERCLA liability. Like so many arguments by string citation, the argument of Teck Cominco and its supporters is deceptively facile and attractive; it ignores much of the nuance and uncertainty that underlie the jurisprudence in the area, as well as its application to the case at hand.

Once the substantive questions concerning CERCLA liability are peeled away, the jurisdictional question presented in *Pakootas* is whether a Canadian company may be held responsible under CERCLA for releases of hazardous substances that were originally disposed of in Canada, but came to rest in the United States. As discussed below, this question raises a host of additional questions ranging from the fundamental, but often overlooked, "does this case even involve extraterritorial application of U.S. law?" to more intricate puzzles concerning the scope of the presumption against extraterritoriality, congressional intent, and the relationship of both to principles of comity (both prescriptive and judicial) when claims arise out of actions with direct and substantial domestic effects. Indeed, the intimations of the parties on both sides of *Pakootas* notwithstanding, the Supreme Court jurisprudence in this area is replete with uncertainty concerning the analytical constructs and precedents that should be applied when the territorial reach of a statute is ambiguous.[305]

Much has already been written on several of these subjects,[306]

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[304] Appellant's Opening Brief at 11-12, Pakootas v. Teck Cominco Metals, Ltd., No. 05-35135 (9th Cir. June 2, 2005), *available at* http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/9thCircuitAppellantsOpeningBrief.pdf.

[305] *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 134–35 (1998) (referring to area as "unsettled to say the least").

[306] *See, e.g.*, *id.*; William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998); Hannah L. Buxbaum, *National Courts, Global Cartels:* F. Hoffman-LaRoche Ltd. v. Empagran, S.A. *(U.S. Supreme Court 2004)*, 5 GERMAN L.J. 1095 (2004), *available at*

and an in-depth analysis of these issues is beyond the scope of this article. Instead, the next section will discuss these issues in relation to the claims alleged in *Pakootas*. As will become clear, under nearly every approach, the outcome is the same: the EPA's section 106 order to Teck Cominco was lawful and should be enforced.

For years, courts have held that that the United States may legislate extraterritorially,[307] and have, with some frequency, invoked a presumption against such legislation, all while declining to establishing standards for determining when an action is extraterritorial or providing meaningful guidance concerning the scope of the presumption.[308] The next two subsections will explore whether *Pakootas* involves extraterritorial application of U.S. law, and if so, whether the presumption would be triggered. The final subsection will argue that even if the application of the presumption is triggered, it is rebutted in *Pakootas*.

### A. *Is the Presumption Against Extraterritoriality Even Triggered In* Pakootas*?*

CERCLA is a remedial statute, and its focus is "decidedly domestic."[309] Congress's unmistakable goals were to facilitate the cleanup of the most hazardous waste sites in the United States, and to hold those who contributed to the problem responsible for the costs of cleanup.[310] As explained above,[311] the President's authority to issue a section 106 unilateral order, and CERCLA's

http://www.germanlawjournal.com/pdf/Vol05No09/PDF_Vol_05_No_09_1095-1106_EU_Buxbaum.pdf; Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990); Sam Foster Halabi, *The "Comity" of* Empagran*: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels*, 46 HARV. INT'L L.J. 279 (2005).

[307] The appellants seem to concede that Congress could regulate this activity if it had chosen to, but that it didn't or at least did not clearly express an intent to do so. *See* Transcript of Oral Argument, *supra* note 260, at 9–10.

[308] *See* Dodge, *supra* note 306, at 120–21.

[309] *See* Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *14 (E.D. Wash. Nov. 8, 2004) (citing Arc Ecology v. U.S. Dep't of Air Force, 294 F. Supp. 2d 1152, 1156 (N.D. Cal. 2003)); Arc Ecology v. U.S. Dept. of Air Force, 411 F.3d 1092, 1101 (9th Cir. 2005) ("The legislative history recounted by the district court indicates that Congress intended for CERCLA to have a domestic focus.").

[310] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1,7 (1989). *See also supra* note 219 and accompanying text.

[311] *See supra* Part V.A.

corresponding liability provisions of section 107, are triggered by the "release" or "threatened release" of hazardous substances from a facility.[312] "Release" is broadly defined to mean any "spilling, leaking, pumping, pouring . . . or disposing into the environment,"[313] and includes passive migration of hazardous substances.[314] Tellingly, Congress defined "environment" as the waters, land and air under the management authority of the United States, within the United States, or under the jurisdiction of the United States.[315] In other words, Congress specifically conditioned CERCLA liability on "releases" of hazardous substances into the environment *of the United States*.

As the facts of *Pakootas* make clear, CERCLA is being applied to the Lake Roosevelt Upper Columbia River Site—a site which is located entirely within the United States.[316] The EPA concluded that releases from that site "may present an imminent and substantial endangerment to public health or welfare or the environment."[317] Those releases are, by definition, located entirely within the United States. The UAO is likewise directed at remedial activities that will take place wholly in the United States. Teck's liability under CERCLA is connected solely to the releases of hazardous substances that are occurring currently within the United States, not its discharges into the Columbia River in Canada.

The district court was hesitant to find that the "releases" from the Lake Roosevelt site were "wholly separable" from the smelter's original discharges in Canada, referring to the distinction as a legal fiction.[318] While the district court was undoubtedly correct that it is a matter of law, rather than physics or chemistry, that separates the Trail Smelter's original discharges and spills in Canada from the releases at the Lake Roosevelt UCR site, this is a distinction with a difference. The described "legal fiction" is one that Congress itself created, and that demonstrates Congress's specific intent to cleanup such facilities where they present a

312 *See* 42 U.S.C. §§ 9606(a), 9607(a)(4) (2000).

313 *Id.* § 9601(22).

314 Transcript of Oral Argument, *supra* note 260, at 13–15.

315 42 U.S.C. § 9601(8).

316 *Id.* at 7–8.

317 *Id.* at 6.

318 Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *16 (E.D. Wash. Nov. 8, 2004).

domestic hazard in the United States. CERCLA's liability provisions center on the "facility" where hazardous substances have "come to be located,"[319] rather than on the original source of the contamination. As the district court recognized, EPA has not sought to regulate any of Teck Cominco's ongoing or future activities in Canada. Teck Cominco, like any other company in Canada, may continue to operate in any way that it sees fit under Canadian authority. The relevant "conduct," as defined by Congress, is all within the United States. *Pakootas* involves, quite simply, the domestic application of domestic law to resolve domestic harms, and as such is easily distinguishable from the type of "extraterritorial" application at issue in the string-cited cases noted above.

Interestingly, Canadian courts have agreed. On at least two separate occasions, Canadian courts have enforced judgments obtained against Canadian companies under CERCLA.[320] The Canadian court in United States v. Ivey, for example, made clear that it did not view CERCLA enforcement against a Canadian PRP as the extraterritorial application of U.S. law.[321] Adopting the reasoning of the lower court, the Court of Appeals added that in applying CERCLA to the Canadian company, the United States was not trying to regulate in Canada:

> [t]he United States did not seek to enforce any laws against extraterritorial conduct. It simply sought financial compensation for actual costs incurred in the United States in remedying environmental damage inflicted in the United States on property in the United States. It is no extension of U.S. sovereign jurisdiction to enforce its domestic judgments against those legally accountable for an environmental mess in the United States by reason of their ownership or operation of American waste disposal sites.[322]

As in *Ivey*, in *Pakootas*, there is no enforcement against extraterritorial conduct, and therefore the presumption shouldn't even be triggered. However, as will be discussed in the next section, even if the presumption were triggered, it wouldn't be a bar in *Pakootas*,

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[319] 42 U.S.C. § 9601(9). *See supra* Part V.A (discussing arranger liability).

[320] *See infra* Part VIII.

[321] United States v. Ivey, [1996] 30 O.R.3d 370, 374.

[322] *Id.*

### B. *The Presumption Meets the Effects Test*

Despite the number of cases that have invoked the presumption against extraterritorial application of U.S. law, there have been remarkably few cases that have attempted to delineate the scope of the presumption. As Professor Dodge has written, the presumption has been interpreted in at least three different ways to say that: (1) acts of Congress apply only to conduct within the United States, unless a contrary intent appears, (2) acts of Congress apply only to conduct that causes effects within the United States, unless a contrary intent appears, and (3) acts of Congress apply to conduct occurring within or having an effect within the United States, unless a contrary intent appears.[323]

While cases supporting all three interpretations can be found, on the whole courts have consistently declined to apply (or simply not even discussed) the presumption against extraterritoriality in cases where the foreign conduct was intended to, and did, result in substantial adverse effects in the United States.[324] This proposition, often referred to as the "effects doctrine" or "substantial effects test," stands as a counterbalance to, or proxy for, the presumption against extraterritoriality. The presumption against extraterritoriality is, at bottom, only a canon of construction that courts employ to help discern Congressional intent. Courts have variously explained that the primary policies underlying the presumption[325] are "the common sense notion that Congress generally legislates with domestic concerns in mind,"[326] and the avoidance of unintended clashes between United States laws and those of other nations which could result in international discord.[327] The substantial effects test addresses each of these concerns. First, it ensures that the United States has a sufficient

[323] Dodge, *supra* note 306, at 112.

[324] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (declining to apply the Sherman Act); *see also In re* Simon, 153 F.3d 991, 995 (9th Cir. 1998) (presumption does not apply when failure to apply U.S. law will result in adverse effects in U.S.); Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 530–31 (D.C. Cir. 1993) (presumption against extraterritoriality doesn't apply where action from abroad causes substantial effects in the United States); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987).

[325] For an informative discussion of the purported rationales, see generally Dodge, *supra* note 305, and Dodge, *supra* note 306.

[326] Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

[327] Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-AAM, 2004 U.S. Dist. LEXIS 23041, at *21 (E.D. Wash. Nov. 8, 2004).

interest in the litigation by focusing on domestic effects. Second, it avoids unintended clashes between United States laws and those of foreign nations by ensuring that there is a well established basis for prescriptive jurisdiction.[328]

As both the Restatements (Second and Third) of Foreign Relations Law of the United States make clear, a state may prescribe rules that attach legal consequences for foreign conduct that is reasonably foreseeable and will have substantial effects within the prescribing state.[329] This sovereign power, derived from concepts of territorial sovereignty, is at its zenith when the statute at issue is directed at remedying effects in the prescribing nation rather than regulating conduct abroad. As Judge Wilkey so eloquently stated in his oft-quoted opinion: "Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its "sovereign" walls . . . .[330]

As applied to *Pakootas*, the predicate acts ("releases" to the "environment" from a "facility") are all taking place in the United States, as will the remedy. By focusing on the effects within the territory of the United States, Congress ensured that it was legislating well within accepted norms of prescriptive comity.[331]

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[328] Though often confused, prescriptive comity is distinct from subject matter jurisdiction. The Court is vested with subject matter jurisdiction once a plaintiff brings a non-frivolous claim invoking the subject matter jurisdiction of the Court—for example, when a citizen suit is filed to enforce an EPA administrative order issued pursuant to CERCLA. Once vested with subject mater jurisdiction, the Court, as a matter of statutory construction, may then inquire into the reach of the statute. This inquiry may in certain cases invoke "prescriptive comity," (i.e., the presumption that legislators take account of the legislative interests of other nations). *See Hartford Fire*, 509 U.S. at 812–13 (Scalia, J., dissenting); Buxbaum, *supra* note 306, at 1102.

[329] *See* RESTATEMENT (SECOND) OF FOREIGN RELATION LAW OF THE UNITED STATES § 18 (1962) (applicable at time Congress enacted CERCLA); RESTATEMENT (THIRD) OF FOREIGN RELATION LAW OF THE UNITED STATES § 402 (1986). The Restatement (Third) of Foreign Relations Law of the United States goes even farther to assert that the substantial effects test governs conduct outside U.S. territory that has or is intended to have substantial effect within the United States. *Id.*

[330] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984) (applying U.S. antitrust laws to foreign corporations).

[331] "Prescriptive comity" is "the respect sovereign nations afford each other by limiting the reach of their laws." *Hartford Fire*, 509 U.S. at 817 (Scalia, J. dissenting).

CERCLA addresses quintessentially domestic conditions: impacts on local health, welfare and the environment, which are at least on par with the bases asserted for the application of United States antitrust laws, insider trading laws and other economic laws—to protect United States interests—that themselves contain little more, if any, indication that Congress intended to reach foreign actions.

The fact that application of CERCLA may have an incidental effect on what Teck Cominco or any other party chooses to discharge into a shared waterway should not bar the application of the remedial statute. As Justice Breyer explained in *Empagran*:

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.[332]

### C. *What About Congressional Intent?*

Of course, whether the application of United States law is labeled extraterritorial, or whether the presumption against extraterritorial application or the substantial effects test are employed, the guiding principle in determining whether a given statute applies to identified conduct is congressional intent. In other words, in a case in which the reach or scope of a statute is at issue the question is, and must be, "Did Congress intend for the statute to apply to the conduct in question?" As discussed immediately above, the substantial effects test provides a "shorthand" for ensuring that, in general, the United States' interests in a controversy are sufficiently strong to provide a reasonable basis to prescribe and adjudicate the matter. But, even where the presumption against extraterritoriality is applicable, it is important to keep in mind that it is just that: a presumption, which may be rebutted. One prong of the rebuttal may well be provided by the interests comprising the substantial effects test. But surely another, and in all likelihood the most significant rebuttal, should be gleaned from Congress's actions—the words of the statute, as

[332] 542 U.S. at 165 (emphasis in original).

well as its legislative history, scheme, structure, and intent.[333]

By enacting and reauthorizing CERCLA, Congress has expressed its overwhelming and inescapable intent to ensure that domestic hazardous waste sites are cleaned up and that those responsible for their creation pay for that clean-up. It should come as no surprise that there is little specific evidence concerning Congress's intent to reach polluters outside the country; CERCLA's broad remedial purposes and the statute as a whole are focused on cleaning up releases and potential releases from sites, not on regulating the originating source of the pollution. As noted above, CERCLA is not a regulatory statute; it does not set limits on discharges. Its focus is on remediation of historic contamination regardless of the source. As a remedial statute, the courts should "construe [CERCLA's] provisions liberally to avoid frustration of the beneficial legislative purposes."[334] There is little question that CERCLA's purposes would be frustrated if a "foreign source" defense were read into the statute. Congress was focused on *remediating* domestic sites. A foreign source defense would also frustrate the goal that "costs of injuries resulting from . . . hazardous substances are borne by the persons who create such risks . . . ."[335] Congress was focused on cleanup of the most hazardous waste sites in the country and making sure that responsible parties bore the cost of the remediation—regardless of pedigree.

### D. Arc Ecology*: The Exception that Proves the Rule?*

In the summer of 2005, with the *Pakootas* case pending review, the Ninth Circuit decided *Arc Ecology v. United States Department of the Air Force*.[336] In that case, Philippine nationals and NGO's sought to use CERCLA to require the United States government to cleanup a former American military base in the Philippines. The Ninth Circuit dismissed the plaintiffs' case for

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[333] *See* Dodge, *supra* note 306, at 110.

[334] Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (citations omitted); *see also* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989); Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 530-31 (D.C. Cir. 1993) (presumption against extraterritoriality doesn't apply where failure to extend the scope of the statute would result in substantial adverse effects in the U.S.).

[335] S. REP. NO. 96-848, at 33 (1980).

[336] Arc Ecology v. U.S. Dept. of Air Force, 411 F.3d 1092 (9th Cir. 2005).

failure to state a claim, finding that the structure and legislative history of CERCLA made clear that CERCLA was not intended to apply to sites outside the United States.[337] While employing the presumption against extraterritoriality, the Court also noted that the property in question was not United States property, that the United States had no right or authority to even go onto the land, and that no American court could require any relief that could be effected.[338]

The juxtaposition between *Arc Ecology* and *Pakootas* is striking; *Pakootas* is distinguishable in every relevant manner. The facility in *Pakootas* is located entirely in the United States,[339] the releases to the environment are entirely within the United States, the United States and the EPA have jurisdiction over all aspects of the cleanup, and the United States and the State of Washington have a close connection to and interest in cleaning up the site. In short, application of CERCLA in *Pakootas* comports with Congress's focus on domestic cleanup, while its application in *Arc Ecology* did not.

Additionally, unlike the situation in *Arc Ecology*, where the federal government opposed application of CERCLA, the enforcement of the 106 order in *Pakootas* is consistent with the Administration's position. *Pakootas* involves the enforcement of an EPA issued order. That order was issued, and has remained in place, despite significant opposition from the Government of Canada, heavy lobbying by industrial interests on both sides of the border, and apparent concerns raised by the Department of State. Beyond that, the Administration, through the Department of Justice, has made its position very clear, writing to the Ninth Circuit in *Arc Ecology*:

> A different analysis applies when a hazardous substance is released or there is a threat of such a release from another country into the United States—for instance, across the Canadian border. EPA has responded to such releases under CERCLA . . . EPA's response in such a case *is not an extraterritorial application of CERCLA* because EPA is addressing a release into the environment in the United

[337] *See id.* at 1103.

[338] *See id.* at 1098–99.

[339] UAO, *supra* note 18, at 2.

States.[340]

The Department of Justice then went on to explain that:

> CERCLA applies to releases in the United States that originated in another nation. CERCLA's application in such a case is not based on the United States' jurisdiction over foreign territory, however, but on the fact that there is a "release" into the "environment" in the "United States" as CERCLA defines those terms.[341]

The United States is correct. Congress expressed its strong preference for cleanup and, in so doing, made no distinctions based upon nationality or the location of the source. Instead, it limited liability under sections 106 and 107, consistent with principles of customary international law and respect for the role of other legislatures (prescriptive comity), to situations in which there has been a release to the environment of the United States.

## VII. HOLDING TECK COMINCO RESPONSIBLE FOR RELEASES OF HAZARDOUS WASTES WITHIN THE UNITED STATES IS CONSISTENT WITH INTERNATIONAL LAW

Another distinct canon of statutory construction that comes into play in cases involving the extraterritorial reach of a statute is that statutes should be read, where possible, to avoid conflict with international law. As explained below, application of CERCLA to hold Teck Cominco responsible for remediation of the hazardous waste currently being released at the Lake Roosevelt UCR site is consistent with international law norms and other existing United States obligations.

### A. *International Environmental Law Norms*

An observer of the current Trail Smelter dispute need not look very far to find one of international environmental law's foundational cornerstones addressing transboundary pollution. The *Trail Smelter Arbitration* clearly articulated the principle that territorial sovereignty was limited, stating, in pertinent part that

> under the principles of international law, as well as the law of the United States, no State has the right to use or

[340] Brief for the Federal Appellees at 18 n.2, *Arc Ecology*, 411 F.3d 1092 (No. 04-15031) (internal references omitted) (emphasis added).

[341] *Id.* at 25 n.9.

> permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[342]

This principle, derived in part from the general principle of law, *sic utere tue ut alterum non laedas*[343] (from the Roman maxim meaning "use your own property so as to not harm that of another"), was in large measure repeated in Principle 21 of the Stockholm Declaration:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[344]

Twenty years later, an overwhelming number of nations in the world again affirmed the principle, in only slightly modified form, in the form of Principle 2 of the Rio Declaration.[345] And, more recently, in 1996 the International Court of Justice opined that "the general obligation of States to ensure that activities within their

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[342] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1965 (Trail Smelter Arb. Trib. 1938).

[343] ALEXANDRE CHARLES KISS & JEAN-PIERRE BEURRIER, DROIT INTERNATIONAL DE L'ENVIRONMENT 103 (2000). Unlike customary international law, general principles of law do not rely on custom and usage. As the Second Circuit has explained,

> Customary international law is discerned from myriad decisions made in numerous and varied international arenas . . . customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a 'soft, indeterminate character that is subject to creative interpretation.'

Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003) (internal citations omitted).

[344] Conference on the Human Environment, June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF.48/14, 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*].

[345] Conference on the Environment and Development, June 3–14, 1992, *The Rio Declaration on Environment and Development*, Principle 2, U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874 (1992) [hereinafter *Rio Declaration*].

jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[346]

Much ink has been spilled concerning the status of these norms and principles of international law.[347] To some, perhaps most, international law scholars, these are fundamental principles that have become recognized customary international law.[348] Others, however, question their status as hard law.[349] While an interesting (and in some contexts very important) discussion,[350] this distinction is largely without import in the context of interpreting whether application of CERCLA in *Pakootas* violates international law. No party, least of all Canada,[351] argues that international environmental law embodies an extreme territorial sovereignty position that would allow, without qualification, a nation to use its territory, as against all others, regardless of consequences to the neighboring states.[352] Similarly, there is no

[346] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8). Additionally, application of CERCLA here to provide for remediation of contaminated sites in the United States and to require the polluter to pay is consistent with larger trends in international law to increase possibilities for citizen participation in environmental cases, and environmental access. *See* ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, G.A. Res. 57/329, Annex, 5, U.N. Doc. A/57/329/Annex (Aug. 31, 2002).

[347] *See, e.g.*, KISS & BEURRIER, *supra* note 343; Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 115 (1995).

[348] KISS & BEURRIER, *supra* note 343, at 110–11.

[349] *See, e.g.*, Bodansky, *supra* note 347, at 115 ("[I]nternational environmental norms reflect not how states regularly behave but how states speak to one another.")

[350] One such context would be a plaintiff bringing a claim under the Alien Tort Claims Act for violation of customary international law.

[351] *See, e.g.*, Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 492 (1973).

> The Canadian delegation . . . commented that [Principle 21] reflects existing rules of international law, the first element in it stressing the rights of states, while the second element made it clear that those rights must be limited or balanced by the responsibility to ensure that the exercise of rights did not result in damage to others.

*Id*. (citations omitted).

[352] A less extreme form territorial sovereignty was suggested by the American negotiator to the 1909 Boundary Waters Treaty, writing to then Secretary of State Elihu Root:

> [A]bsolute sovereignty carries with it the right of inviolability as to such territorial waters, and inviolability on each side imposes a

question that international law norms[353] prohibit the kind of intentional, massive, transboundary environmental damage alleged in *Pakootas*. The Trail Smelter has discharged millions of tons of hazardous substances into the Columbia River and EPA has determined that the Lake Roosevelt UCR site is eligible for listing on the NPL—the list of the nation's most contaminated sites. The harms alleged include harms to the environment and human health. Thus, whether the above-articulated norms and principles have "ripened" into customary international law, or "refer only to a general sense of responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders,"[354] the result is the same; in neither case does the application of CERCLA to Teck Cominco to require remediation of a hazardous waste site in the United States conflict with international law principles.

### B. *What about the Boundary Waters Treaty, NAFTA, and the Uniform Act?*

Canada and the United States have a long history of bilateral cooperation concerning the resolution of environmental and other disputes. Indeed, the 1909 Boundary Waters Treaty is one of the earliest treaties directly addressing pollution of shared water courses.[355] Teck Cominco and its amici supporters, including the Government of Canada, point to this long history as a reason that

> coextensive restraint upon the other, so that neither country is at liberty to use its own waters as to injuriously affect the other . . . . [T]he conclusion is justified that international law would recognize the right of either side to make any use of the waters on its side which did not interfere with the coextensive rights of the other, and was not injurious to it.

STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 103 (2001).

[353] Even the Trail Smelter Arbitration Tribunal recognized that taken to its logical extreme *sic utero* is not a workable doctrine. *See* XUE, *supra* note 72, at 290–91 (2003). The formulation captured by the Trail Smelter Tribunal and subsequent pronouncements require that the case be of "serious consequence" and that the injury be established by "clear and convincing evidence." *Id*.

[354] Amalon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 670 (S.D.N.Y. 1991).

[355] *See* Colleen P. Graffy, *Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes*, 10 GEO. INT'L ENVTL. L. REV., 399, 424 (1998) ("The 1909 Boundary Waters Treaty is an agreement between the United States and Canada that represents one of the earliest non-navigational international watercourse treaties.").

CERCLA *cannot* be applied to address transboundary harms. In so arguing, they suggest that: (i) the history of cooperation is evidence of the background against which Congress was legislating when it passed CERCLA, and (ii) failure to use extra-judicial mechanisms will cause discord and disharmony between the nations. These arguments, while alluring, are by no means determinative.[356] As explained below, none of these bilateral mechanisms or agreements purports to be preemptive or exclusive. Moreover, none has been invoked.

1. *The 1909 Boundary Waters Treaty*

In addition to providing that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other,"[357] the 1909 Boundary Waters Treaty also established the IJC, an independent organization with equal representation in the United States and Canada.[358] The IJC has one Chair and two Commissioners in each country, and its purpose is to help prevent and resolve disputes related to the use and quality of boundary waters, and to advise the two countries on related questions.[359]

The Boundary Waters Treaty contains no provision preempting the application of domestic law. Indeed, the United States specifically rejected suggestions that the Treaty vest the International Joint Commission with those police powers that might be necessary to enforce the anti-pollution clause.[360] Instead, the IJC's dispute resolution processes are optional and dependent upon voluntary referral by one or both nations.[361] Even where a matter has been referred, Article IX makes plain that these reports "shall not be regarded as [a] decision" and "shall in no way have

[356] In addition to CERCLA, plaintiffs may well have common law remedies such as trespass, nuisance, and strict liability that could provide bases for recovery.

[357] Boundary Waters Treaty, *supra* note 35, art. IV.

[358] *Id.* art. VII. *See generally* the International Joint Commission, http://www.ijc.org (last visited Jan. 24, 2005).

[359] Boundary Waters Treaty, *supra* note 35, art. VIII–X.

[360] *See* F.J.E. Jordan, *Great Lakes Pollution: A Framework for Action*, 5 OTTAWA L. REV. 65, 67 (1971–72).

[361] Boundary Waters Treaty, *supra* note 35, art. IX–X. The Confederated Tribes could only call upon the IJC for an investigation and monitoring for the contamination, through the United States (which also serves as a Trustee for Indian rights), *Id.* art. X; Du Bey & Sanscrainte, *supra* note 37, at 362–63.

the character of an arbitral award."[362] Even so, the Treaty provides for arbitration of disputes upon agreement by both nations.[363] Although Canada has on at least two occasions expressed interest in referring the *Pakootas* matter to the IJC to help resolve the dispute over the Upper Columbia River,[364] Canada has still not done so.

2. *The NAFTA/CEC Panel*

The Commission for Environmental Cooperation ("CEC") was created in 1994, under the Side Agreement to the North American Free Trade Agreement ("NAFTA"),[365] to address shared environmental issues between and among Canada, the United States and Mexico.[366] Charged with addressing regional environmental concerns, preventing trade and environmental conflict, and promoting the enforcement of environmental law, the Commission is comprised of three parts: the Council (made up of cabinet-level environment ministers from the three countries); the Joint Public Advisory Committee (made up of fifteen appointed members, five from each of the three countries), and the Secretariat (a professional staff ).[367] "In addition, both Canada and the US have created national Advisory Committees, and the US

[362] Boundary Waters Treaty, *supra* note 35, art. IX. *See also* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 500–01 (1971), *rev'd by implication on other grounds*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488 n.8 (1987) (claims could move forward in state court despite the applicability of the Boundary Waters Treaty and the existence of a related proceeding before the IJC).

[363] Boundary Waters Treaty, *supra* note 35, art. X.

[364] *See* Diplomatic Note, Embassy of Can. to U.S. Dep't of State, *supra* note 28.

[365] The side agreement, the North American Agreement on Environmental Cooperation of 1993, requires a State party to, among other things: publish its laws and regulation; to enforce effectively its environmental laws and regulations by appropriate governmental action; to ensure that judicial, quasi-judicial or administrative enforcement proceedings are available to remedy violations of its environmental laws; to ensure private access to remedies; and to ensure that its proceedings are fair and equitable. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, arts. 4–6, 32 I.L.M. 1480 [hereinafter NAAEC].

[366] *See id.* at pmbl.

[367] COMM'N FOR ENVTL. COOPERATION, LOOKING TO THE FUTURE: STRATEGIC PLAN OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION 2005–2010, at 5 (2005), *available at* http://www.cec.org/files/PDF/PUBLICATIONS/2005-2010-Strategic-plan_en.pdf.

has also established a Governmental Advisory Committee."[368]

The CEC provides unique processes for dispute resolution where a signatory country is failing to enforce its own laws; there is also a procedure that can, and has been, employed by NGO's to provide for transnational enforcement of each party's domestic laws. Pursuant to Article 14, the Secretariat of the CEC may consider a submission from private parties and NGO's asserting that a Party is failing to effectively enforce its own environmental law.[369] The Secretariat may decide if a request for a response from the named nation is merited, and may request the development of a factual record.[370] The Secretariat may, upon a two thirds vote, instruct the preparation of a public factual record.[371]

While the CEC may exert considerable political pressure through its authoritative findings, it has no independent enforcement mechanisms or powers to order direct relief.

Moreover, the CEC's procedures are largely inapplicable to a situation like that of *Pakootas* where the alleged discharges are historic and there are no allegations that Canada is failing to enforce its own laws.

Like the Boundary Waters Treaty, NAFTA also contains provisions that allow for matters to be submitted to arbitration upon mutual agreement. Also like the Boundary Waters Treaty, NAFTA's arbitration provisions do not preclude domestic remedies.

### 3. *The Transboundary–Reciprocal Treaty*

The Canadian and American Bar Associations have drafted, and the uniform law organization of each respective country has promulgated, the Uniform Transboundary Pollution Reciprocal Access Act ("Uniform Act").[372] The Uniform Act was designed to eliminate common law and statutory impediments to

[368] Canada has coordinated its decisions regarding CEC matters through a Governmental Committee, run by the federal environment minister and representatives of provinces who have signed the Canadian Intergovernmental Agreement ("CIA"), a body formed to facilitate provincial involvement in the NAAEC. *Id.* BC is not a signatory to the CIA. *See id.*

[369] NAAEC, *supra* note 365, art. 14.

[370] *Id.* arts. 14, 15.

[371] *Id.* art. 15.

[372] UNIF. TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT §§ 1–10, 9C U.L.A. 392–98 (1982).

transboundary environmental litigation between the United States and Canada by providing an injured party with a remedy for injury or threatened injury in the place where the pollution originated.[373] Without creating new substantive rights, the Uniform Act places "foreign" plaintiffs on the same footing as forum residents.[374] Specifically, the Uniform Act provides foreign plaintiffs with the same rights to access and relief (including enforcement) as forum residents to bring an action under the laws and procedures of the forum state, excluding the forum's choice of law rules.[375] The Uniform Act, however, has not been enacted by either the Canadian or United States federal governments, or the governments of B.C. or Washington State.[376] In sum, nothing in international and bilateral laws, and international law norms precludes or is in conflict with the application of CERCLA in *Pakootas*.

## VIII. COMITY: IS THERE REALLY A CONFLICT?

As other commentators have written, there is currently considerable uncertainty regarding the appropriate weight given to concerns relating to comity.[377] Most commentators would agree

[373] *Id.* § 3.

[374] *Id.* § 4.

[375] *Id.* For example, if both Washington State and British Columbia had enacted the Uniform Act (or otherwise provided substantially equivalent access to their courts and administrative agencies), an injured resident of Washington State could file suit in British Columbia against the Trail Smelter for pollution originating in that province. To the extent that a B.C. resident would have a cause of action, so too would the Washington State resident. *Id.* §§ 3, 4.

[376] The Act has been adopted by eight U.S. States and three Canadian Provinces. *See* Unif. Law Conference of Canada, Table of Uniform Statutes Listed by Statute, http://www.ulcc.ca/en/us/index.cfm?sec=3 (last visited Mar. 8, 2006) (listing signatories).

[377] *See, e.g.*, Dodge, *supra* note 305. One approach is that a court should analyze potential conflict with other nation's laws as a separate consideration of judicial comity, as the majority of the Supreme Court held in *Hartford*. Hartford Fire. Ins. Co. v. California, 509 U.S. 764, 798–99 (2003). Another approach is that a court should view that analysis as part and parcel of a more multilateral balancing approach to determine whether prescriptive jurisdiction is "reasonable." Dodge, *supra* note 305, at 107, 130–31 (multilateral as used in this sense refers to choice of law principles that attempt to identify a single forum for each activity, in contrast with unilateral which determines choice of law without respect to whether another forum might also have jurisdiction over the same event). Further guidance can be gleaned from the canon to interpret statutes, where possible, to avoid a conflict with international law. *See* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

that it necessary for a court to at least consider the relationship of the application of the statute at issue to the laws of other nations, although the reasons they provide may differ. Currently prevailing Supreme Court precedent embodied in *Hartford*, states that where the claims arise out of effects within the United States, a court may properly take into account, as a matter of judicial comity, the laws of other nations to ensure that there is no "true conflict" between the application of U.S. law and that of another nation in a given case.[378] As explained below, the application of CERCLA in *Pakootas* raises no such conflict. Equally clear, however, is that under any of the articulated tests, a court should not decline to hear *Pakootas* based on issues of comity.

### A. *There is no "True Conflict" with Canadian Law*

As applied in *Pakootas*, CERCLA addresses remedial liability for the Trail Smelter's historic discharges to the Columbia River. Neither the issuance nor enforcement of EPA's Unilateral Administrative Order nor the ultimate imposition of liability on Teck Cominco purport to regulate discharge levels in Canada, or impose upon Teck Cominco, or any other entity in Canada, any standard with which they cannot comply. Further, the application of CERCLA to hold Teck Cominco responsible for the remediation of its historic discharges is consistent with Canadian laws that expound "the polluter pays" principle, and that, in the case of British Columbia (the relevant governing jurisdiction) provide for strict, joint and several, and retroactive liability modeled on CERCLA.

[378] E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); *accord Hartford*, 509 U.S. at 789–99 (requiring evidence that "compliance with the laws of both countries . . . is impossible" in order for a conflict to exist). *See also* Spector v. Norwegian Cruise Line, Ltd., 125 S. Ct 2169, 2184 (2005) (Ginsburg J., concurring in part and concurring in the judgment) (noting that the level of conflict must be a "head-on collision"). Canadian law also defines a conflict between two sovereign's laws to mean compliance is impossible, or where compliance with one law will frustrate the purpose of the other. *See* Spraytech Société d'Arrosage v. Hudson (Town) [2001] 2 S.C.R. 241.

1. *The Applicable British Columbia Law is Modeled on CERCLA*

Unlike the United States, where CERCLA provides a *federal* cause of action to address remediation of hazardous waste facilities; in Canada, the provinces have primary responsibility for enacting laws relating to the remediation of contaminated sites.[379] Because the Trail Smelter's operations and discharges took place in British Columbia, B.C. provincial law provides the appropriate reference point. Specifically, Part 4 of the B.C. Environmental Management Act ("EMA")[380] and the related Contaminated Sites Regulation ("CSR")[381] establish the legislative scheme for contaminated site remediation in B.C.

Part 4 of the EMA reflects, in no uncertain terms, the "polluter pays" principle, and bears an unmistakable resemblance to CERCLA. The resemblance between the two statutes is not a coincidence; the B.C. drafters used CERCLA as their model. [382] For example, the EMA allows the provincial authority to order a site investigation to determine if a site is contaminated, and provides for the remediation of a contaminated site by "responsible persons."[383] The EMA includes a substantially similar list of parties responsible for remediation of a contaminated site: the current and previous owners and operators of a site, transporters of contaminated substances, persons who generated the material, and those who "by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in

[379] Remedial environmental legislation in Canada is distinct from legislation addressing, permitting, and regulating of on-going activities. In Canada, the relevant legislation and rules concerning remediation of contaminated sites generally falls within the power of the provinces to legislate**.**

[380] Environmental Management Act, R.S.B.C., ch. 53 (2003).

[381] Contaminated Sites Regulation, B.C. Reg. 375/96, O.C. 1480/96, *available at* http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375_96/375_96.htm.

[382] *See* WALDEMAR BRAUL, MINISTRY OF ENV'T, PROVINCE OF B.C., NEW DIRECTION FOR REGULATION OF CONTAMINATED SITES: A DISCUSSION PAPER 20-21 (1991), *available at* http://www.env.gov.bc.ca/epd/epdpa/contam_sites/reports/new_directions.pdf; CHRIS TOLLEFSON & DIANA BELEVESKY, MINISTRY OF ENV'T, PROVINCE OF B.C., EXTERNAL REVIEW OF REMEDIATION LIABILITY PROVISIONS: THE WASTE MANAGEMENT AMENDMENT ACT, 1993, Pt. III (1996), *available at* http://www.env.gov.bc.ca/epd/epdpa/contam_sites/reports/external_review.html.

[383] *Compare* R.S.B.C. (2003) ch. 53, §§ 41, 48 *with* 42 U.S.C. § 9604 (2000).

whole or in part, caused the site to become a contaminated site."[384] The EMA also specifically provides for liability for such a generator/arranger where a site was contaminated through off-site migration of hazardous substances.[385] Responsible parties under the EMA may be ordered to remediate or contribute "in cash or kind" to another person who has incurred remediation costs,[386] and section 47(1) of the EMA provides for "absolute, retroactive, and joint and severally liability to any person or governmental body for reasonably incurred costs of remediation . . . ."[387]

Ironically, in one of the few significant points of departure between CERCLA and the B.C. EMA, the EMA specifically denies the use of a permit as a shield or defense to liability.[388] Unlike its American counterpart, discharging substances pursuant to a valid Canadian permit is no defense under the EMA. This difference is particularly interesting in light of Teck Cominco's assertion that application of CERCLA is unfair because unlike an American company, it cannot use CERCLA's federally permitted release exemption.[389] Quite apart from the fact that Teck's

[384] *Compare* R.S.B.C. ch. 53 § 45 *with* 42 U.S.C. § 9607(a).

[385] *Compare* R.S.B.C. ch. 53 § 45 *with* 42 U.S.C. § 9607(a)(3).

[386] *Compare* R.S.B.C. ch. 53, § 48(2)(b) *with* 42 U.S.C. § 9607(a)(4).

[387] *Compare* R.S.B.C. ch. 53 § 47(1) *with supra* notes 225-227 and accompanying text. *See also* British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board) 17 B.C.L.R.4th 201 (2003).

[388] R.S.B.C. (2003) ch. 53, § 47(4)(a)-(b). This section provides that liability attaches:

> (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
> (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

*Id.*

[389] *See* Appellant's Opening Brief, *supra* note 304, at 42. There are good policy reasons to distinguish between federally permitted releases and discharges that originated outside of the United States. The exemption derives in part from the idea that before a permit is issued, federal authorities will have already examined impacts on the U.S. environment, and persons in the United States will have been given the opportunity to be heard and to affect the permit. To the extent that discharges originate outside of the U.S., it is reasonable for Congress to have assumed that permitted discharges would be unlikely to take into account the impact of the externalities on the downstream state. Moreover, the citizens of the downstream state who are the recipients of the externalized costs (the United States), arguably didn't benefit from the lower costs externalized from the foreign nation. That is, the downstream state receives all of the externalized

arguments seem to reflect a misunderstanding of the scope and applicability of the CERCLA exemption,[390] the fact that under applicable B.C. law a discharger in B.C. would have no expectation that permit compliance would shield it from liability certainly seems to undermine any arguments with respect to fairness and/or additional uncertainty that application of CERCLA would cause a Canadian discharger.

### 2. *Application of CERCLA Presents No Conflict with Canadian Federal Law*

EPA's application of CERCLA to the Trail Smelter's historical discharges is also consistent with key principles generally underlying Canadian federal environmental laws. Since 2003, the Supreme Court of Canada has twice heard arguments regarding the "polluter pays" principle, and in both cases has recognized its application in Canadian law.[391] For example, in *Imperial Oil*, the Canadian Supreme Court stated that "the principle [that the polluter pays] has become firmly entrenched in environmental law in Canada."[392]

Moreover, nothing in Canadian law (federal or provincial) compels Teck Cominco to act in a manner inconsistent with the section 106 order at issue in *Pakootas*.[393] Indeed, in at least two reported decisions Canadian courts have enforced CERCLA judgments obtained in the United States against Canadian companies. In *United States v. Ivey*,[394] the Ontario Court of

costs and few if any of the benefits.

[390] For example, there is no exemption for unpermitted spills, *see supra* notes 242–43 and accompanying text, and Teck Cominco has reportedly spilled thousands of tons of contamination into the Columbia River in excess of its Canadian permits. *See, e.g.*, Steele *supra* note 158.

[391] Imperial Oil Ltd. v. Quebec (Minister of Environment), [2003] 2 S.C.R. 624, 641; British Columbia Hydro and Power Auth., [2005] 1 S.C.R. 3.

[392] *Imperial Oil*, 2 S.C.R. at 641–42.

[393] As noted above, Canadian courts essentially echo the conflict of laws approach of the substantial effects doctrine, requiring that there be "a reasonable and substantial link between the prescribed conduct and the jurisdiction seeking to apply and enforce the law." Libman v. The Queen, [1985] 2 S.C.R. 178. In fact, Canadian courts may also be more receptive than American courts to claims based purely on international law. *See* Spraytech Société d'Arrosage v. Hudson (Town) [2001] 2 S.C.R. 241 (noting that precautionary principle may be customary international law).

[394] [1995] 26 O.R.3d 533 (Ont. Gen. Div.); *aff'd*, [1996] 30 O.R.3d 370 (Ont. C.A.), *leave to appeal denied* [1997] 2 S.C.R. vi.

Appeals upheld a lower court's ruling enforcing two judgments that the United States had obtained against Canadian defendants who held ownership interests in an American corporation that conducted a waste disposal business outside of Detroit.[395] Recognizing that the purpose of CERCLA was to "provide an effective and swift response to the risks posed by hazardous waste sites and to impose upon those responsible for the creation and maintenance of hazardous conditions the costs of that response," the lower court found that there was a "real and substantial connection" between the American forum where the cause of action arose and the Canadian defendants.[396] In reaching its conclusions, the lower court further explained that:

> Given the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement. In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states.[397]

In denying the defendants' arguments that application of CERCLA to a Canadian company would be against public policy, the court noted the similarities of CERCLA to Ontario's Environmental Protection Act, opining that "[w]hile the measures chosen by our legislature do not correspond precisely with those chosen by the Congress of the United States, they are sufficiently similar in nature to defeat any possible application of the public policy defence."[398]

Adopting the reasoning of the lower court, the Court of Appeals added that in applying CERCLA to the Canadian company, the United States was not trying to regulate in Canada:

> [t]he United States did not seek to enforce any laws against

[395] "The Defendant Ivey, an Ontario resident, had a controlling interest in" the Michigan corporation responsible for dumping hazardous waste in Michigan, and "oversaw its operations between 1974 and 1982." *Id.* at 537. Another defendant, Maziv, was an Ontario corporation that was the parent of the Michigan corporation, and held 80 percent of its shares. *Id.* A third "defendant Ineco, also an Ontario corporation, assumed the liabilities of Maziv[,]" and "Ivey [was] the president and chief executive officer of Ineco and was the president, general manager and director of Maziv from 1961 to 1986." *Id.*

[396] *Id.* at 538, 541.

[397] *Id.* at 549–50.

[398] *Id.* at 554.

> extraterritorial conduct. It simply sought financial compensation for actual costs incurred in the United States in remedying environmental damage inflicted in the United States on property in the United States. It is no extension of U.S. sovereign jurisdiction to enforce its domestic judgments against those legally accountable for an environmental mess in the United States by reason of their ownership or operation of American waste disposal sites.[399]

Earlier this year, the Ontario appeals court again upheld enforcement of a CERCLA judgment in *United States v. Shield Development Co*.[400] *Shield* involved an action to recover response-costs incurred in removing hazardous substances from a site within the borders of the United States: the Essex Copper Processing Site in Milford, Utah.[401] The Ontario Court of Appeals, affirming the Ontario Superior Court, found that the Ontario Environmental Protection Act[402] like CERCLA, provided that the owner of the property may be held liable for costs of removal.[403] Citing *Ivey*, the court noted that "CERCLA is not, in itself, contrary to [Canadian] public policy."[404]

### B. *Comity and Separation of Powers*

To the degree that potential conflict with the law of nations or neighboring nations is a concern to a reviewing court, the Ninth Circuit's recent decision in *Arc Ecology* provides additional insight concerning the relationship between judicial comity and respect for separation of powers. In that case, as discussed above,[405] the Court noted that such concerns are "obviously much less serious where the interpretation arguably violating international law is urged upon [the court] by the Executive Branch of our government."[406] The Court explained that when the Executive Branch is the party advancing a construction of a statute with potential foreign policy

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[399] U.S. v. Ivey, [1996] 30 O.R. 3d 370, 374.

[400] [2005] 74 O.R.3d 583, 595.

[401] *See id.* at 585. Shield and another Canadian company, Anyok Metals Ltd., held an ownership interest in the site and Shield operated the copper processing facility.

[402] R.S.O. 1990, c. E. 19.

[403] 74 O.R.3d 583, 595.

[404] *Id*.

[405] *See supra* Part VI.D.

[406] Arc Ecology v. United States Dep't of the Air Force, 411 F.3d 1092, 1102 (9th Cir. 2005).

implications, one can presume that "the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." [407]

In *Pakootas*, the EPA issued the UAO, the Administration has refused to rescind the Order despite Canada's requests to do so, and the Department of Justice has set forth the position of the United States in its briefing of *Arc Ecology*. The only reasonable inference is that the Executive Branch has weighed the potential consequences of CERCLA's application to the facts and determined that it is in the United States' interests to apply CERCLA in such circumstances. In such a case it would be rather extraordinary for the Ninth Circuit to second guess this calculation and decline to hear the case, or to find a conflict with international law based on comity. Given the Executive Branch's preeminent role in foreign relations there is no reason for the court to step in to limit the rights of the parties to enforce the UAO against Teck Cominco.

## IX. WHAT'S SO BAD ABOUT A RACE TO THE TOP? WE ALL LIVE DOWNSTREAM[408]

It is hardly surprising that among Canadian and American diplomats[409] and the international legal scholars[410] that have addressed the matter, reaction to EPA's issuance of a Unilateral Administrative Order to Teck Cominco has been nearly universally negative. Among this narrow cohort, unilateral action is almost reflexively viewed as improper and a threat to existing international norms and mechanisms. As Professor Dan Bodansky has observed:

> Among international lawyers, unilateralism often seems tantamount to a dirty word. To characterize an action as unilateral is to condemn it. . . . If an action is unilateral, one need not even consider whether it is substantively right or wrong; the fact that it is taken by a single state rather than the

[407] *Id.*

[408] The phrase "we all live downstream" is most often attributed to the Canadian scientist and cultural icon David Suzuki.

[409] *See, e.g.*, Canada's *Amicus* Brief, *supra* note 206; Letter from Paul Cellucci, Ambassador of the United States to Canada to Michael O. Leavitt, Adm'r, U.S. Envtl. Prot. Agency, June 15, 2004, Mining and Manufacturers Associations' *Amicus* Brief, *supra* note 209, add.

[410] *See* Craik, *supra* note 37; Brunnée, *supra* note 37; Parrish, *supra* note 9.

'international community', in itself, makes it illegitimate.[411]

Despite this reflexive diplomatic gnashing of teeth, with its attendant cries of wolf, EPA's actions are neither contrary to international norms, nor inconsistent with the development of more effective and efficient international mechanisms—mechanisms that the opponents of CERCLA's application in *Pakootas* profess to favor. Take, for example, the less subtle threat that the EPA's unilateral action in *Pakootas* will result in Canadian "retaliation" against Midwest utilities and other industries that have allegedly caused significant harm to air quality and human health in Ontario and Eastern Canada.[412] From the perspective of international environmental law, why shouldn't the answer be "Outstanding!"? If, in fact, American industries have exported their pollution (i.e., their costs of production) to Canada, and in turn caused substantial harm in Canada—harm for which Canada's own companies would be held liable—then the costs should be imposed on American industry. What is good for the goose is good for the gander, or more generally, good for the environment.[413] The EPA's issuance of the UAO to Teck Cominco and the subsequent citizen suit to enforce that order materially advance the internationally recognized, bilaterally

[411] Daniel Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?*, 11 EUR. J. INT'L L. 339, 339 (2000).

[412] *See, e.g.*, Appellant's Reply Brief, *supra* note 267, at 13–16; Canada's *Amicus* Brief, *supra* note 206, at 22–23 n.12; Mining and Manufacturers Associations' *Amicus* Brief, *supra* note 209, at 20–28. *See also* Letter from Jack Gerard, President and CEO, Nat'l Mining Ass'n to Colin Powell, Sec'y of State, U.S. Dep't of State, John Ashcroft, Attorney Gen., U.S. Dep't of Justice, and Michael O. Leavitt, Adm'r, U.S. EPA (Apr. 22, 2004) *available* at http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/22APR2004GerardofNMAtoPowelletal.pdf; Letter from Thomas R. Kuhn, Edison Elec. Inst. to Colin Powell, Sec'y of State, U.S. Dep't of State and Thomas Sansonetti, Assistant Attorney Gen., Env't and Natural Res. Div. (June 2, 2004) *available* at http://www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/2JUN2004KuhnofEdisionElectrictoPowelletal.pdf.

[413] That is not to suggest that such internalization of costs and improvements to the environment are without cost, and the response to the hypothetical is intentionally somewhat oversimplified. A more nuanced position is of course necessary, but such an articulation is largely outside the scope of this paper. Suffice it to say that there may be important distinctions between regulating ongoing activities and remediating past contamination, particularly when the nature of the remedy is considered. *See generally* ALLEN L. SPRINGER, THE INTERNATIONAL LAW OF POLLUTION (1983) (comparing traditional liability-based regimes of state responsibility for pollution with regimes that create responsibility before pollution occurs).

agreed, and (just as importantly) domestically implanted[414] norm of making responsible parties pay for the costs of cleaning up hazardous waste sites. If the enforcement of CERCLA to remediate hazardous wastes in the United States results in Canada enforcing its own laws to require American companies to pay for substantial harm that their operations have created in Canada, then that would seem to be a "win-win" from an environmental perspective.

Moreover, application of domestic law to remediate domestic harms matches the public's expectations and desires to have laws and legal mechanisms that reflect and effectuate their widely held environmental remediation goals. CERCLA is, if nothing else, responsive to significant domestic concerns—facilitating the cleanup of hazardous waste sites and ensuring that those who are responsible for the hazard (rather than the American taxpayers) pay for the cleanup. The Trail Smelter discharged millions of tons of slag and other heavy metals that have created a substantial hazard in the United States. In so doing, the owners of the Trail Smelter not only imposed upon the United States significant externalities resulting in harm to human health and the environment (and expenditures related to remediation), but also saved the operation and maintenance costs of installing control technologies and the expenses related to the storage and disposal of its hazardous wastes. Requiring foreign polluters, like Teck Cominco to internalize these costs also helps to level the playing field for those competing companies operating in the United States that are unquestionably subject to CERCLA.

The current international regime is inadequate; there are few effective international mechanisms to require polluters to internalize these costs or that require remediation. One need look no farther than the *Trail Smelter Arbitration* itself, which did little to address the overall environmental concerns, focused as it was on sulfur dioxide air emissions, even while the same facility continued to discharge huge quantities of slag, heavy metals, and other hazardous substances into the Columbia River.[415] In

[414] Retaliation, if based on similar laws and regimes, as it is in the case of CERCLA's requirement that polluters pay for past pollution, would seem to set the floor in line with domestic (U.S. and Canada) and international goals requiring the polluter to pay.

[415] *See supra* Part III (noting that the Trail Smelter Arbitration Tribunal was aware of slag discharges in the 1930s).

response to those who contend that application of domestic law, and CERCLA in particular, abroad may be inefficient, recall that even the famed *Trail Smelter* matter took more than fourteen years to resolve what were essentially farmers' nuisance claims, in which the facts concerning the pollution were well documented and where the nations involved shared similar legal histories, traditions and cultures. International law proceeds at what might be charitably described as an unhurried pace. It generally requires nation states to take up the effort at a state-to-state level, and in the case of the Boundary Waters Treaty, requires both nations to agree to submit to arbitration. Whatever can be said for the length of marathon allocation proceedings and substantial costs of litigation under CERCLA, they may well pale in comparison to reliance on international dispute resolution.

To be clear, there is nothing inherently wrong with internationally negotiated results, international mediation or arbitration—each provide important mechanisms to deal with international differences. But the fact that international law, international mechanisms and bilateral agreements may play useful roles in setting obligations and providing redress for harm does not deny the fact that the application of domestic law can also play an important role. Paradoxically, pushing through domestic channels may well spur the adoption of new legal principles or institutions to address bilateral and international issues:[416] systems react to stressors. If the judicially imposed internalization of costs becomes too steep or leads to too much friction between two nations, it may well lead to agreed mechanisms or effective agreements that upwardly harmonize environmental laws concerning transboundary water pollution. In this sense, the UAO and subsequent citizen suits serve as the legal equivalents of a swift blow to the solar plexus—a shock to the system—that can serve as a catalyst for change. Rather than weaken international and bi-lateral approaches, domestic actions can serve to strengthen them.[417] Further, local jurisdictions and domestic laws may be

[416] *See* Bodansky, *supra* note 411, at 344 (noting the "familiar phenomenon in the development of customary international law, where unilateral national actions, sometimes of doubtful legality, can stimulate similar actions by other states, leading to the emergence of a new customary norm"); Dodge, *supra* note 305, at 164 (noting that legal conflict can create incentives for states to negotiate).

[417] Indeed, Canada has previously employed this technique enacting the

more responsive to localized concerns and private rights than national governments and international law are,[418] including the protection of individual property and environmental justice rights.[419]

In the longer term, the combination of both mechanisms, domestic and international or multilateral, is likely to strengthen and enhance efforts to ensure that polluters pay and that shared watersheds and ecosystems are protected, without regard to which side of the border a polluter resides.

## X. CONCLUSION

> *We do not seek the unanimity that comes to those who water down all issues to the lowest common denominator—or to those who conceal their differences behind fixed smiles—or to those who measure unity by standards of popularity and affection, instead of trust and respect. We are allies. This is a partnership, not an empire. We are bound to have differences and disappointments—and we are equally bound to bring them out into the open, to settle them where they can be settled, and to respect each other's views when they cannot be settled.*
>
> *Our alliance is born, not of fear, but of hope. It is an alliance that advances what we are for, as well as opposes what we are against.*[420]

The *Pakootas* case is currently pending in the Ninth Circuit, and its outcome is uncertain. The case raises important and complex issues concerning the reach and scope of one of the nation's most significant environmental laws, CERCLA, and presents the court with an opportunity to further define the contours and application of the doctrine of extraterritoriality. Despite the diplomatic gnashing of teeth and the dire predictions of Teck Cominco and its amici supporters, the Ninth Circuit's

Arctic Waters Pollution Prevention Act, R.S., c. 2 (1st Supp.) (1985). *See* Bodansky, *supra* note 411, at 340–41.

[418] Theoretically, large multinational corporations may find it easier to influence a small commission or a small handful of diplomats and other officials in the foreign affairs departments of a nation, than to effect unpopular legislative changes or influence domestic courts applying domestic law.

[419] For example, CERCLA recognizes the important role of states and Indian Tribes as trustees for natural resources. 42 U.S.C. § 9607(f) (2000).

[420] President John F. Kennedy, Address before the Canadian Parliament (May 17, 1961).

decision is unlikely to affect our nation's close relationship with Canada. That is not to say, however, that the court's ruling is not important, far from it. Holding Teck Cominco responsible for nearly a century of discharges of slag and heavy metals to the Columbia River and the spoliation of Lake Roosevelt matters a great deal to the plaintiffs who brought the case, to the Confederated Colville Tribes to which they belong and who depend on the natural resources of the area for their "subsistence, culture and spiritual well-being,"[421] and to the millions of people who each year visit and recreate at Lake Roosevelt. The decision also matters to the citizens of the State of Washington and the United States, who are currently footing the bill for investigation and cleanup of one of our nation's most contaminated hazardous waste sites.

Citizens on both sides of the United States-Canada border have overwhelmingly supported, and their respective governments have adopted, broad strict liability schemes to ensure that polluters pay for cleanup of hazardous waste sites. They will soon learn whether a responsible party can otherwise escape liability for cleanup simply by ensuring that it disposed of the materials itself, or whether a multinational corporation with operations in the United States and Canada will be able to use the border as a shield from liability.

It is certainly possible that the Ninth Circuit may take a narrow reading of CERCLA, or apply a broad reading of the presumption against extraterritoriality to avoid purported discord and diplomatic disharmony between the U.S and Canada, but such a holding is far from required. Allowing a Canadian company to escape liability for the cleanup of its wastes located at a site within the United States would undermine Congress's clearly expressed intention to clean up hazardous waste sites, while also ensuring that the parties responsible for such contamination pay for that cleanup.

If history is a guide, even if the Ninth Circuit rules that CERCLA applies and that Teck Cominco can be liable as a PRP, chances are good that the U.S. and Canadian governments will look for a mechanism to resolve this case outside of a final court adjudication, which would, add yet another chapter to the international environmental law texts bearing the title "Trail

[421] Brief of Appellees, *supra* note 271, at 5.

Smelter." In the meantime, the United States Administration deserves credit. As a result of the bold and resolute actions of the Colville Confederated Tribes and its members, the State of Washington and Region 10 of the EPA, the Bush Administration now finds itself strongly on the side of environmental enforcement and environmental justice. EPA properly issued the section 106 Unilateral Administrative Order, and the Administration has commendably stood its ground in the face of stiff opposition from Canada, and domestic mining and other powerful industrial interests. Seemingly natural allies, environmental groups, other Native American Tribes and NGO's on both sides of the border have been slow to support, and understandably weary of the Administration's position—which, while it supports the polluter pays principle also to some reinforces a "go it alone" attitude. Red, blue and green divisions aside, the EPA has quite correctly and profoundly blazed a new trail for CERCLA. It is a trail that reflects Congress's will and the American people's expectations, and a trail that is consistent with international law. It now remains to be seen what the Ninth Circuit will do.