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ARC Ecology v. United States Dep't of the Air Force - Anchors Away: The Potential for Non-Extraterritorial Statutory Application to Contaminate the Environment and International Relations

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ARC ECOLOGY v. UNITED STATES DEP'T OF THE AIR FORCE
ANCHORS AWAY: THE POTENTIAL FOR NON-EXTRATERRITORIAL STATUTORY APPLICATION TO CONTAMINATE THE ENVIRONMENT AND INTERNATIONAL RELATIONS

I. Introduction

In 1980 Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or the Act) to finance the remediation of toxic waste sites and to provide a way to clean up past releases of hazardous waste.¹ The Environmental Protection Agency (EPA), which is charged with the duty of leading an attack on environmental pollution, is responsible for administering the Act.² Courts, however, have continually struggled to determine whether CERCLA applies extraterritorially, and if it does, what circumstances make such application proper.³

In Arc Ecology v. United States Department of the Air Force (Arc Ecology),⁴ the Ninth Circuit Court of Appeals affirmed the Northern District of California’s decision, holding that CERCLA did not apply extraterritorially when the environmental harm suffered did not occur in the United States.⁵ Unfortunately, significant contamination exists at overseas military bases formerly occupied by the

². See Nancy K. Kubasek & Gary S. Silverman, Environmental Law 81 (2d ed. 1997) (providing EPA’s history). The EPA was designed to take over responsibilities formerly performed by the Federal Water Quality Administration in the Department of the Interior, the National Air Pollution Control Administration and the Food and Drug Administration in the Department of Health, Education, and Welfare, among others. See id. The EPA’s mission is to “control and abate pollution in the areas of air, water, solid waste, pesticides, radiation, and toxic substances.” See id. The EPA has frequent conflicts with the executive branch and with Congress. See id.
³. For a discussion describing the difficulties of extraterritorial application, see infra notes 47-73, 78-88 and accompanying text.
⁴. 411 F.3d 1092 (9th Cir. 2005).
⁵. See Michael W. Drumke et al., Recent Developments in Toxic Tort and Environmental Law, 40 Tort Trial & Ins. Frac. L.J. 809, 837 (2005) (stating case was one of first impression in district court).
United States.\(^6\) When the military closed two of these bases, Clark Air Force Base (Clark) and Subic Naval Base (Subic), in the early 1990s, they left behind massive amounts of toxic chemicals as a result of decades of careless hazardous materials usage.\(^7\) The environmental harm alleged in this case, however, occurred in the Philippines, not the United States.\(^8\)

This Note explores the implications that the Ninth Circuit's holding has for the extraterritorial application of CERCLA and also highlights the lax environmental policies generally surrounding the closure of United States military bases located overseas.\(^9\) Part II of this Note describes the facts and procedural history of \textit{Arc Ecology}.\(^10\) Part III provides background information about the EPA and CERCLA, principles of statutory construction and the extraterritorial application of United States environmental laws.\(^11\) Part IV discusses the Ninth Circuit's reasoning for refusing to apply CERCLA, and Part V follows by providing a critical analysis of the court's decision.\(^12\) Finally, Part VI focuses on the practical repercussions of the \textit{Arc Ecology} holding on the relationship between the United States and countries that have hosted United States military bases.\(^13\)

II. Facts

Clark and Subic are former United States military bases located in the Philippines.\(^14\) The United States began operating these bases when it controlled the Philippines in the early twentieth cen-


\(^7\) See id. at 875 (describing contamination left behind at Clark and Subic).

\(^8\) See \textit{Arc Ecology}, 411 F.3d at 1095 (describing location of military bases).

\(^9\) For a discussion of the extraterritorial application of CERCLA and the lax environmental policies generally surrounding the closure of United States military bases located overseas, see \textit{supra} notes 1-8, \textit{infra} notes 10-135 and accompanying text.

\(^10\) For a discussion of the facts of \textit{Arc Ecology}, see \textit{infra} notes 14-27 and accompanying text.

\(^11\) For a discussion of the background of the EPA and CERCLA, principles of statutory construction and extraterritorial application of United States environmental laws, see \textit{infra} notes 28-73 and accompanying text.

\(^12\) For a narrative analysis of \textit{Arc Ecology}, see \textit{infra} notes 74-101 and accompanying text; for a critical analysis of the decision, see \textit{infra} notes 102-21 and accompanying text.

\(^13\) For a discussion of the impact the \textit{Arc Ecology} decision may have on the relationship between the United States and host countries, see \textit{infra} notes 122-35 and accompanying text.

\(^14\) See \textit{Arc Ecology}, 411 F.3d at 1095 (describing factual background of case).
tury. After the Philippines became independent in 1947, the United States government entered into an agreement (Bases Agreement) with the Philippine government allowing the United States to continue operating Clark and Subic. In 1992, the United States withdrew its military personnel and turned the bases over to the Philippine government.

The plaintiffs-appellants are two non-profit environmental organizations and thirty individual Philippine residents who either live or travel near the bases or have family members who live or travel near the bases (collectively Arc Ecology). The defendants-appellees are the Department of the Air Force, the Department of the Navy, the Department of Defense (DOD) and the Secretary of Defense (collectively United States).

The appellants petitioned the Air Force and Navy appellees to conduct preliminary assessments of environmental pollution at Clark and Subic in June 2000. The appellees declined, arguing that (1) CERCLA did not apply to property located outside the territorial boundaries of the United States and (2) an amendment to the Bases Agreement executed by the Philippine government relinquished any right to environmental restoration of the property.

In December 2002, Arc Ecology commenced a citizen suit under CERCLA section 105(d), alleging that they "have been or are likely to be" exposed to contamination created during the American occupation of the Clark and Subic bases. The appellants sought an order compelling the United States to conduct preliminary assessments at the bases and a declaratory judgment stating that CERCLA applied to the bases.

15. See id. (continuing description of factual background of case).
18. See id. (describing parties).
19. See id. (describing parties). The Secretary of Defense in this case is Donald Rumsfeld. See id. at 1092.
20. See id. at 1095 (stating history of case). For a discussion explaining the CERCLA process, see infra notes 32-55.
21. See id. at 1096 (discussing United States's position that CERCLA is inapplicable to present case).
22. See Arc Ecology, 411 F.3d at 1095-96 (describing commencement of CERCLA citizens suit).
23. See id. (describing order sought by appellants). The appellees responded with a motion that contended, inter alia, that the complaint failed to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). See id. at 1096.
In response, the United States filed a motion to dismiss, which the District Court of the Northern District of California granted. The district court concluded the relevant provisions of CERCLA did not apply extraterritorially. The court relied on the statutory presumption that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Arc Ecology appealed and the Ninth Circuit held that CERCLA did not apply extraterritorially to require the United States military to conduct a preliminary assessment of environmental pollution on its former military bases in the Philippines.

III. BACKGROUND

A. The EPA and CERCLA

A presidential reorganization order created the EPA as an independent agency in 1970. The EPA’s purpose is to lead an “integrated, coordinated attack on environmental pollution in cooperation with state and local governments.” Historically, the EPA was a reactive agency, tending only to respond to public concerns revealed through congressional enactments. It was not until the 1980 passage of CERCLA that major federal efforts to govern

25. See id. at 1096 (noting district court’s holding).
27. See Arc Ecology, 411 F.3d at 1096 (describing Ninth Circuit’s holding). The Ninth Circuit performed a de novo review of the district court’s interpretation and construction of CERCLA and the dismissal for failure to state a claim under Rule 12(b)(6). See id. The Rule 12(b)(6) dismissal was limited to the contents of the complaint on appellate review. See id. As such, the Ninth Circuit took as true all allegations of material fact in the complaint and construed them in the light most favorable to Arc Ecology. See id. “Dismissal of the complaint is appropriate only if it appears beyond doubt that the claimant can prove no set of facts in support of the claim which would entitle him to relief.” See id. The Ninth Circuit could affirm the district court’s dismissal for failure to state a claim on any basis supported in the record. See id.
28. See Kubasker & Silverman, supra note 2, at 81 (describing creation of EPA).
29. See id. (discussing purpose of EPA).
30. See id. at 82 (noting that even in best of times, EPA tends to be reactive). “Generally the agency has seen its role as enforcing specific pollution-control laws, not as being in the forefront of generating new policies to prevent problems from arising.” Id.
the prevention and remediation of hazardous material releases began in earnest. 31

CERCLA is an expansive piece of legislation designed to finance the remediation of toxic waste sites. 32 CERCLA calls for Congress to generate a fund to clean up sites that have been identified and prioritized according to a national list. 33 One of CERCLA’s primary purposes is to provide a method for cleaning up past releases of hazardous waste. 34 To achieve this objective, CERCLA holds all responsible parties jointly and severally liable to the federal government for damage to the natural environment and the corresponding cleanup costs. 35 If the parties responsible for creating hazardous waste sites are insolvent, CERCLA also provides financing for long-term cleanup of those sites that are listed under the statute. 36

CERCLA’s definitions are noticeably expansive and cover practically all areas where dumping occurs. 37 This expansive definition provides for broad categories of liability. 38 For example, the term “environment” includes “any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.” 39 The statute defines “otherwise subject to the jurisdiction of the United States” to mean by virtue of United States citizenship, United States vessel documentation or international agreement. 40

31. See id. at 193 (noting that CERCLA provides complex regulatory system). The system deals with a “continuum of activities ranging from spill prevention through final cleanup of contaminated sites.” Id.

32. See Rankin, supra note 1, at 239-40 (providing general description of CERCLA). CERCLA is also known as Superfund. See id.

33. See id. (noting fund is to be supplemented and replenished by private corporations that may have caused waste sites).

34. See Jose Antonio Urrutia, The Extraterritorial Scope of U.S. Environmental Laws: The Case of Chile, 8 Geo. INT’L ENVT’L. REV. 45, 56 (1995) (noting other primary purpose is to mitigate immediate threats or releases of hazardous waste).

35. See id. (noting CERCLA authorizes EPA to create national contingency plan establishing procedures and standards for responding to releases of hazardous substances).

36. See id. (explaining that financing comes through government trust fund known as Superfund). This fund also provides funds for the immediate cleanup of hazardous waste emergencies. See id.

37. See Rankin, supra note 1, at 240 (noting CERCLA’s broad definitions).

38. See id. (describing expansive categories of liability).


This broad liability helps increase the scope of available financing necessary for the remediation of more toxic waste sites.41

CERCLA also contains broad categories of liability regarding toxic actions of companies and individuals.42 This makes CERCLA applicable to almost any hazardous waste site.43 Additionally, CERCLA contains provisions for citizen suits.44 Under the citizen suit provisions, any person is entitled to commence a civil lawsuit against an individual or entity that violates the standards of the Act.45 The statute specifically allows foreign plaintiffs to sue, and it grants jurisdiction to the United States over all citizen suit controversies regardless of the parties' citizenship.46

Although CERCLA allows foreign claimants to sue in United States courts, certain criteria must be met before CERCLA will apply extraterritorially.47 First, the scope of a foreign claimant's right to sue must be identical to a United States claimant's right to sue.48 This right, found in CERCLA's citizen suit provisions, affords any person the ability to commence a civil action for violating CERCLA provisions against another person, the EPA or the President of the United States.49 Second, a foreign claimant may sue under CERCLA if a vessel or facility, subject to United States jurisdiction, "releases hazardous substances into or adjacent to a foreign country's navigable waters, territorial seas or adjacent shorelines."50 Finally, a foreign claimant may only sue under CERCLA if there is a treaty or executive agreement authorizing compensation between the United States and the applicable foreign country, or if the Secretary

41. See id. (noting that CERCLA is very broad legislative scheme used to finance remediation of toxic waste sites).
42. See Rankin, supra note 1, at 240 (describing liability under CERCLA). For companies or individuals to be liable under CERCLA, a court needs to find that the company or individual was a past or present owner or operator of a hazardous waste facility, past or present generator of hazardous substances or a party that provides for transportation of hazardous substances. See id.
43. See id. (describing broad definition of "facility"). A facility includes "virtually any place at which hazardous wastes have been placed." See id.
44. See id. (noting similarity between citizen suit provisions in CERCLA and RCRA).
45. See id. (explaining who may bring citizen suit under CERCLA).
46. See id. (quoting 42 U.S.C. § 9613(b) (2000)) (explaining when United States has jurisdiction over foreign plaintiffs).
47. See Urrutia, supra note 34, at 56-57 (noting that CERCLA will not apply extraterritorially unless conditions are met).
48. See id. (discussing rights of foreign claimants to sue under CERCLA).
49. See id. (explaining who may be subject to suit). An action brought under the citizen suit provisions must originate in either the district court where the violation occurred or in the District Court for the District of Columbia. See id. at 57.
50. See id. (stating provisions from 42 U.S.C. §§ 9611(l)(1), (3) and describing second condition for foreign claimant to assert claim under CERCLA).
of State determines that the foreign country offers a similar remedy for United States claimants.51

Section 105(d) of CERCLA enables a person who is, or may be, affected by a release to petition the President to conduct an initial assessment of the dangers to public health and the environment that “are associated” with the release.52 If the assessment indicates that the release may possibly harm human health or the environment, the President shall evaluate the release to determine its national priority.53

In 1986, Congress determined the original CERCLA provisions needed strengthening to improve federal agency compliance, especially at military installations, and amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA).54 Even after SARA’s enactment, however, the EPA continued to struggle with CERCLA’s enforcement against the DOD and other federal agencies.55

B. Principles of Statutory Construction

Congress’s power to regulate conduct outside the territorial limits of the United States is frequently upheld by the Supreme Court.56 “Whether Congress has actually exercised that authority is a matter of statutory interpretation” that has generally resulted in a

51. See id. (noting that rest of section 111(l) has no legal significance if remedy provision is not met).
52. See Arc Ecology v. United States Dep’t of the Air Force, 411 F.3d 1092, 1095 (discussing section of CERCLA under which Arc Ecology brought suit). If the president has not previously conducted a preliminary assessment of the release, he shall do so within twelve months after receipt of the petition, or he shall explain why the assessment is not appropriate. See id. (citing 42 U.S.C. § 9605(d)).
53. See id. (noting president shall evaluate release in accordance with hazard ranking system).
54. See Wegman & Baily, supra note 6, at 884 (discussing reasoning for implementing SARA). Specifically, some of SARA’s more pertinent provisions include: (1) stressing the importance of innovative treatment technologies to permanently clean up hazardous waste sites; (2) increasing the focus on human health problems created by hazardous waste sites; (3) encouraging greater citizen participation in the decision making process and (4) increasing the size of the trust fund to $8.5 billion. See http://www.epa.gov/superfund/action;.aw.sara.htm. Congress also ordered the Secretary of Defense to perform a Defense Environmental Restoration Program (DERP) to investigate and clean up contamination at DOD sites. See Wegman & Baily, supra note 6 at 885.
55. See id. (recognizing that federal agencies continued to challenge state environmental enforcement efforts).
presumption against extraterritorial application. The Supreme Court has held that unless there is clear congressional intent to apply a particular statute extraterritorially, any legislation passed by Congress applies only within the territorial jurisdiction of the United States. Clear congressional intent is determined by the Foley Doctrine, a rule of statutory construction that presumes Congress is primarily concerned with United States domestic affairs.

When applying the Foley Doctrine, courts look to four tools of statutory construction for evidence of intent to apply a statute extraterritorially. These tools are: (1) the plain language of the relevant statute; (2) whether the statute provides for mechanisms of overseas enforcement such as venue and investigative authority; (3) whether Congress addressed the problem of potential conflicts with foreign laws; and (4) the legislative history of the statute. The majority of United States environmental statutes do not demonstrate congressional intent for extraterritorial application.

Additionally, the doctrine of expressio unius est exclusio alterius states that omissions are the equivalent of exclusions when a statute affirmatively designates certain persons, things or manners of operation. The application of this doctrine to CERCLA supports the conclusion that only foreign claimants satisfying express requirements may proceed to court under CERCLA.

C. Extraterritorial Application of United States Environmental Laws

Although the presumption against extraterritoriality has diminished in some contexts, it has generally prevailed in situations in which Congress intended to apply the statute extraterritorially.
volving environmental issues.\textsuperscript{65} There are, however, exceptions to this presumption, such as claims where serious effects are felt in the United States.\textsuperscript{66} This doctrine, known as the “effects doctrine,” permits application of United States laws to conduct that has certain “effects” in United States territory, even if the conduct does not actually take place within national territory.\textsuperscript{67} Phrased differently, “the presumption against extraterritoriality is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”\textsuperscript{68}

In 2004, the Eastern District of Washington ruled in \textit{Pakootas v. Teck Cominco Metals, Ltd. (Pakootas)}\textsuperscript{69} that CERCLA does apply extraterritorially to impose liability on a Canadian company whose discharges caused contamination in the United States.\textsuperscript{70} In this landmark ruling, the court relied heavily on the “effects test,” which abandons the presumption against extraterritoriality when the regulated conduct harms the United States.\textsuperscript{71} In \textit{Pakootas}, the court ruled that it had personal jurisdiction over the Canadian defendant under Washington State’s long-arm statute.\textsuperscript{72} The court articulated that if the failure to expand the scope of the statute to include a foreign setting will result in “adverse effects” within the United States, then the presumption against extraterritoriality generally is not applied.\textsuperscript{73}

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65. See Austen L. Parrish, \textit{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, 399-94 (2005) (providing background on extraterritorial application of United States environmental laws). The Environmental Law Institute has stated, “the presumption against extraterritoriality has been applied with greater force to environmental laws.” See \textit{id.} at 394. Although this does not mean that all environmental laws are interpreted to only apply domestically, “current legal doctrine provides little direct support for extraterritorial environmental enforcement.” \textit{See id.}

66. \textit{See id.} at 395 (noting even environmental laws contain exceptions to general presumption against extraterritoriality).

67. \textit{See id.} (providing general description of effects doctrine).

68. \textit{See id.} (restating presumption against extraterritoriality).


70. \textit{See Hagen & Horewitch, supra note 56, at 159} (discussing ruling in Pakootas and explaining effects test).

71. \textit{See id.} (noting reliance on effects test in ruling).

72. \textit{See id.} (noting that statute provides for exercise of jurisdiction over any person committing tortious acts within state).

73. \textit{See id.} at 160 (explaining holding in Pakootas). Although the ruling was groundbreaking, the court emphasized that its holding was narrow and not intended to control a foreign company operating in a foreign country. \textit{See id.}
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IV. NARRATIVE ANALYSIS

A. CERLCA's Geographic Scope

To determine whether the disputed provisions of CERCLA applied to Clark and Subic, the Ninth Circuit first looked to the plain language of the statute. The court found that CERCLA section 105(d) did not discuss the location of contaminated sites that are covered, nor did it discuss who is entitled to petition for a preliminary assessment of contaminated sites. Section 105(d) referred to releases without any geographic boundaries, and the identification of who may petition for a preliminary assessment was equally vague. The Ninth Circuit found it unnecessary to decide this identification issue because even if CERCLA did apply to the bases when enacted, Arc Ecology still would have needed to show that they could state a claim when they filed their action, which the court concluded they could not do.

B. Presumption Against Extraterritoriality

The Ninth Circuit next examined Congress's intent to provide relief to foreign claimants like Arc Ecology. The court found the appellants could not state a claim under CERCLA because of the statutory presumption against extraterritoriality. The Ninth Circuit noted that both it and the Supreme Court have adhered to the


75. See Arc Ecology, 411 F.3d at 1096 (discussing section 105(d)).

76. See id. (quoting 42 U.S.C. § 9605(d)) (noting vagueness of section 105(d)). The statute simply states "[a]ny person who is or may be affected by a release." 42 U.S.C. § 9605(d).

77. See id. at 1097 (rejecting appellants' claim that statute covers any territory or possession over which United States has jurisdiction).

78. See id. (examining Arc Ecology's contention that Congress intended to have CERCLA apply to former military bases located outside United States). To advance their argument, Arc Ecology pointed to CERCLA's definition of the "United States," which includes "the several states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the [U.S.] Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction." See id. (quoting CERCLA at 42 U.S.C. § 9601(27)) (emphasis added in opinion). The court concluded that reasonable minds could presume that CERCLA applied to Clark and Subic because the United States possessed both bases. See id. The government stated, however, that "the most reasonable construction of 'possession' would be U.S. property that does not rest within the territory of another sovereign nation." See id. The court explained it did not need to decide this point, because even if CERCLA did apply when enacted, Arc Ecology could not show that they could state a claim when they filed their action. See id.

79. See id. (explaining why Arc Ecology failed to state claim).
principle that legislation is presumed to apply only within the territorial jurisdiction of the United States unless Congress affirmatively expressed a contrary intention. Applying the presumption against extraterritoriality in Arc Ecology, the Ninth Circuit found no evidence that Congress intended to authorize lawsuits under CERCLA by foreign claimants allegedly affected by contamination occurring on a United States military base located in a foreign country.

The Ninth Circuit noted the absence of any material relating to CERCLA’s legislative history that would support the recognition of a claim for alleged contamination of a site outside the United States. The court concluded the legislative history, which the district court discussed, indicated that Congress intended CERCLA to have a domestic focus. Because the congressional record was silent with respect to any extraterritorial application of CERCLA, the Ninth Circuit concluded it was unlikely that Congress intended for CERCLA to provide relief to appellants like Arc Ecology. The court also noted the academic commentary on CERCLA’s scope unanimously supported the conclusion that Congress did not intend for CERCLA to apply in the manner sought by the appellants.

80. See Arc Ecology, 411 F.3d at 1097 (explaining presumption); see also Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (explaining that Congress is primarily concerned with domestic issues).

81. See Arc Ecology, 411 F.3d at 1098 (finding appellants’ contention that 10 U.S.C. §§ 2701(c)(1)(A)-(B) required Secretary of Defense to apply CERCLA to foreign claimants affected by contamination occurring on any foreign military base fails to rebut presumption against extraterritoriality).

82. See id. at 1101 (indicating non-extraterritorial intent).

83. See id. (commenting on CERCLA’s legislative history). For instance, a House committee report just prior to CERCLA’s re-authorization commented that “there may be as many as 10,000 [ ] sites across the Nation” and that the federal government’s resources were inadequate to “fulfill promises that were made to clean up abandoned hazardous wastes in this country.” See id. (quoting H.R.Rep. No. 99-253, pt. 1, at 55, reprinted in 1986 U.S.C.C.A.N 2835, 2837) (emphasis added in opinion).

84. See id. (quoting Small v. U.S., 125 S.Ct. 1752, 1757 (2005)) (discussing legislative history and congressional intent). When the DOD closed the bases, almost no restoration work was done, even though the level of contamination at the bases would probably qualify a domestic facility for the Superfund National Priorities List. The Supreme Court in Small held that “[t]hose who use legislative history to help discern congressional intent will see the history here as silent, hence a neutral factor, that simply confirms the obvious, namely, that Congress did not consider the issue.” See id.

85. See Arc Ecology, 411 F.3d at 1101 (noting limitations on citizen suits by aliens). The court commented that “[c]itizen suits by aliens rest on a slim foundation.” See id. Further, “[e]ven if allowed, such lawsuits would be limited to conduct occurring within the U.S. . . .” See id. (quoting Lisa T. Belenky, Cradle to
The Ninth Circuit also denied the appellants' argument that
CERCLA should be interpreted to apply extraterritorially to avoid
violating international law. The court's concern with this argument
was the appellants' reliance on international principles found
in the Restatement (Third) of Foreign Relations Law of the United
States sections 601-02 (1987). The Ninth Circuit noted that although
courts may look to the Restatement for guidance, the Restatement alone is not an acceptable primary source of authority to rely on for determining customary international law.

The court also noted Arc Ecology provided "no authority for the proposition that international law recognizes a current claim for a preliminary assessment or cleanup of Philippine territory based on actions taken over a decade ago." The court explained that even if the United States "injured" the Philippines during its operation of the bases, compensation was, or should have been, negotiated between the two nations when the United States relinquished control of the bases to the Philippines. The Ninth Circuit ultimately concluded that the appellants did not present an actual conflict between domestic and international law.

C. Lack of Statutory Coverage When Appellants Filed Suit

The Ninth Circuit further concluded Arc Ecology did not state a claim when they filed their case because, at the time of filing, Clark and Subic had already been under the exclusive control of the Philippines for ten years. The court stated that it did not matter if the bases were covered during CERCLA's inception. What

86. See id. at 1102 (denying Arc Ecology's argument).
87. See id. (noting problem with Arc Ecology's argument).
88. See id. at 1102 n.8 (quoting United States v. Yousef, 327 F.3d 56, 99 (2d Cir. 2003)) (explaining that incorrect reliance on Restatement may lead to erroneous conclusions of law). Even the Restatements' authors admit that it is not uncommon for the Restatement to be at odds with the positions taken by the United States Government. See Restatement (Third) of Foreign Relations Law of the United States at ix (1987).
89. See Arc Ecology, 411 F.3d at 1102 (refusing to accept appellants' gloss on international law and claiming it does not follow that denial of Arc Ecology's cause of action as of 2002 is in violation of international law).
90. See id. (noting lack of agreement between countries at time bases were turned over).
91. See id. (noting there was no conflict of law).
92. See id. at 1098 (noting that Philippines is foreign sovereign).
93. See id. (examining relevant timing).
mattered was whether the appellants had a cause of action under CERCLA when they commenced their case in 2002.\(^\text{94}\)

The court also agreed with the United States government that the lack of an inter-governmental agreement providing the United States with the authority to address alleged contamination on or around the bases barred the United States from doing so.\(^\text{95}\) The court determined it would be unreasonable to find that, in enacting CERCLA, Congress intended for the president to undertake preliminary assessments or cleanups of foreign soil absent an applicable agreement with the foreign government.\(^\text{96}\)

The Ninth Circuit further defeated Arc Ecology's attempt to state a claim under CERCLA because of the doctrine of *expressio unius est exclusio alterius*, which states that omissions are the equivalent of exclusions when a statute affirmatively designates certain persons, things or manners of operation.\(^\text{97}\) Applying this analysis, the court recognized that CERCLA expressly authorizes some actions by a narrow class of foreign claimants, and Arc Ecology was not included in that class.\(^\text{98}\) The court noted that Arc Ecology claimed release of hazardous material directly on the bases and not,

\(^{94}\) *See* Arc Ecology, 411 F.3d at 1098 (noting it is uncontested that United States no longer has any control or possession over Clark and Subic).

\(^{95}\) *See id.* (highlighting importance of lack of agreement between Philippines and United States).

\(^{96}\) *See id.* at 1099 (noting that to hold otherwise would impermissibly encroach on Executive’s foreign affairs authority). “[T]he provision in CERCLA concerning foreign claimants, 42 U.S.C. § 9611(l), recognizes these limitations as it restricts recovery by foreign claimants to instances where such relief is authorized by treaty, executive agreement, or where the Secretary of State certifies that the foreign claimant’s country provides a reciprocal remedy to U.S. citizens.” *Id.* at 1099 n.4.

\(^{97}\) *See id.* at 1099-1100 (explaining meaning of doctrine).

\(^{98}\) *See id.* (analyzing Arc Ecology’s CERCLA claim under doctrine of *expressio unius est exclusio alterius*). The court concluded that the appellants did not meet the requirements of CERCLA found in U.S.C. § 9611(l):

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

*See id.* at 1099 (quoting 42 U.S.C. § 9611(l) (2000)).
as the statute requires, in the navigable waters, territorial sea or adjacent shoreline of a foreign country.  

Most important, the Ninth Circuit noted that Arc Ecology’s suit was not authorized by a treaty or executive agreement between the governments of the two countries, nor had the Secretary of State certified that the government of the Philippines provided a reciprocal remedy for American claimants. The Ninth Circuit further recognized that Congress had provided other means for foreign claimants to seek relief and that the appellants had not explored any of those options.

V. Critical Analysis

The Ninth Circuit’s decision in *Arc Ecology* is consistent with existing precedent addressing the extraterritorial reach of CERCLA in situations where the United States is not the country harmed. The decision is troubling, however, because (1) it highlights the prevailing United States policy of applying CERCLA extraterritorially only when the United States suffers adverse environmental effects and (2) this policy may damage international relations.

The Ninth Circuit’s holding confirms the notion that CERCLA’s broad scope alone is insufficient to show congressional intent for the statute to apply extraterritorially. Notably, the presumption against extraterritorial application of United States laws, which has become a “canon of construction,” has been diminished in some contexts. The language of many antitrust and securities statutes also does not contain a clear expression of congressional intent to apply the statutes extraterritorially, yet

99. See *Arc Ecology*, 411 F.3d at 1099 (noting release of hazardous material did not comply with statutory requirements).

100. See id. (discussing requirements under 42 U.S.C. § 9611(1)(4)).

101. See id. at 1100 (discussing establishment of Foreign Claims Act for compensating inhabitants of foreign country for property loss, personal injury or death incident to noncombat activities of United States armed forces occurring outside United States).

102. For a discussion of existing precedent regarding the extraterritorial application of CERCLA, see *supra* notes 47-101, *infra* notes 103-21 and accompanying text.

103. For a discussion regarding the effects doctrine, see *supra* notes 66-73, *infra* notes 107-09 and accompanying text.

104. See *Rankin*, *supra* note 1, at 249 (examining CERCLA’s broad scope).

105. See *Parrish*, *supra* note 65, at 393 (describing canon of construction for determining unexpressed congressional intent). Justice Holmes recognized this canon almost a century ago when he proclaimed, “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” See id.
courts demonstrate a willingness to allow for extraterritorial application in these contexts.  

There is also a notable exception to the presumption against extraterritoriality when dealing with environmental laws.  

"The traditional unwillingness to allow extraterritorial application of [United States] environmental law is not likely to bar claims where serious effects are felt in the United States." The "effects doctrine" in essence negates the presumption against extraterritoriality where the failure to extend the scope of the statute to a foreign setting will cause harm within the United States.  

The *Arc Ecology* court thoroughly examined principles of statutory construction regarding Congress's power to regulate conduct outside the territorial limits of the United States and had a reasonable basis for continuing the prevailing presumption against extraterritorial application absent clear congressional intent. Case law, academic commentary and CERCLA's legislative history all ultimately indicate that the Ninth Circuit could properly decline to apply CERCLA to the military bases because the United States was not the country harmed.  

Unlike the environmental damage suffered in *Pakootas*, the harm alleged in *Arc Ecology* did not occur in the United States or a

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106. See Hagen & Horewitch, *supra* note 56, at 270 (noting differences in holdings based on type of statute in question); see also J. Turley, *When in Rome: Multilateral Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598, 617 (1990) (noting how courts view environmental matters as local conditions and interpret ambiguous statutes to have domestic focus).  

At a time when the world is developing inexorably toward a unified and interdependent system of economies and environments, American courts continue to adopt an archaic territorialist view of . . . environmental disputes that is more reflective of the early 1900s. In the meantime, the presumption against extraterritoriality stands as a judicially maintained barrier to worker and environmental protections, behind which American multinationals can essentially turn back the clock on corporate responsibility.  

*Id.* at 664.  

107. See Parrish, *supra* note 65, at 395 (noting that not all environmental laws are interpreted with presumption against extraterritoriality).  

108. See *id.* (explaining possibility of extraterritorial interpretation of United States environmental laws if harm suffered is in United States).  

109. See *id.* (reiterating that presumption against extraterritoriality probably does not apply when United States suffers harm).  

110. For a discussion regarding the presumption against extraterritorial application of United States statutes, see *supra* notes 56-91, 98-109, *infra* notes 111-21 and accompanying text.  

111. For a discussion concerning case law, academic commentary and legislative history, see *supra* notes 28-101 and accompanying text.
United States territory.\textsuperscript{112} This difference in the location of the alleged environmental harm is what the application of the effects test turns on, and the Ninth Circuit accurately followed case precedent in declining to apply the effects test in a situation in which the United States did not suffer environmental harm.\textsuperscript{113} As the Pakootas court noted, Congress "intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct."\textsuperscript{114} The caveat the Pakootas court noted and which the Arc Ecology court accurately followed, however, is the notion that the fundamental purpose of CERCLA is to protect the domestic environment, not the environment of foreign countries.\textsuperscript{115}

CERCLA requires the DOD to remediate contamination and assume financial liability for most activities at military installations located in the United States, but the Act does not necessarily impose such liability on overseas bases.\textsuperscript{116} In reality, the overseas cleanup process is highly unregulated by United States statutory law.\textsuperscript{117} Accordingly, presidential executive orders or bilateral agreements with foreign countries, not CERCLA, generate the legal obligation the United States has to clean up its overseas bases.\textsuperscript{118} The court correctly recognized that a CERCLA action was not the proper basis for recovery and correctly noted the other options available to Arc Ecology.\textsuperscript{119}

\textsuperscript{112} See generally Arc Ecology v. United States Dep't of the Air Force, 411 F.3d 1092, 1095 (9th Cir. 2005) (noting harm alleged occurred in Philippines, which is not United States territory).

\textsuperscript{113} See generally Pakootas v. Teck Cominco Metals, Ltd., 2004 WL 2578982 at *16 (E.D. Wash. 2004) (explaining effects test); see also Parrish, supra note 65, at 395 (discussing effects doctrine).

\textsuperscript{114} See Pakootas, 2004 WL 2578982 at *17 (noting congressional intent).

\textsuperscript{115} See id. (noting CERCLA's fundamental purpose).

\textsuperscript{116} See Wegman & Baily, supra note 6, at 884 (discussing coverage of military activities and facilities). Domestically, the military cannot avoid liability resulting from ownership of military bases unless it can prove that the government did not conduct, contract for or permit the disposal of wastes covered by CERCLA. See id.

\textsuperscript{117} See id. at 924 (providing background on cleanup and closures of military facilities). Additionally, there are no statutes regulating base closures. See id.

\textsuperscript{118} See id. at 925 (describing source of United States legal obligation relating to overseas base cleanup). This means the EPA has no authority over contaminated bases overseas. See id. Accordingly, the responsibility for environmental compliance at closed overseas bases is generally in the hands of base commanders. See id.

\textsuperscript{119} See Arc Ecology v. United States Dep't of the Air Force, 411 F.3d 1092, 1100 (9th Cir. 2005) (describing other avenues for seeking relief). The court noted, as an example, that Arc Ecology had not explored the possibility of obtaining compensation through the Foreign Claims Act, which compensates inhabitants of a foreign country for losses resulting from non-combat activities of United States armed forces occurring outside the United States. See id. The court also explained
The Ninth Circuit’s holding in *Arc Ecology* correctly affirms the current notion that CERCLA applies extraterritorially only when environmental harm occurs in the United States. Although the holding may seem harsh, the court satisfactorily followed the applicable law.

VI. IMPACT

Despite the Ninth Circuit’s adherence to precedent and appropriate interpretation of CERCLA, its decision not to extend CERCLA’s reach extraterritorially underscores the health concerns related to a policy of not removing contamination from former military bases. Domestically, CERCLA mandates that the DOD remediate contamination and assume financial liability for almost all activities on military bases located in the United States. Unless it can prove the government did not conduct, contract for or permit the disposal of wastes covered by CERCLA, the military cannot escape liability stemming from its ownership of military bases. The same policy does not apply if the bases are located overseas.

When overseas military bases are about to be turned over to foreign governments, and the health of United States personnel is less likely to be an issue, the DOD has been reluctant to spend money for environmental purposes. The DOD has been unwilling to commit the large amount of money necessary to restore a property and its underlying soil and groundwater to its original condition.

Judges’ inability to legislate from the bench bound the Ninth Circuit to follow a precedent that runs an increasing risk of (1) compounding the adverse political repercussions associated with lax environmental standards overseas or (2) leaving behind con-

the Foreign Claims Act indicates the notion that when Congress does mean to create legislation with an extraterritorial effect, it does so with unmistakable intent. See id.

120. See Parrish, *supra* note 65, at 398 (noting broad support for conclusion).
121. See *supra* notes 102-20 for a discussion of applicable law.
122. See generally Wegman & Baily, *supra* note 6 (discussing base contamination and cleanup policies).
123. See *id.* at 884 (discussing CERCLA’s coverage of military activities and facilities).
124. See *id.* (discussing military’s difficulty with avoiding liability under CERCLA).
125. See *id.* at 938-39 (discussing cleanup policy in base closure situations). Additionally, the Pentagon has not agreed to abide by host country standards or apply “compatible” United States standards, like it said it would if ongoing compliance was involved. See *id.* at 939.
126. See *id.* (describing failure to commit necessary resources).
taminated military bases when they are closed.\textsuperscript{127} The law as it current stands continues to risk jeopardizing the United States political and defense relationships with foreign countries.\textsuperscript{128} The court’s holding also highlights two policy questions that federal decision-makers must resolve regarding cleanup at overseas military bases: "(1) how should the cost of the cleanups be split between the United States and host nations, and (2) what legal procedures and substantive rules should govern the cleanups."\textsuperscript{129}

Unfortunately, the Ninth Circuit’s holding also supports the general observation that the United States has agreed to far fewer commitments to pay cleanup costs for closures in developing countries with weaker environmental standards because those host countries have little leverage to compel the United States into accepting responsibility and liability for past contamination.\textsuperscript{130} When the DOD closed the bases, almost no restoration work was done, even though the level of contamination at the bases would probably qualify a domestic facility for the Superfund National Priorities List.\textsuperscript{131}

In this case of first impression, the Ninth Circuit has not changed the law.\textsuperscript{132} It simply confirmed the notion that CERCLA will apply extraterritorially only if there is environmental harm within a United States territory.\textsuperscript{133} The case also highlighted the need for a stronger cleanup policy for overseas military bases.\textsuperscript{134} The lack of regulation for overseas cleanup and the United States’s aversion to providing assistance when the bases left behind are lo-

\begin{itemize}
\item \textsuperscript{127} See Wegman & Baily, supra note 6, at 939 (noting inadequacies of current standards for overseas base cleanup).
\item \textsuperscript{128} See id. (noting General Accounting Office’s opinion that military’s failure to provide sufficient environmental safeguards at overseas bases has potentially harmful effects).
\item \textsuperscript{129} See id. at 927-28 (describing concerns that federal decision-makers need to address).
\item \textsuperscript{130} See id. at 940-41 (noting apparent discrepancy in United States policy based on economic level of host country).
\item \textsuperscript{131} See id. at 937-38 (describing condition of bases when United States military left).
\item \textsuperscript{132} For a discussion of the laws involved, including the presumption against extraterritorial application of United States laws, legislative history and scholarly commentary, see supra notes 28-101 and accompanying text.
\item \textsuperscript{133} See Hagen & Horewitch, supra note 56, at 274 (discussing use of effects test).
\item \textsuperscript{134} See generally Wegman & Baily, supra note 6, at 925-27 (commenting on weak cleanup policies of overseas military bases).
\end{itemize}
cated in developing countries may ultimately damage international relations.\textsuperscript{135}

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\footnotesize\textsuperscript{135} See id. at 927 (noting potential damage current cleanup policies may create with foreign nations).