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Amlon Metals, Inc. v. FMC Corp.: U.S. Courts' Denial of International Environmental Responsibility

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NOTES

AMLON METALS, INC. v. FMC CORP.: U.S. COURTS' DENIAL OF INTERNATIONAL ENVIRONMENTAL RESPONSIBILITY

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INTRODUCTION

Growing amounts of hazardous waste are generated worldwide, particularly in industrialized nations. Estimates of the global volume of hazardous waste generated each year range from 300 to 500 million tons.[1] The United States produces between 260 and 275 million tons of this waste.[2] Faced with the problem of disposal, hazardous waste handlers in recent decades have increasingly chosen to export waste to other countries.[3] The United States exports approximately eighty percent of its hazardous waste to Canada.[4] Australia, Japan, Mexico, Brazil, Finland, Guinea, Haiti, Netherlands, Nigeria, Sweden, South Africa, United Kingdom, West Germany and Zimbabwe also receive waste from the United States.[5]

Shipping hazardous wastes over long distances for disposal, however, constitutes a serious threat to human health and the

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1. KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES 5 (1995).

2. *See id.* ("The share of the USA appears particularly high because in that country large quantities of dilute waste waters are managed as hazardous wastes. In Europe, these are managed under water protection regulations and do not appear in the hazardous waste statistics.")

3. *See id.* at 4.

4. Paul E. Hagan, *International and United States Controls on Transboundary Shipments of Hazardous and Other Wastes*, C990 ALI-ABA 57, 99 (1995).

5. *See id.*

environment.[6] The amount of hazardous waste exported has increased dramatically in recent years.[7] On a global scale, thousands of hazardous waste exports take place every year,[8] some in accordance with national and international law, but others illegally. Typically, there is a contract or bilateral agreement between the two countries as to the importing and exporting of hazardous waste.[9] A problem arises, however, when a country receives hazardous waste that was not contracted for.

One of the best publicized incidents of illegal hazardous waste exportation involved the disaster of the *Khian Sea.*[10] The *Khian Sea* set sail from Philadelphia in 1986 with a cargo of almost 14,000 tons of toxic incinerator ash.[11] After unsuccessfully attempting to dispose of the ash in Honduras, Panama, and Guinea-Bissau, the *Khian Sea* identified the ash as fertilizer and received an import permit from the Haitian Department of Commerce.[12] The *Khian Sea* had unloaded a cargo of almost thirty million pounds of ash before the Haitian government discovered the true nature of the cargo.[13] The Haitian government accordingly rescinded the import permit and ordered the ship to reload the waste and leave.[14] After leaving Haiti, the *Khian Sea* attempted to unload the waste at several other sites without success.[15] At the end of its journey, the *Khian Sea* docked in Singa-

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6. *See* KUMMER, *supra* note 1, at 4.

7. *See id.*

8. *See id.* at 5.

9. *See* 42 U.S.C. § 6938 (1994). This part of RCRA explains how no person shall export any hazardous waste unless there is both an agreement and consent.

10. *See* Lillian M. Pinzon, *Criminalization of the Transboundary Movement of Hazardous Waste and the Effect On Corporations,* 7 DEPAUL BUS. L.J. 173, 174 (1994).

11. *See id.* ("The United States Environmental Protection Agency (EPA) reported that the ash contained aluminum, arsenic, chromium, copper, lead, mercury, nickel, zinc and toxic dioxins.").

12. *See id.* at 174-75.

13. *See id.* at 175.

14. *See id.*

15. *See* Teresa A. Wallbaum, *America's Lethal Export: The Growing Trade In Hazardous Waste,* 3 U. ILL. L. REV. 889, 894 (1991).

pore mysteriously absent its cargo.[16] The only plausible explanation thus far for the missing cargo is that the ship dumped the waste somewhere in the Indian Ocean.[17]

African nations are frequently the dumping grounds for hazardous waste from industrialized nations.[18] In July, 1988, 625 bags of hazardous wastes were discovered in a garbage dump near Freetown, the capital of Sierra Leone. Local residents suffered choking symptoms from vapors emitted by the waste that had leaked into a nearby estuary.[19]

Zimbabwe was also the unwilling recipient of an illegal waste disposal scheme.[20] In 1983, two Americans contracted with a Zimbabwean firm to ship chemicals for use in dry cleaning and degreasing heavy machinery. The Americans, however, shipped toxic waste that ended up in an abandoned mine shaft. Fourteen years later, the waste has not been removed from the mine shaft.[21] The Environmental Protection Agency (EPA) reported that the waste was "leaking copiously, creating a serious risk of chemical reaction, fire, and the generation of toxic fumes."[22]

Ninety percent of hazardous waste is disposed of in an unsafe manner.[23] Perhaps the most widely known domestic catastrophe stemming from unsafe disposal of hazardous waste occurred in Love Canal, New York.[24] Prior to the construction of the town, a local chemical company used the site as a landfill for the disposal of its chemical wastes. The effects of the unsafe disposal surfaced twenty-five years later, in the mid-1970s, as vegetation died,

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16. *See* Pinzon, *supra* note 10, at 175.

17. *See id.*

18. *See* Wallbaum, *supra* note 15, at 894.

19. *See id.*

20. *See id.*

21. *See id.*

22. *Id.* (citing GREENPEACE U.S.A., INTERNATIONAL TRADE IN WASTES: A GREENPEACE INVENTORY 62-114 (5th Ed. 1990) [hereinafter GREENPEACE INVENTORY]).

23. *See id.* at 895-96. This is an EPA estimate.

24. *See* Pinzon, *supra* note 10, at 174 ("William J. Love built a canal originally intended to provide cheap fuel to the local community. The project was abandoned in 1910, leaving only a large ditch, and in the 1920's the Hooker Chemical and Plastics Corporation used the canal as an industrial landfill.").

children suffered mysterious burns, and the number of miscarriages, birth defects and cancers skyrocketed. In addition, there was an abnormally high number of birth defects in the community.[25]

In 1984 Congress evaluated the effectiveness of the Resource Conservation and Recovery Act (RCRA)[26] in light of Love Canal and similar tragedies. Congress concluded that RCRA was ineffective and implemented the 1984 Hazardous and Solid Waste Amendments to close the existing loopholes.[27] This legislation, however, only applies to domestic incidents.[28] Thus, foreign entities have no redress through RCRA.

Only one court has ruled on whether RCRA applies extraterritorially[29] to waste located outside the United states. In *Amlon Metals, Inc. v. FMC Corp.*,[30] the court ruled that the citizen suit provisions of RCRA did not apply to waste located outside the United States. In applying the so called "Foley Doctrine,"[31] the court reviewed the language and legislative history of RCRA and found no congressional intent to apply RCRA extraterritorially.[32]

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25. *See id.*

26. 42 U.S.C. § 6901-6992(k) (1994) (describing RCRA, its objectives and functions). In 1976 Congress passed RCRA in response to growing awareness of and concern for the dangers associated with the unsafe disposal of hazardous waste.

27. Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. 98-616, 98 Stat. 3221 (codified as amended in scattered sections of 42 U.S.C.).

28. *See infra* Part II.B.

29. Extraterritorial application of laws is the exercise of jurisdiction over persons, objects, and events beyond the recognized limits of the land and citizenry of the legislating states.

30. 775 F. Supp. 668, 676 (S.D.N.Y. 1991).

31. *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949). In *Foley Bros.*, the Court held that the Federal Eight Hour Law did not apply to a contract between the United States and a private contractor for construction work in a foreign country. In reaching this conclusion, the Court decided that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States whereby unexpressed congressional intent may be ascertained. The Court based its holding on the assumption that Congress is primarily concerned with domestic conditions.

32. *See Amlon*, 775 F. Supp. at 676.

The extraterritorial application of United States law has raised questions in other areas as well. For example, antitrust law[33] provides models for determining whether, and in what circumstances, U.S. law should apply extraterritorially. The extraterritorial application of RCRA was first addressed by the *Amlon* court.[34] Thus, its holding is pivotal to the future extraterrritorial application of RCRA.

Part I of this note discusses RCRA generally and examines its specific provisions on the export of hazardous waste. Part II examines in detail the decision in *Amlon v. FMC*, which held that RCRA does not apply extraterritorially. Part III explores the methodology courts employ in determining whether a federal statute should apply extraterritorially. Part IV examines the potential for addressing claims under the Basel Convention[35] and the Alien Tort Statute.[36] This note concludes that *Amlon* was decided incorrectly and that RCRA should either be amended to apply extraterritorially or courts should apply RCRA extraterritorially.

I. THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

In response to growing public awareness of the serious problems resulting from hazardous waste disposal Congress enacted RCRA in 1976.[37] RCRA was created to protect land and ground water from the disposal created of hazardous waste.[38]

The relevant portion of RCRA is subchapter III, which creates a regulatory program focused solely on hazardous waste.[39] Subchapter III defines the scope of "hazardous waste, imposes duties

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33. *See, e.g.*, United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416, 443 (2d Cir. 1945).

34. *See infra* Part II.A-B.

35. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, 28 I.L.M. 649 [hereinafter Basel Convention].

36. 28 U.S.C. § 1350 (1994).

37. *See* JACKSON B. BATTLE & MAXINE I. LIPELES, ENVIRONMENTAL LAW: HAZARDOUS WASTE 3 (1993).

38. *See id.*

39. 42 U.S.C. §§ 6921-6939 (1994).

on entities that generate hazardous waste,"[40] and "prescribes" standards and permit requirements for facilities that treat, store, or dispose of hazardous waste."[41] The regulatory program under RCRA's subchapter III is described as a "cradle-to-grave"[42] program that regulates the handling of hazardous waste from the moment of generation to its ultimate disposition.[43]

RCRA section 3001 requires EPA to promulgate criteria for identifying hazardous waste "taking into account toxicity, persistence, degradability in nature, potential for accumulation in tissues," and other hazardous traits such as "corrosiveness" and "flammability."[44] These are the criteria used as the basis for issuing a hazardous waste list.[45] The remaining provisions of subchapter III relate to enforcement and to standards covering generators, transporters, and disposal sites. EPA has broad authority to mandate such standards "as may be required to protect human health and the environment."[46]

In addition, section 3002 provides standards for hazardous waste generators that cover recordkeeping, reporting, labeling,

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40. RCRA hazardous waste export and import requirements apply only to wastes that qualify as "hazardous wastes" under RCRA. A waste is considered hazardous under RCRA if it meets a complex regulatory definition of hazardous waste. Under existing rules, a solid waste can be a RCRA hazardous waste if it exhibits one of four "characteristics" or if it is listed as a hazardous waste by EPA. The four characteristics for determining whether a waste is hazardous are: ignitability, corrosiveness, reactivity, and toxicity. 40 C.F.R. §§ 261.20-261.24 (1997). Generally a mixture of solid and characteristic waste is a RCRA hazardous waste if the mixture continues to exhibit a hazardous characteristic. 40 C.F.R. § 261.3(d)(1)(1997).

41. *See* BATTLE & LIPELES, *supra* note 37, at 3.

42. *See generally* 42 U.S.C. § 6901-6992(k)(1994).

43. "Ultimate disposition" is a key phase. If RCRA is to be applied up to a waste's ultimate disposition, this is all the more reason to amend RCRA so foreigners can be bring suit, because they too are included in the range of people who can be affected by the ultimate disposition of waste. Why should violators of RCRA be excused of illegal actions, just because the final stage of their actions take place on foreign soil?

44. 42 U.S.C. § 6921(a) (1994).

45. *See id.* § 6921(a).

46. *Id.* § 6922(a).

and use of appropriate containers.[47] Section 3002(5)[48] requires the use of a manifest to ensure that the hazardous waste generated by a source is ultimately processed on-site or at a facility with a section 3005 permit. Section 3002(5) is incorporated into section 3003, which requires standards for transporters. As the last phase of this "cradle to grave" system for hazardous waste, section 3004 requires standards covering storage and disposal facilities. These standards cover compliance with Section 3002(5) and other recordkeeping requirements. More importantly, these standards cover treatment and disposal methods, as well as location, construction, and operation of disposal sites.

Section 3005 establishes a permit system which is the key enforcement provision for disposal sites. EPA has broad inspection powers.[49] It has the power to issue compliance orders, subjecting violators to a civil penalty, or to bring a civil action against violators of any RCRA requirement.[50] Criminal penalties are also available for violating permit requirements or for the falsifying documents.[51]

In addition to EPA's regulatory powers, section 6972 of RCRA, the citizen suit provision, empowers "any person"[52] to commence a civil action against parties whose past or present hazardous waste activities contribute to an imminent hazard.[53] These enforcement mechanisms, however, are not available once the waste leaves the United States.[54]

The United States regulates the export of hazardous waste[55]

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47. *Id.* § 6922(a)(1-3).

48. *Id.* § 6922(a)(5).

49. *Id.* § 6972.

50. *Id.* § 6928.

51. *Id.* § 6928(d).

52. *Id.* § 6972(a).

53. In applying the "imminent and substantial endangerment" standard, the courts have required only a relatively low level of danger as a trigger. Plaintiff need only prove that an existing dangerous condition creates a risk of harm to the environment or human health. *See id.* § 6972 (a)(1)(B).

54. *See infra* notes 104-22 and accompanying text.

55. Originally, RCRA did not authorize the EPA to regulate the international transport of hazardous waste. This loophole re-

pursuant to Section 3017 of RCRA.[56] Section 3017 regulations prohibit the export of hazardous waste unless:

•The exporter has provided EPA with a proper notification of intent to export;

•The United States requests and receives the consent of the importing country;

•The importing country's consent is attached to the manifest accompanying the shipment; and

•The shipment conforms to the terms of the consent given by the receiving country or to terms of an agreement entered into by the United States and the importing country governing transboundary waste shipments.[57]

Too often, however, hazardous waste is exported without conforming to section 3017. Currently, RCRA fails to address the serious consequences of unregulated export of hazardous waste. These consequences include the environmental and public health hazards of unsafe disposal of exported waste, the economic consequences of the waste trade on developing nations, and the political effects of using other nations as disposal sites.

The illegal export of hazardous waste is not the only reason for stricter controls. Presently, RCRA does not require that the exported waste be disposed of in any particular manner.[58] Furthermore, RCRA does not provide the EPA with authority to prevent an otherwise legal shipment on the grounds that it will be disposed of in an unsound manner. "The EPA's role is limited to notifying the receiving country of the export and asking for the nation's informed consent."[59]

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sulted in the dumping of hazardous waste in third world countries as companies attempted to get around the expensive disposal standards of RCRA. Regulations adopted in 1980 established a notification procedure that required minimal recordkeeping and only an annual notice of shipment to receiving nations.

Wallbaum, *supra* note 15, at 900.

56. 42 U.S.C. § 6938 (1994).

57. *Id.* § 6938(a).

58. *See supra* notes [61-62] and accompanying text.

59. *See id.*

Currently, critics of RCRA say it is nothing more than a record-keeping system that has no control over the disposal of hazardous waste.[60] Even prior informed consent is ineffective because receiving nations often are not given sufficient information.[61]

The United States and European nations are well aware of the health and environmental hazards associated with the unsafe disposal of hazardous waste. "Hazardous waste can cause death, injuries, illnesses, contamination of groundwater and well closing, soil contamination, fish kills, livestock losses, municipal waste treatment plant outages, crop losses, and habitat destruction . . . loss of livelihood, and loss or devaluation of property."[62]

Another concern arising from the transfer of hazardous waste is the economic effect of the waste trade on developing nations. When industrialized nations exploit developing nations as disposal sites, the burden of dangerous chemicals on these nations enhances their poverty.[63] Nations importing hazardous waste also bear the cost of accidents occurring from improper disposal.

In addition, the unregulated export of hazardous waste creates political consequences for the exporting country. Countries will be deterred from accepting hazardous waste from the U.S. if the U.S. continues to dump its waste illegally. This will create a burden for the U.S., because the U.S. lacks adequate disposal space. International relations will also suffer. As foreign citizens are endangered by the illegal export of hazardous waste, countries will lose respect for and trust in the U.S. Eventually, this could lead

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60. *See id.*

61. *See id.* at 91 (citing GREENPEACE INVENTORY, *supra* note 22, at 292).

62. *See* Wallbaum, *supra* note 15, at 911.

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> Although some developing nations have enacted controls against the importation of hazardous waste, expecting these developing nations to implement stringent controls ignores the reality of the situation. Due to the large sums of money involved and the extreme poverty of the receiving nations, it would be impractical to expect these nations to refuse lucrative disposal contracts.

Id. at 914.

to damaging effects on U.S. commerce.[64] Senator Kasten points out that "[w]hen we dump our waste on foreign countries with little concern for their ecosystems, the implications for our foreign policy are considerable and entirely negative. You can't build a house on sand, and you can't build an ally on a heap of toxic trash."[65] "Garbage imperialism" and "toxic terrorism" are terms used by the developing nations toward the increasing export of hazardous waste.[66] The situation is so dire that parallels have been drawn between the use of developing nations in Africa as disposal sites and the exploitation of Africa through slavery and colonization.[67]

II. *AMLON METALS, INC. V. FMC CORP.*

Only one court has ruled on whether RCRA applies extraterritorially to waste located outside the United States. In *Amlon Metals, Inc. v. FMC Corp.*,[68] a United Kingdom corporation and its American agent brought suit against a Delaware corporation, alleging that the Delaware corporation had violated RCRA by misrepresenting the composition and characteristics of copper residue it had shipped to the United Kingdom corporation for disposal.[69] The court in *Amlon* ruled that the citizen suit provisions of RCRA did not apply to wastes located outside the United States.[70]

Plaintiff Amlon, a New York corporation, was the sole American agent for co-plaintiff Wath.[71] Wath was a United Kingdom corporation with its principal place of business in Wath-on-

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64. *See id.* at 913.

65. Senator Kasten is one sponsor of the proposed Waste Export Control Act of 1988. A recent example supporting Senator Kasten's argument is the strained relationship between Nigeria and Italy in the wake of the *Koko* incident. *See id.* at 889.

66. *Id.* at 913.

67. *See id.*; *see also* Organization of African Unity, Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, May 23, 1988, 28 I.L.M. 567, 568.

68. 775 F. Supp. 668 (S.D.N.Y. 1991).

69. *See Amlon*, 775 F. Supp. at 670.

70. *See id.* at 676.

71. *See id.* at 669.

Dearne, South Yorkshire.[72] Amlon's principal business was the acquisition of metal residues, which were then shipped to Wath for drying and processing.[73]

Amlon and FMC, a Delaware corporation, entered into a contract which specified that copper residue would be treated for metallic reclamation purposes. The material would be free from harmful impurities, and it would not be a hazardous waste.[74]

FMC shipped twenty containers of the residue material to England.[75] Amlon and Wath were unaware that the drivers of the trucks that took the containers from FMC's plant to the cargo ship were told to wear respirators. In addition, the containers had been marked "corrosive" before leaving FMC.[76]

Upon the arrival of the containers in England, Wath's personnel noticed a strong odor coming from the containers.[77] Amlon contacted FMC and was told that probably xylene[78] was causing the smell.[79] FMC stated that xylene was present in concentrations of 0 to 100 parts per million.[80] The smell was still present a week later, and Amlon again contacted FMC.[81] FMC told Amlon that xylene might be present in concentrations five to fifteen times higher than FMC had previously stated.[82] Thereafter, the British government's own analysis of the material revealed that it contained xylene,[83] 7-hydrogen[84] and chlorinated phenols.[85]

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72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.*
78. Xylene is an EPA-listed hazardous waste. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., TOXICOLOGICAL PROFILE FOR XYLENE 1 (Aug. 1995).
79. *Amlon*, 775 F. Supp. at 669.
80. *See id.*
81. *See id.* at 669-70.
82. *See id.* at 670.
83. *See id.* Xylene was represented in "concentrations up to ten times higher than FMC had disclosed in its second communication."

> Short-term exposure of people to high levels of xylene can cause irritation of the skin, eyes, nose, and throat; difficulty in breathing; impaired function of the lungs; delayed response to a visual stimulus; impaired memory; stomach dis-

Amlon and Wath sued FMC in a British court.[86] The British court dismissed the case stating that "all the actions claimed to be taken by FMC took place in the United States and U.S. law would apply."[87] Amlon and Wath then brought suit in United States district court in New York asserting claims under RCRA's citizen suit provision and other theories.[88] In response, FMC in part moved to dismiss the RCRA claim for lack of jurisdiction on the ground that RCRA does not extend to waste located within the territory of another sovereign nation.[89] Plaintiffs contended that RCRA should be applied extraterritorially.[90] In particular, plaintiffs maintained that two aspects of RCRA, its export provision,[91] and the use of the term "any person" in its citizen suit provision,[92] supported their view.

> comfort; and possible changes in the liver and kidneys. Both short and long-term exposure to high concentrations of xylene can also cause a number of effects on the nervous system, such as headaches, lack of muscle coordination, dizziness, confusion, and changes in one's sense of balance. People exposed to very high levels of xylene for a short period of time have died.

See U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 78, at 1. Additionally, exposure of pregnant women to high levels of xylene may cause harmful effects to the fetus. *See id.*

84. *See Amlon*, 775 F. Supp. at 670 ("7-hydrogen is an allegedly carcinogenic pesticide intermediary.").

85. *See id.* Chlorinated phenols may form dioxin when exposed to heat and a catalyst. Tests on laboratory animals indicate that dioxin is the most potent carcinogen known. Exposure to dioxin can cause a serious skin disease called chloracne. Tests on laboratory animals also indicate that exposure may result in a rare form of cancer called soft tissue sarcoma. SEE PHANTOM RISK 249-260 (Kenneth R. Foster et al eds., 1983).

86. *Amlon*, 775 F. Supp. at 670.

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.* at 670-71.

91. 42 U.S.C. § 6938 (1988).

92. *Id.* § 6972.

A. *Relief Under RCRA's Export Provision*

Assuming the plaintiff's allegations to be true, the lack of warning to, and consent from, Wath and British authorities violated RCRA's export requirements.[93] If the waste were sent intentionally, there might have been an additional cause of action under RCRA's knowing endangerment provision.[94] Claims under RCRA's export provision, however, must be raised by the federal government, specifically EPA. Due to the failure of EPA to bring an action against FMC, Amlon and Wath filed under the citizen suit provision, the only remaining available recourse under RCRA.

B. *Relief Under RCRA's Citizen Suit Provision*

RCRA's citizen suit provision provides that:

> [A]ny person may commence a civil action . . . against any person . . . including any past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.[95]

Plaintiffs claimed that they were entitled to relief under this provision because the hazardous waste in the material may present imminent and substantial danger to human health and to the environment.[96]

The defendant argued that section 6972(a)(1)(B) failed to state a claim upon which relief could be granted, because RCRA did not apply extraterritorially.[97] FMC supported this contention by asserting " 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdic-

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93. *Id.* § 6938(a).

94. *Id.* § 6928(e).

95. *Id.* § 6272(a)(1)(B).

96. *See Amlon*, 775 F. Supp. at 672. Toxic chemicals may evaporate from or leak out of containers that store copper residue. These hazardous chemicals would then pollute the local water supply, thus posing an imminent and substantial danger to workers nearby and the community at large. *See id.*

97. *See id.*

tion of the United States.' "[98] The defendant also noted that courts must determine whether " 'language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control.' "[99]

As to plaintiff's claim that RCRA's citizen suit provision applied extraterritorially, the court followed *EEOC v. Aramco.*[100] In *Aramco,* the Supreme Court denied foreign application of United States employment discrimination law, stating that courts should only apply laws extraterritorially upon a finding of clear congressional intent.[101] Plaintiffs in *Amlon* tried to distinguish *Aramco* and asserted extraterritorial jurisdiction by analogizing to cases that applied U.S. securities law extraterritorially.[102] In those cases, illegal domestic conduct resulted in harmful effects only in foreign countries.[103] The court rejected the notion that the "conduct" test would allow the assertion of extraterritorial jurisdiction without regard to the intent of Congress.[104] The *Amlon* court then analyzed both RCRA's legislative history and statutory language to determine congressional intent.[105]

The court decided that the plain language of RCRA did not indicate that the citizen suit provision should apply to danger located abroad.[106] The court stated that the language of the citizen suit provision, "endangerment to health or to the environment," applied only to the territorial environment and persons located in the U.S.[107]

Additionally, the court did not find any intent in the statute's legislative history to apply the citizen suit provision extraterritorially.[108] Plaintiffs argued that the legislative history of the Hazardous and Solid Waste Amendments of 1984 ("HSWA") showed the intention of Congress to apply RCRA extraterritorially.[109] Amlon

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98. *See id.* at 672 (quoting *Foley Bros.*, 336 U.S. at 285).
99. *See id.* (quoting *Foley Bros.*, 336 U.S. at 285).
100. 499 U.S. 1227 (1991).
101. *See id.* at 1230.
102. *See Amlon,* 775 F. Supp. at 672-73.
103. *See id.*
104. *See id.* at 673-74.
105. *See id.* at 674-76.
106. *See id.* at 675.
107. *See id.* at 676.
108. *See id.* at 674.
109. *See id.*

and Wath also argued that statements by members of Congress addressing the problems of hazardous waste in other countries indicated Congress' intent to apply RCRA extraterritorially.[110] The court, however, concluded that these comments applied only to the hazardous waste export provision and did not apply to RCRA's citizen suit provision.[111] Therefore, the court dismissed plaintiffs' claim for relief under RCRA's citizen suit provision.[112]

C. *Domestic Litigation*

Currently, RCRA contains a loophole whereby U.S. companies may illegally dump hazardous waste abroad. The same activity, however, if done domestically would be subject to RCRA. For example, in *Graham Oil Co. v. BP Oil Co.*,[113] Graham leased property to Boron Oil ("Boron") on April 25, 1966.[114] On August 1, 1983, Graham and BP, Boron's successor, signed a Lease Amendment.[115] The property was always used as a gasoline and service station under the time period of the lease. On January 27, 1992, BP removed three 10,000 gallon underground storage tanks from the leased premises. On February 4, 1992, BP notified Graham that it was not going to renew the lease. Thus, the lease expired on November 30, 1992.[116]

When BP removed the three underground storage tanks from service, they submitted a "Closure Report" to the Department of Environmental Regulations ("DER").[117] The Closure Report, dated July 28, 1992, revealed contamination to the subsurface of Graham's property. The property was contaminated with many chemicals, one of which was xylene.[118] Graham obtained a copy

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110. *See id.*

111. *See id.* Claims under the export provision must be raised by the federal government, specifically the EPA. Since the EPA failed to bring any action against FMC, Amlon and Wath followed the only recourse left to them under RCRA and filed a citizen suit. Thus, the export provision is not discussed more fully in the case.

112. *See id.* at 676.

113. 885 F. Supp. 716 (W.D. Pa. 1994).

114. *See id.* at 718.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.* Xylene is one of the chemicals at issue in *Amlon.*

of the Closure Report after July 28, 1992.[119] Prior to July 28, 1992, however, Graham denied having knowledge of any contamination of its property.[120]

Graham filed a complaint and sought relief under RCRA's citizen suit provision.[121] Contrary to the decision in *Amlon*, the court granted Graham relief under RCRA's citizen suit provision. The court cited section 6972, which provides that a citizen may maintain an action against any person "who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any soil or hazardous waste which may present an imminent and substantial endangerment to health or the environment."[122] The court continued by stating that section 6972 allows the court to award relief when a citizen brings a complaint pursuant to RCRA by "restraining any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . ., to order such person to take other such action as may be necessary . . ., (or) to apply any appropriate civil penalties."[123] Section 6972 further allows the court to award "costs of litigation to the prevailing party."[124] *Amlon* and *Graham* have similar fact patterns,[125] yet their outcomes are drastically different. Unlike the plaintiffs in *Amlon*, the plaintiffs in *Graham* were able to seek relief under RCRA's citizen suit provision. In order to understand the significance of the *Amlon* decision, and to judge for ourselves whether it was decided correctly, we must look to the law of extraterritoriality.

III. EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES

There exists a substantial body of case law that deals with the

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119. *See id.*

120. *See id.*

121. *See id.* at 719.

122. *Id.* at 720 (citing 42 U.S.C. § 6972 (1988)).

123. *Id.*

124. *Id.*

125. Plaintiffs in both cases are bringing suit because of the illegal disposal of hazardous wastes. Xylene is an example of a hazardous waste that was found in both cases. *See* Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 727 (W.D. Pa. 1994); *Amlon*, 775 F. Supp. at 670.

extraterritorial impact of federal statutes.[126] "Congress in prescribing standards for conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."[127] Whether an act of Congress can be applied extraterritorially is a matter of statutory construction.[128]

In order for a federal statute to apply beyond the territory of the United States, Congress must have intended such an extraterritorial application.[129] The Supreme Court has held that a presumption against the extraterritorial application of U.S. law exists.[130] Clear evidence of congressional intent either in the language of the statute or in its legislative history overcomes this presumption.[131] RCRA, however, lacks such evidence.

Courts look at several factors in determining whether a federal statute should apply outside the United States: the language and structure of the statute itself, legislative history, potential conflicts with foreign law, and administrative interpretations of the law. Although a number of federal environmental statutes contain provisions regulating activities occurring outside the United States, few presently contain clear congressional intent relative to their overall extraterritorial application.[132] Neither U.S. citizens, nor foreign citizens have standing to invoke RCRA remedies for waste disposal abroad.[133]

Courts have extended the application of U.S. law extraterritorially in other areas of the law, especially in the field of antitrust.[134]

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126. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

127. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952).

128. Statutory construction first requires an examination of the nature of the statute to determine whether it mandates extraterritorial application. If the statute does not mandate extraterritorial application, then a presumption arises against such application. To overcome this presumption and apply the statute beyond the U.S. territory, Congress must have clearly expressed that intent. *See* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

129. *See id.*

130. *See id.*

131. *See Foley Bros.*, 336 U.S. at 285.

132. *See, e.g.*, 7 U.S.C. § 136(o) (1994).

133. *See* 42 U.S.C. § 6972(B) (1988).

134. *See, e.g., Alcoa*, 148 F.2d at 443.

These cases may provide support for amending RCRA and allowing courts to apply its citizen suit provision abroad. These antitrust cases are similar to *Amlon* in two important ways: "the legal conduct and the harmful effects occur in two separate sovereign jurisdictions and either the unlawful conduct is within the jurisdiction of the United States or there are non-trivial effects upon its domestic interests."[135] In determining whether to apply U.S. law extraterritorially, the courts sum these up as either an "effects"[136] or a "conduct"[137] test. The leading case on the extraterritorial application of U.S. statutory law is *United States v. Aluminum Co. of America* (*Alcoa*).[138]

A. *The "Effects Test"*

The "effects test" became part of United States law in *Alcoa*, where the court adopted the objective territoriality theory of the *S.S. Lotus Case.*[139] In *Lotus*, France objected to Turkey's attempt to try a French naval lieutenant for criminal negligence that caused a collision between his ship and a Turkish vessel on the high seas.[140] The collision killed several Turkish citizens.[141] In its ruling on jurisdiction, the Permanent Court of International Justice ("PCIJ") concluded that Turkey was free to act unless a custom-

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135. Lee I. Raiken, *Extraterritorial Application of RCRA: Is its Exportability Going to Waste?*, 12 VA. ENVTL. L.J. 573, 584 (1993).

136. *See, e.g.*, *Alcoa*, 148 F.2d at 443.

137. *See, e.g.*, United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979).

138. Alcoa was investigated by the Department of Justice (DOJ) for twenty-five years. Many justices of the Supreme Court are appointed from the DOJ. When the case came to the Supreme Court, they could not get five justices who did not work on the case with the DOJ. Thus they sent the case to the Second Circuit, and the Second Circuit wrote as if they were the Supreme Court. Professor Joseph Sweeney, lecture in Public International Law at Fordham University School of Law (Nov. 1996).

139. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A). No. 10 ("Lotus"). This case states that a state has jurisdiction to prescribe, adjudicate, or enforce rules of conduct for acts that occur outside its territory but which have effects within it.

140. *See id.*

141. *See id.*

ary prohibition against the exercise of jurisdiction could be found.[142] The PCIJ established the objective territoriality principle which is applied to offenses or acts commenced outside the state's territory, but completed within the state's territory, or causing serious and harmful consequences to the social and economic order within the state's territory.[143] Applying the PCIJ's analysis of *Lotus*, the Supreme Court in *Alcoa* ruled that the Sherman Act applied to a foreign agreement that was intended to affect U.S. trade and did so, even though the agreement was solely between foreign companies and was performed entirely on foreign soil.[144] The court ruled that any state may impose liabilities for conduct outside its borders that has illegal consequences within its borders.[145] This rule applies even to persons not within the state's allegiance.[146] Thus, under the reasoning of *Alcoa*, the plaintiffs in *Amlon* should be able to seek relief under RCRA's citizen suit provision. The court in *Alcoa* further stated that such liabilities will ordinarily be recognized by other states.[147]

In the more recent decision of *Hartford Fire Insurance Co. v. California*,[148] the state of California instituted an action against Hartford Fire Insurance Co. (Hartford) under the Sherman Act, claiming that Hartford, and other London-based reinsurers, had engaged in unlawful conspiracies to affect the insurance market in the United States.[149] The Court held, in accordance with *Alcoa*, that where a person subject to regulation by two states can comply with the laws of both, jurisdiction may be exercised over foreign conduct that was meant to produce, and does in fact produce, some substantial effect in the United States.[150] The Court held that no conflict exists between laws of the United States and foreign states, for purposes of international comity,[151] where per-

142. *See id.*
143. *See id.*
144. *See Alcoa*, 148 F.2d at 443.
145. *See id.*
146. *See id.*
147. *See id.*
148. 509 U.S. 764, 798-99 (1993).
149. *See id.* at 764.
150. *See id.* at 798-99.
151. *See* BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (defining com-

sons subject to regulation by both states can comply with the laws of both.

In *EEOC v. Aramco*, a United States citizen brought a Title VII action against a United States employer, charging that while he was working abroad his employer discriminated against him because of his race, religion, and national origin.[152] The Supreme Court held that Title VII does not apply extraterritorially to regulate employment practices of United States employers abroad.[153] The Court stated that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority is a matter of statutory construction.[154] The Court in *Aramco* stated "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United states."[155] This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained."[156] The Court stated that this serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.[157]

The U.S., however, may create the very discord it claims to prevent in *Aramco*, if it continues the practice of dumping waste in foreign countries without allowing these countries to seek relief in U.S. courts. This creates discord with foreign nations and also heightens the probability that these nations will close their doors to our hazardous waste. In turn, the U.S. will have an unmanageable excess of hazardous waste, due to limited disposal space. This will have a profound effect on U.S. business and industry.

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ity as "respect").

152. EEOC v. Aramco, 499 U.S. 244, 245 (1991).

153. *See id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *See id.*

B. *The "Conduct Test"*

The second test used to determine extraterritorial application of U.S. law is the "conduct test." In *United States v. Columba-Colella*,[158] the Fifth Circuit held that as long as the conduct occurring within the United States is prohibited, the effects of the conduct need not be felt in the United States in order for U.S. law to govern.[159] Following the reasoning of the *Columba* court, the plaintiff in *Amlon* should be entitled to relief under RCRA. FMC's illegal conduct occurred in the U.S., but the effects were felt in England, nearly identical facts to the scenario that *Columba* is describing. Under both the "effects" test and the "conduct" test, RCRA should meet the requirement of extraterritorial application. Thus, the *Amlon* court ignores the very reasoning of the caselaw on extraterritorial application in denying the extraterritorial application of RCRA.

IV. Potential Remedies in International Law: The Basel Convention and The Alien Tort Statute

Another approach for plaintiffs who are unable to seek relief under RCRA is to seek relief under public international law. The Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Convention") is a multilateral treaty that attempts comprehensive regulation of transboundary movement and the disposal of hazardous waste on a global scale.[160]

The general obligations of parties to the Basel Convention include: preventing the export of hazardous waste without approval of the importing country and proving the importing country has adequate facilities to dispose of the waste; prohibiting trade with non-parties; minimizing the generation of hazardous waste; managing exported waste in an environmentally sound manner; and cooperating in training of technicians, the exchange of information, and the transfer of technology.[161] The Convention makes

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158. 604 F.2d 356 (5th Cir. 1979).

159. *Id.* at 360.

160. Stephen Johnson, *The Basel Convention: The Shape of Things to Come For United States Waste Exports?*, 21 Envtl. L. 299, 301 (1991).

161. *See id.* at 311-315.

states responsible for the failure of their nationals to adhere to the treaty law.[162]

However, the remedies available under the Basel Convention are limited. Unlike RCRA, the Basel Convention contains no citizen suit provision, nor any liability protocol of any kind. Similar to RCRA, aggrieved parties must rely on governments to bring forth their claims. Thus, the Basel Convention might not give any more relief to a plaintiff than it would be entitled to under RCRA.[163]

The plaintiff may, alternatively, seek venue under the Alien Tort Statute.[164] The Alien Tort Statute grants original jurisdiction to U.S. federal courts of any civil action by an alien for torts committed in violation of the law of nations.[165]

In *Filartiga v. Peña-Irala*,[166] the Second Circuit found jurisdiction under the Alien Tort statute over a claim made by an alien against an official of his own government for the torture-slaying of the claimant's son. The court found that freedom from torture was part of customary international law and that the international law of human rights did not distinguish between violations directed at one's own subjects and violations directed at others.[167] Faced with a possible flood of cases brought by aliens against their own governments claiming violations of international human rights law, federal courts have moved to limit *Filartiga*'s principles both on political question and lack of available

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162. *See id.* at 315.

163. *See* Wallbaum, *supra* note 15, at 907. Greenpeace and other environmental groups criticize the Basel Convention as ineffective.

> The agreement provides only for a notification and consent scheme, which, according to Greenpeace, 'does not restrict the international waste trade; it simply sets up a global tracking system for waste.' In addition, a consent and notification system discourages waste minimization and creates the dangerous illusion that the international waste trade is under control.

Id.

164. 28 U.S.C. § 1350.

165. *See id.*

166. 630 F.2d 876 (2d Cir. 1980).

167. *See id.*

remedy grounds.[168]

In *Amlon*, the complaint did not successfully allege any treaty violation that is actionable under the Alien Tort Statute.[169] In order to gain U.S. jurisdiction under the Alien Tort Statute, the complaint must allege facts that, if true, would constitute a violation of the law of nations.

The plaintiffs in *Amlon* relied upon two sources of customary international law: (1)the Stockholm Principles;[170] and (2)the Restatement (Third) of Foreign Relations Law.[171] The *Amlon* court, however, held that these invocations of international law do not establish a violation of such law under the Alien Tort Statute.[172]

Amlon's complaint contained no clear allegation of a violation of the law of nations. Thus, their second cause of action was dismissed. Seeking relief under the Alien Tort Statute is unlikely to succeed in a case like *Amlon*. If courts do not apply the Alien Tort Statute in instances as extreme as terrorism,[173] it probably

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168. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

169. *Amlon*, 775 F. Supp. at 671.

170. Report of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14 & Corr. 1, princ. 21, at 7; *see* 775 F. Supp. at 671 ("Plaintiff's reliance on the Stockholm Principles is misplaced, since those Principles do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders.").

171. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 602(2); *see* 775 F. Supp. at 671 ("Nor does the Restatement of Foreign Relations law constitute a statement of universally recognized principles of international law. At most, the Restatement iterates the existing U.S. view of the law of nations regarding global environmental protection.").

172. *See* 775 F. Supp. at 671.

173. In *Tel-Oren*, the plaintiffs sued the alleged perpetrators of an attack on a civilian bus in Israel. The three-judge court dismissed the case for three different reasons. One judge held the case was a nonjusticiable political question. Another judge concluded that non-state, politically motivated acts of terrorism were not prohibited by customary international law. The third judge stated that the Alien Tort statute only provided jurisdiction over alien tort suits for which international law recognizes an individual cause of action. 726 F.2d 774.

will never be applied in an environmental action.

CONCLUSION

The present regulatory system controlling the export of hazardous waste is inadequate. The current system fails to address the common problems associated with unsafe disposal of hazardous waste as well as the additional problems stemming from the political and economic issues associated with using foreign nations as disposal grounds for hazardous waste.

There is a loophole in the current RCRA statute. U.S. companies can illegally dump hazardous waste abroad, without domestic repercussions. The same activities, however, if done domestically would be subject to RCRA. Thus, the statute fails to provide relief for foreign plaintiffs bringing suit under RCRA.

FMC's conduct in *Amlon* constituted a violation of environmental regulations. Illegal shipping of hazardous waste breaches the express provisions of RCRA. Since claims under the export provision of RCRA can only be raised by the EPA, and Amlon could not seek relief under the citizen suit provision, changes to RCRA need to be made or courts need to apply RCRA extraterritorially to protect innocent plaintiffs.

Congress can amend RCRA by expanding the citizen suit provision to apply to foreigners as well as nationals. Extraterritorial application of RCRA would include RCRA liability provisions, which allow foreign nationals to sue waste generators for violations. Creating liability provisions will discourage these generators from circumventing the requirements of RCRA.

RCRA's export provision can also be amended by either having plaintiffs adjudicate their claims without the EPA or requiring the EPA to take on more claims on behalf of foreigners who have a plausible reason to seek relief under RCRA. Extraterritorial application of RCRA will provide relief for those persons injured by the improper disposal.[174]

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174. The adequacy of the disposal facility should be no less than the exporting country's standards. This would provide equally strong environmental protection worldwide, ensure minimization of hazardous waste production, and require the polluter to pay in advance.

Congress will have to weigh many policy arguments before amending RCRA. One such argument is that expansion of the citizen suit provision to include foreigners will open the floodgates to greater litigation in the United States. This might be too great a burden for U.S. courts. Deciding more cases involving the extraterritorial application of RCRA, however, may lead to more precise law. Thus, future courts may find it easier to litigate these cases, and the burden of overcrowding the courts may seem minimal in light of the alternative deterioration in foreign relations.

Amending RCRA to apply extraterritorially seems to be the only effective solution. An outright ban on the export of hazardous waste is simply unfeasible and ineffective. Hazardous waste will continue to be produced. A total ban on the export of waste will create unreasonable burdens on nations without the space to dispose of it. The U.S. is one of these nations. Moreover, preventing the export of hazardous waste would likely only result in an increase in the illegal hazardous waste trade. A complete ban would also actually harm the developing nations, because developing nations benefit economically from legal waste trade. There are potential remedies under public international law for those unable to seek relief under RCRA. To seek relief under the Alien Tort Statute, however, one must overcome difficult threshold issues. Similarly, to receive relief under the Basel Convention, one must rely on the government to state its claim.

Federal courts have applied U.S. laws extraterritorially in other areas. Courts should follow this trend, and apply RCRA extraterritorially as well. This would allow victims of the illegal export of hazardous waste to seek adequate relief. In addition, Congress should amend RCRA so that courts are better situated to apply RCRA extraterritorially.