

*Federal Judicial Center
International Litigation Guide*

International Environmental Law
A Guide for Judges

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I. The Increasing Prevalence of International Environmental Law in Federal Courts

International environmental law is becoming increasingly prevalent in federal court litigation. This is the result of several broad trends, including the following:

- Increased international trade—particularly in energy commodities, natural resources, and complex manufactured products—can subject companies operating in the United States to environmental law in other nations within the supply chain. Conversely, such international trade can subject foreign companies to environmental regulations that apply in the United States, in the foreign nation, or through international agreements and conventions.
- An increase in bilateral investment treaties and multilateral trade agreements may create legal rights and may result in federal court litigation when domestic and foreign companies engage in activities that conflict with domestic and foreign environmental laws, or with substantive requirements in the treaties and trade agreements themselves.
- U.S. environmental agencies are increasing efforts to regulate and enforce environmental laws “at the border” in order to ensure that products and commerce imported into the United States comply strictly with domestic environmental standards even if standards used abroad are less stringent. Examples are emission standards for motor vehicle engines, restrictions on natural resources that can be utilized in domestic products, and bans on the trade of endangered species.
- There are growing efforts by both developed and developing nations to strengthen environmental standards and pollution controls, including efforts to seek recourse for pollution and other environmental impacts that cross international borders. Examples are controls for water pollution in rivers flowing between the United States and Canada, and the international transportation of mercury across nations and continents.
- There is growing recognition that the most serious environmental issues, such as climate change, are truly global in nature, and thus their solution requires a coordinated policy and control regime among nations, as well as additional efforts by the United States to “lead by example” in setting domestic standards for global pollutants.
- The increasing extraterritorial application of domestic environmental laws seeks to hold multinational companies operating abroad to standards that would apply in the United States.

This guide is intended to provide an introduction to the wide range of issues that fall under the category of international environmental law, and it focuses on those that have arisen or are likely to arise in federal court litigation. Although the prevalence of international environmental law is likely to grow in coming years for the reasons discussed above, at this time the development of case law is in its infancy. Thus, this guide includes discussions of general international environmen-

tal law concepts and frameworks to assist judges in analyzing issues that are relatively novel or of first impression.

II. Sources of International Environmental Law

International environmental law is an extremely broad field, and there is little consensus about the boundaries that define its scope. The subject matter encompasses numerous sources of domestic, foreign, and pure international law, and affects a vast range of human and commercial activities. Sources of international environmental law include the following:

- international environmental law treaties and agreements;
- multilateral trade agreements and bilateral investment treaties between the United States and other nations;
- international partnerships;
- international standards set by multilateral organizations and adopted through either laws or regulations, or on a voluntary basis, by the United States; and
- domestic and foreign laws that are intended to apply either at the border or abroad.

A. International Environmental Law Treaties and Agreements

For most of the twentieth century, treaties and agreements between nations constituted the central focus of international environmental law. Key treaties, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹ the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,² and the Framework Convention on Climate Change and Kyoto Protocol,³ continue to have significant force today in signatory nations. These treaties and agreements are generally not independently enforceable in U.S. federal courts. For example, in *Greenpeace USA v. Stone*,⁴ the U.S. District Court for the District of Hawaii held that an international convention on hazardous waste disposal could not be enforced to prevent disposal of chemical weapons at a disposal site in Hawaii because there was no implementing statute or regulation.

To make international environmental law treaties and agreements enforceable in federal courts, Congress must pass domestic laws implementing them and providing for a cause of action. For example, the Migratory Bird Convention between the United States and Great Britain on behalf of Canada⁵ is enforced not under the convention, but through the Migratory Bird Treaty Act of 1918 enacted by Congress.⁶ When considering litigation brought pursuant to an international

1. Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

2. Mar. 22, 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657.

3. May 9, 1992 and Dec. 11, 1997, 2303 U.N.T.S. 162.

4. 748 F. Supp. 749, 767 (D. Haw. 1990).

5. Convention for the Protection of Migratory Birds, U.S.–Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

6. 16 U.S.C. §§ 703–712 (§ 709 omitted) (1918); see *Andrus v. Allard*, 444 U.S. 51 (1979).

treaty, courts first must determine whether any implementing legislation provides jurisdiction for enforcing the treaty and the obligations it creates.

Even when international treaties do not give rise to federal causes of action for direct enforcement of obligations, they can be relevant in federal court litigation for auxiliary reasons. For example, treaties may be cited as a measure of the validity of a federal or state law. In *Japan Whaling Association v. American Cetacean Society*,⁷ the Supreme Court upheld the Secretary of Commerce's determination that Japan's whaling would not "diminish the effectiveness" of the International Convention for the Regulation of Whaling, because Japan agreed to a phase-out of commercial whaling. Treaties also may invalidate local laws because federal treaties preempt state law.⁸ And finally, treaties may be relevant to the reasonableness of federal regulation. In *Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority*,⁹ the D.C. Circuit relied extensively on CITES¹⁰ in interpreting the government's duties under the Endangered Species Act.¹¹

B. Multilateral Trade Agreements and Bilateral Investment Treaties

The most rapidly growing sources of international environmental law are bilateral investment treaties and multilateral trade agreements, which create judicially enforceable environmental obligations for the signatory countries. Examples of such obligations and agreements are the Commission for Environmental Cooperation established by the North American Free Trade Agreement for the United States, Canada, and Mexico,¹² and the environmental specifications on goods that can be traded between the United States and South Korea in the Korean Free Trade Agreement.¹³

In recent years, there has been an increase in accession to both bilateral investment treaties and multilateral trade agreements, such as those enforced by the World Trade Organization (WTO). Bilateral investment treaties, sometimes called BITS, are nation-to-nation agreements designed to encourage foreign investment by granting protection to private investors. Issues that arise under trade agreements are likely to be presented in federal court when the dispute settlement procedures are not triggered, which often occurs with bilateral investment treaties. Although these agreements typically provide that disputes should be resolved in international arbitration,¹⁴ the judgment resulting from arbitration is enforced in domestic courts, and the parties may attempt to involve federal courts for other reasons. The resulting litigation can raise sensitive issues concerning both sover-

7. 478 U.S. 221 (1986).

8. See *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999).

9. 659 F.2d 168, 180 (D.C. Cir. 1981).

10. Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

11. 16 U.S.C. §§ 1531, 1538, 1540 (2012).

12. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

13. United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, 125 Stat. 428 (2011).

14. See Jennifer L. Tobin & Marc L. Busch, *A BIT Is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 World Pol. 1 (2010).

eignty and the environment. For instance, in *Republic of Ecuador v. Chevron Corp.*,¹⁵ one of the many judicial decisions in the decades-long fight over environmental damage allegedly caused by the oil company's exploration in Ecuador's rainforest, the Second Circuit gave priority to the relevant treaty's arbitration process over federal court jurisdiction. Specifically, the court refused to stay an international arbitration process Chevron initiated under a bilateral investment treaty and declined a request to entertain claims in federal court instead. Companies and investors also may cite jurisdictional provisions in bilateral investment treaties in an effort to establish federal court jurisdiction over claims that seek to invalidate the application of foreign environmental laws that they allege are inconsistent with the treaties.¹⁶

Multilateral trade agreements also frequently contain important standard environmental provisions, many of which are administered by the World Trade Organization (WTO). In particular, Article XX of the General Agreement on Tariffs and Trade contains two important exceptions that prevent the agreement from abrogating measures that (1) are "necessary to protect human, animal or plant life or health," Art. XX(b), and (2) relate "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption," Art. XX(g).¹⁷ WTO disputes are resolved between countries under the WTO's dispute settlement procedures rather than in federal courts. However, WTO provisions may be cited during federal court litigation as principles that inform federal agency action. For instance, the U.S. Court of Appeals for the Federal Circuit upheld the State Department's decision to allow imports of shrimp from nations that did not protect turtles, citing a WTO decision to that effect.¹⁸ This decision illustrates the deference federal courts have given to international decisions and bodies that are duly authorized under treaties and other international agreements.

C. International Partnerships

It takes many years, if not decades, to ratify treaties and trade agreements. To expedite the development of international environmental law norms, the United States increasingly relies on international partnerships. In some instances, a partnership is designed to help implement a treaty and may even be implemented before treaty negotiations are complete.

15. 638 F.3d 384 (2d Cir. 2011).

16. Eric Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (London: Earthscan 2001); Rahim Molloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 *Berkeley J. Int'l L.* 1 (2011).

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 *Sts. A11*, T.I.A.S. 1700, 55 *U.N.T.S.* 194.

18. See *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1297 (Fed. Cir. 2002); Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (in which the WTO appellate body held that the United States could not prohibit imports of shrimp from countries that did not take steps to prevent turtles from being endangered by shrimp fishing).

Since the 2002 World Summit on Sustainable Development (WSSD), the United States has been at the forefront of efforts to move multilateral institutions toward partnerships aimed at practical and results-focused actions involving governments, businesses, and other organizations. For example, one of the most significant North American partnerships is the U.S.–Mexico Border Partnership, a ten-year effort to achieve measurable environmental results, such as reducing water contamination, air pollution, land contamination, and exposure to all hazardous materials, and improving environmental health and performance.

Other examples include partnerships aimed at reducing water contamination, air pollution, land contamination, leaded gasoline, mercury, and methane emissions. These partnerships have three measures in common: (1) clear, quantifiable, and achievable goals; (2) clear communication and transparency; and (3) credible and measurable results.

Although currently there are no examples of international partnerships being litigated in federal courts, given the increasing prevalence of these partnerships, it is likely that parties will turn to the courts to enforce the commitments of the United States under such agreements. International partnerships alone may not automatically provide causes of action for enforcement in federal courts. Courts will look to whether Congress has ratified legislation that provides an enforcement mechanism in federal courts. In addition, many partnerships are voluntary in nature even if they come with commitments of significant federal resources to aid in implementation. Thus, courts should assess whether the partnership provides mandatory, enforceable rights or obligations, or merely sets forth aspirational goals and resource commitments for the parties involved.

D. International Standards and Standard-Setting Organizations

In the past half-century, as industry has become increasingly global the need for common standards has led to a proliferation of international standards and standards-setting organizations. The most prominent actor in this movement has been the International Organization for Standardization (ISO),¹⁹ a nonprofit that works with national standard setters around the globe to achieve common international standards. ISO sets standards in numerous areas, including important environmental standards. For example, there are standards for air quality (ISO 13.040), water quality (ISO 13.060), radiation protection (ISO 13.280), environmental management (ISO 14001), and greenhouse gases (ISO 14064).

Like international treaties, ISO standards may arise in U.S. courts in connection with the reviewing of the reasonableness of federal regulation. For instance, in *Forester v. Consumer Product Safety Commission*,²⁰ the D.C. Circuit struck down an agency safety standard for bicycles, but noted that “[c]ongruence of the regulation with . . . ISO standards suggests that the standard is a reasonable one.”²¹ Private contracts, particularly contracts with the government or among companies seek-

19. The abbreviation does not match the initial letters of the organization in recognition that the initials would be different in every language.

20. 559 F.2d 774 (D.C. Cir. 1977).

21. *Id.* at 793.

ing to purchase manufactured goods, often incorporate ISO environmental standards. Even though ISO standards may not legally bind parties to specific requirements, courts have considered the standards as evidence in litigation assessing the reasonableness of a party's conduct.²²

E. Cross-Border and Extraterritorial Application of Domestic Environmental Laws

Certain U.S. environmental laws are explicitly or implicitly extraterritorial in their language, or apply with equal force to imported products at the border and activities that have impacts abroad. Examples include (1) the regulation of pollution that originates in the United States but has transboundary effects; (2) domestic environmental regulations (such as chemical and air emission requirements) for imported products at the time they attempt to clear U.S. Customs; and (3) controversially, state environmental laws that take into account the international impacts of commerce and link formally with international regulatory regimes.

U.S. courts apply a presumption against extraterritorial application of domestic law. As the Supreme Court explained in *Morrison v. National Australia Bank Ltd.*,²³ “unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.”²⁴ But the *Morrison* Court also emphasized that the anti-extraterritoriality “principle represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate.”²⁵ The increasing focus on international and cross-border pollution has put pressure on this principle, leading to litigation that implicates the extraterritorial application of domestic environmental law.

As industry in the United States continues to make progress in protecting clean air and water, environmental groups have begun scrutinizing the environmental impacts of U.S. actors when these impacts are felt outside the nation’s borders. To date, cases have largely addressed situations in which there has been some nexus to either conduct or pollution occurring within the United States. For example, in *Environmental Defense Fund v. Massey*,²⁶ the D.C. Circuit held that the United States National Environmental Policy Act (NEPA) of 1969²⁷ could be applied to the National Science Foundation’s decision to incinerate waste in Antarctica. In doing so, the court emphasized that the government’s decision was made in the United States and the United States exerts substantial control over Antarctica. At least one court, following this reasoning, held that NEPA applied to export credit agencies funding overseas development so long as their decisions took place

22. See, e.g., *Hicks v. United States*, No. 04-00810, 2006 WL 5186501, at *1 (N.D. Ala. Feb. 2, 2006) (citing compliance with ISO standards as a basis for denying motion to exclude expert report).

23. 561 U.S. 247 (2010).

24. *Id.* at 255.

25. *Id.*

26. 986 F.2d 538 (D.C. Cir. 1993).

27. 42 U.S.C. §§ 4321–4347 (1969).

within the United States and could have effects within the United States.²⁸ In a third decision, the Ninth Circuit upheld the application of the Comprehensive Environmental Response, Compensation, and Liability Act²⁹ to a Canadian smelting facility on the basis that pollution from the smelter ended up in the United States.³⁰

These decisions suggest a willingness by courts to hold U.S. actors accountable for compliance with domestic environmental laws when certain conduct or impacts are felt in the United States. However, the decisions to date have not addressed the more difficult situation in which a U.S. actor is sued for environmental harms occurring outside the United States and the relevant decision making was also extraterritorial. In this context, courts might consider the extent to which decisions made abroad followed a chain of command that issued from the United States.

Climate change, in particular, has placed strains on traditional conceptions of extraterritorial jurisdiction, because global greenhouse gas concentrations are the cumulative result of greenhouse gas emissions from all over the world and cannot be traced to any *particular* polluter or any *particular* nation. Consequently, disputes regarding the extraterritorial application of environmental law are likely to increase as both the federal government and individual states enact environmental laws that seek to curb greenhouse gas emissions, including laws that look beyond the specific jurisdiction to emissions anywhere in the world.³¹ For example, the U.S. Environmental Protection Agency (EPA) issued a finding in 2010 that domestic greenhouse gas emissions were endangering both the domestic and international environments; it relied heavily on the International Panel on Climate Change in making the finding.³² Based on this finding, the EPA adopted a series of regulations pursuant to the Clean Air Act that established—for the first time—restrictions and standards governing greenhouse gas emissions from vehicles and stationary sources across the United States.

These greenhouse gas emission regulations were ultimately affirmed in part and reversed in part in a decision the U.S. Supreme Court issued on June 23, 2014, *Utility Air Regulatory Group v. EPA*³³ (*UARG*). That decision did not disapprove of the EPA's authority to regulate greenhouse gas emissions in general under the Clean Air Act, but it stated that the agency must exercise that authority in accordance with congressional intent and the statute's purpose.³⁴ In particular, the Court said, the EPA was not free to radically expand the scope of its regulatory programs

28. *Friends of Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007).

29. 42 U.S.C. §§ 9601–9675 (1980).

30. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006).

31. James W. Coleman, *Importing Energy, Exporting Regulation*, 83 *Fordham L. Rev.* 1357, 1359 (2014) (explaining this dynamic).

32. Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 40 C.F.R. 1 (2009), *available at* http://www.epa.gov/climatechange/Downloads/endangerment/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf.

33. 134 S. Ct. 2427 (2014).

34. *Id.* at 2439–46.

to cover any and all sources of greenhouse gas emissions when there was no indication that Congress expected or intended that result when it passed the relevant statutory provisions.³⁵ Thus, the EPA could continue to regulate greenhouse gas emissions from vehicles and from stationary sources that were already subject to permitting under the Clean Air Act by virtue of emissions of other, traditional air pollutants. However, it could not impose permitting requirements on sources for their greenhouse gas emissions alone, as doing so would drastically expand the scope of the statutory permitting programs.³⁶ The *UARG* decision, while not precluding the EPA from adopting further regulations addressing greenhouse gas emissions, may have a restraining influence on the agency as it considers further rule making, including specifically rules that may have extraterritorial reach (and that would more likely be outside of Congress's intent).

California recently enacted legislation that seeks to address the extraterritorial nature of greenhouse gas emissions.³⁷ This legislation covers a low carbon fuel standard that addresses crude oil produced in Canada and that is being challenged in the Ninth Circuit, and a state cap-and-trade law that is being linked to other international climate change regimes. This type of state law raises constitutional questions, including the domestic and foreign Commerce Clauses, the federal affairs preemption doctrine, and the Treaty Clause.

In recent years, because of the global nature of greenhouse gas emissions, climate change has dominated popular discussion of international environmental law. The numerous efforts at combating climate change—public and private as well as international, national, and local—implicate each of the environmental law sources discussed above. For example, the European Union implements a cap-and-trade system that recently sought—unsuccessfully—to regulate foreign registered aircraft while they moved through Europe, and the State of California recently proposed the first linkage between a domestic greenhouse gas cap-and-trade program and a foreign one.

While climate change will most likely be the most visible focus of international environmental law and litigation in coming years, the growing global nature of environmental challenges and the rapidly rising international trade in natural resources, energy commodities, and complex manufactured goods are increasing the prevalence of international environmental law in disputes among sovereigns, companies, and nongovernmental organizations. Although to date such disputes largely have been addressed outside of federal court, as the stakes rise it is likely that federal courts will become the adjudicator of some of these complex matters.

35. *Id.*

36. *Id.*

37. California's Global Warming Solutions Act of 2006, California Health & Safety Code §§ 38500–38599.

III. Major Topics in International Environmental Law

International environmental law's substantive scope is as broad as its sources are diverse. The law addresses nearly every aspect of the modern economy, and it is aimed at pollution prevention and remediation as well as natural resource conservation. This section provides an introduction to some of the major areas of international environmental law and examines how the law might arise in federal litigation involving (a) climate change, (b) hazardous chemicals and materials, (c) protected species, (d) water pollution, (e) air pollution, (f) environmental disaster response, and (g) transborder enforcement of environmental regulations.

A. Climate Change

International climate change law has proceeded on two levels: (1) efforts to achieve an international treaty to comprehensively control greenhouse gas emissions; and (2) regional, domestic, and local efforts to address greenhouse gas emissions without defined geographic boundaries. Although the climate change discussion is decades old, these issues have begun to reach the federal courts only recently. It is likely that the future will bring litigation regarding climate change laws, regulations, and, potentially, torts. Given the uniqueness and complexity of the topic, some background regarding efforts to address climate change may be helpful.

1. *International Climate Change Negotiations and the Kyoto Protocol*

Climate-change-related litigation is most likely to involve the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding international instrument that came into force in 1994.³⁸ The treaty aimed to reduce greenhouse gas emissions to 1990 levels by the year 2000 and maintain them “at a level that would prevent dangerous anthropogenic interference with the climate system.”³⁹

In an effort to fulfill the UNFCCC's goals, countries adopted the Kyoto Protocol in 1997,⁴⁰ which set binding commitments on thirty-eight countries to reduce greenhouse gas emissions beginning in 2008. One hundred and ninety-one nations (but not the United States) ultimately ratified the protocol. Nations attempted to fulfill their Kyoto Protocol commitments using a variety of mechanisms, including energy efficiency measures, taxes on carbon-based fuels, and cap-and-trade programs that place an overall cap on greenhouse gas emissions from an economy.

The Kyoto Protocol covers only a fraction of global emissions because the United States never ratified it and because it does not place commitments on de-

38. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (1992).

39. *Id.* art. 2.

40. Framework Convention on Climate Change and Kyoto Protocol, May 9, 1992 and Dec. 11, 1997, 2303 U.N.T.S. 162.

veloping nations, including China, now the largest greenhouse-gas-emitting nation. More recent UNFCCC negotiations have focused on a successor agreement. But hard divisions between developing and developed countries have emerged, and no new agreement has been reached. On June 25, 2013, President Obama announced a renewed commitment to seeking an international agreement on binding reductions in greenhouse gas emissions before the end of his administration in 2016.⁴¹ If the United States commits to such an international agreement, it is likely that it will include obligations to enact regulations that seek greenhouse gas reductions—obligations that may be challenged as part of enforcement proceedings in federal courts.

2. *Other International Greenhouse Gas Initiatives*

At the national level, the United States is in the midst of enacting comprehensive regulations to control greenhouse gases, while at the state and local levels, governments are developing laws and regulations to address the emissions of the global pollutants. As discussed elsewhere in this guide, private parties and non-governmental organizations are bringing lawsuits to spur government action against and seek damages and remedies from emitters of greenhouse gases for their climate change impacts. These efforts are now working their way through the federal courts and most likely will be a source of litigation for many years.

Because of the global nature of greenhouse gases, climate change efforts have sometimes led to regulations and lawsuits that push the boundaries of traditional territorial jurisdiction. For example, there has been increased scrutiny of greenhouse gas emissions associated with the production of fuels overseas when those fuels are used in the United States. Congress recently amended the Clean Air Act to require that the nation's transportation fuel market contain increasingly mandated volumes of fuel each year that meet standards for "lifecycle greenhouse gas emissions."⁴² Such a lifecycle analysis includes all the emissions associated with producing the fuel overseas and transporting it in international territory, as well as all the emissions that could result from international land use change if farmers place more land under cultivation for energy crops used to make ethanol.⁴³

A federal district court originally enjoined California from implementing a similar regulation of California motor fuels, holding that attempting to control greenhouse gas emissions from fuel production in other countries violated the dormant Commerce Clause.⁴⁴ In its holding, the court found that the Constitution's Commerce Clause prohibited California from regulating conduct beyond the state's borders, and that taking such international emissions into account effectively amounted to extraterritorial regulation. On appeal, however, both a divided panel and en banc court reversed the district court, finding that California's

41. President Barack Obama, Remarks by the President on Climate Change, Georgetown University, Washington, D.C. (June 25, 2013), <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>.

42. 42 U.S.C. § 7545(o)(1)(B) (2007).

43. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14670 (Mar. 26, 2010) (to be codified at 40 C.F.R. pt. 80).

44. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071 (E.D. Cal. 2011).

interests in addressing climate change gave it broad interests in controlling a broad range of conduct that might have ramifications outside the state's borders.⁴⁵ In June 2014, the Supreme Court denied certiorari; however, the litigation is moving back through the federal courts on remand and could be presented to the Supreme Court again following further review by the district court and the Ninth Circuit.

Environmental groups have sought to challenge international emissions of greenhouse gases in the U.S. courts.⁴⁶ One coordinated effort focuses on emissions that result from oil exported to the United States from the Canadian oil sands. This oil is produced by particularly energy-intensive methods, resulting in higher greenhouse gas emissions than those associated with the extraction of oil in other areas. Environmental groups have lodged several NEPA challenges to permits for pipeline projects that would bring oil to the United States from Canada. The courts have rejected such challenges on the grounds that the government examined the potential environmental consequences of the projects, including those that could occur both in the United States and abroad in Canada.⁴⁷ A similar challenge was raised to the Department of Defense's use of fuel produced in Canada. This suit also was dismissed, on the grounds that the nongovernment plaintiff lacked standing to challenge the Defense Department policy and had not demonstrated harm from the use of petroleum from the Canadian oil sands.⁴⁸

In a number of recent cases, both individuals and environmental groups have sought—so far unsuccessfully—to litigate global climate change issues on the basis of common law theories that, if accepted, could be used to bring international greenhouse gas emitters into U.S. courts. The most prominent of these cases involve claims brought under the federal common law alleging that climate change constitutes a “nuisance” and that sources of greenhouse gas emissions, wherever located, are therefore liable for any harms or risks of harm attributed to the effects of global warming.

In *American Electric Power Co. v. Connecticut*⁴⁹ (*AEP*), the U.S. Supreme Court dismissed a suit by a group of states demanding injunctive relief against electric utilities, on grounds that the Clean Air Act authorizes the EPA to undertake regulatory efforts to address greenhouse gas emissions and climate change and there-

45. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013); *petition for rehearing en banc denied*, 740 F.3d 507 (9th Cir. 2014).

46. *See* *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010); *Natural Res. Def. Council v. Dep't of State*, 658 F. Supp. 2d 105 (D.D.C. 2009); *see also* *Complaint, Ctr. for Biological Diversity v. Dep't of State*, No. 11-cv-00345 (D. Neb. Oct. 5, 2011).

47. Despite the lack of success in court, President Obama initially did reject an application for the most recent pipeline from Canada, known as the Keystone XL Pipeline. However, the Administration's ultimate decision on the Keystone XL Pipeline remains under further review as of August 2014. Presidential Memorandum, Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit, Jan. 18, 2012, <https://www.whitehouse.gov/the-press-office/2012/01/18/presidential-memorandum-implementing-provisions-temporary-payroll-tax-cu>.

48. *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01-11-cv-41, 2011 WL 3321296 (E.D. Va. July 29, 2011).

49. 131 S. Ct. 2527 (2011).

fore displaces claims challenging such emissions under *federal* common law.⁵⁰ The Ninth Circuit subsequently concluded that *AEP*'s holding also applies to federal common law claims seeking monetary relief, and it dismissed a lawsuit by an Alaskan tribal village against oil companies and others for damage to the village allegedly caused by global warming.⁵¹

AEP expressly left open the question whether a *state* common law claim for global warming owing to greenhouse gas emissions could proceed.⁵² However, a federal district court in Mississippi dismissed state common law claims by gulf coast landowners for damages from Hurricane Katrina, which the complaint linked to global warming; the court found the claims preempted by the Clean Air Act, based on the reasoning of *AEP*.⁵³ That decision was later affirmed on different, unrelated grounds of *res judicata*.⁵⁴

Notwithstanding these unfavorable decisions, litigants may continue to bring similar actions under other common law theories that were not addressed in *AEP*. The environmental group Our Children's Trust, for example, has filed lawsuits in jurisdictions across the United States alleging that the atmosphere is a natural resource that state and federal governments have an affirmative obligation to protect for the public good under the "public trust" doctrine.⁵⁵ None of these claims has been successful, and indeed most have been dismissed on grounds that they would improperly interfere with the government's legislative and regulatory authority, including a claim against the federal government in *Alec L. v. Jackson*.⁵⁶ However, some courts have expressed sympathy for the claims, even when disallowing them.⁵⁷

If any of these claims are successful, future plaintiffs may seek to internationalize this common law climate change litigation. Domestic emitters have no greater effect on climate change than foreign emitters, because the impact of greenhouse gases is global. Plaintiffs from the United States may attempt to hold foreign emitters liable, either in U.S. courts or in foreign tribunals. Indeed, the environmental group responsible for the "public trust" climate change litigation in the United States, Our Children's Trust, has also brought or supported similar litigation in Ukraine, Uganda, the Philippines, and the Netherlands.⁵⁸

Defendants in federal court litigation have also relied on the unique global characteristics of greenhouse gases as a defense. In a suit brought by residents of Kivalina, an Alaskan village, against ExxonMobil Corp., the defendants argued that tort suits generally should include all parties responsible for the alleged envi-

50. *Id.* at 2536–37.

51. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858–59 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

52. *AEP*, 131 S. Ct. at 2540.

53. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012).

54. *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 469 (5th Cir. 2013).

55. Our Children's Trust, US Legal Actions, <http://ourchildrenstrust.org/legal/US-Action>.

56. 863 F. Supp. 2d 11 (D.D.C. 2012) (appeal pending).

57. *See, e.g., id.*

58. Our Children's Trust, International Legal Actions, <http://ourchildrenstrust.org/legal/international>.

ronmental harm.⁵⁹ Given the global nature of greenhouse gas emissions and climate change, ExxonMobil argued that defendants should include “all human beings and entities engaged in man-made greenhouse-gas emitting activity *anywhere on the planet* over the last two centuries—including car and truck drivers, construction and farming vehicle operators, manufacturing plants, and *foreign emitters of every kind*.”⁶⁰ While the majority in *Kivalina* dismissed the case on grounds that under *AEP*, the federal common law claims were displaced by the Clean Air Act, a concurring member of the panel specifically agreed with the district court that the plaintiffs lacked standing.⁶¹ At least one other district court reached a similar conclusion.⁶² If litigants are to raise such challenges in the future, they may ask courts to revisit long-established precedent relating to standing, the burden of proof for showing distinct harm, and joinder of necessary parties.

B. Hazardous Chemicals and Materials

Hazardous chemicals and materials have been the subject of much international regulation in recent years, which could lead to federal court litigation in the future. Older international agreements, such as the Chemical Weapons Convention and the Basel Convention, have been the subject of recent federal court litigation.

1. Chemical Weapons Convention

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) is an international treaty that was ratified by the United States in 1997.⁶³ The convention prohibits countries from manufacturing, storing, or using chemical weapons. The convention orders countries with existing chemical weapons in storage to destroy those weapons.⁶⁴ In 1998, the United States passed the Chemical Weapons Convention Implementation Act,⁶⁵ which laid out the criteria courts should consider before imposing civil penalties for CWC violations.⁶⁶ Shortly after the United States ratified the convention, the Tenth Circuit ruled that Congress could authorize the incineration of the weapons stockpiles, even if that process might lead to health-related risks.⁶⁷ The Tenth Circuit’s decision is consistent with the theme

59. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

60. Brief of Defendant-Appellant at 69–70, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (No. 09-17490) (emphasis added).

61. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879–80 (N.D. Cal. 2009).

62. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 857–62 (S.D. Miss. 2012).

63. 32 I.L.M. 800 (1993).

64. The Organisation for the Prohibition of Chemical Weapons, an independent association based in The Hague, Netherlands, oversees compliance with the treaty. Most nations are members of the convention, and 190 United Nations members signed the agreement. Among those nations not included in the 190, Myanmar and Israel have signed but not yet ratified the treaty; Angola, Egypt, North Korea, and South Sudan have not signed the treaty.

65. 22 U.S.C. § 6761(a)(2)(D) (1998).

66. *See United States v. Complex Machine Works*, 23 Ct. Int’l Trade 942, 1315 n.12 (1999).

67. *See Chemical Weapons Working Group, Inc. v. U.S. Dep’t of the Army*, 111 F.3d 1485 (10th Cir. 1997).

of cases discussed throughout this guide: deference is given to government action that is intended to enforce international commitments and agreements.

The passing of the April 2012 convention deadline for the destruction of all chemical weapons stored in the United States could lead to federal litigation.⁶⁸ One case that has already been decided involves the planned destruction of more than 2,600 tons of chemical weapons and other materials stored at the Pueblo Chemical Depot. Before implementing the destruction of weapons required under the convention, the State of Colorado challenged the method and timing of the destruction.⁶⁹ Congress specifically required the Department of Defense's Assembled Chemical Weapons Assessment program to develop alternative means for destroying the nation's chemical weapons stockpile. When the State of Colorado challenged the federal government's decision on how and when the weapons would be destroyed, a federal district court determined, based on Congress's actions in compliance with the CWC, that Congress had "superior authority" to determine how the destruction would occur.⁷⁰

As the United States continues to implement the requirements for weapons destruction in other localities new litigation challenging the time, place, and manner of the destruction activities and their consequences (such as the storage of any waste) may be filed. The *Colorado* decision suggests that courts may give the federal government wide discretion, over state and local opposition, as to how the convention should be implemented.

2. *Basel Convention*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal⁷¹ was enacted in 1992 as a comprehensive global agreement on hazardous waste. As of August 2011, 175 parties are covered by the agreement, which controls the production, handling, "transboundary movements," and destruction of hazardous waste.

The convention has important implications for both the federal government and companies that trade in materials that may be considered hazardous or that seek to recycle waste-containing hazardous materials in other countries. To the extent U.S. courts have considered the convention, they have not yet permitted claims under the convention to be litigated in federal courts. Congress has not enacted implementing legislation for the Basel Convention, as it did for the CWC. To date, courts have held that it is non-self-executing and may not be enforced absent implementing legislation.⁷²

68. See *Chemical Weapons Demilitarization: Before the S. Subcomm. on Emerging Threats and Capabilities, S. Armed Services Comm., 106th Cong. (Apr. 11, 2005)* (statement of Donald A. Mahley, Deputy Assistant Secretary for Arms Control Implementation), available at <http://2001-2009.state.gov/t/ac/rls/rm/44633.htm>.

69. *Colorado Dep't of Public Health and Env't v. United States (Colorado)*, No. 08-CV-01883-RPM, slip op. (D. Colo. Sept. 22, 2009).

70. *Id.*

71. 1673 U.N.T.S. 126, 28 I.L.M. 657 (1989).

72. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 767 (D. Haw. 1990); *Doe v. Nestle*, 748 F. Supp. 2d 1057, 1137 (C.D. Cal. 2010).

Looking to older agreements, such as the Basel Convention and similar treaties on the production, movement, and disposal of hazardous substances, many countries have enacted their own regulations on hazardous materials. Given the comprehensiveness and strength of these foreign laws and regulations, there may be efforts to hold U.S. companies liable for conduct claimed to be inconsistent with these requirements.

3. Hazardous Chemical Regulation

In 2007, the European Union enacted the Regulation on Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH).⁷³ That agreement, which binds all twenty-seven member-states of the European Union, addresses the scrutiny given to products shipped throughout the world that contain certain chemicals. REACH applies not only to EU chemical manufacturers, but also to importers of chemicals into the European Union, even users who manufacture products that include the chemicals. REACH does include some exemptions for certain highly regulated products, such as cosmetics and pharmaceuticals, but the scope of these exemptions vary. REACH uses the “precautionary principle,” which states that if there is a suspected risk, the burden is placed on the actor to prove that the chemical is not harmful. Chemical manufacturers face a heavy informational burden from the regulation.

Even though REACH does not apply within the United States, the vast data it generates could lead to litigation in federal courts. REACH requires American companies that export their chemicals to EU nations to produce certain data; these data may create new disclosure obligations for the companies under the United States’ Toxic Substances Control Act (TSCA),⁷⁴ which is the domestic law that regulates hazardous chemicals. The heightened requirements for the collection of data about certain chemicals manufactured in the United States also may implicate toxic tort claims in federal courts. Although toxic tort suits are already prevalent in federal courts, REACH may provide an additional argument that companies should have made consumers aware of the results of the data that American companies generate pursuant to REACH. If raised as part of U.S.-based environmental litigation, such arguments will present novel questions regarding the admissibility of data collected pursuant to an international regulatory regime.

4. Hazardous Waste Regulation

The disposal of hazardous waste has also been the subject of much recent international regulation. For example, even though the Basel Convention is in place, the exportation of old electronic equipment for disposal remains a major issue. These materials, which usually make their way to recycling plants in Africa and Asia, are

73. Regulation 1907/2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, 2006 O.J. (L. 396) 1.

74. 15 U.S.C. § 2601 (1976).

cited as a health risk to plant employees. The European Union banned the export of hazardous materials in the mid-1990s, and since then it has been trying to stop such exportation and dumping in developing countries; but reports suggest that many shipments still slip through.⁷⁵ Unlike the European Union, the United States has not established laws implementing the exportation bans established by the Basel Convention. Because other countries with which the United States regularly does business have recently begun a concentrated effort to end these exports, groups may seek to put additional pressure on the United States by filing litigation to implement the Basel Convention.

Many nations are well under way in implementing the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). First proposed at the United Nations in 1992, GHS aims to standardize the classification and labeling of chemicals worldwide. Dozens of countries have partially implemented GHS, particularly those portions related to the transport of dangerous goods. The European Union recently fully aligned its chemical labeling requirements with GHS. In the United States, several agencies with overlapping responsibility for chemical management have taken initial steps toward full implementation of GHS. For example, in 2012, the Occupational Safety and Health Administration (OSHA) finalized a rule to align the agency's Hazard Communication Standard with GHS.⁷⁶ OSHA and other agencies have taken steps to implement GHS, resulting in final agency rules and decisions, the sufficiency of which may be challenged in federal courts.

C. Protected Species

In the United States, the Department of Justice (DOJ) prosecutes violations of international endangered species laws, usually in conjunction with claims under U.S. law. The Endangered Species Act of 1973 (ESA)⁷⁷ implements provisions under the United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁷⁸ This convention and the U.S. implementing legislation seek to prevent the commercial exploitation of endangered species by outlawing international trafficking of these species.

The ESA provides strict domestic protections for endangered and threatened species and outlaws the import and export of those species in accordance with regulations for those categories of species detailed in CITES.⁷⁹ The ESA also as-

75. Aidan Lewis, *Europe Exporting Electronic Waste Despite Ban*, BBC News, Aug. 4, 2010, available at <http://www.bbc.co.uk/news/world-europe-10846395>.

76. Hazard Communication, 77 Fed. Reg. 17,574 (Mar. 26, 2012).

77. 16 U.S.C. § 1531 (2012).

78. In 1975, the United Nations enacted the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

79. 16 U.S.C. § 1538 (2012). It provides regulations for three categories of species: all species in present danger of extinction (listed in Appendix I to CITES), art. II(1), 27 U.S.T. 1092, 993 U.N.T.S. 245; species that are not in imminent danger of extinction but may become endangered without strict trade regulations (Appendix II), art. II(2); and species that party states have identified as endangered within their respective jurisdictions (Appendix III), art. II(3). CITES does not contain provisions for the enforcement of its terms; rather, each party to the convention agrees

sesses civil and criminal penalties for violations of these regulations.⁸⁰ The ESA is a common subject of litigation in the federal courts, including the U.S. Supreme Court. Over several decades, the ESA has generated a significant legacy of federal cases interpreting its key provisions, most of which govern the federal government's obligations to comply with NEPA in administering federal programs.⁸¹ The ESA establishes criminal penalties for the trafficking of listed fish and wildlife, including those brought across the border into or outside the United States, and it requires only general intent to establish liability.⁸² In other words, DOJ may prosecute without showing that the defendant knew the wildlife was protected or intended to violate the ESA.

Despite its broad scope, the ESA is not the exclusive enforcement mechanism for CITES regulations.⁸³ DOJ also prosecutes international trafficking of protected species under the Lacey Act.⁸⁴ Enacted in 1900, the Lacey Act was originally aimed at combating the importation of invasive species harmful to native wildlife.⁸⁵ In its current form, the Act makes it illegal to "import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce" any wildlife, plant, or fish that has been "taken, possessed, transported, or sold" in violation of any federal, state, or foreign law.⁸⁶ Liability under the Lacey Act "relies on the violation of a predicate law," including foreign laws that prohibit the trade, transport, or possession of a particular species.⁸⁷ For example, in *United States v. Labs of Virginia, Inc.*,⁸⁸ the court found that the defendants violated the Lacey Act by importing wild-caught, crab-eating macaques, a protected species in Indonesia.⁸⁹ The Act is not limited to live species; any "part, product, egg, or offspring" of wildlife or fish

to implement and enforce the permit requirements specified in each of these categories, art. IX(1), 27 U.S.T. 1103, 993 U.N.T.S. 251. As of 2010, 175 states are parties to CITES.

80. See 16 U.S.C. § 1540 (2012).

81. See, e.g., *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (holding that the ESA did not require the Environmental Protection Agency to consider species-related considerations in issuing a water discharge permit and outlining the history of ESA litigation in federal courts).

82. See *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998).

83. See *United States v. Manghis*, No. 08-10090-NG, 2011 U.S. Dist. LEXIS 56491, at *4 (D. Mass. May 26, 2011) ("[CITES] is enforced by the Endangered Species Act, the Lacey Act, general criminal statutes, and a series of regulations").

84. 16 U.S.C §§ 3371–3378 (2012).

85. See Laura T. Gorjanc, *Combating Harmful Invasive Species Under the Lacey Act: Removing the Dormant Commerce Clause Barrier to State and Federal Cooperation*, 16 *Fordham Envtl. L. Rev.* 111, 114 (2004).

86. 16 U.S.C. § 3372 (2012).

87. In this respect, the Lacey Act is similar to the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 101-5, 201–04, 91 Stat. 1494 (1977), now codified under 15 U.S.C. § 78, 78(a), 78dd-2, 78ff(a), 78m, 78n, 78q(b).

88. 272 F. Supp. 2d 764, 770 (N.D. Ill. 2003).

89. See also Gorjanc, *supra* note 85, at 116.

is subject to its regulations as well.⁹⁰ In 2008, Congress amended it to also include plant products, such as seeds and timber.⁹¹

Several types of civil and criminal penalties may be imposed for violations of the Lacey Act, depending on the value of the trafficked species or products and the defendant's knowledge of their illegal nature.⁹² Individuals who "knowingly" import or export illegal species valued at more than \$350 can face criminal felony charges punishable by a \$250,000 fine and up to five years in prison; those who traffic in species without taking "due care" to ensure their legality are subject to civil fines of less than \$10,000.⁹³ The government need not show that the species was obtained using illegal means to establish that a defendant "knowingly" violated the Act; it is enough that the defendant knew the export violated a foreign law.⁹⁴ Even if an individual does not have the requisite knowledge to be charged, all animals and goods trafficked in violation of the Act are subject to forfeiture on a strict liability basis.⁹⁵

The United States has also enacted laws protecting wildlife pursuant to numerous treaties and U.N. conventions. Table 1 lists these treaties, laws, and regulations, as well as the non-U.S. signatories.

90. 16 U.S.C. § 3371(a) (2012).

91. 16 U.S.C. § 3371(f) (2012); *see also* U.S. Dep't of Agric., Animal and Plant Health Inspection Serv., Lacey Act Primer and Updates (Aug. 2013), *available at* https://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf (last visited Oct. 6, 2015) (explaining the 2008 amendments to the Lacey Act).

92. *See* 16 U.S.C. § 3373 (2012) (listing the requisite knowledge and corresponding penalties for civil and criminal violations).

93. *Id.*

94. *See* *United States v. Labs of Va., Inc.*, 272 F. Supp. 2d 764, 770 (N.D. Ill. 2003) (holding that the defendants violated the Lacey Act when they exported wild-caught macaques contrary to Indonesian law, regardless of whether the Indonesian officials who issued their license were bribed to do so).

95. 16 U.S.C. § 3374 (2012).

**Table 1. U.S. Laws That Protect Wildlife Pursuant to
Treaties and U.N. Conventions**

Treaty or Convention	U.S. Law Implementing Treaty	Non-U.S. Signatories	Summary of Regulations
Agreement on the International Dolphin Conservation Program, May 21, 1998, 11 Stat. 1122	International Dolphin Conservation Act, 16 U.S.C. § 1411 (1992)	Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Vanuatu, Venezuela	Limits use of purse seining to catch yellowfin tuna to reduce incidental dolphin takings; permits trade embargoes against countries that do not comply with the Act
Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Feb. 11, 1992, T.I.A.S. 11465	National Oceanic and Atmospheric Administration Authorization Act, 15 U.S.C. § 1511 (1992)	Japan, South Korea, Russia	Prohibits directed fishing for anadromous fish in the convention area and retention of incidentally taken anadromous fish
Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702	Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712 (§ 709 omitted) (1918)	(As amended): United Kingdom, Mexico, Japan, Russia	Restricts taking of migratory birds
Convention for the Conservation of Salmon in the North Atlantic Ocean, Mar. 2, 1982, T.I.A.S. 10789	Atlantic Salmon Convention Act of 1982, 16 U.S.C. § 3601 (1982)	Canada, Denmark, European Community, Iceland, Norway	Limits salmon fishing to designated fisheries within certain distances of coastal land
International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, 177 U.N.T.S. 396, and 364 U.N.T.S. 1953; Convention on the Conservation of Polar Bears, Nov. 15, 1973, U.N. Reg. No. 50540	Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 (1972)	43 signatories; see http://www.iwc.int/members	Prohibits taking, import, export, or sale of marine mammals
Pacific Salmon Treaty, U.S.-Can., Jan. 28, 1985, T.I.A.S. 11091	Pacific Salmon Treaty Act of 1985, 16 U.S.C. § 3631 (1985)	Canada	Limits harvesting of salmon in the Pacific Ocean
Northwest Atlantic Fisheries Convention, Feb. 8, 1948, 64 Stat. 1067	Northwest Atlantic Fisheries Act of 1950, 16 U.S.C. § 5601 (1950)	Canada, Cuba, Denmark, France, Iceland, Japan, South Korea, Norway, Russia, Ukraine	Limits number of fish allowed to be caught in specified Northwest Atlantic zone

By the end of the last decade, approximately 5,000 animal species and 25,000 plant species had been recognized by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the number of signatory nations had grown to 175.⁹⁶ Many of these laws place obligations on nation states themselves, and thus disputes between nations that arise under them may be ill suited for federal courts. For example, in a high-profile dispute between the United States and Mexico in 2011, the World Trade Organization sided with Mexico in a complaint against the United States over dolphin-safe tuna labeling requirements, and it rejected the United States' position that the North American Free Trade Agreement (NAFTA) was the proper venue for the dispute.⁹⁷

D. Water Pollution

The international law of water pollution, like the international law of climate change, has global and regional dimensions, and as has occurred with climate change law, efforts to create a binding global agreement have not been realized. Issues relating to cross-boundary water pollution raise novel questions that test the typical territorial limits of U.S. environmental law. One case involved pollution that originated in Canada and reached the waters of the United States. The Ninth Circuit held that the application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁹⁸ was not extraterritorial when it imposed liability for the release of hazardous substances into the U.S. portion of the Columbia River from waste that entered the river in Canada.⁹⁹ There has been a dearth of cases addressing transnational water pollution (in part, owing to the strong incentive of sovereigns to reach accommodation on such issues). However, *Pakootas* may be interpreted to suggest that pollution originating elsewhere but reaching the United States can trigger domestic environmental laws.¹⁰⁰

96. Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243. At a recent meeting of CITES, proposals to recognize a number of threatened species, including the polar bear and the Atlantic bluefin tuna failed. Similarly, the International Whaling Commission (IWC) failed to agree on a proposal to lift its whaling moratorium, in place since 1986, in exchange for reductions in whaling by nations already engaged in the practice, particularly Japan. The proposal was strongly opposed by Australia. Even before its opposition at the IWC, Australia instituted an action against Japan in the International Court of Justice, alleging violations of the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, 177 U.N.T.S. 396, and 364 U.N.T.S. 1953. *See also* Whaling in the Antarctic (*Australia v. Japan*), 2010 I.C.J. 148 (May 31).

97. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Dispute D5381, United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (2011).

98. 42 U.S.C. §§ 9601–9675 (1980).

99. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074–75 (9th Cir. 2006) (upholding the application of CERCLA to a Canadian smelting facility after it disposed of waste that subsequently leached hazardous substances into the Columbia River at a site located in Washington State).

100. *Id.*

Efforts to establish an international approach to transnational water pollution have received significant attention but not resolution. In 1997, the United Nations adopted the Convention on the Law of the Non-navigational Uses of International Watercourses,¹⁰¹ which governs water that crosses international borders. The convention has not entered into force because it has not yet been ratified by thirty-five nations. Although the convention has not entered into force, analogous principles have informed the United States' interactions with Canada and Mexico, and such principles, in turn, could influence any federal court litigation seeking to enforce laws against transnational pollution.

E. Air Pollution

Conventional air pollution, unlike greenhouse gases, has effects that are realized locally, regionally, or in cases such as mercury, across several nations as a result of air transport and deposition patterns. The United States' most important international collaborations in this area are with Canada and Mexico. Indeed, the case decided by an international arbitration tribunal that many consider the foundation for later cases addressing transborder pollution concerned air emissions that crossed the border into the United States from a smelter in British Columbia.¹⁰² In the early twentieth century, sulfur dioxide fumes from the smelter were damaging agriculture and wildlife in Washington State.¹⁰³ When disputes continued concerning ongoing pollution, the countries created a special tribunal, which held that under international law,

no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence.¹⁰⁴

The tribunal prescribed a detailed system of control and monitoring, and possible compensation for fumes from the smelter.¹⁰⁵

The United States' Clean Air Act contains one provision that specifically addresses international air pollution and may be enforced in federal court. Section 115(a) of the Act applies when the EPA receives reports from a "duly constituted international agency" that give it "reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country." Under § 115, the EPA must order the polluting U.S. state to revise its Clean Air Act pollution controls "to prevent or eliminate the endangerment,"¹⁰⁶ so long as the foreign country "has given the United States essentially the same rights

101. 21 May 1997, 36 I.L.M. 700 (1997).

102. *See* Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938).

103. The International Joint Commission, created by the 1909 Boundary Water Treaty, 36 Stat. 2448 (1909), decided that Canada should pay \$350,000 for damages caused through 1932; Trail Smelter Arbitration, 3 R.I.A.A. at 1946.

104. Trail Smelter Arbitration, 3 R.I.A.A. at 1965.

105. *Id.* at 1966–81; *see also* Trail Smelter Arbitration, 3 R.I.A.A. 1938 (1941) (further proceedings).

106. 42 U.S.C. § 7415(a), (b) (1970).

with respect to the prevention or control of air pollution occurring in that country.”¹⁰⁷ Although this provision has not been litigated, in 2012, environmental groups filed a petition with the EPA to regulate air pollution pursuant to § 115. The groups have indicated that they will consider filing litigation in federal court to force such regulation if the EPA does not act sooner.¹⁰⁸

F. Environmental Disaster Response

Two major ecological disasters in recent years have highlighted the international aspects of environmental disaster response. The 2010 Deepwater Horizon oil spill in the Gulf of Mexico released almost 5 million barrels of crude oil into the ocean over a roughly two-month period, causing enormous damage to both the marine environment and the regional economy. The spill containment and cleanup process is an example of multifaceted engagement between private transnational industry and government regulators. Ultimately, the scores of legal issues unresolved by settlements, including civil and criminal liability, environmental remediation, tort claims, and private actions seeking recovery of economic harm and compensation for medical damages, are being managed by the U.S. District Court for the Eastern District of Louisiana through the federal courts’ multidistrict litigation procedures.

The Fukushima nuclear disaster, caused by the March 11, 2011, earthquake and tsunami in Japan, has led to stronger global responses, which, in turn, are leading to regulations that are likely to be litigated in federal courts. For example, in the United States, the Nuclear Regulatory Commission (NRC) has developed an initial set of proposals for tightening safety regulation of U.S. nuclear power plants, which have drawn mixed reviews from Congress. The NRC is currently undertaking a larger study of the Fukushima disaster in order to develop more comprehensive policy recommendations.

G. Transborder Enforcement of Environmental Regulations

An area of international environmental law that is likely to be increasingly active in federal courts is enforcement to ensure that products that enter the United States from other countries are compliant with the environmental laws applicable in the United States. Transnational environmental regulation and enforcement occurs at both the federal and state levels. For example, in California, Proposition 65¹⁰⁹ regulates the import of products containing chemicals that have not been tested according to California’s standards. At the national level, the Lacey Act¹¹⁰ prohibits the trade of protected plants and animals, and it was expanded in the 2000s to include timber in the definition of plants. Transborder enforcement has

107. 42 U.S.C. § 7415(c) (1970).

108. Ben Geman, *Petition Seeks New EPA Pathway to Require Greenhouse Gas Curbs*, The Hill (Feb. 19, 2013, 11:42 AM), <http://thehill.com/policy/energy-environment/283689-petition-seeks-new-epa-pathway-to-require-greenhouse-gas-curbs>.

109. The Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65, California Health & Safety Code §§ 25249.6–25249.13.

110. 16 U.S.C. §§ 3371–3378 (2012).

large-scale implications for American corporations and is a growing initiative for the EPA.

International environmental law enforcement can implicate several different industries, but two primary areas of focus have been the import of motor vehicles and other engines (mobile sources) that do not meet Clean Air Act emissions standards, and the import of pesticides and toxic chemicals. Beginning in 2003, the EPA began working with U.S. Customs and Border Protection to investigate the nature of noncompliant goods that were entering the United States.¹¹¹ Most of the products were motor vehicles and engines (ranging from chainsaws to motorcycles and ATVs). These mobile sources are a significant source of nitrogen oxide (NOx) and volatile organic compound (VOC) emissions in the United States. Beginning in the mid-2000s, the EPA began to ramp up its enforcement efforts involving illegal equipment imports—going from four cases in 2003 to approximately ninety cases by 2007.

Historically, the EPA has faced challenges in identifying and tracking imports with transborder environmental impacts. More recently, if the EPA identifies a shipment of goods that are noncompliant with the Clean Air Act, it will follow up with an information request to determine whether there is a pattern and practice of noncompliance. The EPA is also turning to other parties in the supply and distribution chain that may be liable in the United States, including retailers and distributors of the noncompliant goods who are positioned to compel compliance through contractual relationships and the free market. There is also some extension of U.S. jurisdiction to foreign corporations through the use of a Certificate of Conformity—a document that allows a corporation to manufacture products and import them into the United States for approximately one year.

Two cases provide examples of the EPA's approach of examining multiple levels of a corporate transaction in enforcing environmental laws against domestic companies at the border: *United States v. McCulloch Corp.*¹¹² and *United States v. Volvo PowerTrain Corp.*¹¹³ In *McCulloch*, a Taiwanese manufacturer and three American corporations agreed to pay a \$2 million penalty and \$5 million in air pollution reduction projects in order to resolve their liability related to the manufacture of chainsaws and their importation into and sale in the United States. The chainsaws were manufactured by Jenn Feng Industrial Co. of Taiwan; its subsidiary, McCulloch, an American corporation, obtained certificates of conformity from the EPA. Two additional American corporations, MTD Products and MTD Southwest, purchased the engines from Jenn Feng and imported and distributed them using retailers throughout the United States. After examining this transaction, the EPA discovered that the engines had been sold without a catalytic converter that would reduce emissions. The EPA was alerted to the issue by a retailer

111. Press Release, Environmental Protection Agency, U.S. EPA and U.S. Customs Service Sign Agreement to Share Information on Hazardous Waste, Chemical, Pesticide Imports (Jan. 15, 2003) (on file with author).

112. No. 08-CV-0699-RCL (D.D.C. 2008). Environmental Protection Agency, *MTD and Jenn Feng Clean Air Act (CAA) Settlement* (Apr. 24, 2008), <http://www2.epa.gov/enforcement/mtd-and-jenn-feng-clean-air-act-cao-settlement>.

113. 758 F.3d 330 (D.C. Cir. 2014).

who suspected that the products might not comply with the Clean Air Act. The EPA argued that the Clean Air Act assigns liability broadly, to not just a manufacturer/importer, but any entity that causes the manufacture/import of a good. The EPA ultimately reached a consent decree settlement with all four companies.

In *PowerTrain*, PowerTrain and its subsidiaries imported into the United States nearly 80,000 engines and pieces of equipment from 2002 to 2008 that were not covered by a Clean Air Act certificate of conformity. PowerTrain originally obtained a certificate on the engines in 2002 and rolled over the certificate when it began importing its products from a Chinese company. The EPA allows for the rollover of a certificate if the products continue to conform to the same characteristics and configuration and are manufactured in a similar way. However, the EPA discovered that after they were distributed in the United States, the products PowerTrain imported were actually different models, had different power ratings, and were made by a different manufacturing entity than what was represented on the certificate. In 2011, PowerTrain agreed to pay \$2 million to resolve its liability, to provide subsidies to consumers to replace their old appliances, and to implement a plan to ensure that its future products are compliant.

More recently, in March 2015, a Chinese importer, Shanghai Howhit Machinery Manufacture Co. Ltd., and four Texas importers settled claims alleging that they violated the Clean Air Act's provisions governing the manufacture, testing, and certification of motor vehicles prior to sale in the United States.¹¹⁴ The EPA had alleged that the companies imported and sold off-road recreational vehicles without proper certification from 2007 to 2011. Additionally, some of the imported vehicles lacked emissions control systems or were manufactured by a company different from the one listed in the certificate application. The EPA discovered the alleged violations during inspections at several ports. The companies agreed to pay \$560,000 to settle the claims, but were not required to admit wrongdoing under their consent decree with the EPA.

The transnational enforcement of environmental regulations has emphasized the need for U.S. purchasers, distributors, and retailers to actively ensure that foreign suppliers are complying with U.S. requirements, performing required tests, and obtaining appropriate certificates for their products. For example, under the Lacey Act, it is illegal to import into the United States a product containing wood that was taken in violation of the source country's laws and regulations.¹¹⁵ If the government can make the case that the wood was illegally taken, it can pursue strict liability for the U.S.-based importer or distributor. Furthermore, if the government demonstrates that a company, through negligence or knowingly, allowed a component to enter a product stream, it may pursue criminal penalties.¹¹⁶

114. Geason Enterprises Consent Agreement (Environmental Appeals Board Docket # CAA-HQ-2013-8050) (Mar. 31, 2015).

115. 16 U.S.C. § 3372 (2012).

116. The most high-profile case involved guitar manufacturer Gibson Guitar Corp. In 2012, the company entered a criminal enforcement agreement with the U.S. Department of Justice (DOJ) to resolve a criminal investigation into whether the company violated the Lacey Act by illegally importing ebony wood from Madagascar and India. Under the terms of the agreement, prosecution was deferred in exchange for payment of a \$300,000 penalty and a \$50,000 community

Exports are also an emerging transnational environmental enforcement issue. Under the Resource Conservation and Recovery Act (RCRA),¹¹⁷ exporters are required to inform the EPA when they plan to export goods for reuse or recycling. The EPA has found that it is not receiving the required notices and, in many cases, is not informed about exports until the receiving country notifies it that there is a problem with contamination. The EPA is currently focusing on identifying new approaches for handling this issue.

service payment to promote conservation. Department of Justice, *Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations* (Aug. 6, 2012), <http://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations>.

117. 42 U.S.C. §§ 6901–6908a (1976).

IV. Conclusion

As the global economy grows more complex environmental challenges become more interconnected. As a result, international and extraterritorial environmental laws will become increasingly important to U.S. citizens and U.S. companies. A clear understanding of these laws will be important for U.S. judges tasked with the responsibility of applying them to the environmental, economic, and legal challenges of the coming decades.

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