

THE SCOPE OF THE NATIONAL ENVIRONMENTAL POLICY ACT: SHOULD THE 102(2)(C) IMPACT STATEMENT PROVISION BE APPLICABLE TO A FEDERAL AGENCY'S ACTIVITIES HAVING ENVIRONMENTAL CONSEQUENCES WITHIN ANOTHER SOVEREIGN'S JURISDICTION?

I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA),¹ established a comprehensive environmental policy for the nation by requiring all federal agencies to evaluate the environmental impact of their major activities. To accomplish this, the Act prescribes certain procedural directives found in section 102(2).² Litigation involving the NEPA has primarily dealt with these provisions and in particular section 102(2)(C). Known as the "teeth"³ of the Act, this section requires each agency to prepare and to file a detailed statement of the environmental impact a prospective project will have before the agency decides to participate or to implement it.⁴

Since its inception, federal agencies dealing in foreign policy and foreign assistance programs have steadfastly resisted application of NEPA 102(2)(C)⁵ requirements to their decisionmaking. The case of *Natural Resources Defense Council v. Export-Import Bank of the United States*⁶ will test this resistance and determine whether a federal agency's activity abroad having significant impact on the environment of another country falls within the scope of the NEPA. The Natural Resources Defense Council filed suit to enjoin the Export-Import Bank (Eximbank), a federal agency, from financing projects and purchases for foreign countries. Eximbank had not prepared impact statements nor had it ever promulgated procedures and guidelines to conform its decisionmaking processes to comply with the requirements of the Act.⁷

This Note will analyze the scope of the statute's 102(2)(C) provision to determine its applicability to federal agencies' actions

1. 42 U.S.C. §§ 4321-4347 (1970).

2. *Id.* at § 4332(2).

3. Strausberg, *The National Environmental Policy Act and The Agency for International Development*, 7 INT'L LAW. 46, 47 (1973).

4. 42 U.S.C. § 4332(2)(C) (1970).

5. *Id.* [hereinafter will also be cited by authorities in subsequent quotes in this paper as 102(C)].

6. No. 77-0080 (D.D.C., filed Jan. 14, 1977).

7. *Id.*

abroad. It will be demonstrated that a canon of construction, the presumption against extraterritoriality, is a suitable and useful aid in resolving this issue. With its guidance, an extensive examination of statutory language and legislative history will be undertaken to establish the intent of Congress, the primary duty of any statutory analysis. It will then be observed that there is no clear indication of congressional intent and, in its absence, it will be presumed that Congress intended the statute's provision to be limited to the territorial boundaries of the nation. After concluding that in actuality Congress' concern was primarily domestic, and therefore, its intent was only to give 102(2)(E) and not 102(2)(C) an international scope, an evaluation of relevant case law will be made to determine whether there is any judicial support for the theory that 102(2)(C) extends beyond the usual statutory reach. Finding no direct support for this hypothesis, and instead, a strong indication that courts will consider countervailing policy arguments, practical considerations will be noted and scrutinized. In the final analysis, it will be determined that 102(2)(C) procedure should not apply to federal activities abroad.

II. STATUTORY INTERPRETATION

A. A Canon of Construction: The Presumption Against Extraterritoriality.⁸

Some guidance must be supplied before examining the statutory language and the legislative history in order to ascertain congressional intent. This aid comes in the form of a "well-established"⁹ canon of construction. In the absence of express language indicating a "contrary intent,"¹⁰ a statute will be construed to apply only to conduct occurring within the territorial jurisdiction of the United States.¹¹

This canon of construction has aided courts in numerous cases to determine the extraterritorial scope of various congressional enactments. For example, in *American Banana Co. v. United Fruit Co.*,¹² the Court held that the Sherman Act would not extend to foreign restraint of trade activity by an American corporation. Util-

8. Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349, 354 (1975) [hereinafter cited as Mich. Note].

9. *Id.*

10. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

11. *Id.*; *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

12. 213 U.S. 347 (1909).

izing a strict territorial approach, Justice Holmes stated that "in [a] case of doubt" statutes must be interpreted as embracing only acts committed within the "territorial limits over which the law-maker has general and legitimate power."¹³ He concluded that the acts performed in Panama and Costa Rica did not fall within the ambit of the U.S. statute.¹⁴ The Justice seemed to be concerned that the comity of nations might be harmed by a holding to the contrary.

Although the strict territorial approach of *American Banana* was subsequently modified in *United States v. Bowman*,¹⁵ the Supreme Court, in *Blackmer v. United States*,¹⁶ determined that Congress had the authority to extend its laws to govern the actions of its citizens in other countries. The Court focused on the question of statutory construction. Did Congress intend the law to be applicable to its citizens abroad?¹⁷ The Court utilized the canon of construction to aid in its determination¹⁸ that Congress had clearly indicated the Act's scope would reach citizens residing abroad by expressly providing for the U.S. consul to serve process on these citizens.

In *Foley Bros., Inc. v. Filardo*,¹⁹ the Court refused to extend the Eight Hour Law²⁰ to public works projects built in Iran on behalf of

13. *Id.* at 357 (footnotes omitted). The Court said:

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial."

Id. at 355, 357.

14. *Id.* at 357. "We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned." *Id.*

15. 260 U.S. 94 (1922).

16. 284 U.S. 421 (1932).

17. *Id.* at 437. "[T]here is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government." *Id.* (footnote omitted).

18. *Id.*

While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.

Id.

19. 336 U.S. 281 (1949).

20. Act of Aug. 1, 1892, ch. 352, 27 Stat. 340 (repealed by Act of Aug. 13, 1962, Pub. L. 87-581, title II, § 203, 76 Stat. 360).

the United States. The question again was not of power but of statutory construction.²¹ The Court reaffirmed the "canon of construction"²² utilized in *Blackmer* and noted that "[i]t is based on the assumption that Congress is primarily concerned with domestic conditions."²³ Thus the Court found "nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case."²⁴

It would appear that Congress has taken into account the *Foley* decision by providing the requisite express language in subsequent federal statutes. The Restatement of Foreign Relations Law²⁵ notes several statutes which have been appropriately phrased so as to apply to conduct occurring outside the United States.²⁶

The courts have, in certain circumstances, found an extraterritorial scope where the statute's language has not clearly indicated such a reach. The courts still employ the *Foley* canon of construction, but in such cases imply that its strict use is unnecessary since congressional intent is obvious. In *United States v. Bowman*,²⁷ the criminal legislation involved did not specifically include in its scope offenses committed on the high seas or in foreign countries. Noting "it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard,"²⁸ the Court

21. "The question before us is not the power of Congress to extend the Eight Hour Law to work performed in foreign countries. Petitioners concede that such power exists The question is rather whether Congress intended to make the law applicable to such work." 336 U.S. at 284-85.

22. *Id.* at 285.

23. *Id.*

24. *Id.* The Court continued by saying: "There is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.*

25. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

26. Federal statutes designed to be applied to conduct taking place outside the United States usually expressly so provide, e.g.:

(i) 18 U.S.C. §§ 7,9 (1958) dealing with offenses within the "special maritime and territorial jurisdiction of the United States," including national vessels and national aircraft.

. . . .
18 U.S.C. § 2381 (1958) makes treason "within the United States or elsewhere" an offense. The statute has in several cases been applied to acts of treason committed outside the United States. *Kawakita v. United States*, 343 U.S. 717 (1952)
Id. at § 38.

27. 260 U.S. 94 (1922).

28. *Id.* at 98.

did apply "the same rule of interpretation"²⁹ to criminal statutes which were intended to protect the Government and its property. Here, it can be logically inferred that Congress wishes to protect its property and itself since the statute is entitled "Offenses against the Operation of the Government."³⁰

The Lanham Act³¹ was interpreted in *Steele v. Bulova Watch Co.*³² as having language conferring "broad jurisdictional powers upon the courts of the United States."³³ Although there is, arguably, language of an express nature,³⁴ the Court primarily based its decision on the activities by the petitioner within the United States and the domestic effect his activities had. The Court observed that component parts of the petitioner's "Bulovas" entered the United States and concluded that this competition would have, in the United States and elsewhere, an adverse effect on Bulova Watch Company's carefully "cultivated" trade name.³⁵

This opinion did not go unchallenged. In a strong dissent,³⁶ Justice Reed chastised the Court for its improper interpretation. In his opinion, the only acts of infringement were to be found in Mexico.³⁷ Thus, the question was one of statutory interpretation.³⁸ Utilizing the traditional canon of construction, the Justice determined that there was no contrary congressional intent or explicit words which could evidence an extraterritorial scope.³⁹

It should be noted that subsequently, in *Vanity Fair Mills v. T. Eaton Co.*,⁴⁰ the Second Circuit Court of Appeals refused to apply the Lanham Act to a trademark infringement by an alien in Canada, even though it might have had an adverse economic effect on

29. *Id.*

30. *Id.* at 98-99.

31. 15 U.S.C. §§ 1051-1127 (1976).

32. 344 U.S. 280 (1952).

33. *Id.* at 283.

34. *Id.*

35. *Id.* at 286.

His operations and their effects were not confined within the territorial limits of a foreign nation. He bought component parts of his wares in the United States and spurious "Bulovas" filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company's trade reputation in markets cultivated by advertising here as well as abroad.

Id.

36. *Id.* at 289.

37. *Id.* at 290.

38. *Id.*

39. *Id.*

40. 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

American commerce. The court suggested that the Act would not apply to a foreign citizen's acts within his own country in accordance with a valid trademark registration.⁴¹

In *Laurizton v. Larsen*,⁴² the Court interpreted the Jones Act⁴³ as not applying to a Danish seaman negligently injured aboard a foreign ship while in Havana harbor. The Court considered and rejected the plaintiff's assertion that the Jones Act would be applicable here in lieu of Danish law. "This contention that the Jones Act provides an optional cumulative remedy is not based on any explicit terms of the Act, which makes no provision for cases in which remedies have been obtained or are obtainable under foreign law."⁴⁴ The Justices perceived that the words employed in the stat-

41. 234 F.2d at 642. The court stated:

[W]e do not think that Congress intended that the infringement remedies provided in § 32(1)(a) and elsewhere should be applied to acts committed by a foreign national in his home country under a presumably valid trademark registration in that country.

The Lanham Act itself gives almost no indication of the extent to which Congress intended to exercise its power in this area

In the *Bulova* case, . . . the Court stressed three factors: (1) the defendant's conduct had a substantial effect on United States commerce; (2) the defendant was a United States citizen and the United States has a broad power to regulate the conduct of its citizens in foreign countries; and (3) there was no conflict with trademark rights established under the foreign law, since the defendant's Mexican registration had been canceled by proceedings in Mexico. Only the first factor is present in this case.

We do not think that the *Bulova* case lends support to plaintiff; to the contrary, we think that the rationale of the Court was so thoroughly based on the power of the United States to govern "the conduct of *its own citizens* upon the high seas or even in foreign countries *when the rights of other nations or their nationals are not infringed*", that the absence of one of the above factors might well be determinative and that the absence of both is certainly fatal.

Id. at 642-43 (footnotes omitted).

The court does not state that if two of the factors are present (the defendant is a U.S. citizen and there is no infringement on foreign law) this occurrence will be enough to waive a showing of the third factor (substantial effect) and thus permit extraterritorial application of the statute in question. In *Mich. Note, supra* note 8, it was similarly argued that this canon of construction rested on two considerations—that Congress was concerned with domestic conditions and that Congress did not wish to infringe on the laws of other nations. It was submitted that if there was no infringement on the laws of other countries then the presence of the second factor (that Congress had not been primarily concerned with domestic conditions when enacting this legislation) would not be required and the clear expression necessary under the canon need not be ascertained. This reasoning as the above quote shows is without support. Nor does *Foley* show that there are two considerations on which this canon of construction rests. It is more likely that the canon rests on domestic concern. Instead, the court will take into account the presence of all three factors, especially domestic effect, (as will be proven later) before deciding not to apply the canon strictly.

42. 345 U.S. 571 (1953).

43. 46 U.S.C. § 688 (1970).

44. 345 U.S. at 576 (1953).

ute were of a broad and sweeping character.⁴⁵ The Court noted that provisions of the shipping laws had traditionally been construed narrowly and thus have had limited application.⁴⁶ The Court concluded that "Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in absence of more definite directions"⁴⁷ The opinion bolstered its conclusion with another basic concept stemming from "the long-headed admonition of Mr. Chief Justice Marshall that 'an act of congress [sic] ought never to be construed to violate the law of nations if any other possible construction remains'"⁴⁸

This language of the Court does not evidence another principle upon which the canon of construction rests.⁴⁹ Instead this admoni-

45. *Id.* The Court observed:

Rather he relies upon the literal catholicity of its terminology. If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment." It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

Id. at 576-77.

46. *Id.* at 577. The Court determined:

The shipping laws of the United States, set forth in Title 46 of the United States Code, comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies. While some have been specific in application to foreign shipping and others in being confined to American shipping, many give no evidence that Congress addressed itself to their foreign application and are in general terms which leave their application to be judicially determined from context and circumstances. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. Thus, in *United States v. Palmer*, 3 Wheat. 610, this Court was called upon to interpret a statute of 1790 (1 Stat. 115) punishing certain acts when committed on the high seas by "any person or persons," terms which, as Mr. Chief Justice Marshall observed, are "broad enough to comprehend every human being." But the Court determined that the literal universality of the prohibition "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them" (p. 631) and therefore would not reach a person performing the proscribed acts aboard the ship of a foreign state on the high seas.

Id. at 577-78 (quoting Marshall, C.J., in *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

47. *Id.* at 581.

48. *Id.* at 578 (quoting Marshall, C.J., in *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804)).

49. *Id.*

tion of Marshall amounts to a prudential consideration which is in "accord"⁵⁰ with "this doctrine of construction."⁵¹ The Court clearly points out that there is no question of infringement on principles of international law:

On the contrary, we are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether "any" or "every" reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions.⁵²

The *Leasco Data Processing Equipment Corp. v. Maxwell*⁵³ case once again demonstrates the substantial conduct theory. Although this case involves the regulation of a foreign corporation rather than an American "citizen,"⁵⁴ the court asserted jurisdiction even in the face of an inconclusive Securities Exchange Act,⁵⁵ because there had been "significant" conduct in the United States.⁵⁶ There was domestic impact as well, since the acts committed in the United States were part of a scheme to defraud an American investor.⁵⁷

A review of the cases reveals that the courts will employ the presumption against extraterritoriality unless there is a showing that there is substantial conduct within the United States or that foreign activity is demonstrated as having a substantial domestic impact or effect. In addition, the courts have applied statutes if there is a criminal offense perpetrated against the U.S. Government in the absence of clear language in the statute to the contrary.

In the case presently before the court,⁵⁸ there is no criminal offense against the Government involved, nor has there been a showing of any substantial conduct within the territorial boundaries of the United States. Unless there is demonstrated by the Natural Resources Defense Council that there is substantial con-

50. *Id.*

51. *Id.*

52. *Id.* at 578-79. The Court footnoted this with a good discussion of the subject. *Id.* at 579 n.7.

53. 468 F.2d 1326 (2d Cir. 1972).

54. *Id.* at 1333.

55. 15 U.S.C. §§ 78a-78jj (1976).

56. 468 F.2d at 1334. The significant conduct was "when substantial misrepresentations were made in the United States." *Id.* at 1337.

57. *Id.*

58. *National Resources Defense Council v. Export-Import Bank of the United States*, No.77-0080 (D.D.C. filed Jan. 14, 1977).

duct or substantial impact within the United States, the courts should utilize the clear language test⁵⁹ which has invaluable aided the courts in the past.

B. Statutory Language

To satisfy the canon of construction reviewed earlier,⁶⁰ a statute or a section of the statute⁶¹ involved must contain express language or a clear indication that Congress intended it to have an extraterritorial scope. On its face this section does not have such an expression. Although "all agencies"⁶² is certainly a clear indication that Congress intended the statute to apply to every federal agency, the subsequent language does not indicate whether the Act applies to major federal actions within or without the territorial United States.

The phrase "human environment"⁶³ is equally uninformative as one commentator has noted:

[I]t cannot be inferred that simply because Congress used "human environment," rather than "national environment," it intended section 102(2)(C) to apply to the worldwide environment. It seems clear that Congress utilized the former phrase to ensure that the environmental consequences would be viewed from the human perspective rather than solely from an objective physical perspective.⁶⁴

This observation can be garnered from the remarks of Senator Jack-

59. The canon of construction or presumption against extraterritoriality mentioned before. See note 8 *supra* and accompanying text.

60. *Id.*

61. 42 U.S.C. § 4332 (1970). Section 102 provides:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,
 (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 (iii) alternatives to the proposed action,
 (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

62. *Id.*

63. *Id.*

64. Mich. Note, *supra* note 8, at 360.

son accompanying the Senate Committee Report and Dr. Lynton Caldwell's statement in the Senate Hearings.⁶⁵

Throughout the statute there are words and phrases of ambiguous meaning utilized, such as "man's," "environment," "biosphere," "all agencies," etc. Reliance on such words as indicating an extraterritorial scope would be ill placed. A rule of statutory construction laid down in *American Banana*,⁶⁶ cited in *Steele v. Bulova Watch Co.*⁶⁷ and utilized in *Sociedad Nacional De Manneros de Honduras v. McCulloch*,⁶⁸ establishes that "[w]ords having universal scope, such as '[e]very contract in restraint of trade,' '[e]very person who shall monopolize,' etc., will be taken . . . to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch."⁶⁹

Thus, it becomes clear that these words must be taken as describing subject matter within the territorial United States. Further, it should be noted that words such as biosphere are words of art and, in this case, biosphere's definition and use indicates no geographical or territorial "quantity."

If words of general meaning are to be weighed, then the specific words as "Americans" and "Nation" found scattered throughout the NEPA must be balanced as well. For, if examined closely, these words in their context seem to give the Act a decided domestic character.

At the outset, the Act heralds, by its title, the probable domestic interest embodied in the statute. A title can and will be considered in interpreting a statute.⁷⁰ Here, National Environmental Policy Act seems to indicate a concern with the environmental policy relating to one nation, the United States.⁷¹

The preamble, which enumerates the purposes of the Act, suggests a predominant domestic purpose by the following phrase: "to enrich the understanding of the ecological systems and natural re-

65. 115 CONG. REC. 40416 (1969); *Hearings on S. 1075, S. 237 and S. 1151 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 118 (1969) [hereinafter cited as *Senate Hearings*].

66. 213 U.S. 347 (1909).

67. 344 U.S. 280 (1952).

68. 201 F. Supp. 82 (D.D.C.), *aff'd*, 372 U.S. 10 (1962).

69. 213 U.S. 347, 357 (1909).

70. 2A D. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 47.03 (4th ed. 1973).

71. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1505 (1971), *National* is defined as, "of, relating to, or affecting one nation as distinguished from several nations or a supranational group . . . compare INTERNATIONAL . . ." *Id.*

sources important to the nation"⁷² Similarly, section 101(a),⁷³ which enumerates the environmental policy of Congress, states a goal with this phrase: "and fulfill the social, economic and other requirements of present and future generations of Americans."⁷⁴ In addition, section 101(b)⁷⁵ which delineates another list of goals, advances the theory that Congress was primarily concerned with domestic goals by the phrase "to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may— . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."⁷⁶ A close examination of these sections and the enacting clause easily provides the reader with a foundation for concluding that the statute is domestic in concern.⁷⁷

A final argument to support this proposition is to be found in section 201.⁷⁸ This subchapter calls for a report to be submitted to Congress by the Council on Environmental Quality,

which shall set forth (1) the status and condition of the . . . environmental classes of the Nation . . . (2) current and foreseeable trends . . . and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation.⁷⁹

It is apparent from this that Congress was concerned with the domestic problems and conditions that the Nation's environment would produce and required a report only on the Nation's environment. It would be logical to conclude that if Congress was so concerned with the global environment, as evidenced by the scattered references to the world's environment, it would have so indicated its concern by requiring a review of the effect of federal agencies' programs and activities throughout the world.

72. 42 U.S.C. § 4321 (1970).

73. *Id.* § 4331(a) (1970).

74. *Id.*

75. *Id.*

76. *Id.*

77. This conclusion can arguably be supported by the theories of *noscitur a sociis* and *eiusdem generis*. "The meaning of a word is or may be known from the accompanying words." BLACKS LAW DICTIONARY 1209 (1968). "The doctrine means that general and specific words are associated with and take color from each other, restricting general words to sense analogous to less general. *Dunham v. State*, 140 Fla. 754, 192 So. 324, 325, 326 (1939)." *Id.* "Of the same kind, class, or nature." *Id.* at 608.

78. 42 U.S.C. § 4341 (1970).

79. *Id.*

C. *Legislative History*

Legislative history is an additional tool used to interpret a statute. The history involved indicates first, an absence of a clear indication from Congress that 102(2)(C) action-forcing procedures have an extraterritorial scope, and second, a strong suggestion, as the Court has recognized,⁸⁰ that Congress was primarily concerned with domestic issues. It appears that what little international concern Congress had was codified in section 102(2)(E). Furthermore, the history does not show any linkage between 102(2)(E) and 102(2)(C), thus it is unlikely that these two provisions should be read together.

The House bill, H.R. 12549, was designed by the drafters⁸¹ merely to amend the Fisheries and Wildlife Act⁸² in order to set up a Council on Environmental Quality. Hearings on the bill were held by the Committee on Merchant Marine and Fisheries.⁸³ Of the numerous statements before the committee there is but a single reference, in a statement by Margaret Mead,⁸⁴ to the international scope that the bill should have. These few sentences must be balanced against the tremendous amount of testimony and material before the Committee, which might be classified as domestic in concern. It must be weighed in light of its effect on the committee. The remark engendered no debate.⁸⁵ Nor did it spur Congressmen to amend H.R. 12549 to include a section 102(2)(C) type impact provision having an express international scope, or a section 102(2)(E) type international cooperative provision.⁸⁶ In fact, the House bill never contained either of these directives.⁸⁷

Instead, the Hearings culminated in a House Report⁸⁸ which clearly does not express an extraterritorial scope and rather pointedly states:

The purpose of the bill, as hereby reported, is to create a Council on Environmental Quality with a broad and independent over-

80. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

81. *Mr. Dingall, et al.*

82. 16 U.S.C. §§ 741-754 (1976).

83. *Hearings on H.R. 6750, H.R. 11886, H.R. 11942, H.R. 12077, H.R. 12180, H.R. 12207, H.R. 12209, H.R. 12228, H.R. 12264, and H.R. 12409, Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 91st Cong., 1st Sess. (1969) [hereinafter cited as House Hearings].*

84. *Id.* at 26.

85. *Id.*

86. 115 CONG. REC. 26571-90 (1969).

87. *Id.*

88. H.R. REP. NO. 378, 91st Cong., 1st Sess. 2 (1969) [hereinafter cited as H. REP.].

view of current and long-term trends in the quality of our national environment to advise the President, and through him the Congress and the American people on steps which may and should be taken to improve the quality of that environment.⁸⁹

The Hearings⁹⁰ and the Report⁹¹ surrounding the Senate bill, S. 1075, must be examined and "accorded the greatest weight" in interpreting 102(2)(C), "since all the 102(2) directives found in NEPA are taken from S. 1075."⁹² The Senate Hearings show "little attention"⁹³ paid to the "limited territorial scope of S. 1075."⁹⁴ This lack of commentary on extraterritoriality does not provide the requisite clear indication necessary to give the NEPA 102(2)(C) directive an extraterritorial scope.

The Senate Conference Report is not "comparably clear"⁹⁵ either. There is nothing in the Report which indicates that the 102(2)(C) provision requires federal agencies abroad to file impact statements for foreign activities. There is no indication of an extraterritorial scope for 102(2)(C) at all. Finally, there is no indication that 102(2)(C) and 102(2)(E) supplement each other and should be construed in conjunction with each other. Nor does the section by section analysis⁹⁶ give the slightest hint of an extraterritorial scope for 102(2)(C). Instead, the Senate Report suggests that the draftsmen were concerned with the quality of the Nation's environment:

It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nations present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.⁹⁷

89. *Id.* at 1. The House Report further stated:

In achieving the purpose, the bill would require the transmission to the Congress by the President of an annual environmental quality report on the status of various aspects of the American environment, as well as on the foreseeable trends that may affect that status, and on their impact on other national requirements.

Id.

90. *Senate Hearings*, *supra* note 65.

91. S. REP. No. 296, 91st Cong., 1st Sess. 2 (1969) [hereinafter cited as S. REP.].

92. Mich. Note, *supra* note 8, at 366.

93. *Id.* at 367.

94. *Id.*

95. *Id.* at 366.

96. S. REP., *supra* note 91, at 20.

97. *Id.* at 4. The Senate Report continued:

The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life.

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On the other hand, there are words and phrases of broad meaning utilized throughout the legislative history. Words such as "man's," "biosphere," "all," "environment," and "human environment" can be found in the Hearings, congressional records and documents and in the Senate and House Reports. However, application of the *American Banana* theory of statutory construction would require that these words be construed to refer to subject matter within the territorial limits of the United States.

Moreover, Congress must be aware that language of such general character will be construed narrowly by the courts.⁹⁸ Therefore, Congress' failure to give a clear indication of an extraterritorial scope for 102(2)(C)—or some sign of a link between 102(2)(C) and 102(2)(E) in the legislative history—can only mean that Congress did not intend the provision to have such a scope.

There are statements to be found in the Senate Hearings which show a concern with the international aspects of environmental problems. Statements such as William Macomber's recommendation that the bill take into account that:

1. The deterioration of the national environment is part of a global process and thus requires remedial action on an international as well as a national scale.
2. Study, review and research must, therefore, be extended to take into account problems . . . beyond national borders
3. The solution of the environmental problem being a matter of national interest as well as of international concern, U.S. participation in bilateral and multilateral programs dealing with the international aspects of the problem must be recognized as a vital part of U.S. policy to cope with environmental problems.⁹⁹

This language should be compared to the remarks found in the section by section analysis on section 102(2)(E) in both the Senate Report and the final Conference Report. The similarity is striking.

In recognition of the fact that environmental problems are not confined by political boundaries, all agencies of the Federal Govern-

If the United States is to create and maintain a balanced and healthful environment, new means and procedures to preserve environmental values in the larger public interest, to coordinate Government activities that shape our future environment, and to provide guidance and incentives for State and local government and for private enterprise must be devised.

Id.

98. See notes 25, 26, 28, 47 *supra* and accompanying text.

99. *Senate Hearings*, *supra* note 65, at 10.

ment which have international responsibilities are authorized and directed to lend support to appropriate international efforts to anticipate and prevent a decline in the quality of the worldwide environment. In doing so however, the agencies are constrained to act in a manner consistent with the foreign policy of the United States.¹⁰⁰

It seems apparent from this comparison, that the addition of section 102(2)(E), after the Senate Hearings, was intended to encapsulate this and similar statements, ideas, and solutions into 102(2)(E) and make it "the sole protection for the international environment."¹⁰¹ Senator Jackson's remarks accompanying the reading of the Conference Report into the record would seem to prove that this observation is correct.¹⁰²

Thus, it is logical to conclude that 102(2)(E) is the only directive Congress¹⁰³ intended to have an international scope and that all other procedural directives, including 102(2)(C), are concerned with domestic activities.

There is a strong indication that Congress, in particular, the Senate, was primarily concerned with domestic issues in enacting the NEPA. The fact that the Senate Hearings were held before the Committee on the Interior and Insular Affairs, a committee traditionally concerned with domestic problems, is significant. It should be noted that the record does not indicate that the Committee ever officially consulted with the Foreign Relations Committee or any

100. 115 CONG. REC. 40420 (1969).

101. Mich. Note, *supra* note 8, at 367.

102. 115 CONG. REC. 40416-17 (1969). He said:

Another provision that should be brought to the attention of the Senate is section 102(e) of the conference report.

This provision was added to the bill as an amendment I offered in the Senate Interior Committee in June. The purpose of the provision is to give statutory authority to all Federal agencies to participate in the development of a positive, forward looking program of international cooperation in dealing with environmental problems all nations and all people share

Id.

103. The House is included, here, as well. The House report displayed similar language: "It is an unfortunate fact that many and perhaps most forms of environmental pollution cross international boundaries as easily as they cross states lines." H. REP., *supra* note 88, at 7. The Committee seems to have been concerned with domestic activities which could have environmental impacts on other countries. For example, pollution from our smokestacks could easily cross into Canada or Mexico. Thus, the Committee was expressing concern as it should that one nation's domestic activities should not despoil another nation's environment. There is no indication that there was concern about our foreign activities environmental impact, which have been encouraged by another nation.

other committee. It has been argued that Senator Jackson, the bill's sponsor, intentionally limited the scope of S. 1075 so that his committee would have jurisdiction.¹⁰⁴

In fact, it seems clear from the statements made by the Senators and Congressmen at the Hearings and in debate before adoption of the bills that most of the NEPA, including the action-forcing procedures, reflects a domestic concern and scope.¹⁰⁵

Finally, it should be noted that in S. 1075 section 102(2)(E) was characterized as "international effects."¹⁰⁶ Several statements throughout the legislative history lead one to believe that Congress was concerned with the problem of domestic activities,¹⁰⁷ having an environmental impact on other countries outside the United States. For example, the use of pesticides in the United States has environmental impact on other countries as well, since the pesticides can eventually get into our rivers and flow into Canada or Mexico.¹⁰⁸ This is a problem that concerns every nation.¹⁰⁹ There is no indication, though, that Congress was concerned about our limited involvement in joint foreign activities having environmental impact where these activities are encouraged or invited by the nation's sovereign.

104. See F. ANDERSON, NEPA IN THE COURTS (1973).

105. 115 CONG. REC. 40416 (1969). Senator Jackson characterized NEPA as a "national policy for the management of America's future environment." *Id.*

Senator Allot, co-sponsor of S. 1075 summed up what the NEPA stood for by the following statement. "It has been accurately stated that by the enactment of this measure, the Congress is not giving the American people something, rather the Congress is responding to the demands of the American people." *Id.* at 40422.

Senator Muskie added: "Mr. President, S. 1075 brings into focus the Senate's continuing concern for the quality of the Nation's environment." *Id.* at 29053.

Senator Nelson manifested his concern for the nation's environment. "In much of the Nation, we destroyed our forests. Then across the nation, we destroyed our rivers." *Senate Hearings, supra* note 65, at 59.

Finally Senator Randolph stated:

[t]his legislation which is of concern, . . . to Congress and the people of the United States. Today, approximately 203 million persons live in an area that is becoming increasingly confined. Because of the problems of urban development, mobility of people, and the methods by which products are moved from one point to another our society and our environment are constantly changing.

115 CONG. REC. 40425 (1969).

106. 115 CONG. REC. 29056 (1969).

107. Note that activities, here, should have a direct environmental impact. In other words, there is direct causation. The act of building and running a railroad would have a direct environmental impact, however a contract to finance same would not.

108. It should be noted that these activities have a direct environmental impact. See note 103 *supra*.

109. See note 103 *supra*.

III. CASE LAW

To date there has been no case decided which has directly dealt with the issue of the applicability of the National Environmental Policy Act to foreign assistance programs. However, five cases have raised the issue of extraterritorial application of the NEPA.

The case of most importance is *Sierra Club v. AEC*,¹¹⁰ which directly questioned the applicability of the NEPA to foreign assistance programs. The suit centered around a nuclear generating system export program. The sale of these systems and fuels to other countries involved the financial aid of the Export-Import Bank. The sales also involved technical help and cooperation of the Atomic Energy Commission, and the State Department. All three were named as defendants in the suit filed by the Sierra Club, which claimed that each named defendant should file a 102(2)(C) impact statement.¹¹¹ The issue was never decided since the AEC voluntarily agreed to prepare an impact statement. The issue being moot, the court held it "inappropriate where, as here, the court finds it unnecessary to impose specifically any positive NEPA obligation on Eximbank."¹¹² Although it might be argued that the court in effect acknowledged some agency would have to file an impact statement for a foreign assistance program, it is possible to distinguish this case on its facts, its holding,¹¹³ and the underlying interest involved. The potential for great harm, including domestic impact, is much greater than that which would be found in most foreign assistance programs.

The court in *People of Enewetak v. Laird*¹¹⁴ decided whether the NEPA applied to the Defense Department's activities in a trust territory. The Defense Department had filed an original impact statement concerning the project on Enewetak which was to test our nuclear defenses by simulating nuclear blasts with high explosives.¹¹⁵ The Council on Environmental Quality requested a more complete report be filed. The Defense Department agreed to file one. Thus, there was no question as to the filing of the impact statement. The issue which remained was whether the court had

110. Civil No. 1867-73 (D.D.C. Aug. 3, 1974).

111. *Id.*

112. *Id.*

113. Because this case was settled out of court, no decision on the merits of extraterritorially applying the NEPA was reached.

114. 353 F. Supp. 811 (D. Hawaii 1973).

115. *Id.* at 814.

subject matter jurisdiction under the NEPA to enjoin continued core drilling while the new impact statement was being prepared.¹¹⁶ The court held that the NEPA would apply since the residents of the Trust Territory are subject to U.S. authority and "do not have an independent government which can move to protect them from United States' actions that are thought to be harmful to their environment."¹¹⁷

In the *People of Saipan v. Dept. of Interior*,¹¹⁸ the same court held that the NEPA could be applied to federal agencies operating in the Trust Territory of the Pacific Islands.¹¹⁹ Suit was filed in order to enjoin implementation of a lease agreement for construction and operation of a hotel on public land in Saipan. The Trust Territory Government, in particular the High Commissioner, had not prepared an environmental impact statement which would consider the hotel's influence on the environment. The court concluded that "the Trust Territory Government was not a federal agency"¹²⁰ subject to judicial review under the APA or NEPA, and thus dismissed the suit.

It is worthy to note that the *Enewetak* court did confront the *Foley* canon of construction. The court did not reject the canon but found instead, that there was an indication that Congress intended the statute to extend to trust territories by its use of "the Nation"¹²¹ language instead of the "United States."¹²² The court stated:

Congress must manifest an intention to include the Trust Territory within the coverage of a given statute before the courts will apply its provisions to claims arising there. Such an intention is usually indicated by defining the term "State" or "United States" as used in the legislation to include the Trust Territory. Hence a problem of statutory construction arises

By its own terms, NEPA is not restricted to the United States territory delimited by the fifty states. In contrast to the usual practice, the term "United States" is left undefined and used only twice in the entire statute, and in both of these instances it serves the limited purpose of identifying certain policies, regulations and pub-

116. *Id.* at 820.

117. *Id.* at 818.

118. 356 F. Supp. 645 (D. Hawaii 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

119. 356 F. Supp. at 647.

120. Tarlock, *The Application of the NEPA to the Darien Gap Highway Project*, 7 N.Y.U.J. INT'L L. & POL. 459, 465 (1974).

121. 353 F. Supp. at 816.

122. *Id.* at 815.

lic laws that would otherwise remain ambiguous. Where one would have expected "United States" to have been used, the lawmakers substituted the much broader term "Nation."¹²³

The court's opinion in *Enewetak*, and subsequently in *People of Saipan*, can be also attributed to a United States governmental interest. Congress had legislative control over the island. Moreover, in each case there was no sovereign power to protect the people involved. Instead, the United States, as trustee, was burdened with this responsibility.

The fourth case, *Sierra Club v. Coleman*,¹²⁴ involved a deficient impact statement already prepared and circulated by the Federal Highway Administration. The defendants, the Department of Transportation and the Federal Highways Administration, were engaged in constructing the "Darién Gap Highway"¹²⁵ through Panama and Columbia which would link up the Pan American Highway System of South America with the Inter-American Highway.¹²⁶ Sierra Club brought suit to enjoin further construction until an impact statement was prepared that would meet the substantive and procedural requirements of NEPA.¹²⁷ The court granted the injunction noting that the defendant never objected to filing an environmental impact statement. Instead, the defendants argued that their original document complied with the impact statement requirements of NEPA.¹²⁸ In answer to this argument, the court outlined several major problems found in the document:

The second major defect in the "Assessment" is a substantive one: the failure of that document to adequately discuss the problems of the transmission of aftosa, or "foot-and-mouth" disease. While there is in the document a recognition of the probable transmission of aftosa absent the most stringent of control programs, and a consequent discussion of the evolving plans for preventing transmission of the disease to North America, there is no discussion whatsoever of the environmental impact upon the United States of a breakdown of such a control program. Considering that, according to the undisputed record in this case, aftosa is the most serious existing livestock disease, which if it spread into the United States could result in the destruction of up to twenty-five percent of North

123. *Id.* at 815-16 (footnotes omitted).

124. 405 F. Supp. 53 (D.D.C. 1975).

125. *Id.* at 54.

126. *Id.*

127. *Id.*

128. *Id.* at 56.

American livestock and an economic loss of ten billion dollars, as well as the extinction of such endangered species as the American bison, it seems evident that an impact statement which fails to discuss this possibility is fatally deficient.¹²⁹

Thus, the case is of little support to the proposition of the extraterritorial reach of the 102(2)(C) provision since an impact statement had already been prepared and no argument was made against its preparation. At best, the case simply signifies the court's willingness to require NEPA disclosure where there is likelihood of substantial impact on United States territory.

The final case, *Wilderness Society v. Morton*,¹³⁰ is of questionable relevance to the issue of the reach of the NEPA. The court recognized the right of a Canadian environmental group to enter into a suit filed against the Secretary of the Interior to test whether he had complied with procedures under the NEPA before he decided to issue permits for the Trans-Alaska pipeline. However, "[u]nder general principles of international law, the United States has a duty to manage activities within its territorial boundaries so as not to cause damage to environment of adjoining countries."¹³¹ Moreover, this case was not deciding U.S. Government agency activities within the jurisdiction of another sovereign. Thus, finding no direct support in case law, it might be of some assistance to review cases in which the courts have not applied NEPA 102(2)(C) due to counter-vailing considerations.

In *Cohen v. Price Commission*,¹³² the court refused to apply section 102(2)(C) "to an authorization by the Price Commission under the Economic Stabilization Act of 1970 for a fare increase on New York City subways and buses."¹³³ The court did not grant the requested temporary relief. Instead the court seemed to feel that the plaintiffs would fail on the merits "because the Price Commission's duty to act with dispatch was inconsistent with the systematic and interdisciplinary study required by NEPA."¹³⁴

The District Court for the District of Columbia reasoned similarly when it dismissed a suit brought by the Gulf Oil Corporation¹³⁵

129. *Id.* at 55.

130. 463 F.2d 1261 (D.C. Cir. 1972).

131. Tarlock, *supra* note 120, at 465.

132. 337 F. Supp. 1236 (S.D.N.Y. 1972).

133. Tarlock, *supra* note 120, at 467.

134. *Id.*

135. *Gulf Oil Corp. v. Simon*, 373 F. Supp. 1102 (D.D.C. 1974), *aff'd*, 502 F.2d 1154 (Temp. Emer. Ct. App. 1974).

which contended that the Energy Office's establishment of crude oil quota constituted a major federal action and thus required the filing of an impact statement.

Mr. Tarlock has persuasively argued in his article, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*¹³⁶ that: "Cohen and Gulf Oil do stand for the proposition that the agency can exempt itself by demonstrating that the blanket application of NEPA would seriously interfere with its ability to carry out its primary mission."¹³⁷

His observation seems to be well grounded since the court in *Commonwealth of Pennsylvania v. Federal Maritime Commission*¹³⁸ refused to grant a declaratory judgment and preliminary injunction on a suit challenging the so-called "Far East minibridge tariffs"¹³⁹ on the theory that the defendants violated the National Environmental Policy Act in their handling of the tariffs. The court reasoned that the Federal Maritime Commission had an obligation to accept tariffs under the Shipping Act. If compliance with the NEPA requirement would interfere with the agency's duty, the court concluded that the NEPA "might have to yield."¹⁴⁰

IV. POLICY AND OTHER COUNTERVAILING CONSIDERATIONS

Courts have considered, and always will consider, other factors, policies, and arguments before deciding to apply the National Environmental Policy Act. Even if a court should find that there was a theoretical base, through statutory language or legislative history,

136. Tarlock, *supra* note 120.

137. *Id.* at 467-68.

138. 392 F. Supp. 795 (D.D.C. 1975).

139. *Id.* at 798.

140. *Id.* at 802.

Further, even if there is an inconsistency between NEPA's requirements and the Shipping Act, plaintiffs have failed to show that the former would control. By its own terms, NEPA applies only "to the fullest extent possible." Agencies are exempted from compliance with NEPA when compliance would give rise to agency violation or statutory obligations. *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972). The FMC [Fed. Maritime Comm.] is bound to accept tariffs in the foreign commerce that otherwise meet the regulations issued pursuant to the statute If NEPA procedures conflict with this duty, the NEPA procedures might have to yield. *Atlanta Gas Light Co. v. Federal Power Commission* 476 F.2d 142 (1973). A preliminary injunction should not be issued in the face of a substantial question raised regarding the applicability of NEPA to the FMC's actions in this case.

Id.

for extending the NEPA to foreign assistance programs requiring activities within another sovereign's jurisdiction, the defendant agency should suggest practical considerations to the court for non-application of the NEPA.

As noted above, violation of an agency's mandate or significant interference with the implementation of the agency's purpose will be weighed heavily against strict NEPA application. Thus, the Export-Import Bank has in the past directed the court's attention to its enabling legislation.¹⁴¹ In its brief for a motion for summary judgment in the *Sierra Club v. AEC* case, the Eximbank analyzed the Export-Import Bank Act of 1945 and concluded that the function and purpose of the bank was to provide financing and other assistance so that United States' exports would be able to compete in world markets. In addition, the bank noted that the 1971 amendment was adopted to strengthen the bank's slipping competitive position by giving the bank more flexibility.¹⁴²

Application of the NEPA would impair the bank's ability to compete and thus seriously interfere with its purpose. Two major factors which produce this disadvantage is the time and the money

141. In its brief in support of a motion for summary judgment Eximbank outlined several plausible arguments for violation or interference with purpose. *Sierra Club v. United States Atomic Energy Commission*, Civil No. 1867-73 (D.D.C. 1973) [hereinafter cited as *Eximbank Brief*].

142. *Id.* at 41-42.

A review of the Export-Import Bank Act of 1945, as amended, demonstrates that the very nature of the Bank and the activities it performs are fundamentally incompatible with the application of NEPA to Bank activities. The language of that Act makes very clear that the sole function of the Bank is to assist United States exports in world markets by providing export financing that is competitive with export financing provided by other exporting nations. Thus, the purpose of the Bank is to "foster expansion of exports of goods and related services, thereby contributing to the promotion and maintenance of high levels of employment and real income and to the increased development of the productive resources of the United States."

In 1971, Congress amended the Export-Import Bank Act to strengthen the Bank and make U.S. exports more competitive in world markets. As the Senate Report on the bill which became the 1971 amendment noted:

The United States has, over the past decade, experienced a persistent imbalance in its international payments accounts. More recently, this imbalance has been aggravated by the failure of U.S. exports to keep pace with greatly increasing imports. At the same time, the growth of U.S. exports failed also to keep pace with the growth of world trade.

The primary feature in the amendment was a provision to withdraw Bank receipts and disbursements from the unified Federal budget. This was important so that "regardless of fluctuations in Government monetary and fiscal policies on the money markets at home and abroad" the Bank would still have flexibility "to meet the needs of the U.S. Export community"

Id. (footnotes omitted).

it takes to prepare an impact statement.

The Eximbank has urged that compliance with 102(2)(C) procedures would seriously frustrate the quick decisionmaking necessary for international negotiations.¹⁴³ An impact statement and preceding assessment, depending on the project, can take a long time to prepare if done conscientiously. This delay can interfere greatly with the start and completion of any project. In a world which relies increasingly on computers in order to expedite decisions such "red tape" can be a serious handicap in competing with other governments for foreign markets.

Cost is another factor which must be taken into account. It has been estimated that one environmental impact statement has cost \$7 million to prepare.¹⁴⁴ Although the preparation of many impact statements would not approach this figure, it is likely that the hiring and sending of experts to a foreign country would be of great expense to both the applicant nation or corporation and the agency. This is not to mention the cost in terms of travel time. Whatever the final approximation for each project, this figure must be added to the costs of the hundreds of other projects¹⁴⁵ which the agency engages in each month. The final figure could be astronomical and could well interfere with the budget of the agency.

The burden of the cost must be allocated as well. Either it is distributed to the applicant nation directly by requiring it to produce its own impact statement which will meet 102(2)(C) standards (the agency could also provide the statement and bill directly), or else the cost is deflected by charging higher interest rates. Whatever option chosen, short of congressional budget allocation or subsidy, the burden will be shifted to the applicant. This will of course be sorely resented by all nations, rich and poor, and regarded as a special hardship by poor nations who would be compelled to spend money to get money. Certainly, applicants who can pick and choose between nations and markets for purchases and financing will hesitate before incurring this added expense, red tape, and delay.

The Eximbank has also indicated that 102(2)(C) disclosure requirements "would frustrate foreign government demands for confidence of negotiations."¹⁴⁶ True, secrets or materials necessitating

143. *Id.* at 43.

144. *Joint Hearings before the Comm. on Public Works and the Comm. on the Interior and Insular Affairs*, 92nd Cong., 2d Sess. 557 (1972).

145. Eximbank Brief, *supra* note 141, at 17. "Inasmuch as the Bank is involved in hundreds of 'significant' export financing transactions . . .," *Id.*

146. Mich. Note, *supra* note 8, at 373.

such confidence could be deleted. However, this would render the effectiveness of 102(2)(C) minimal at best and make the preparation of an impact statement a futile exercise.

Perhaps the most devastating argument to be noted is the uncertainty which judicial review of NEPA procedure produces whenever Eximbank has committed itself on a project. This factor would not be lost on the potential applicant. With a federal court lurking in the background ready to test whether an impact statement is necessary and then whether it is adequate, the certainty necessary for most business deals would be destroyed. No applicant nation would wish to tie up its possibilities for financing by contracting with a nation which is never certain until the final court decision is handed down that it will be able to supply the money to start or complete a project. Nor does a court's inquiry stop once an "adequate" impact statement is filed. If an environmental group is so inclined, it can bring a suit to enjoin further action on a project already approved by an agency, stipulating that the agency's go ahead decision was arbitrary and did not properly take into account the environmental factors and alternatives brought out by the filed impact statement. "Most circuits, following the lead of *Calvert Cliffs*' . . . have required a showing of a good faith effort on the part of the agency to weigh environmental and developmental values in striking a final balance between the activity and its alternatives."¹⁴⁷

With a foreign policy which in large part has rested on monetary incentives, Eximbank has been "a powerful tool in the hands of those who formulate this nation's overall foreign policy."¹⁴⁸ Congress has recognized that "the Bank is, in effect, an arm of this nation's foreign policy apparatus."¹⁴⁹ Thus, the Bank in its decision-making process has to have considered: "this nation's foreign policy objective of supporting free and democratic governments throughout the world; and (c) enhance U.S. prestige and influence in neutral states so that these states can resist the political influence of Communist countries."¹⁵⁰

Unfortunately, the difficulties delineated above could greatly undermine our foreign policy objectives. Applicant countries would certainly hesitate before accepting our foreign assistance. Similarly, applicants would consider Russia and other countries' willingness to

147. Tarlock, *supra* note 120, at 470.

148. Eximbank Brief, *supra* note 141, at 20.

149. *Id.*

150. *Id.*

finance without such cost and delay. Furthermore, our foreign policy would be damaged and our image tarnished because the countries would regard extraterritorial application of NEPA as "environmental imperialism."¹⁵¹ Although it can be considered as a restriction on our own agency, putting few burdens on the applicant nations, many nations might view it as an imposition of our environmental standards and resent it.¹⁵² And, in part, the policy behind extension of NEPA to foreign jurisdiction is based on a belief that "it is highly improbable that host countries will ever consider environmental factors to the same extent as this country."¹⁵³ This sentiment is reminiscent of the "white man's burden" expressed by this country and others in its imperialistic stage. It is a belief not necessarily founded on truth. Furthermore, it is questionable whether this country has the right to determine another country's environmental policy unless an impact is shown upon the U.S.

The less developed countries argue that it is inequitable to require "the less developed countries to divert scarce resources to environmental quality in order to rectify the past environmental depredations of the developed nation,"¹⁵⁴ and that the financial burden should rest on the developed nation if it wishes to achieve a certain standard of environmental quality.

Application of the NEPA 102(2)(C) to foreign assistance agencies essentially performing foreign policy functions raises serious questions of unconstitutional infringement by Congress upon the foreign policy power of the executive branch. "The extent of congressional power in the field of foreign policy remains an open question. The views range from exclusive executive power to determine foreign policy to recognition of concurrent power in Congress."¹⁵⁵ It has been argued by one commentator that Congress, having recognized the possible "legislative usurpation of functions reserved to the executive,"¹⁵⁶ inserted a saving feature which dissipates possible constitutional infirmities. That saving feature is the phrase "where consistent with the foreign policy of the United States."¹⁵⁷ Perhaps the use of this phrase does dissipate constitutional infirmities, but

151. Mich. Note, *supra* note 8, at 378.

152. Tarlock, *supra* note 120, at 468.

153. *Id.*

154. *Id.*

155. Mich. Note, *supra* note 8, at 353 (footnotes omitted). See generally Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

156. Strausberg, *supra* note 3, at 59.

157. *Id.* (quoting 42 U.S.C. § 4332(2)(E)).

this expression is found in 102(2)(E) and not in 102(2)(C) procedures. It is significant that Congress felt it necessary to put in such a saving feature in an international cooperation provision. It would be logical to conclude that in the 102(2)(C) more stringent action-forcing directive, Congress would have inserted a similar feature, or one of even more flexibility, if it had intended 102(2)(C) to apply to foreign policy agencies.

The insertion of this "saving feature" underscores the possibility that practically speaking a court would not require a foreign assistance agency to file an impact statement. The agency could make a showing of conflict with foreign policy and the court would exempt it. "[A] court might well conclude that requiring the preparation of an impact statement for extraterritorial activities would be relatively pointless if the nature of those activities necessitated that only a minimal standard of adequacy be applied."¹⁵⁸

Finally, it can be argued that for prudential reasons the court should not review the extraterritorial activities of federal agencies. To apply the NEPA 102(2)(C) requirement to these activities would require the court to review these activities as well, if there is to be any enforcement of these provisions. "Traditionally, the federal judiciary has been reluctant to intervene in the conduct of foreign affairs."¹⁵⁹ An analogy might be made to the act of state doctrine:

A court might therefore rationally conclude that the federal activity under the control of the United States would not be an appropriate occasion to assess the environmental impact of an assistance project, since so much would depend on measures taken by a sovereign independent of United States control.¹⁶⁰

V. CONCLUSION

Environmental planning is a desirable goal. But the question is whether the impact procedure is the best way of accomplishing this objective "when two or more sovereigns share the responsibility for a project."¹⁶¹

This Note has focused on the statute itself to determine whether the statutory language and legislative history indicate a congressional intent to give the impact statement directive an extra-territorial scope.

158. Tarlock, *supra* note 120, at 471.

159. *Id.*

160. *Id.* at 472.

161. *Id.* at 473.

Applying the presumption against extraterritoriality, it must be concluded that there is no language in the statute or legislative history which would satisfy this well-established canon of construction. To the contrary, it is highly probable that 102(2)(E), the international cooperation provision, was intended as an exclusive statement of the international aspects of the otherwise domestically oriented National Environmental Policy Act.

It is evident, as well, that case law to date does not directly support the assertion that 102(2)(C) has an extraterritorial scope. Nor does it, or the language and legislative history of the statute, prove that the two provisions, 102(2)(C) and 102(2)(E), must be construed together. Instead, the case law points to the possibility that courts are willing to entertain countervailing considerations.

The numerous policy arguments present the court with a variety of rationales as to why it would be impracticable, and unconstitutional to apply the NEPA to foreign assistance programs. Thus, a court, if it should decide to apply the NEPA, must carefully consider the possible ramifications of its holding in each case.

However, if the plaintiff should be able to demonstrate substantial and significant domestic conduct or direct impact on the environment of the United States, the court might be warranted in dropping the presumption against extraterritoriality. This, coupled with a finding, if ascertainable, of some congressional intent to apply NEPA 102(2)(C) extraterritorially, could provide the basis for a theoretical extraterritorial application of the NEPA. At that stage, the court would be faced with the practical problems of applying the 102(2)(C) provisions. Here, the court should allow a showing by the foreign assistance agency of reasons why the NEPA should yield.

Jeremy Galton