

GRADUATING SENIOR

SHOULD U.S. ENVIRONMENTAL LAWS APPLY EXTRATERRITORIALLY?:
AN EXPLORATION OF NEPA, ESA AND TSCA

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I. INTRODUCTION

The global environment must be the concern of every nation. The United States has long considered itself a global leader, and for that reason it should participate in environmental preservation at a global level. The United States has enacted many environmental laws in order to protect the environment within its territory from further degradation, and this paper will discuss three of those laws. The U.S. enacted the National Environmental Policy Act which requires the consideration of environmental impact before any major federal action. The U.S. enacted the Endangered Species Act which requires the protection of endangered and threatened species and their habitats. The U.S. also enacted the Toxic Substances Control Act which set forth a system of testing and regulation for chemical substances and mixtures determined to be dangerous for humans and the environment. These efforts by the U.S. make valuable progress toward environmental conservation within the U.S.; but this paper argues that the U.S. could do more. None of these important pieces of U.S. environmental legislation is consistently applied to U.S. actions in foreign countries, even when the situation desperately calls for it.

Any discussion of extraterritorial application of U.S. laws must be cognizant of the need to respect foreign sovereignty and foreign relations. The balancing of environmental and diplomatic concerns is a core issue in whether U.S. environmental laws should be applied outside of the U.S. This paper argues that U.S. environmental laws should be applied extraterritorially by presenting the arguments for and against extraterritorial application of U.S. environmental laws, and discussing several important environmental laws that could be effective in protecting the global environment if enforced extraterritorially. Section II presents the arguments for extraterritorial application of U.S. environmental laws. Section III addresses the arguments against extraterritorial environmental regulation. Section IV discusses three important U.S. environmental laws that could be used to help protect the global environment; however none are consistently applied extraterritorially at this time. Part IV A addresses the National Environmental Policy Act and the arguments surrounding its interpretation and extraterritoriality. Part IV B discusses the Endangered Species Act and its interpretation to apply only within the territorial lands and waters of the U.S. Finally, part IV C focuses on the Toxic Substances Control Act and the EPA's interpretation that it should only apply domestically.

II. ARGUMENTS IN FAVOR OF EXTRATERRITORIAL APPLICATION OF U.S. ENVIRONMENTAL LAWS

There are many reasons why U.S. environmental laws should be applied to the actions of U.S. citizens and businesses operating in foreign countries. This section addresses four of the strongest arguments. In some instances, such as where the foreign country in question has an environmental regulatory system that is even partially functioning, the U.S. should refrain from imposing its own environmental regulations in

order to promote the development of foreign environmental regulation.¹ Such deference might actually improve the system for global environmental protection in the long run by promoting the development of environmental laws in lesser developed countries (LDCs).² Where the foreign country's regulatory system fails, or does not provide enough environmental protection, the U.S. has a duty to preserve the environment by imposing its own environmental regulations on its citizens and businesses operating in that country.

A. THREAT POSED BY WEAK REGULATORY SCHEMES IS GLOBAL

The environmental threat posed by poor environmental regulations in lesser developed countries is felt on a global level. Critics of extraterritorial application of U.S. environmental laws may argue that an LDC has the sovereign right to choose whether economic growth or environmental protection is more important in some circumstances, so long as the environmental harm is suffered by that country alone. The environmental threat of poor regulation in LDCs is never just local however, because the global environment is too interconnected to contain a threat in just one country.³ The threat posed to the atmosphere through ozone depletion cannot be divided by country so that India or America is only harming its portion of the atmosphere through the use of dangerous chemicals.⁴ The U.S. bans the sale or use of certain chemicals within the U.S., but it allows the export of these chemicals for use in foreign countries in some circumstances.⁵ This is not a safe practice because even though these chemicals are not being used within the United States, their effects may be felt by those in the U.S.(and also all across the globe) when the banned chemical returns in imported food products⁶ or in pollution drifting through the air or water to damage U.S. territory.⁷

B. SOME LESSER DEVELOPED COUNTRIES ARE ILL-EQUIPPED TO REGULATE EFFECTIVELY

One of the most important reasons U.S. environmental laws should be applied extraterritorially is that many lesser developed countries are not situated or prepared to impose their environmental regulations on U.S. citizens and companies operating in their territory.⁸ Many times an LDC has the goal of protecting the environment, and it may even have the necessary regulations on its books, however the country's economic situation makes it impossible to effectively enforce its environmental laws. If basic

¹ *Developments in the Law – International Environmental Law: VI Extraterritorial Environmental Regulation*, 104 HARV. L. REV. 1609, 1637(1991) [hereinafter *Developments in the Law*]. (India's tort law system improved greatly after the litigation over the Bhopal disaster was transferred from the U.S. back to India. This likely would not have happened had the U.S. intervened aggressively and oversaw the litigation itself.)

² *Id.*

³ *Id.* at 1617 (citing B. Madhusoodana Kurup, *Environmental Protection Act: A Scientist's View*, 11 COCHIN U.L. REV. 12, 13 (1987)).

⁴ *Developments in the Law*, *supra* note 1, at 1617.

⁵ WILLIAM H. RODGERS JR., *HANDBOOK ON ENVIRONMENTAL LAW*, §§3.1-5.10 (West Pub. Co. 1977).

⁶ *Id.*

⁷ Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 *ECOLOGY L.Q.* 477, 480 (1990).

⁸ *Id.* at 477.

necessities of life such as food, water and clothing are in short supply, environmental protection may not be a national priority.⁹ In these situations the U.S. has a duty to impose its environmental laws in order to protect the LDC's citizens, natural resources and environment from U.S.-owned businesses operating in that country.

One reason why LDCs are sometimes less capable of protecting their environments is because they lack the ability to interpret sophisticated scientific evidence necessary to evaluate environmental risks.¹⁰ For example, an LDC's economic limitations may mean that it lacks the resources necessary to interpret and evaluate the chemical data necessary to make an informed decision regarding importation of pesticides.¹¹ In this case the LDC could make a decision, based on its best interpretation of the information, to allow a U.S.-based corporation to use a pesticide or other chemical that could have a horrible impact on the local and global environment. This problem would be eliminated if U.S. environmental regulations were imposed on American businesses regardless of its operating location.

A second reason why some LDCs are less-capable of enforcing environmental regulations is that corrupt government officials may allow environmentally harmful activities within an LDC for personal economic gain.¹² A U.S.-based corporation could influence a corrupt official to look the other way regarding a factory's pollution or other environmentally-harmful practice in an LDC. Savvy businessmen have illegally imported waste products into economically disadvantaged countries by bribing officials to ignore their cargo for years.¹³ In many LDCs, government officials have such close personal and financial connections to the international business community operating in their country, that they are reluctant to enforce environmental regulations that may damage their self-interest in the business.¹⁴ In extreme cases a U.S.-based corporation may be so strong and influential that its power is greater than that of the LDC's government.¹⁵ In these cases the ability of the corrupt official to harm the environment to serve his or her own self-interest could be eliminated if U.S. environmental laws were enforced on its businesses operating in foreign countries.

Another reason why many LDCs are ill-equipped to regulate effectively is that they simply do not have the resources or mechanisms necessary to enforce meaningful environmental protection.¹⁶ In some LDCs the entire department of agriculture could consist of one or two staff members with nothing but a motorcycle and no fuel.¹⁷ In Mexico for example, hazardous waste regulation is hampered by the difficulty of detection cause by lack of personnel, weak institutional controls and minimal penalties.¹⁸ India has very strict environmental regulations in some areas, but the government failed

⁹ *Id.* at 486.

¹⁰ Karen A. Goldberg, *Efforts to Prevent Misuse of Pesticides Exported to Developing Countries: Progressing Beyond Regulation and Notification*, 12 *ECOLOGY L.Q.* 1025, 1045 (1985).

¹¹ *Id.*

¹² Lori Gilmore, *The Export of Nonhazardous Waste*, 19 *ENVTL. L.* 879, 884 (1989).

¹³ *Id.* at 886.

¹⁴ Neff, *supra* note 7, at 487.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Goldberg, *supra* note 10, at 1030.

¹⁸ Sanchez, *Health and Environmental Risks of the Maquiladora in Mexicali*, 30 *NAT. RESOURCES J.* 163, 176-180, 184-86 (1990).

to provide for an effective agency to enforce these regulations, so they are often ineffectual.¹⁹ The United States clearly possesses the necessary resources to enforce its environmental regulations, and it should enforce its domestic regulations extraterritorially when the country where U.S. citizens and businesses are operating cannot control environmentally-degrading actions by itself.

C. CURRENT METHODS OF INTERNATIONAL ENVIRONMENTAL REGULATION ARE NOT VERY EFFECTIVE

A third argument for the extraterritorial application of U.S. environmental laws is that the current method of international environmental regulation, comprised of international agreements and treaties, has not always proven to be that effective. In cases where international agreements have been ineffective, unilateral regulation by the U.S. may provide the best protection for the environment.

International agreements and treaties are very slow to develop because they require international discussion, drafting, and approval.²⁰ For example, the world has known of the danger of the deteriorating ozone layer for more than a decade, but the Montreal Protocol, an international agreement designed to curb ozone depletion, took years to draft.²¹ The Basel Convention regulates the international trade of hazardous wastes, however its requirements are vague, and loopholes to avoid compliance are plentiful.²² In countries that are incapable of limiting ozone depletion and controlling the importation of hazardous waste, the U.S. could impose its own environmental regulations on its citizens to eliminate these dangers.

International agreements are difficult to implement and enforce because they apply across national boundaries.²³ Enforcement initially requires that countries agree to comply with the regulation, and then there must be a method to ensure compliance and penalize defiance. Applying U.S. environmental laws to actions in weaker LDCs would eliminate the need to monitor for strict compliance with international environmental laws in countries where it would be particularly difficult.²⁴ When international law fails to protect the environment, international environmental protection must be achieved through extraterritorial application of stronger nations' environmental regulations.

D. CONSEQUENCES OF NOT IMPOSING U.S. ENVIRONMENTAL LAWS CAN BE DIRE

A final argument for the extraterritorial application of U.S. environmental laws to citizens and businesses operating in foreign countries is provided by the example of the Union Carbide disaster in Bhopal, India. This horrific accident is one of many caused by U.S. corporations operating in countries with more relaxed environmental laws, and it

¹⁹ *Developments in the Law*, *supra* note 1, at 1617 (citing R. Jaganmohan Rao & Sumitra, *A Critique of the Environment Act*, 11 COCHIN U.L. REV. 18, 25, 31 (1987)).

²⁰ Neff, *supra* note 7, at 481.

²¹ *Id.* at 482.

²² *Id.*

²³ *Id.* at 486.

²⁴ *Developments in the Law*, *supra* note 1, at 1611.

shows the dire consequences of failing to impose U.S. laws on businesses operating abroad.

The U.S.-based Union Carbide Corporation (UCC) was one of the first U.S. companies to open a subsidiary company in India when it opened Union Carbide India Limited (UCIL) in 1934.²⁵ UCIL operated 14 plants in India producing pesticides for use within India.²⁶ On December 3, 1984 methyl isocyanate (MIC) gas leaked from a tank at UCIL killing 3,800 people²⁷ and injuring countless thousands of others.²⁸ UCIL had ceased active production of chemicals in the early 1980s and, because it was not producing, it allowed its safety systems to fall into disrepair, a careless mistake that almost certainly would not have been made at a plant in the U.S.²⁹ After the disaster at Bhopal no clean-up effort was made, and the area remains so polluted that people not even present during the leak of 1984 are suffering the effects of MIC gas.³⁰

While it is possible that the Bhopal disaster could have happened on U.S. soil, the environmental regulations imposed on pesticide manufacturers operating in the U.S. make it very unlikely. If the leak had happened in the U.S., at the very least polluter-pays laws would have required Union Carbide to pay for an extensive cleanup of the disaster area which would have prevented countless deaths, and U.S. tort law would likely have provided victims with monetary compensation.³¹ If U.S. environmental law had been applied extraterritorially to control the UCIL subsidiary of Union Carbide, perhaps the disaster in Bhopal, the suffering of countless people, and extreme harm to the environment could have been avoided.

III. ARGUMENTS AGAINST EXTRATERRITORIAL APPLICATION OF U.S. ENVIRONMENTAL LAWS

There are many arguments against extraterritorial application of U.S. environmental laws. The arguments involve both economic and political concerns, and should be carefully considered before any decision to impose U.S. environmental regulations in a foreign county.

A. ECONOMIC CONCERNS

1. Market Substitution

The market substitution argument states that preventing U.S. companies from engaging in environmentally harmful practices in foreign countries will limit its competitiveness and make way for companies operating in less-regulated countries to

²⁵ Union Carbide, Bhopal Information Center, <http://www.bhopal.com/chrono.htm> (last visited April 23, 2008).

²⁶ *Id.*

²⁷ This is the number of fatalities according to Union Carbide, other estimates of immediate casualties from the leak on December 3rd range from 8,000 to 15,000 people.

²⁸ Neff, *supra* note 7, at 487.

²⁹ The Bhopal Medical Appeal, <http://www.bhopal.org> (last visited April 23, 2008).

³⁰ *Id.*

³¹ The Indian courts did provide victims with some measure of damages.

step in and take the place of the U.S.³² Basically this argument says that if the U.S. doesn't allow a practice, another country will, and American businesses will suffer. The United States is clearly not the only country capable of producing and exporting hazardous chemicals to lesser developed countries for example, and supporters of the market substitution argument believe that if U.S. companies are forbidden to produce and export DDT for example, a manufacturer somewhere else will do it instead. American workers suffer through lost jobs or the downward pressure on wages resulting from the reality or possibility of market substitution. Supporters of this argument ask why American citizens and businesses should be forced to suffer for the environment if another country is going to export dangerous chemicals and reap the economic benefits regardless of U.S. regulations?

2. Extraterritorial Regulation Will Force Businesses to Relocate

Opponents of extraterritorial environmental regulation argue that if the U.S. imposes its environmental laws on businesses operating in foreign countries, those businesses will be forced to relocate their entire operation to another less-restrictive country.³³ This would be an exodus of the entire operation and not just a new plant or manufacturing operation in a foreign country. American businesses will be forced to relocate entirely in order to avoid U.S. extraterritorial regulation and remain competitive with companies based in less-restrictive countries. These opponents argue that if U.S. environmental laws force businesses to relocate, it will have drastic consequences on the U.S. economy.³⁴ They argue that this relocation would harm U.S. employment, trade, industrial base, and national security.³⁵ The effect of any proposed environmental regulation on the U.S. economy is a very important consideration and must be taken seriously. If U.S. domestic regulations cause companies to base parts of their operation in a foreign country, and then extraterritorial regulation forces the business to relocate entirely outside of the U.S., the regulations will no longer have any control over that company's environmentally-harmful practices. A balance between economics and environmental concerns is important if long-term environmental preservation is going to be successful.

B. POLITICAL CONCERNS

1. Environmental Imperialism

One political concern surrounding enforcement of U.S. environmental laws extraterritorially is that foreign nations and their citizens could interpret this as U.S. imperialism. Some may already view U.S. actions in foreign countries through critical eyes and see the U.S. as trying to impose its culture, economics, and political system on the world. This view could be exacerbated if the U.S. began exporting its environmental

³² Goldberg, *supra* note 10, at 1037.

³³ *Id.* at 1039.

³⁴ Peter J. Berrie, *Controlling the Export of Hazardous Industries: A Look at the United States Asbestos Industry*, 2 *TRANSNAT'L L. & CONTEMP. PROBS.* 273, 274 (1992).

³⁵ *Id.*

policy as well as its goods. This potential negative reaction could be tempered if the U.S. acts carefully.

Businesses often form in the U.S. and move operations or open branches or plants in foreign countries for a variety of reasons.³⁶ These businesses must comply with their host country's environmental laws; however these laws are often less stringent than the environmental regulations in the U.S., particularly if the host country is less developed than the U.S.³⁷ If all U.S. citizens and businesses, regardless of their location, were required to comply with U.S. environmental laws, the exportation of environmental degradation could be improved or eliminated, however the host country could resent the U.S. regulating in its territory.

Various departments of the U.S. Government operating in foreign countries are not always subject to U.S. environmental regulations regarding their actions. The actions of U.S. governmental agencies in foreign countries can have devastating consequences on the environment and the plants and animals that inhabit it. Like U.S. citizens and businesses, the U.S. government should be subject to U.S. environmental laws even when operating abroad, however the U.S. must not ignore the power of the host country to set its own regulations.

If the U.S. wishes to impose its environmental regulations on businesses operating abroad, it must be very careful. International and foreign environmental regulation will not improve if other governments resent the U.S. and its policy as imperialist and resist cooperation.

2. Disregard for Foreign Sovereignty

Every country has the sovereign right to enact its own laws, determine the best use of its resources, and control the activity of those within its borders. The appearance that the United States is imposing its environmental laws on another country could offend that country's sovereign right to use its own resources as it wishes.³⁸ If U.S. development in a foreign country was interrupted because the American corporation propelling that development was constrained by restrictive U.S. environmental laws, the host country could see U.S. regulation as imposing on its sovereignty. This would be a case where only U.S. citizens and businesses were regulated; however adherence to U.S. environmental law would have serious effects on the development potential of the country in which the action was to take place.

The sovereignty and continued development of poorer nations is very important, and cannot be ignored in the quest to protect the environment. The best solution will require a balancing of development interests and environmental protection in each situation. If the economic reality of an LDC forces it to ignore environmental concerns in favor of development, the U.S. should work with that country to prevent long-term environmental harm.

³⁶ Labor, supplies, real estate, and raw materials are often less expensive in other locations.

³⁷ Neff, *supra* note 7, at 478.

³⁸ Mary McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 437 (1991).

C. ADDRESSING THE ARGUMENTS AGAINST EXTRATERRITORIAL REGULATION

Almost all of the arguments against extraterritorial application of U.S. environmental laws can be refuted by the extreme importance of protecting the international environment. Careful action by the U.S. in deciding when, where and under what circumstances to impose its regulations in foreign countries will also help to address political concerns.

The economic concerns of market substitution and industry exodus have both been proven incorrect in this area of law. The market substitution argument fails because it has been shown that as more developed countries such as the United States impose stricter regulations on environmentally harmful practices, other countries follow.³⁹ Thus if the U.S. leads the way in imposing strict environmental standards on its citizens and businesses, it is unlikely that it will suffer market substitution in the long-run because the other countries that could step in to the U.S. will follow its example instead. The argument that strict extraterritorial regulation will cause businesses to move their entire operation also fails because researchers have collected data on the supposed mass exodus of U.S. industries, and have found that very few hazardous industries are leaving the U.S. in response to strict environmental regulations.⁴⁰

The political concerns could all be assuaged if the U.S. acted carefully in its imposition of environmental regulation abroad and respected the independence and sovereignty of the foreign government. The U.S. could avoid imperialist concerns surrounding extraterritoriality by regulating only in situations where the host country is ill-equipped to regulate on its own, and only controlling the conduct of American citizens, the U.S. Government and American-owned businesses. If the U.S. required its government, citizens and businesses to obey its environmental policy regardless of their location, the U.S. would demonstrate the nation's respect for foreign laws regarding the environment and avoid imperialist criticism.

IV.

AN EXPLORATION OF THE EXTRATERRITORIAL POTENTIAL OF SEVERAL IMPORTANT U.S. ENVIRONMENTAL LAWS

The U.S. has the responsibility to regulate its citizens and businesses acting in foreign countries but in many cases it does not. Even where the language of the legislation in question would allow for it to be applied extraterritorially, the U.S. often fails to do so. This section discusses three important pieces of U.S. environmental legislation that could be helpful in protecting the environment in LDCs if enforced extraterritorially: the National Environmental Policy Act; the Endangered Species Act; and the Toxic Substances Control Act. These statutes were chosen because they demonstrate the general policy of the U.S. regarding environmental legislation, and they also show the difficulty surrounding extraterritorial application. None of these laws are applied extraterritorially in a consistent manner; yet each one, if applied extraterritorially, has the potential to reach actions outside of the U.S. and prevent environmental harm.

³⁹ Goldberg, *supra* note 10, at 1038.

⁴⁰ *Id.*

A.
THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969 (NEPA) was enacted on January 1, 1970 as a way for Congress to declare a national policy concerning the environment. The purpose of NEPA is, “to declare a national policy which will encourage ... harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment ... to stimulate the health and welfare of man ... and to establish a Council on Environmental Quality.”⁴¹ There is some debate surrounding the applicability of NEPA to actions occurring outside of the United States because the language of the Act lends support to both the contention that NEPA applies solely to federal actions occurring within the boundaries of the United States and its territories, and the contention that NEPA applies to all federal actions both domestic and abroad. This section discusses the general provisions and operation of NEPA and highlight the interpretation of NEPA’s extraterritorial application.

1. INTERPRETING NEPA

The two primary components of NEPA create the Council on Environmental Quality, and impose the requirement that all federal agencies consider the effects their actions may have on the environment.⁴² This is accomplished by requiring that agencies prepare Environmental Impact Statements in connection with any proposal for legislation or major Federal action significantly affecting the quality of the human environment.⁴³

a. The Council on Environmental Quality

Title II of the Act creates the Council on Environmental Quality (CEQ).⁴⁴ The CEQ is comprised of three members who are appointed by the President. NEPA sets out various qualifications for CEQ members to ensure that members are uniquely qualified to see that NEPA requirements are fulfilled.⁴⁵ The responsibilities of the CEQ include: assisting the President in preparing the Environmental Quality Report required by section 201 of the Act;⁴⁶ gathering information on environmental trends; reviewing programs and activities of the Federal Government in accord with NEPA; making recommendations to the President; conducting investigations relating to environmental quality; documenting changes in the natural environment; reporting to the President on the condition of the

⁴¹ National Environmental Policy Act, 42 U.S.C. § 4321 (2000).

⁴² *Id.* § 4332.

⁴³ *Id.* § 4332.

⁴⁴ *Id.* § 4331.

⁴⁵ *Id.* § 4344.

⁴⁶ *Id.* § 4341. (The Report must set forth (1) the status of the major natural, manmade, or altered environmental classes of the Nation; (2) current and foreseeable trends in the environment and their effects on the Nation; (3) the adequacy of available natural resources for fulfilling the requirements of the Nation; (4) a review of the programs of the government, Federal, State and local with respects to their effect on the environment; and (5) a program for remedying the deficiencies of existing programs.)

environment; and making and furnishing studies on matters of policy to the President.⁴⁷ Perhaps the most important function of the CEQ included in these responsibilities is to oversee the preparation of EISs by Federal agencies proposing actions or legislation of the type addressed by NEPA.

b. Environmental Impact Statements

The most important procedural aspect of NEPA is the Environmental Impact Statement (EIS), which requires Federal agencies to consider the environmental impact of their proposed actions.⁴⁸ Title I Sec. 102 of NEPA states,

“all agencies of the Federal Government shall 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.”⁴⁹

Requiring preparation of EISs was intended to make federal agencies consider ecological safety along with development.⁵⁰ The requirement that agencies prepare an EIS with any proposed legislation or major Federal action⁵¹ was necessary in order to meet the environmental policy goals stated in NEPA. NEPA was designed to make sure that federal actions would occur only after decision-makers had fully explored the environmental consequences of the actions, and decided that the benefits of the actions outweighed their environmental costs.⁵²

NEPA's EIS requirement has been helpful in getting federal agencies to consider the consequences of their actions on the environment. It is difficult, however, to know whether NEPA's EIS requirement applies when an agency's activities occur in, or

⁴⁷ *Id.* § 4344.

⁴⁸ *Id.* § 4332. (A copy of the EIS must be made available to the President, the CEQ, and the public.)

⁴⁹ *Id.* § 4332.

⁵⁰ Bosire Maragia, *Defining the Jurisdictional Reach of NEPA: An Analysis of the Extraterritorial Application of NEPA in Environmental Defense Fund, Inc. v. Massey*, 4 WIDENER J. PUB. L. 129, 143 (1994).

⁵¹ Browne C. Lewis, *It's a Small World After All: Making the Case for the Extraterritorial Application of the Nation Environmental Policy Act*, 25 CARDOZO L. REV. 2143, 2146 (2004). (If an agency is unsure if their activity is 'major' they must prepare an Environmental Assessment "designed to help the agency determine whether it must prepare an EIS.")

⁵² *Jones v. D. C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974).

exclusively affect, foreign nations, and the debate regarding the extraterritorial application of NEPA's EIS requirement is still unresolved.

2. THE ARGUMENT FOR EXTRATERRITORIAL APPLICATION OF NEPA

There are several arguments in favor of applying NEPA extraterritorially. The language of the statute, if read broadly, could support an argument for extraterritorial application. The executive branch seemed to favor extraterritorial application by enacting Executive Order 12,144, and through the CEQ which continually promotes extraterritorial application of NEPA principles. Finally, the judicial branch has rendered decisions that fall on both sides of this argument, however its position in *Environmental Defense Fund, Inc. v. Massey* would support the contention that NEPA should apply extraterritorially.⁵³

a. Extraterritorial Language Within NEPA

A broad reading of the language of NEPA could lead to the conclusion that it was designed to apply extraterritorially. The stated purpose of the Act is “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment.”⁵⁴ NEPA also addresses the need to “fulfill the social, economic, and other requirements of present and future generations of Americans.”⁵⁵ The use of the term ‘man’ in one section and ‘Americans’ in another suggests that the drafters recognized the difference between these two terms and wanted to highlight that difference in various parts of the Act. To use the specific term ‘Americans’ would suggest that that portion of the Act applies specifically to those residing in America, while the use of the term ‘man’ in other parts of the Act appears to have a more global application. An argument based on the language used in NEPA would proceed by claiming that if the drafters meant for NEPA to apply only in the territory of the United States they would not have used universal terms in the drafting of the statute.

b. Executive Support for Extraterritorial Application of NEPA

In 1978 the CEQ issued a statement setting out its position that NEPA should be applied extraterritorially.⁵⁶ The CEQ suggested that NEPA be amended to include language providing that if “the environment of a foreign country was impacted by the [proposed] project, the federal agency was only required to prepare a Foreign Environmental Statement.”⁵⁷ While this proposal was never realized, it seems that the position of the CEQ should carry some weight in deciding the extraterritorial application of NEPA since it is the agency created to administer NEPA.

⁵³ *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

⁵⁴ National Environmental Policy Act, 42 U.S.C. §4321 (2000).

⁵⁵ *Id.* §4331.

⁵⁶ Sylvia M. Reichel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115 (1994).

⁵⁷ Lewis, *supra* note 51, at 2151.

President Carter issued Executive Order 12,114 in an attempt to resolve the question of NEPA's extraterritorial application. Executive Order 12,114 stated that NEPA should be applied extraterritorially in four situations: (1) Major Federal actions significantly affecting the global commons; (2) Major Federal actions significantly affecting the environment of a foreign nation ... not involved in the action; (3) Major Federal actions significantly affecting the environment of a foreign nation by exposing it to toxic substances or radioactive substances; (4) Major Federal actions outside the US which impact resources of global concern.⁵⁸ The Executive Order provided for exceptions that exempted activities that had important foreign policy implications.⁵⁹ The issuance of Executive Order 12,114 showed President Carter's recognition of the need to apply NEPA extraterritorially.

c. Judicial Support for Extraterritorial Application of NEPA

The judicial branch has had several opportunities to interpret NEPA and decide whether its language applies to extraterritorial actions. In each case the court determined that NEPA's EIS requirement did not apply extraterritorially to all federal actions. The courts in some cases declared that NEPA applied to the situation before them, limited their interpretation to the facts of the cases before them.

The judiciary had a chance to interpret the extraterritoriality of NEPA in *Environmental Defense Fund, Inc. v. Massey*.⁶⁰ The primary issue in *Massey* was the National Science Foundation's burning of food waste in Antarctica.⁶¹ In *Massey*, the court held that NEPA was "designed to control the decision-making process of U.S. federal agencies, not the substance of agency decisions."⁶² Therefore, the action regulated by NEPA in the *Massey* case was the decision to burn food waste, not the extraterritorial burning of the waste. By deciding that the decision to burn food waste was the primary Federal action at issue in this case the court was able to bypass the question of NEPA's extraterritorial application because the decision occurred domestically. This would seem to make NEPA applicable to all federal decisions, because all decisions are made domestically, but the court in *Massey* limited its decision to that case alone.

In *Natural Resources Defense Council, Inc., v. Nuclear Regulatory Commission*,⁶³ the U.S. Court of Appeals for the District of Columbia held that the Nuclear Regulatory Commission could approve the sale for export of a nuclear reactor and nuclear materials without the preparation of an EIS regarding the impact of that action on the recipient nation.⁶⁴ The court in this case recognized that conditioning export licenses was not a traditional extraterritoriality problem, but the imposition of U.S. regulatory standards in this case would have presented the same problems as a traditional extraterritoriality case.⁶⁵

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Envntl. Def. Fund, Inc. v. Massey*, *supra* note 53.

⁶¹ *Id.*

⁶² *Id.* at 532.

⁶³ *Natural Res. Def. Council, Inc., v. Nuclear Regulatory Comm'n*, 674 F.2d 1345 (D.C. Cir. 1981).

⁶⁴ *Id.*

⁶⁵ *McDougall*, *supra* note 38, at 452.

In *Greenpeace USA v. Stone*⁶⁶ the court held that an EIS was not required for the movement of chemical munitions through Germany. The court's reasoning for not applying NEPA to this case was that a diplomatically delicate situation could arise if a U.S. agency put procedural hurdles in the way of this operation.⁶⁷

The judiciary has not yet decided on NEPA's general applicability to federal actions occurring in or affecting only foreign nations despite its many opportunities to make this issue more clear. It is possible that if a case requiring interpretation of NEPA's extraterritoriality survived to be reviewed by the U.S. Supreme Court this issue could be resolved once and for all.

3. EXAMPLE OF NEPA'S APPLICABILITY IN A FOREIGN COUNTRY

An example of the confusion over the application of NEPA in a foreign country arose in the 1978 case of the National Organization for the Reform of Marijuana Law (NORML) v. U.S. Department of State.⁶⁸ The United States District Court for the District of Columbia was able to circumvent the ultimate issue of the extraterritorial application of NEPA in this case; however it still provides an example of how the statute might work in a foreign country.

The plaintiffs in this case were seeking a declaratory judgment that the Department of State was in violation of NEPA for failing to prepare an EIS in connection with a federal program providing assistance to a Mexican herbicide spraying project.⁶⁹ The spraying project was aimed at eradicating Mexican marijuana and poppy crops to combat drug trafficking from Mexico into the United States. NORML alleged that the program endangered the health of its members who traveled to Mexico and also its members who ingested marijuana that had been sprayed with the herbicide. The attorneys for NORML argued that Mexican-grown marijuana consumed in the United States had been found to contain high levels of the herbicide paraquat presenting a serious health risk.⁷⁰

NORML claimed that NEPA's EIS provision was applicable because this situation constituted a "major Federal action significantly affecting the quality of the human environment."⁷¹ The Department of State furnished financial and technical support for the program providing \$12 million a year and aircrafts for the identification and eradication of the fields as well as personnel training.⁷² NORML sought an injunction preventing the Department of State from providing assistance to this program until they fully complied with NEPA, and from supporting any other herbicide spraying program in another country without preparing an EIS.⁷³

⁶⁶ *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990).

⁶⁷ McDougall, *supra* note 38, at 454.

⁶⁸ *NORML v. U.S. Dep't of State*, 452 F. Supp 1226 (D. D.C. 1978).

⁶⁹ *Id.* at 1228.

⁷⁰ *Id.*

⁷¹ National Environmental Policy Act, 42 U.S.C. §4332(2)(C) (2000).

⁷² *NORML*, *supra* note 68, at 1231.

⁷³ *Id.*

The court discussed the application of NEPA in this situation, however it chose to focus on the fact that the federal action in this case had effects in the U.S.⁷⁴ which would mandate compliance with NEPA and failed to significantly address the extraterritorial application of NEPA. The issue was further avoided by the Department of State's agreement to prepare and EIS regardless of the outcome of the litigation.

Despite of the outcome of this case, it demonstrated the potential impact NEPA could have on Federal programs carried out in foreign nations. If an injunction had been granted in this case, the Department of State would have been forced to temporarily cease its participation in the Mexican spraying project, which would have halted its progress. If preparation of an EIS showed that the project would have detrimental affects on the environment, the agency could be forced to abandon the project or seek alternative methods of accomplishing its goals. The court in NORML concluded that without U.S. support of this project, "unilateral continuation by Mexico may not be entirely possible."⁷⁵ Thus the application of NEPA to this situation could have put an end to a program that was significantly harming the environment.

This case provides an example of the effect NEPA could have on foreign nations receiving U.S. support. If NEPA's EIS requirement is followed by the Federal agency, environmental concerns could slow a project or prevent it altogether. As the NORML case illustrated, if NEPA is not followed a project could ultimately be interrupted due to an injunction requiring preparation of an EIS. In the case of poorer countries, such as Mexico, the removal of U.S. support could put an end to the project in question for better or worse.

B.

THE ENDANGERED SPECIES ACT

The Endangered Species Act of 1973 (ESA) was considered to be the first legislation where Congress recognized the need to protect not only endangered plants and wildlife, but also the habitats necessary to sustain these species. The Act states that its purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."⁷⁶

1. INTERPRETING ESA

The sections of ESA that are particularly important to this discussion are: Section Four, Determination of Endangered Species and Threatened Species, Section Seven Interagency Cooperation; Section Eight, International Cooperation; and Section Nine, Prohibited Acts.

a. Section Four - Determination of Endangered Species and Threatened Species

⁷⁴ The court focused on the harm to NORML members who ingested the pesticide in marijuana consumed within the United States. NORML, *supra* note 68.

⁷⁵ *Id.*

⁷⁶ Endangered Species Act, 16 U.S.C. § 1531 (2000).

Section Four of the Act is the first step toward achieving ESA's stated purpose by identifying species that are endangered or threatened. The factors considered in declaring a species endangered or threatened are: 1. the present or threatened destruction of its habitat or range; 2. overutilization for commercial, recreation, scientific or educational purposes; 3. disease or predation; 4. inadequacy of existing regulatory measures; 5. other natural or manmade factors affecting its continued existence.⁷⁷ The identification of endangered or threatened species is important because, without identifying which species ESA applies to from the start, every agency action affecting any species would require a finding of whether or not that species was endangered or threatened before its action could go forward. Determining which species are at risk from the start eliminates a step in many cases.

b. Section Seven - Interagency Cooperation

Section Seven is the most crucial section of ESA and imposes duties on federal agencies contemplating actions which would affect an endangered species or its habitat.⁷⁸ This section requires federal agencies to consult with the Department of the Interior to ensure that their actions do not jeopardize the existence or habitat of any endangered species or threatened species as identified by Section Four.⁷⁹ If the Secretary of the Interior finds that the proposed activity jeopardizes the species or adversely modifies its habitat, the Secretary will suggest reasonable and prudent alternatives that do not violate the Act.⁸⁰ The agency must then determine if it wishes to follow the recommendations, develop its own alternative actions, or seek an exemption to Section Seven. ESA provides an exception to the requirements of Section Seven which allows any federal agency to apply for an exemption from the consultation and jeopardy requirements.⁸¹

c. Section Eight - International Cooperation

Section 8(b) is of particular importance to a discussion of the extraterritorial application of ESA. Section 8(b) is titled "Encouragement of Foreign Programs."⁸² This section states that the Secretary shall encourage foreign countries to create their own programs to protect fish, wildlife and plants.⁸³ This section further orders the Secretary to encourage the entering of agreements with foreign countries to promote conservation of species and habitats, and the encouragement of those involved in the taking of fish, wildlife or plants in foreign countries or on the high seas to develop conservation practices.⁸⁴ This section authorizes the Secretary to provide funding to foreign countries for training of personnel for this purpose.

⁷⁷ *Id.* §1533.

⁷⁸ Bradley J. Epstein, *The Endangered Species Act Applies Extraterritorially*. *Defenders of Wildlife v. Lujan*, 5 TRANSNAT'L LAW. 447, 453 (1992).

⁷⁹ Endangered Species Act, 16 U.S.C. §1536 (2000).

⁸⁰ *Id.* §1536(b)(3)(a).

⁸¹ *Id.* §1536(g)(1).

⁸² *Id.* §1537(b).

⁸³ *Id.* §1537(b).

⁸⁴ *Id.* §1537(b).

d. Section Nine - Prohibited Acts

Section Nine of ESA lists the acts that are prohibited under ESA. This section prohibits any person subject to the jurisdiction of the United States from: 1) importing or exporting any endangered or threatened species; 2) taking any such species from within the U.S. or its territorial seas or on the high seas; 4) possessing, carrying, selling, transporting, delivering or receiving in interstate or foreign commerce any such species; 6) selling or offering for sale any such species in interstate commerce; or 7) violating any regulation pertaining to any endangered or threatened species listed in Section Four of ESA.⁸⁵

2. THE ARGUMENT FOR EXTRATERRITORIAL APPLICATION OF ESA

a. Statutory Language of ESA

Section Seven is the most important section of ESA for this discussion so this section focuses on the statutory language of Section Seven. Section 7(a)(2) provides the only territorial language in the section and requires “consultation as appropriate with affected States” to determine if endangered or threatened species or habitats would be affected by the proposed action.⁸⁶ This language clearly points to ESA’s applicability within the territory of the U.S., however it does not specifically preclude application of ESA extraterritorially. Elsewhere in Section Seven it discusses endangered or threatened species and their habitats only in very broad terms that would not require or forbid extraterritorial application thus it is possible that ESA was meant to apply extraterritorially.

b. Executive Interpretation

The Executive Branch offered its interpretation of Section Seven of ESA through its enactment of regulations that implement the Act. The regulation interpreting and implementing sections 7(a)-(d) of ESA illustrates the Executive Branch’s understanding of the Act to exclude agency actions in foreign countries.⁸⁷ The regulation originally required agencies to insure that actions “in the United States, upon the high Seas, and *in foreign countries*” not jeopardize a species, but was amended to a more restrictive form in 1986.⁸⁸ The language of the amended regulation currently states that an agency must “insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas not jeopardize an endangered species.”⁸⁹ The change made in the amended regulation shows the Executive Branch’s interpretation of ESA to exclude extraterritorial application. Because the Executive Branch, through the EPA, enacts and enforces these regulations however, it is still possible that future regulations drafted and enacted by the EPA could allow for extraterritorial application of ESA.

⁸⁵ *Id.* §1538(a)(1).

⁸⁶ *Id.* §1537(a)(2).

⁸⁷ Endangered Species Committee Regulations, 50 C.F.R. § 402.01 (2008).

⁸⁸ *Id.* § 402.01, emphasis added.

⁸⁹ *Id.* § 402.01(a).

c. Judicial Interpretation

The Judicial Branch has had several opportunities to interpret the extraterritoriality of ESA. In Tennessee Valley Authority v. Hill, Chief Justice Burger stated that the wording of ESA revealed a “conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”⁹⁰ The Court held that the language required application of ESA *wherever* the existence of an endangered or threatened species was jeopardized by agency action.⁹¹ While this case didn’t deal directly with extraterritorial application of ESA, the language used by Justice Burger did not limit the application of the Court’s decision to domestic species and habitats and would seem to allow for ESA to be applied extraterritorially.

The Judicial Branch had an opportunity to interpret ESA in Defenders of the Wildlife v. Lujan. The plaintiffs brought this suit in response to the amended EPA regulation discussed above and sought a declaratory judgment that the new regulation erred in its interpretation of Section Seven of ESA to apply only to the United States and the high seas. The plaintiffs sought an injunction requiring the Secretary of the Interior to return the regulation to its original form. The District Court dismissed the case for lack of standing, and the Court of Appeals for the 8th Circuit reversed. Upon remand the District Court found for the plaintiffs, ordering the Secretary to publish a new rule. The case was granted certiorari by the U.S. Supreme Court, however it was dismissed for lack of standing and the issue of the extraterritoriality of Section Seven of ESA was never addressed. Since the case was ultimately dismissed on other grounds, the Supreme Court’s position on the extraterritoriality of Section Seven cannot be ascertained; however the 8th Circuit Court’s interpretation of the Act is very helpful.

The 8th Circuit Court found that Congress intended ESA to apply extraterritorially. The court based this finding on the language and the legislative history of the Act. The court found the language of ESA was “all-inclusive” and had to be read to apply extraterritorially.⁹² The court illustrated the expansive language of the statute by pointing out that agency “consultation [with the Secretary of the Interior] must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas, therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.”⁹³

Regardless of the ultimate dismissal of Lujan, the 8th Circuit interpretation shows that at least one court was willing to interpret ESA to apply extraterritorially. The language used by the court in Lujan made it clear that the 8th Circuit Court of Appeals found no other possible interpretation of the language of Section Seven of ESA. It was unfortunate that the Supreme Court found the plaintiffs lacked standing, because it would have been very enlightening to see the Supreme Court’s view on the extraterritoriality of ESA. If the Supreme Court had sided with the 8th Circuit, the Secretary of the Interior would have been forced to amend the regulation to require compliance with Section Seven in foreign countries.

⁹⁰ Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978).

⁹¹ *Id.*

⁹² Defenders of the Wildlife v. Hodel, 707 F. Supp. 1082, 1085 (D. Minn. 1989).

⁹³ *Id.*

3. EXAMPLE OF ESA'S APPLICABILITY IN A FOREIGN COUNTRY

The plight of the Golden-Cheeked Warbler provides a good example of why ESA should apply to U.S. agency actions in foreign countries. The Golden-Cheeked Warbler (Warbler) is a small bird that has its primary nesting habitat in central Texas.⁹⁴ The Warbler was placed on ESA's Endangered Species List in 1990 and at the present time has not made significant population increases to be removed from the list. In fact, there are only several hundred breeding pairs remaining.⁹⁵ The Warbler only nests and raises its young in the Ashe-juniper and oak forests of central Texas and has lost a significant portion of its habitat because trees have been cleared for development and grazing lands.⁹⁶ The Warbler migrates to Mexico and Central America for the winter months.

ESA controls agency actions within the U.S. territory, however after Defenders of the Wildlife v. Lujan was dismissed, ESA continues to apply *only* to actions within the U.S. as stated in the Endangered Species Committee Regulations.⁹⁷ The shrinking Warbler population has been further threatened by U.S. agency actions in Guatemala. The U.S. Animal and Plant Health Inspection Service (APHIS) conducts an aerial and ground pesticide spraying program in Guatemala to eliminate the Mediterranean Fruitfly.⁹⁸ The spraying program is potentially damaging to the Warbler in several ways. The program eliminates a food source for the Warbler by eliminating bug species. The program endangers the health of the Warbler because it eats pesticide-filled insects. The program could harm the Warbler through direct contact with the pesticide through preening. Finally, the program endangers the Warbler because, with eradication of the Mediterranean Fruitfly, agriculture can expand in Guatemala eliminating more of the Warbler's forest habitat. Under the government's current position on foreign application of ESA, APHIS does not have to consult with the Secretary of the Interior regarding the impact on the Warbler or its habitat from this program, nor does it have to investigate less-damaging alternatives to its current program.⁹⁹

If ESA were interpreted to apply extraterritorially, the conservation efforts to save the Warbler in Texas would be much more successful. Those attempting to save the Warbler from extinction in Texas by developing a habitat conservation plan¹⁰⁰ are much less affective if the Warblers are being poisoned by APHIS as soon as they leave Texas for their winter habitat. The actions of APHIS in Guatemala are not restricted by ESA even though the effects of those actions reach the territory of the U.S., thus ESA should be interpreted to apply to U.S. government actions that affect endangered or threatened species and their habitats regardless of their location.

C.

⁹⁴ Texas Parks and Wildlife, <http://www.tpwd.state.tx.us/huntwild/wild/species/gcw/> (last visited April 23, 2008).

⁹⁵ Caroline Cox, *Pesticides and Birds: From DDT to Today's Poisons*, JOURNAL OF PESTICIDE REFORM, (1991), available at http://www.eap.mcgill.ca/MagRack/JPR/JPR_14.htm.

⁹⁶ See Texas Parks and Wildlife, *supra* note 94.

⁹⁷ Endangered Species Committee Regulations, 50 C.F.R. § 402.01 (2008).

⁹⁸ Cox, *supra* note 95.

⁹⁹ Epstein, *supra* note 78, at 449.

¹⁰⁰ *Id.*

THE TOXIC SUBSTANCES CONTROL ACT

The Toxic Substances Control Act (TSCA) was the first comprehensive legislation to control toxic substances. Prior to enactment of TSCA in 1976, Congress focused primarily on specific areas of pollution in legislation such as the Clean Air Act¹⁰¹ and the Federal Water Pollution Control Act.¹⁰² TSCA gives the EPA broad powers to regulate chemicals that are, or could be, toxic to people or the environment. In enacting TSCA, Congress found that humans and the environment are continually exposed to a large number of chemicals, some of whose manufacture, processing, use, or disposal may present an unreasonable risk of injury.¹⁰³ As a result of these findings, the policy behind TSCA is to require the collection of data regarding the effect of toxic chemicals on health and the environment by those who manufacture such chemicals.¹⁰⁴ Congress further sought to regulate toxic substances which present an unreasonable risk of injury to health or the environment in a manner that would not unduly impede economic or technological advances.¹⁰⁵

1. INTERPRETING TSCA

There are several sections of TSCA that are crucial to a basic understanding of how the statute works: Section Four, Testing of Chemical Substances and Mixtures; Section Five, Manufacturing and Processing Notices; Section Six, Regulation of Hazardous Chemical Substances and Mixtures; and Section Eight, Reporting and Retention of Information.

a. Section Four – Testing of Chemical Substances and Mixtures

Under section Four the EPA can require that a manufacturer test certain chemicals or mixtures according to EPA rules.¹⁰⁶ In order to require such tests, the EPA must determine that the manufacture, distribution, processing, use or disposal of the chemicals presents an unreasonable risk; or that the chemicals may enter the environment in substantial quantities or present a likelihood of substantial human exposure.¹⁰⁷ The EPA must then determine that there is insufficient data currently to determine the effects of that risk,¹⁰⁸ and that testing is necessary to establish the necessary data.¹⁰⁹

b. Section Five – Manufacturing and Processing Notices

¹⁰¹ Clean Air Act, 42 U.S.C §§ 7401-7671 (2000).

¹⁰² Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000)

¹⁰³ Toxic Substances Control Act, 15 U.S.C. §2601(a) (2000).

¹⁰⁴ *Id.* §2601(b).

¹⁰⁵ *Id.*

¹⁰⁶ Martha Neville, *Who's Singing the Mexicali Blues: How Far Can the EPA Travel Under the Toxic Substances Control Act?*, 50 WASH. U. J. URB. & CONTEMP. L 265, 276 (1996).

¹⁰⁷ Toxic Substances Control Act, 15 U.S.C. § 2603(a) (1976).

¹⁰⁸ *Id.* § 2603(a)(1)(A)(ii) (1976).

¹⁰⁹ *Id.* § 2603(a)(1)(A)(iii).

Section Five states that a manufacturer planning to produce a new chemical substance or manufacture or process an existing chemical substance for a significant new use,¹¹⁰ must first submit a notice of its intention with the EPA.¹¹¹ If the Section Four test rules are applicable to the substance in question, the test results must be submitted along with the Section Five notice.¹¹² For any substance or new use of a substance not covered by § Four, but considered by the EPA to be potentially hazardous, the manufacturer must submit data that shows that the substance or new use does not present an unreasonable risk of injury to health or the environment.¹¹³

c. Section Six – Regulation of Hazardous Chemical Substances and Mixtures

Section Six applies to all chemicals, not just new chemicals or new uses of existing chemicals.¹¹⁴ This section is triggered if the EPA finds that a substance or mixture presents or will present an unreasonable risk of injury to health or the environment.¹¹⁵ The EPA must then issue a rule to regulate the use of the substance or mixture using only the least burdensome requirements.¹¹⁶ Under Section Six the EPA can create any necessary rule including but not limited to: completely prohibiting the manufacture, processing or distribution of the substance; prohibiting the manufacture, processing or distribution of the substance for a particular use or in a particular amount; limiting the amount of the substance that can be manufactured, processed, or distributed in total or for a particular use; requiring the substance or mixture to have a warning label, or a requirement that manufacturers give notice of the hazard to distributors.¹¹⁷ Generally Section Six requires the EPA to first use its powers under other statutes to regulate the substance in question before turning to its powers under Section Six of TSCA.¹¹⁸

d. Section Eight – Reporting and Retention of Information

Section Eight permits the EPA to require manufacturers or processors of chemical substances or mixtures to maintain records and submit reports to the EPA.¹¹⁹ The EPA can impose this requirement on manufacturers who produce or process only small quantities of a chemical substance or mixture, but only to the extent necessary to enforce this section.¹²⁰ The records may contain: the common name and the chemical identity of the substance or mixture; the total amount of each substance and mixture used; a

¹¹⁰ Toxic Substances Control Act, 15 U.S.C. §2604 (1976). (The determination that a use is a significant new use is made by considering: the projected volume of manufacturing and/or processing; the extent to which the use changes the type of exposure of humans or the environment to the substance; the extent to which the new use increases the magnitude and duration of exposure; and the reasonably anticipated manner and method of manufacturing, processing and disposal.)

¹¹¹ *Id.* §2604(a)(1).

¹¹² *Id.* §2604(b)(1)(A)(ii).

¹¹³ *Id.* §2604(b)(2)(B).

¹¹⁴ *Id.* §2605(a).

¹¹⁵ *Id.* §2605(a).

¹¹⁶ *Id.* §2605(a).

¹¹⁷ *Id.* §2605(a).

¹¹⁸ *Id.* §2605(c)(1).

¹¹⁹ *Id.* §2607(a)(1).

¹²⁰ *Id.* §2607(a)(1)(B) .

description of any byproducts; all existing data concerning environmental and health effects; and the number of people exposed and the duration of exposure.¹²¹

2. THE ARGUMENT FOR EXTRATERRITORIAL APPLICATION OF TSCA

There is support for both the argument that TSCA applies extraterritorially and the argument that it applies only within the territory of the U.S. within the statute. The executive branch has interpreted TSCA to apply only within the U.S. The judiciary, through its Foley Doctrine, seems to exclude extraterritorial application.

a. Statutory Language of TSCA

There is language in TSCA that would support both the arguments for and against extraterritorial application of the statute. In Section Six it states that the EPA must consider “the effects on the national economy” before issuing any rule.¹²² The use of the word “national” suggests that, at least this portion of TSCA, applies only to the territorial U.S. There is further support for solely intra-territorial application within the statute because there is a lack of clear extraterritorial language.

There is support for extraterritorial application within the statute because it has broad, all-encompassing language that seems to imply that it was meant to cover more than just the territory of the United States. The section on Congressional findings states that “human beings and the environment”¹²³ are exposed to chemicals, not Americans and the environment. Nowhere in the language of the findings or policy does it mention the United States, America, the Nation, or any other language that would lead a reader to understand that the statute was meant to apply solely to the U.S. or its citizens. The broad, all-encompassing language of TSCA seems to suggest that its application was meant for more than just the territory of the U.S.

b. Executive Interpretation of TSCA

The executive branch has interpreted TSCA through administrative rules issued by the EPA. The EPA has refrained from applying TSCA extraterritorially, stating that TSCA was enacted to protect the citizens of the United States from unreasonable risk of injury to their health or the environment from exposure to chemical substances.¹²⁴ This language clearly demonstrates that the EPA considers TSCA to apply only in cases where regulation is necessary within the United States. Regardless of the EPA’s treatment of TSCA in the past however, it is possible that the statute was meant to apply both within and outside of the territorial United States and future EPA regulations could reflect this.

c. Judicial Interpretation of TSCA

¹²¹ *Id.* §2607(a)(2)(A-G).

¹²² *Id.* §2605(c)(1)(D).

¹²³ *Id.* §2601(a)(1).

¹²⁴ Polychlorinated Biphenyls (Pcbs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 40 C.F.R. § 761 (2007).

The judiciary provided its approach to extraterritorial application of federal laws by creating the Foley doctrine which states that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”¹²⁵ The Foley doctrine can be overcome by a showing of clear Congressional intent for the statute in question to apply extraterritorially. In the case of TSCA, it is arguable that there is no clear language demonstrating Congressional intent to apply the statute extraterritorially. It is also possible to argue that the language of TSCA is so broad and all-encompassing that it does evidence a clear Congressional intent for it to apply extraterritorially.

3. EXAMPLE OF TSCA’S APPLICABILITY IN A FOREIGN COUNTRY

According to EPA rules, TSCA is not currently being applied extraterritorially. The EPA uses TSCA to regulate chemicals that are or may be toxic to humans, but its determination of which chemicals necessitate testing and regulation does not consider health or environmental effects outside of the U.S. If the EPA considered health effects occurring outside of the U.S., it would likely see broader effects and find a need to regulate more chemicals, and regulate some chemicals more stringently.

An example of dire foreign effects not being considered by the EPA is the effect of many chemicals on the Inuit population in the Arctic. It has been shown that human and animal populations in the Arctic are severely contaminated by chemicals that are often not even produced or used in the Arctic.¹²⁶ Chemicals used in southern countries travel great distances via air and water currents and contaminate the environment of the Arctic. Chemicals can also reach the Arctic through predators consuming contaminated prey. Because of the “cold-condensation-effect”¹²⁷, concentrations of chemicals in the Arctic can often exceed the concentrations in the source country.¹²⁸

It has been shown that many Inuit display higher levels of contamination than any other population except industrial accident victims.¹²⁹ Inuit populations have higher levels of various toxic metals and PCBs due in large part to their traditional diet. Many Inuit populations still subsist largely on local fish and game.¹³⁰ The high concentration of seafood in Inuit diets causes concern for mercury poisoning. Meat from seals, toothed whales and freshwater fish contains high levels of mercury, and provide a large portion of a traditional Inuit diet.¹³¹ Meat from seabirds contains high levels of lead. A soup made from one murre (a common seabird) can yield as much as 50 micrograms of lead, about a quarter of the provisional daily intake proposed by the World Health Organization.¹³²

¹²⁵ *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

¹²⁶ Ronald Fein, *Should the EPA Regulate Under TSCA and FIFRA to Protect Foreign Environments from Chemicals Used in the United States?*, 55 STAN. L. REV. 2153, 2154 (2003).

¹²⁷ *Id.* at 2162. (Arctic chemical concentrations can be higher for some chemicals due to the “cold-condensation-effect” whereby cold Arctic temperatures create a sink for chemicals that are volatile in more temperate climates.)

¹²⁸ *Id.* at 2161.

¹²⁹ *Id.* at 2163.

¹³⁰ Arctic Monitoring and Assessment Programme, *Arctic Pollution 2002*, <http://www.amap.no> (follow “publications online” hyperlink; then search for “arctic pollution 2002”) (last visited April 23, 2008).

¹³¹ *Id.*

¹³² *Id.*

Toxaphene is a significant contaminate of Canadian freshwater fish, surprisingly however there is no known source of toxaphene in the Arctic.¹³³

The effects of this intense contamination on the Inuit population are staggering. The average Canadian and Greenlandic Inuit have chemical levels (including mercury, chlordane, toxaphene, and PCB) well above public health guidelines.¹³⁴ These high contamination levels are linked to severe health concerns and birth defects. Inuit mothers' breast milk is so contaminated that the typical Inuit infant takes in seven times more PCBs than infants in southern countries.¹³⁵

The contamination of Inuit populations by chemicals used in the U.S. is not considered by the EPA in its determination to regulate certain chemicals under TSCA.¹³⁶ Under the provisions of TSCA, the EPA must consider several factors in determining whether a certain chemical needs regulation including: the effects of the substance on health and the environment; the magnitude of human exposure; and the magnitude of environmental exposure.¹³⁷ If foreign Inuit populations were included in this consideration, the magnitude of human and environmental exposure would increase significantly, likely leading to increased regulation of certain chemicals. Unfortunately, foreign Inuit populations are not considered by the EPA. The EPA has stated that the premanufacture test notice rule "does not require submission of any data which relates only to exposure of humans or the environment outside the United States."¹³⁸ By taking this stand on TSCA, the EPA does not consider any health effects on Inuit populations caused by exposure to chemicals.

V. CONCLUSION

The above discussion of extraterritoriality and the studies of NEPA, ESA and TSCA show the unpredictability of extraterritorial application of major U.S. environmental laws as well as the need to apply these laws to actions in foreign countries. The language of each of these statutes would support extraterritorial application; however none of these statutes clearly call for extraterritorial application. The examples of Mexican marijuana eradication program, the Golden-Cheeked Warbler, and the Arctic Inuit population show the need for clear extraterritorial application of all of these statutes. If major U.S. environmental laws were consistently applied extraterritorially, significant time and effort could be saved, along with various plant and animal species. The various reasons calling for extraterritorial application of U.S. laws in Section II demonstrate the need for this form of international environmental regulation in many situations. While economic, foreign relation and anti-imperialistic concerns must be addressed, this paper shows that U.S. environmental laws could be applied extraterritorially without significant disruption of U.S. economics or foreign policy and with respect for foreign sovereignty.

¹³³ Fein, *supra* note 126, at 2162.

¹³⁴ *Id.* at 2163.

¹³⁵ *Id.* at 2164.

¹³⁶ 40 C.F.R. §720.50(d)(3) (2008).

¹³⁷ Toxic Substances Control Act, 15 U.S.C. §§2605(c)(1)(A)-(D) (2006).

¹³⁸ Submission of test data and other data concerning the health and environmental effects of a substance, 40 C.F.R. §720.50(d)(3) (2008).