Controlling the Environmental Hazards of International Development

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Comment

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"We asked him about the dam, that vast scheme of Lend-Lease of which so much vague ill had been spoken all along the way. 'It is all salt,' he moaned, 'the land below the American dam. They did not trouble to find out, but now the people will eat namak (salt) for ever and ever.'"*

INTRODUCTION

Programs aimed at the development of the poorer countries of the world often cause irreparable injury to the environment. Additionally, the projects themselves may fail to achieve their objectives because biological, climatic, and cultural factors of the natural environment have not been considered in project planning. The responsibility for choice, approval, and oversight of U.S.-financed projects normally rests on U.S. government officials and technicians. These officials should also take responsibility for integrating environmental factors into project planning. Most federal agencies have been complying, in various degrees, with existing statutory duties of environmental planning. However, the foreign affairs agencies have claimed for themselves a total exemption, of doubtful legality, from such responsibilities.

It is possible to challenge a foreign aid project in which environmental problems have not been carefully considered, but the international nature of the dispute presents legal obstacles which would not exist in litigation over a purely domestic matter. This Comment will discuss some of the environmental hazards of international development and describe the operation of two key agencies which administer foreign aid programs. It will then analyze, in the light of the National Environmental Policy Act (NEPA) and recent litigation, some of the legal hurdles which must be cleared if the courts are to have any part in the prevention of environmental disasters abroad.

* ERIC NEWBY, A SHORT WALK 74 (1959).
I

SOME ENVIRONMENTAL PROBLEMS OF DEVELOPING COUNTRIES

Many of the environmental problems of the less developed countries also occur in the U.S., but others are unique to the foreign environment. These problems may be caused by American efforts to make progress abroad occur in quantum leaps. For example, simultaneous areawide development of water resources, power, transportation, and agriculture often has widespread and unforeseen, but not unforeseeable, effects on population, public health, wildlife, and climate. And American advisors sometimes export outmoded or inapplicable theories of development to regions with unique, unstudied, or unknown environmental conditions. To demonstrate the difficulty of planning environmentally sound foreign aid programs and to emphasize the magnitude of the disasters that may result from lack of environmental foresight, an overview of the environmental problems of international development is given below.

A. Problems Associated with Dam Construction

One of the primary needs of a developing country is energy. A glance at the globe will show that many of the world’s largest rivers, potential sources of cheap, clean power, and water for irrigation, run through nations of the Third World. Gigantic projects, similar in scope to the Aswan High Dam on the Nile, are in various stages of planning and implementation on the Amazon, Mekong, Niger, Volta, and Brahmaputra-Ganges Rivers.

Until the recent political shift in Southeast Asia, a project was planned for the Mekong, “virtually the last big river on earth uncontrolled by man,”1 calling for six large dams and many smaller ones in three countries. The dams were to be the keystone in a TVA-type scheme of regional development covering Cambodia, Laos, Vietnam, and Thailand.2 The project had the potential of creating 12 times the electricity that the four countries possessed in 1971.3 Completion of the project would have required 30 years and $14 billion (toward which Lyndon Johnson pledged $1 billion in U.S. funds),4 along with

4. HUDDLE, supra note 2, at 3.
the combined efforts of 25 nations and 16 United Nations agencies. These huge commitments were made despite a substantial risk that the dams would create more problems than they would solve. Even though Thailand would have been the prime beneficiary of power from the Mekong project, some Thai officials hesitated to endorse it because of fears that environmental problems would keep the project from producing its potential benefits.

Many dams become useless or overly expensive to operate within a few years because of silt accumulations. Despite the optimistic predictions of planners, the reservoir behind the Anicicaa Dam in Colombia lost 23.4 percent of its capacity because of sedimentation in the first 21 months after the dam gates were closed. This necessitated the construction of upstream debris dams and costly dredging operations. Even with these remedial measures there remained the possibility that one moderate flood could completely fill the reservoir with silt and swamp the power plant. After 12 years the reservoir was virtually useless. And in Haiti a $50 million power dam was built with a life expectancy of 50 years. Ten years later, silting had progressed, but no turbines had yet been installed, nor was any irrigation system available.

The risks associated with such projects are also large. Some of these risks are encountered when dams are built in this country; others are peculiar to tropical or arid regions. Damming a river the size of the Congo would effect some change of climate over a large area and possibly worldwide. Simply the weight of water needed to

7. R. DASMANN, J. MILTON, & P. FREEMAN, ECOLOGICAL PRINCIPLES FOR ECONOMIC DEVELOPMENT 211 (1973) [hereinafter cited as DASMANN ET AL.].
9. Id. 330-38.
10. Id. 339.
11. Id. 341.
12. Remarks of Wolfram Drewes, FARVAR & MILTON, supra note 8, at 951.
14. MIT, STUDY OF CRITICAL ENVIRONMENTAL PROBLEMS, MAN'S IMPACT ON THE GLOBAL ENVIRONMENT 97 (1970) [hereinafter cited as SCEP REPORT].
fill a reservoir behind a dam can create problems. In 1967 the accumulation of water behind the Koyna Dam in India produced a Richter 6.4 earthquake which killed 200 persons.16

Other effects of dams are felt far downstream. The loss of rich, silt-laden water can be detrimental to floodplain agriculture. Since the completion of the Aswan High Dam, the delta soil is no longer being replenished by Nile mud; without this estimated 100 million tons yearly, wave action and sea currents are causing the shoreline to retreat. The encroaching Mediterranean now threatens delta agriculture by increasing the salinity of groundwater.16

Fresh water from the Nile no longer nourishes the marine life of the Eastern Mediterranean. This has caused a near-total disappearance of the sardine fishing industry, a loss estimated in 1965 at $7 million per year.17 One method of mitigating these losses is to increase fish yield by “farming” the reservoir above the dam, but the prospects are never certain and depend on ecological awareness, careful planning, piscicultural techniques, and social organization. Too often, the fisheries potential has been ignored or left to chance.18 In some cases whole fishing communities have been transferred from coastal to reservoir areas. Construction of the Aswan High Dam has already caused the relocation of more than 100,000 people, and the Volta Dam in Ghana has caused the relocation of more than 75,000.19

Reservoir fisheries may turn out to be a bad bargain. Fish poisoning from pesticide runoff and eutrophication caused by fertilizer runoff are two possible problems.20 Lake Kariba,21 along the Zambezi River

16. KASSAS, IMPACT OF RIVER CONTROL SCHEMES ON THE SHORELINE OF THE NILE DELTA, Farv & MILTON, supra note 8, at 187.
17. George, THE ROLE OF THE ASWAN HIGH DAM IN CHANGING THE FISHERIES OF THE SOUTHEASTERN MEDITERRANEAN, FARV & MILTON, supra note 8, at 164. The same effect has been expected below the Pa Mong Dam on the Mekong River. Bardach, SOME ECOLOGICAL IMPLICATIONS OF MEKONG RIVER DEVELOPMENT PLANS, FARV & MILTON 236, at 239. For a description of the Pa Mong Dam project, see C. McDOLE, A REPORT ON SOCIO-CULTURAL CONDITIONS IN THE PA MONG STUDY AREA OF NORTHEAST THAILAND 4-5 (1969).
19. Scudder, ECOLOGICAL BOTTLENECKS AND THE DEVELOPMENT OF THE KARIBA LAKE BASIN, FARV & MILTON, supra note 8, at 206, 208. See generally W. BOYLE & B. KUHNS, EVALUATIONS, SUGGESTIONS AND RECOMMENDATIONS ON THE PROGRAM OF THE VOLTA RIVER AUTHORITY FOR RESETTLEMENT OF THE PEOPLE IN THE AREA TO BE INUNDATED BY CONSTRUCTION OF THE VOLTA RIVER DAM, GHANA (1964). The number of people who might be forced to move by construction of the Pa Mong Dam (see supra note 11) was estimated at 310,000 and growing rapidly. DASMANN ET AL., supra note 7, at 221.
20. George, supra note 17, at 174. This is a serious problem in Africa, where renewal of the water of a lake may take several thousand years, as opposed to seven
in Zambia, has become an extremely productive fishing area, but fishermen have been frustrated by mats of floating aquatic weed, covering hundreds of square miles. The weed reduces the oxygen content of the water, kills plankton, blocks the passage of small boats, and tears fishing nets. By transpiration, it also greatly increases evaporative loss of water. Weed infestation has also been a serious problem on Lake Volta in Ghana, and in other man-made lakes in Africa and South America.

Forced population displacement, in this and other contexts, causes deeper problems. Changes in surroundings, climate, diet, and health conditions have resulted in new epidemic and endemic diseases, psychological difficulties, and breakdown of family structures and cultural patterns. Without social ties, large numbers of people flock to cities, where they must cope with unemployment and poverty.

B. Irrigation

A major benefit often expected from dam projects is use of impounded water for irrigation, although the agricultural benefits sometimes go untapped for lack of planning. The introduction of irrigation agriculture usually involves an increase in the number of crops per year and a change in varieties grown. This demands political and social organization which are often lacking.

Reservoirs can also provide breeding grounds for harmful insects:

[In Pakistan I saw the Tarbella Dam, which is proudly presented as the largest land-fill dam in the world. It's a pretty impressive structure . . . . At another dam in the same part of the world, the Mangla Dam, it's very difficult for people to live in the vicinity of the dam-reservoir because of vector-borne disease created by the impounded water. Has anybody stopped to think that perhaps the Tarbella Dam may create the largest single malaria problem in Asia?

Dr. Lee M. Howard, Dir., Office of Health, Technical Assistance Bureau, AID, in a speech to AID engineers, reprinted in AGENCY FOR INTERNATIONAL DEVELOPMENT, ENVIRONMENT & DEVELOPMENT PROCEEDINGS 83 (1973).

21. When filled in 1963, Lake Kariba was the world's largest man-made reservoir.
23. Little, The Invasion of Man-Made Lakes by Plants, in MAN-MADE LAKES, supra note 18, at 75-85.
26. Statement of Gilbert White, FARVAR & MILTON, supra note 8, at 252, in reference to AID-built dams on the Khorat Plateau of Thailand. See also DASMAN ET AL., supra note 7, at 183.
gation project on the Indus River is so extensive and complex that a computer system may be necessary to coordinate water flow.\textsuperscript{28}

In some arid regions, irrigation development has caused the loss of millions of acres of farmland through waterlogging and salinization. Initially, the flowing irrigation water leaches salt out of the land. At the same time, irrigation raises the normally salty water table in such areas to the surface. When the water evaporates, the salt is left on the surface. In wetter climates, the salt would travel downstream and end up in the ocean. But in dry countries the aim of irrigation is to prevent as much water as possible from reaching the ocean, and there may not be enough flow from the irrigation and rainfall to carry the salt away. In the area where the salt ends up, either the land or the groundwater will be too salty for agricultural use. In the Indus Basin, groundwater has been mined by tube wells in order to lower the water table and also wash the salt away. But the ultimate efficacy of this strategy is disputed.\textsuperscript{29} Newly irrigated land above the Aswan High Dam has been rendered useless by salinization. It has been decided that an attempt to remedy the problem will be made by construction of a $106 million agricultural drainage project.\textsuperscript{30}

Enthusiastic engineers have overused irrigation systems without assuring proper drainage; the subsoil region becomes waterlogged, making the land unfit for cultivation. In some regions the combined effects of salinity and waterlogging have taken more land out of cultivation than irrigation has added.\textsuperscript{31}

Perhaps the most serious side effect of irrigation systems is the spread of waterborne diseases. Schistosomiasis has become Africa's most prevalent disease,\textsuperscript{32} and its increased incidence is attributed to ir-
irrigation development. The construction of innumerable irrigation canals provides an ideal perennial environment for the snail host and a means for spreading the worm throughout the continent. Schistosomiasis has been a major health problem in the Nile Delta since the building of the first Aswan Dam in 1902; the new High Dam will spread the disease to the entire Nile Valley. The disease is not confined to North Africa; it exists also in Venezuela, Brazil, East and West Africa, China, and Japan. Development of the Mekong River in Cambodia, Laos, Thailand, and Vietnam would have provided an opportunity for the spread of schistosomiasis and other parasitic diseases. Irrigation projects have also contributed to the resurgence of malaria in Pakistan and Brazil. The spread and persistence of malaria has often been called a manmade problem; and highways, pesticide use, and forestry practices, as well as irrigation projects, are often named as agents of the disease.

C. Agriculture

The large-scale introduction of irrigation often involves new crops and new methods of cultivation. The intensification of agriculture that irrigation permits can bring new pests. In the Neiva district of Colombia, for example, an increase of cotton planting to two crops per year caused insect outbreaks. And irrigation, particularly by overhead sprinkler, of arid land in Israel and elsewhere has produced artificial oases favorable to the invasion and increase of many agricultural pests.

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33. Hughes & Hunter, supra note 32, at 76.
36. Bardach, supra note 17, at 242-43. For a list of other disease vectors aided by irrigation canals, see Hughes & Hunter, supra note 32, at 76.
37. Hughes & Hunter, supra note 32, at 81.
38. Smith & Reynolds, Effects of Manipulation of Cotton Agro-Ecosystems on Insect Pest Populations, FARVAR & MILTON, supra note 8, at 373, 386-87.
Another phase of agricultural development is the introduction of new grain varieties. This "Green Revolution," through research sponsored largely by American foundations, has spread American agricultural technology first to Mexico, then to many Third World nations. High-yielding, disease-resistant strains have been sown in tens of millions of acres in India, Pakistan, and other countries, and have unquestionably added greatly to the world's food supply. Though these hybrid grains are often billed as "miracle" rice and wheat, the explanation of their success is simple. The new hybrids are just more efficient machines for turning water, soil, and air into edible grain.

However, the increased yield is not sustained without intensive fertilizer application. In India and Pakistan, fertilizer use more than tripled from 1966 to 1969, the period during which much of the new seed was distributed. Most of the agricultural development funds supplied by the United States Agency for International Development (AID) are given for the financing of fertilizer purchases from American manufacturers. The critical ingredient in most nitrogen fertilizers is ammonia (NH₃), which requires for its production methane, a product of natural gas or petroleum. Because of the current oil and gas shortages, the price of nitrogen fertilizers has more than quadrupled in three years, leaving us and the recipient countries in a cruel financial bind.

The fertilizers necessary for the miracle grain are not only expensive, but are also dangerous for the environment. Fertilizer runoff, sometimes up to 60 percent of the amount applied, results in pollution, fish losses, and eutrophication of waterways. The effect of phosphate fertilizer runoff is particularly serious. Of the elements necessary to sustain life, phosphorus is the most limited in the world supply. Virtually all phosphate runoff, 13 million out of the 14 million tons of runoff per year, becomes embedded in the sediment of the ocean.

41. Id. 10.
42. Id. 55 (India); NULTY, supra note 29, at 77 (Pakistan).
43. BROWN, supra note 27, at 8.
46. WORKSHOP ON GLOBAL ECOLOGICAL PROBLEMS, MAN IN THE LIVING ENVIRONMENT 17 (1971) [hereinafter cited as WGEP REPORT].
47. Id. 48-53.
reserves of accessible phosphate are quickly dwindling. Without mined phosphate fertilizer, the world will be able to support only two billion people.\(^{48}\)

The new grains have other drawbacks besides heavy fertilizer requirements. They also require investment in irrigation, storage, and wet-season drying facilities, transportation and marketing systems, and farmer education.\(^{49}\) The cost of these grains is high in relation to their nutritional content. The protein content is generally lower\(^ {50}\) and the carbohydrate content higher than that of standard strains. And the taste of the miracle grains is disagreeable to many people.\(^ {51}\)

The new varieties also lack natural resistance to bacteria and insects and may require more pesticide applications than the old grains.\(^ {52}\) But agricultural pests have a notorious ability to develop resistance to poisons. At present chemists are hard-pressed to invent stronger and stronger poisons in order to stay a few years ahead of the insects.\(^ {53}\) And in the tropics, resistant strains develop particularly fast, because insects there breed year-round.\(^ {54}\) Thus the agricultural systems of developing countries become hooked into an expensive case of "pesticide addiction," just as in this country.\(^ {55}\)

Agricultural poisons are a greater threat to the people of the Third World than to us. Such controls on pesticide use that we have usually do not exist abroad, where pesticides are "freely distributed and highly recommended by U.S. agricultural extension services,"\(^ {56}\) and agric-
cultural workers are apt to have little understanding of the dangers involved. The poisoning of fish results in a serious food loss in Southeast Asia and other areas where they constitute a major protein source. Those fish which can develop resistance to pesticides will cause human ingestion of DDT and other poisons. The high DDT content of mothers' milk is more critical in poor countries, where all infants are breast-fed, many until the age of three or later.

Another problem arises when jungles are cleared for agricultural use. Unlike as it may seem, the soil underlying most tropical forest is of poor quality. Only thick vegetation dependent on high rainfall holds these soils in place. If the forest is cleared in patches larger than garden size, essential elements of the soil wash away, leaving a rock-hard substance called laterite, “more useful for road construction than agriculture.” Laterization of soil has already caused failures of agricultural development projects in Brazil, Togo, Dahomey, and other countries.

D. Livestock Farming

Over 60 percent of the world’s agricultural land is non-arable and suited primarily for grazing. Some of the worst developmental blunders have occurred in the management of this land.

In earlier times the cattle herds of East African peoples were limited in size only by the available water supply. In years of low rainfall
many animals died. Well drilling seemed a promising way to increase herd size. Unfortunately, without the natural control, the cattle herds expanded beyond the carrying capacity of the land. In places, the cattle completely stripped the land of its perennial grass cover, allowing the takeover of woody, toxic, or otherwise undesirable plants. Deterioration of the range may become irreversible before the damage is noticed.\textsuperscript{63} There is much evidence that imprudent expansion of cattle herds has worsened the effects of the critical droughts now occurring in Saharan Africa.\textsuperscript{64}

Another problem of cattle farming in Africa has been the tsetse fly. The fly's bite transmits an organism which causes \textit{nagana}, a disease of domestic animals similar to human sleeping sickness, which the fly also carries. Destruction and abandonment of grassland because of overgrazing allows the takeover of tree and bush vegetation, a perfect habitat for the fly.\textsuperscript{65} Control of the tsetse fly has been attempted by three methods, all ecologically distasteful: cutting down the trees, aerial or ground spraying of insecticides, and wholesale massacre of game animals, many of which are immune hosts of the nagana organism.\textsuperscript{66}

\section*{E. Population}

In countries with sizable nomadic populations, it is often considered politically expedient to place them in permanent settlements. Beyond showing an obvious disregard for cultural preference, settlement of nomads, whether forced or voluntary, can have ecological drawbacks. The nomad is utilizing the cumulative resources of a wide area, no part of which could support a stationary way of life. Nomads generally have a higher standard of living than settled people of the same area. When induced to stay in one place, the nomad causes overgrazing and subjects his animals to fatal diseases and climatic extremes.\textsuperscript{67}

More broadly, the processes of development are leading to urban-
ization (which is proceeding at a greater rate than in industrialized nations) and modernization, phenomena which we have come to regard as mixed blessings. We are steering poor countries toward dirty air and dirty water, noise, traffic, crime, urban poverty, and other disasters which we have not yet learned to avoid. Okinawa, which became modernized under the post-war American occupation, is a good example. The major causes of death there, formerly malaria and other tropical diseases, have become cancer, heart disease, and accidents, which the health care system was completely unequipped to handle. This is a cost of development which is never considered and perhaps never will be considered. Can anyone imagine an American advisor suggesting to the leaders of a Third World state that they prohibit private automobiles in their country and instead use available investment funds for safer, cleaner forms of transportation?

No development project ought to be planned without considering its effect on population size and distribution. For example, an injection of capital into rural agriculture, in the form of a 50 percent subsidy on the price of a tractor in Pakistan, will take jobs away from half of the laborers. Tenant farmers are forced to become day laborers, while the landowners reap all the profits. Thus the social costs of such a program outweigh the benefits. As the per capita output of agricultural labor increases, the rural unemployed migrate to the cities, further increasing unemployment rates of 15 or 20 percent. It is possible to reverse this trend. Investment in tube well irrigation induces labor-intensive agriculture and has been shown to increase the man/land ratio.

70. E. Owens & R. Shaw, Development Reconsidered 56-57 (1972); Nulty, supra note 27, at 114-15.
73. See text accompanying notes 28-29 supra.
74. Nulty, supra note 29, at 14-15; Kaneda & Ghaffar, supra note 29, at 14-15. The choice between capital-intensive and labor-intensive development schemes has been the subject of considerable debate. Environmental protection activities, such as terracing land to avoid erosion, planting trees, cleaning up oil spills and waste disposal sites, and separation of storm and sanitary sewers, may be examples of programs in which labor-intensive investment may be the most profitable. See Sachs, Environmental Quality Management and Development Planning: Some Suggestions for Action, in
But the United States should face the possibility that the answer to the problem of feeding a large population is to limit the size of the population. In particular, the United States should reconsider its policy of supplying food to poor nations under the Food for Peace Program. This program was primarily intended to rid the United States of grain surpluses (which depressed prices) in order to expand markets for American agricultural commodities. But much of this rationale has disappeared along with the large grain surpluses of the 1950's.

Even assuming we can continue to afford it, the program needs reexamination. We must decide whether we wish to continue to feed nations which are too poor in natural resources ever to become self-sustaining or too powerless and politically disorganized ever to bring their birthrate under control by any means but starvation. It is no exaggeration to state that the net effect of Food for Peace, on a worldwide scale, may be to lower standards of living.

It has been seriously suggested that we apply the principle of "triage," borrowed from the military field hospital, to the area of foreign

FOUNEX REPORT, supra note 52, at 123, 126-27. There are recent indications that Congress favors more labor-intensive aid projects. HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 1ST SESS., REPORT ON H.R. 9360, MUTUAL DEVELOPMENT AND COOPERATION ACT OF 1973, at 16 (1973).


76. W. PADDock & P. PADDock, FAMINE—1975! 168-71 (1967). Recent proposals would add live beef cattle (H.R. 17207, 93d Cong., 2d Sess.) and processed meat products (H.R. 17443, 93d Cong., 2d Sess.) to the list of commodities authorized under P.L. 480. In recent hearings, the only considerations discussed were the effects on the U.S. cattle, dairy, and poultry industries. Hearings on H.R. 17207, H.R. 17265, and H.R. 17443 Before the Subcomm. on Department Operations of the House Comm. on Agriculture, 93d Cong., 2d Sess., ser. 93-VVV (1974).

77. 7 U.S.C. § 1691 (Supp. III, 1973). The idea of using Food for Peace to control the politics of recipient countries also influenced the drafters. PADDock & PADDock, supra note 76, at 171-72.

78. Foreign aid programs based on need or on the concept of the favored helping the unfortunate may involve an incentive system that results in a general reduction in living standards. By transferring resources from societies that are behaving in such a way as to meet nature's criteria to countries that are not, the natural selection in favor of the former is reduced.

The extreme case is a foreign aid program that equalizes living standards in all the countries involved, where effective population control does not prevail. Rates of population growth will be most rapid in those countries with no system of population limitation and the highest birth rates. The resulting population growth will reduce the common living standard to a level that limits population growth even in the world's least-demanding or least-organized societies. . . .

Where the system of foreign aid does not completely equalize income but only transfers a certain part of income from successful to unsuccessful societies, it operates in the same direction but with less force.

aid. Those nations which appear incapable of ever achieving self-sufficiency would be refused further aid. Those with the potential of matching their population growth with agricultural productivity (the “walking wounded”) would be left to save themselves. The grain available for aid would be saved for those nations in need of temporary sustenance to increase worker productivity and to allow time for agricultural development and birth control education. Deciding on such a policy obviously involves staggering moral, technical, and political problems. Yet we live in a time of dwindling world grain supplies, a time when much U.S. grain goes to feed victims of the worst emergencies, perhaps only to save them for the next famine. The United States has put itself in a “humanitarian trap” by giving $500 million of aid to crowded, starving Bangladesh, a country with little chance of ever attaining self-sufficiency.

To face squarely the principle of triage is frightening, but not so frightening as the refusal to do so. It is time we assess the environmental impact of feeding the world. If malaria eradication or increased grain yield is not coupled with a program of population control, mass starvation will not be prevented, only delayed, while valuable resources are being consumed. The Aswan High Dam will cause an enormous increase in food supply, yet not enough to feed the people who were born during its construction. Can any project be considered a success when it leaves the country in a poorer state than at its inception?

F. Determining the Costs and Risks of Development

By this time it should be clear that no agency should undertake a large-scale foreign development without considering its possible impact on all phases of the environment. Dam-builders must consult agri-
cultural technicians; agricultural technicians must consult public health specialists, and so on. It is apparent from the examples cited above that these problems have not been adequately considered in the past. Of course, it should not be assumed that all of the disasters mentioned above were the fault of the U.S. Government; nor is it true that the U.S. foreign affairs agencies are oblivious to environmental problems. Nor should it be inferred that all development projects are doomed to fail, nor that economic development and environmental quality are necessarily incompatible.\(^8\)

Three principal lessons about environmental impact assessment in the foreign context may be learned from these examples. First, the assessment must be broad enough to include effects unique to the foreign environment which may defeat the purpose of the project or lessen its intended benefits. For example, in this country, much attention is often paid to the environmental costs of highway construction, such as damage to air and land along the highway. But once the highway is completed, these costs will normally not inhibit its use. On the other hand, the clearing of jungle in Brazil, the irrigation project in Pakistan, or the chemical pest control plan in India completely or partially fail to have their intended effects. Through failure to consider environmental risks, objectives such as increasing the amount of arable land or increasing food supply may not be realized. The project may even aggravate the underlying problems it was designed to solve. This kind of assessment is largely technical, rather than political, and is often the most important one an agency should make in deciding what types of projects to sponsor.\(^9\)

Second, standards considered adequate for environmental protection may be different in a foreign situation than in a domestic one, both on technical and political grounds. For example, variations in environment and culture may enhance or diminish the effects of pollution levels. In a country where fish is the dietary staple, pesticide residue buildup in those fish may be more important than in the U.S. Therefore, stricter standards might be necessary in a pest control plan using insecticides. On the other hand, requiring air pollution control equipment for industry may cause more economic and political disruption abroad and may be especially inadvisable where the air is clean and may be able to tolerate some pollution without adverse health effects.

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84. A committee of the National Academy of Sciences has taken an optimistic position on this point. *National Academy of Sciences, Institutional Arrangements for International Environmental Cooperation* 64-65 (1972).

85. Senator Jackson has remarked that "the problems of the environment do not, for the most part, raise questions related to ideology, national security and the balance of world power." 115 Cong. Rec. 40,417 (daily ed. Dec. 20, 1969).
Third, political decisions involved in the standard-setting process, such as choosing between a cement plant and clean air, are best left to the recipient country. Poor countries look with suspicion or alarm at the environmental movement in this country. To them, pollution is a "rich man's disease" which they would like to contract. Many of them are still looking forward to a nineteenth century, a period in which their industry can develop and their gross national product can increase without artificial limitations. Until the present, the United States has taken everything it wanted from the earth. Even today, an American uses up five times as much agricultural produce and many times more energy than an Indian or a Nigerian, yet we may be telling them to sacrifice economic growth for the sake of the environment. But the donor's political delicacy should not excuse it from informing the recipient government of all environmental costs and risks. Otherwise, the diplomatic repercussions might justifiably be severe when unplanned consequences become apparent.

Since the regional seminars held in 1971 to prepare for the United Nations Conference on the Human Environment, representatives of developing countries have been discussing and advocating the principle of additionality. This concept denotes "the additional financing which developing countries require and may request to cover the extra costs of taking environmental factors into account without suffering a curtailment of the scope of their development which can be financed from available development funds." In the case of private industrial

87. SCEP Report, supra note 14, at 251.
89. One source gives the following figures for 1972 per capita energy consumption (kilograms of coal equivalent):

<table>
<thead>
<tr>
<th>Country</th>
<th>Energy Consumption</th>
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<tr>
<td>United States</td>
<td>11,611</td>
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<td>U.S.S.R.</td>
<td>4,767</td>
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<td>China</td>
<td>567</td>
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<td>India</td>
<td>186</td>
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<td>World</td>
<td>1,984</td>
</tr>
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<td>World (except U.S.)</td>
<td>1,404</td>
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</table>


91. MacLeod, supra note 30, at 10-11.
development, this merely means that "the polluter must pay," a proposition which received strong support at the Stockholm Conference.68

It is difficult to dispute that a builder of a new factory should be asked to include pollution control equipment or other controls necessary to protect the environment. But in large-scale hydro or agricultural projects, those most likely to be financed by government aid, donor countries may not be willing to contribute additional funds. The cost of environmental planning may be prohibitive, and the recipient country may be afraid to ask for additional funds for fear of offending the donor's sense of generosity.

II

THE FOREIGN AID PROCESS AND ITS ENVIRONMENTAL COMPONENT

Each year Congress authorizes funds for assistance to foreign countries. These funds change hands through a variety of loans, grants, and guarantees administered by several agencies.64 This section will briefly describe how these funds are transferred and spent. The important questions are: 1) to what extent does the U.S. government control the choice and design of the resulting development projects and programs; and 2) who should be charged with the responsibility of assessing the impact of such activities on the environment. To the extent that funds are transferred with no strings attached and the recipient determines the uses to be made of them, any environmental controls mandated by the U.S. would be impractical and imperialistic. But where the important planning decisions are made by U.S. officials, our government ought to be compelled to conduct a study of environmental consequences as rigorous as that required for domestic projects.

A. The Agency for International Development

Most of the activities of the United States which could be characterized as developmental assistance are approved, administered, and supervised by the Agency for International Development, an independent body within the Department of State.65 AID's statutory au-

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63. MacLeod, supra note 30, at 34. The U.S. voted against the additionality recommendation in the belief that there is no reason to treat environmental costs of aid programs any differently from other costs. Environmental Quality: The Third Annual Report of the Council on Environmental Quality 93 (1972).

64. For fiscal 1973 the total of obligations and loan authorizations to less developed countries was $4.113 billion. Agency for International Development, U.S. Overseas Loans and Grants 9 (1974) [hereinafter cited as Overseas Loans and Grants].

65. For fiscal 1973, AID's authorizations totalled $2.001 billion. Id.
Authorization is found in the Foreign Assistance Act of 1961. Assistance programs are divided into three main categories: capital assistance, program assistance, and technical assistance.

1. Capital Assistance

Capital assistance is aid made available "to establish or expand physical facilities and financial institutions . . . that contribute to the basic economic development of cooperating countries." It may take the form of a loan or an outright grant. Capital assistance encompasses construction projects costing over $100,000, feasibility studies, and financial aid to intermediate development banks.

The process is initiated by an application from the government of the developing country to the AID mission located there. The application is first subject to a feasibility study, or Preliminary Review, normally conducted by AID in the field. The purpose of this review is to determine whether a detailed examination of the proposed project is warranted. The study must include preliminary engineering design analysis which demonstrates the technical soundness of the project. If the application passes preliminary review, the mission forwards a request for Intensive Review to the Regional Bureau in Washington.

The Intensive Review procedure may be carried out either in Washington, in the host country, or in both. It is conducted by a Capital Assistance Committee which examines the technical, economic, and financial aspects of the proposal. Intensive Review results in a recommendation, or Capital Assistance Paper, which is circulated to other AID offices for comment and submitted to the Regional Assistant Administrator. He can give final authorization to projects involving up to $10 million; larger projects must be approved by the AID Administrator or his Deputy.

After a project is authorized, a Capital Assistance Agreement is worked out with the recipient government. The Agreement sets out AID's obligations, all requirements and conditions which the recipient must meet, and the rights of AID to monitor and supervise the implementation of the project. AID must then ensure that the project is car-

98. Id. AID maintains less scrutiny over the uses of funds supplied to development banks, but it still must approve large subloans made by these banks. M.O. 1524.1, at 4 (1963). The amount authorized for transfer to such banks is 10 percent of the Development Loan Fund. 22 U.S.C. § 2165 (1970).
ried out in compliance with the terms of the Agreement and that the project is "proceeding with due diligence and efficiency in conformity with sound engineering, management, and financial practices." AID will approve engineering firms, contractors, plans, bidding documents, and construction contracts, and will inspect project sites.

Throughout the approval and implementation process, AID officials are required by law to make decisions which cannot be meaningful without consideration of environmental factors. Among the elements to be taken into account are: "the economic and technical soundness of the activity to be financed, . . . whether the activity gives reasonable promise of contributing to the development of economic resources . . . and whether or not the activity to be financed will contribute to the achievement of self-sustaining growth." Projects chosen are supposed to be the "most economic and efficient feasible alternatives for producing the desired results." And for all hydroelectric, irrigation, port development, and water and sewer projects, a benefit-cost study must be done. This analysis cannot be meaningful without considering the many environmental hazards involved.

2. Program Assistance

Program assistance includes loans and grants of a "non-project nature." "[T]he totality of the resources made available, rather than their particular use, constitutes the primary U.S. concern." Program assistance may be used to achieve a particular economic goal or five-year plan of the recipient country, to effect a balance of payments, or meet budgetary needs. Included among these activities are Commodity Program Assistance and P.L. 480 Program Assistance.

The P.L. 480 program (Food for Peace) is authorized by the Agricultural Trade Development and Assistance Act of 1954. Trans-
fers may be in the form of grants, sales for local currency, or dollar sales on long-term credit. Although transfers are selected and approved by AID, the program is mostly controlled by the Department of Agriculture, and the commodities transferred are not charged to AID appropriations. In fiscal 1973 the program resulted in $1.118 billion of shipments to the less-developed countries. Commodity Program Assistance provides financing, by grant or loan, for foreign countries to purchase U.S.-made goods and equipment. A variety of financing procedures and methods exist; payment may be made as direct reimbursement to the borrower country, to a U.S. bank, or to the supplier.

All forms of program assistance are approved by means of a Program Assistance Approval Document, prepared by the appropriate AID Regional Bureau in Washington. This document is submitted to the Regional Assistant Administrator, or in unusual cases to the Administrator.

In general, program assistance involves considerably less direct AID participation than does capital assistance, though the degree of control varies according to the method of financing used. AID does exercise "considerable control over the use of the dollars for commodity imports." This control could be used, for example, to choose pesticides and fertilizers which are least harmful to the environment. Likewise, the Department of Agriculture, in its supervision of Food for Peace, could consider the effects of various food items on diet and public health. At present, economic factors of U.S. agriculture appear to take precedence over consumer considerations.

3. Technical Assistance

Technical assistance generally takes the form of advisory services, such as engineering, economic, or management studies. Typical examples are a general survey of the transportation needs of a region, or construction or equipment of an agricultural research laboratory costing less than $100,000. Economic and technical soundness of projects must be taken into account in the planning stage, and careful analysis

113. See supra note 76.
of alternative courses of action is deemed essential.\textsuperscript{118}

Technical assistance project proposals are submitted by each AID mission to AID in Washington as part of the annual country program submission. Review and approval are the responsibility of the Regional Assistant Administrator, but projects costing over $1 million and certain other important projects must be approved by the Administrator. The Mission Director continues surveillance and evaluation of projects and has discretion to make certain changes in them.\textsuperscript{117} Technical assistance often includes the procurement of commodities such as books, vehicles, and agricultural items. Recipients, suppliers, and shippers are closely controlled by regulations, and AID typically retains effective control over the transaction at every stage.\textsuperscript{118}

4. Recent Amendments

The overall scheme of AID operations is currently in a state of change. In December 1973, Congress enacted potentially significant amendments to the Foreign Assistance Act.\textsuperscript{119} Implementing regulations for these statutory changes have not yet gone into effect. It is possible that the procedures outlined in the text above will undergo substantial change. In what is intended as a major restructuring, Congress wishes that AID staffs in Washington and abroad be reduced in size and wants more responsibility for project planning to be given to recipient countries.\textsuperscript{120} Whether a shift of responsibility to developing countries actually occurs will probably depend less on Congress' wishes than on any one country's supply of planners, technicians, and engineers, as well as its general organizational competence and willingness to cooperate. In cases where the new policy does have some effect, environmental assessment responsibilities should be shifted to the recipient country along with the other aspects of project planning.

\textsuperscript{116} M.O. 1311.1, at 1 (1963).
\textsuperscript{117} M.O. 1323.1, at 1-4 (1963).
\textsuperscript{118} United States v. Concentrated Phosphate Ass'n, 393 U.S. 199, 204 (1968).
The regulations are found at 22 C.F.R. pt. 201 (1975).
\textsuperscript{120} \textit{Report on H.R. 9360, supra} note 119, at 16. \textit{But cf.} note 103 \textit{supra.}
B. The Export-Import Bank

The Export-Import Bank of the United States is an independent, corporate, federal agency which supplies financing for enormous amounts of export sales. In fiscal 1974 the Bank financed $12.8 billion worth of exports. This program is not strictly U.S. foreign aid, since the Bank borrows and lends like any other bank, completely outside of the U.S. government budget, at interest rates competitive with those of other exporting countries. Still, the Bank is an arm of the nation's foreign policy apparatus, and its operations have much to do with international development. In fiscal 1973, the Bank provided $1.613 billion of credit to the less developed countries.

Generally, the Bank only extends credit for the purpose of financing purchases of specific U.S.-made goods or of services provided by U.S. firms. Many of these purchases involve the most serious risks to the environment, both in rich and poor countries. The Bank has financed construction of mining facilities, hydroelectric projects (including dams in Zaire and the Ivory Coast), paper mills, liquefied natural gas plants, cement plants, pipelines, thermal power plants, and chemical plants. It has aided the purchase of at least 39 nuclear power facilities, including plants in Taiwan, Yugoslavia, and Mexico.

C. Present Extent of Environmental Planning

The reader by this time may have received the impression that no one in the foreign affairs agencies has ever given any thought to environmental values. This is plainly not the case. Both the State Department and AID have opened environmental affairs offices, and each has published environmental assessment regulations. AID has engaged in a variety of activities which involve environmental protection and impact assessment. These include seminars for AID's own en-

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121. Eximbank in the World Marketplace 7 (Annual Report 1974). The Bank generally provides 30-45 percent of purchase price at interest rates of 7-8 1/2 percent. Id.
124. 12 C.F.R. § 402.1(b) and (d) (1975).
126. Id. 3.
training programs for foreign technicians, case studies of the environmental effects of past development projects, and environmental impact evaluations in connection with the planning of some major capital assistance loans. Although significant, these are partial measures and, as will be shown, do not add up to full compliance with the National Environmental Policy Act, summarized in the following section.

By contrast, Eximbank has not shown much interest in the environmental consequences of its loans. It exists only to help Americans do business overseas, and its primary concern in lending is the assurance of repayment. Because its participation in project implementation is so small, and the number and size of its projects so large, consideration of environmental effects in decisionmaking would require a whole new field of activity for which the Bank now has no personnel.

1. **The National Environmental Policy Act**

The National Environmental Policy Act of 1969 has become the environmental lawyer's most effective statutory tool. It was designed not to improve environmental quality directly but rather to improve the environmental planning activities of government agencies. Since a great deal of analysis has been written on the Act, its requirements will only be briefly outlined here.

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127. See ENVIRONMENT & DEVELOPMENT PROCEEDINGS, supra note 20.
129. Some of these are being planned in conjunction with the Smithsonian Institution. Dept of State, Memo, Environmental Aspects of AID Programs, in 1972 Merchant Marine Hearings, supra note 57, at 1701, 1704.
130. The Mekong River Basin development program, because of its enormous potential, received particular attention. Other projects whose plans include an environmental element are an airport in Seoul, Korea, a power plant in Indonesia, a steel mill in Turkey, and a malaria control program in Ethiopia. Environmental Activities Report, supra note 128, at 1712-13. However, these environmental "annexes" are extremely brief and conclusory. The annex for the Ethiopian malaria control program, which involves the use of DDT, is only six pages long. Richard Frank, Center for Law and Social Policy, Memo to Eugene Coan, Sierra Club, San Francisco, Nov. 8, 1974, at 2.
131. Eximbank claims to be governed on environmental matters by its own internal regulations. These appear to be no more than a two-page request circulated by the President of Eximbank. Frank, infra note 178, at 12. During the discovery in Sierra Club v. AEC, Civil No. 1867-73, Memorandum Opinion at 6 ERC 1980 (D.D.C. 1974), it was made known that the Bank had once appointed a NEPA compliance officer, but he had died and had not been replaced. Personal communication from Eldon Greenberg, Center for Law & Social Policy, Wash., D.C. Apparently, the Bank has more recently decided to re-evaluate its environmental policy. Coan, Hillis, & McCloskey, Strategies for International Environmental Action: The Case for an Environmentally Oriented Foreign Policy, 14 NAT. RES. J. 87, 101-02 (1974).
133. See, e.g., F. ANDERSON, NEPA IN THE COURTS (1973) [hereinafter cited as
The section of the Act which has so far been the most influential is that which requires the preparation of an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."\textsuperscript{134} All agencies of the federal government must build into the decisionmaking process "an appropriate and careful consideration of the environmental aspects of proposed action in order that adverse environmental effects may be avoided or minimized . . . ."\textsuperscript{135} The core of the EIS is the consideration of alternative measures. The agency should consider the feasibility of taking no action at all, of achieving the same goal through a completely different type of project (including a project outside the agency's jurisdiction or capabilities), and of conducting the proposed action at a different location.\textsuperscript{136} A draft Statement is circulated for comment among other agencies which have expertise in the area concerned. Copies of the EIS are also to be made available to the public.\textsuperscript{137}

2. Present Compliance by AID

NEPA specifically applies to all federal agencies and makes no exception for foreign affairs. Still, AID has in the past taken the position that the EIS requirement does not apply to the Agency's foreign activities but that it would nonetheless comply with the spirit of the Act by following procedures which amount to "almost the same thing."\textsuperscript{138} As a result of litigation, AID is now willing to enter a court-approved stipulation that NEPA applies to all its activities. The settlement provides that draft regulations for NEPA compliance will be published by February 29, 1976.\textsuperscript{138a} AID's current procedures are set out in two Manual Circulars, issued to AID missions in 1970 and 1971, which


\textsuperscript{136} Id. § 1500.8(a)(4); see also Jordan, Alternatives Under NEPA: Toward an Accommodation, 3 Ecology L.Q. 705 (1973).


\textsuperscript{138} 1970 Merchant Marine Hearings, infra note 161, at 1123, 1131 (testimony of Christian Herter, Jr.).

\textsuperscript{138a} Environmental Defense Fund v. Agency for International Development, D.D.C. Civ. No. 75-0500, filed Apr. 8, 1975, stipulation at 7. The draft regulations will be followed by a 60-day period for public comment, 30 days after which the final regulations will be published. These will apply to capital, technical, and commodity assistance projects.
were published in 1972. These apply only to capital projects, a category which AID is now de-emphasizing, and only to those capital projects funded through direct grants or loans. These procedures do not necessarily apply to transactions in which funds go from AID to an intermediate development bank, even though AID may retain the authority to review subloans made by the borrower.

Under AID procedures, the threshold determination on whether a project will have a significant effect on the environment is made by the AID unit, in the field or in Washington, which is responsible for the planning of the project. This decision is reviewed by the Regional Bureau in Washington. If significant impact is foreseen, an environmental analysis, identical in content to an EIS, is included in the feasibility study or intensive review request (IRR) for the project. Whenever official is charged with approving the feasibility study or IRR is responsible for the adequacy of the environmental assessment. There is no equivalent to the two-phase system of draft and final EIS required by NEPA. The Council on Environmental Quality (CEQ) need not be given the feasibility study or IRR but only a summary report. The summary is not circulated to any other agency for comment, as required by the CEQ guidelines. Any request by a third agency for the report may be denied for security reasons. At a later stage in the planning, CEQ, and other agencies upon AID invitation, may participate in the review process. If the project proposal reaches the formal approval stage, an environmental statement equivalent to the final EIS will be included as an annex to the approval documents. After AID has approved the proposal and the recipient government has been notified of the decision, the environmental statement is at last made available to CEQ, to Congress, and to the public. Public hearings, which are encouraged though probably not required by CEQ

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140. These are defined at text accompanying notes 97-98 supra.
142. See note 98 supra.
144. CEQ Guidelines, supra note 135, 40 C.F.R. § 1500.7 (1974).
145. This will be done at “periodic intervals (to be determined in light of the workload).” M.C. 1214.1, 1972 Merchant Marine Hearings, supra note 57, at 1696, § II.C.5.
146. CEQ Guidelines, supra note 135, 40 C.F.R. § 1500.7(a) (1974).
148. Id. at 1697, § II.C.11.
guidelines, are not contemplated by AID.

The Agency has also sent its missions a circular dealing with precautions to be taken in the procurement and distribution of pesticides. This document shows an increased concern for the dangers of pesticide use, but it does not contain any substantive provisions. Instead, it cautions AID missions to consider all alternatives when advising pesticide use, to educate foreign personnel about pesticide-related health hazards, and to be aware that many food-importing countries have established limits on pesticide residues in imported produce.

The inadequacy of these procedures was the subject of a suit which has now been terminated by settlement. AID has agreed to publish new regulations governing the environmental assessment of pest management programs.

It is indisputable that both the capital project and pesticide procurement regulations, even if scrupulously observed, would not satisfy the requirements of NEPA. NEPA has become a meaningful, effective law mainly by the intervention of concerned individuals and public-minded organizations in the decisionmaking process. Many past blunders might have been avoided if the public has been given notice and allowed to comment on planned foreign assistance projects.

AID also is not observing fully its own regulations. Although the 1971 circular directs that environmental analyses be listed in CEQ’s monthly Monitor, no document from AID has appeared there as of October 1975. Thus the public is completely excluded from whatever environmental assessment is occurring. Meanwhile, other agencies have prepared a substantial number of EIS’s with international as-

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149. CEQ Guidelines, supra note 135, 40 C.F.R. § 1500.7(d) (1974).
151. The change in AID pesticide policy has had at least one favorable result. Pesticides used to be shipped overseas in gunny-sacks, with the predictable result of considerable leakage, loss, and contamination. Sturdier containers are now being used.
151a. Stipulation, supra note 138a, at 2-5. The regulations should be published in final form in late 1976. Until these are effective, AID agrees, with narrow exceptions, not to supply DDT, Aldrin, Dieldrin, 2,4,5-T, Chlordane, Heptachlor, or any other pesticide whose use has been cancelled or suspended in the United States.
152. In United States v. 247.37 Acres of Land, 2 ELR 20154 (S.D. Ohio 1972), a condemnation action was halted because no notice of the draft EIS on the planned reservoir had been given to the public, and no comment on it had been received from CEQ. Failure to respond to public comment may be grounds for enjoining a federal project. Brooks v. Volpe, 350 F. Supp. 269, 278-79 (W.D. Wash. 1972). Failure to consult with all government agencies which might reasonably have jurisdiction over a project or which possess expertise in that area is also a violation of NEPA. Simmans v. Grant, 370 F. Supp. 5, 18-19 (S.D. Tex. 1974).
AID's justification for its incomplete compliance rests largely on a myth that it continues to propagate: that all important foreign aid decisions are made by the receiving country, and that "[t]here is no intent to impose U.S. standards, priorities, or solutions on a foreign government . . . ." In fact, many projects are conceived, planned, and supervised wholly by American officials. "Applications" for loans are often written at the AID mission and sent to the recipient only for signature. Foreign governments should have decisionmaking authority so that they can implement their own development priorities and objectives. But, given current procedures, AID's myth serves only as an excuse for giving inadequate consideration to the environment.

III

ENFORCING NEPA IN THE FOREIGN AID AREA: LEGAL OBSTACLES

Many agencies have experienced problems with the EIS requirement. First, the requirement may force them to enter a field in which they have little experience or interest, to employ new personnel, and to expend substantial funds for impact studies. Second, it may force them to hold more public hearings on impact studies. Second, it may force them to hold more public hearings on impact studies. Second, it may force them to hold more public hearings on impact studies. Second, it may force them to hold more public hearings on impact studies. Second, it may force them to hold more public hearings on impact studies.

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154. The State Department has written impact statements on the signing of treaties dealing with the protection of the oceans and with wildlife conservation in Antarctica, and on matters concerning the U.S. boundaries with Canada and Mexico. See CEQ, Notice of Public Availability of draft EIS, 37 Fed. Reg. 19667 (1972) (ratification of international convention on civil liability for oil pollution damage); Notice of Public Availability of Final EIS, 37 Fed. Reg. 26462 (1972) (use permit for pipeline under river between Windsor, Ont., and Detroit); ENVIRONMENTAL QUALITY: THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 392 (1974) (Colorado River International Salinity Control Project). These have often been filed too late to give the public any opportunity to participate. Coan, Hillis, & McCloskey, supra note 131, at 99-100.

The Defense Department has written statements on projects in the Pacific Trust Territory and possessions. See 102 MONITOR, Apr. 1974, at 52 (bombing practice in the Marianas); id., Jan. 1975, at 40 (Corps of Engineers project in Guam); id. 31 (destruction of Herbicide Orange near Johnston Island).

The Department of Transportation, in planning the route of the Inter-American Highway through Panama and Colombia, filed an "Environmental Impact Assessment," but this was pro forma and had no effect on the planning process. Conservationists, fearing indiscriminate land development, deforestation, harm to native tribes, and spread of foot-and-mouth disease to the United States, filed a suit. Sierra Club v. Coleman, D.D.C. Civ. No. 75-1040. On Oct. 17, 1975, the court issued a preliminary injunction against further construction until meaningful environmental assessment is completed. For the history of the dispute, see Tarlock, The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project, 7 J. INT'L LAW & POL. 459 (1974).

155. M.C. 1214.1, 1972 Merchant Marine Hearings, supra note 57, at 1694, § I.B.

156. NEPA by itself probably requires public hearings in some cases, but only "where appropriate," subject to agency discretion. However, hearings which are a nor-
open their operations further to the scrutiny of the public. Third, it increases the possibility that agency decisions will be subjected to judicial review. Finally, even if a court cannot reverse the agency's final decision to go ahead with a project, a temporary injunction can still delay a project for years. In many cases the suit exposes officials to charges of insensitivity, conflict of interest, and dishonesty.

AID has been particularly reluctant to comply with NEPA because some of its projects involve diplomatic secrets. To involve the public in such projects might be undesirable. However, NEPA hearings are valuable opportunities to avoid errors. The problem of the conflicting needs of diplomacy and of effective foreign aid requires a close look at NEPA and the legislative intent behind it.

A. Was NEPA Intended to Cover Foreign Aid Projects?

NEPA requires that all agencies of the federal government prepare Environmental Impact Statements for certain projects. Normally, an agency seeking an exemption from a statute has the burden of showing that Congress intended an exemption. The courts have thus far been unwilling to grant blanket exemptions from the operation of NEPA.

1. AID's Position

The State Department and AID in a 1970 Memorandum con-
strued the EIS requirement not to apply to actions taken in other countries. The legal position adopted in the memo relied on a "venerable rule" of statutory construction: laws of the United States do not automatically apply outside the country. A statute should be interpreted as applying only within the boundaries of the enacting country unless there is a clearly expressed intent that it apply extraterritorially. If this rule is relied on in NEPA litigation, the burden of demonstrating the applicability of NEPA to the foreign affairs agencies will be lifted from the government side and placed on the adverse party.

The only authority cited by the memo for the extraterritoriality rule is section 38 of the Restatement of Foreign Relations Law of the United States (1965). An examination of the rule will show that it does not sustain the State Department's position. The Restatement rule is based almost completely on cases involving regulation of the private conduct of American citizens abroad. Most of these cases relate to commercial matters, for example, the reach of the antitrust, securities fraud, and trademark infringement laws. The remainder deal with criminal statutes. The cases universally hold that U.S. citizens in foreign countries remain subject to U.S. law if Congress intended to give the statute extraterritorial effect. Some cases require a specific showing of legislative intent; others allow extraterritoriality to be inferred from the nature of the statute.

The State Department's attempt to apply this doctrine to NEPA makes no sense at all. The memo emphasizes that NEPA does not apply to foreign aid because those projects are located in other countries. But NEPA regulates agencies, not projects. It is not a law


162. Id. 553.

163. There is one case in which the U.S. government was indirectly involved. The defendant was an American corporation which held a U.S. government cost-plus contract to do construction work in Iraq and Iran. Plaintiff, an American citizen, was employed by defendant as a cook in those countries. He sought the benefit of a statute which provided for time-and-a-half pay for all workers under U.S. government contracts. The suit was filed as an ordinary contract action against the employer in a New York state court, but on certiorari the U.S. government participated on the employer's side. The Supreme Court held that the overtime law did not apply to contracts performed in other countries. Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).


166. In 1971, the House Committee on Merchant Marine and Fisheries specifically
aimed generally at the private behavior of U.S. citizens abroad, but only at the conduct of government decisionmakers. As shown above,\textsuperscript{168} the approval of a foreign aid project may occur either in the foreign nation or in Washington, or the responsibility may be shared between the two. The particular location of the official who approves a project is obviously an inappropriate distinction for deciding whether an EIS is necessary. All U.S. officials, wherever situated, must be guided in the conduct of their duties by federal law. An examination of the Reporter's comments to the Restatement section shows that one rationale for the extraterritoriality doctrine is to avoid conflicts between the law of the United States and those of another sovereignty. Such a conflict cannot occur in the case of internal U.S. government procedures, which are outside the scope of foreign law.

2. \textit{The Intent of Congress}

The correct way to ascertain the scope of NEPA is to ask whose environment it is supposed to protect, not which projects it is supposed to cover. The intent of Congress should first be sought in the language of the Act. There are some indications that the Act was created and emphatically rejected the State Department's legal position. Frank,\textit{ infra} note 178, at 22-23.

167. "[T]he harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates." Jones \textit{v. D.C. Redevelopment Land Agency}, 499 F.2d 502, 512, 6 ERC 1534, 1539 (D.C. Cir. 1974).

Even if NEPA is seen as applying to projects rather than agencies, it is not clear that the territorial situs of an aid project is in the foreign country. The EIS requirement applies to projects "supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance." \textit{CEQ Guidelines, supra} note 135, 40 C.F.R. \S 1500.5(a)(2) (1974). It is the antecedent authorization and financing of the project which is a major part of the federal action. Most of this activity occurs in the United States. All Eximbank loans, all P.L. 480 funds, and nearly all AID funds are spent in the United States. See text accompanying notes 108-10, 117-18, 121-26 \textit{supra}. For example, in fiscal 1972, 80 percent of AID's development assistance ($1.073 billion) was spent here, often by a direct transfer to the American supplier. H.R. \textit{Rep. 93-388}, 93d Cong., 2d Sess., 12 (1973). In fact, during that year, repayments and interest on outstanding AID loans resulted in a net flow of $32 million \textit{into} the United States. \textit{Id}.


168. \textit{See} text accompanying notes 94-155 \textit{supra}.
to protect not only the environment of the United States but of the whole world, and judicial interpretation has so far supported this view. In the Purpose and Policy sections, words having worldwide rather than national implication are used. Section 2 refers to "man and his environment" and "damage to the environment and biosphere;" section 101(a) \(^{169}\) speaks of the "overall welfare and development of man;" and section 101(c) \(^{170}\) declares that "each person [not 'each American'] should enjoy a healthful environment." On the other hand, "the Nation" or "National" appear in several other sections of the Act, as well as in its title. Section 201, \(^{171}\) which requires the President to compile a yearly Environmental Quality Report, refers only to "national environmental and economic concerns," which to the State Department "rather strongly suggests the Act applies only within the United States." \(^{172}\)

The most direct reference to the international scope of NEPA is contained in section 102(2)(E). \(^{173}\) This directs that all agencies "shall . . . [r]ecognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." Although this provision is a clear showing of concern for the world environment, the State Department sees it as having little or no substantive effect \(^{174}\) and as being virtually the only section of the Act aimed at the foreign affairs agencies. \(^{175}\) Note that the phrase

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170. Id. § 4331(c).
171. Id. § 4341.
172. State Dep't Memo, supra note 161, at 553. Ironically, each of the Annual Reports has contained a section on the international environment. ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 93-104 (world weather modification), 199-210 (international cooperation and development) (1970); SECOND ANNUAL REPORT 28-34 (worldwide developments) (1971); THIRD ANNUAL REPORT 77-107 (international aspects of environmental quality) (1972); FOURTH ANNUAL REPORT 329-72 (international action to protect the environment) (1973); FIFTH ANNUAL REPORT 427-66 (global environment) (1974).
174. State Dep't Memo, supra note 161, at 555-56. In a critical place, the Memo changes "shall" to "should."
175. Letter from David M. Abshire, Ass't Secretary of State for Congressional Relations, to John Dingell, Chairman, Subcomm. on Fisheries and Wildlife Conservation, Jan. 25, 1971, reprinted in 1970 Merchant Marine Hearings, supra note 161, pt. 1, at 1146-47. AID and the State Department did comply, at least nominally, with § 103 of the Act (42 U.S.C. § 4333), which requires all agencies to review their statutory authority, regulations, policies, and procedures, in order to determine whether any changes might be necessary to achieve full compliance with the Act. Not surprisingly, all of the foreign affairs agencies found that no such changes were needed. Letter from William C. Salmon, Acting Director, Office of Environmental Affairs, Dep't of State, to
“where consistent with the foreign policy of the United States” is a limitation only on the second part of the section, which seems to refer not to AID-type assistance but rather to participation in United Nations environmental programs and other multilateral efforts.178

A secondary source for the interpretation of a statute is its legislative history, both prior and subsequent to its enactment.177 In the case of NEPA, unfortunately, not much is available.178 The Act was hastily put together, passed, and signed.179 The most telling remark was made during congressional hearings in 1970 by Congressman John Dingell, one of the Act’s drafters. Referring specifically to the EIS provision and its possible international scope, he frankly admitted, “I am not sure what I had in mind when this language was included.”180 The question of an exemption for foreign affairs was discussed at the 1970 hearings, but no real conclusion emerged. The Act had been in effect for only a few months, and its judicial interpretation was not yet settled. There was some confusion at the hearings as to whether NEPA would make demands on private industry, here or abroad.181 Despite this confusion, there seems to have been a general feeling against an exemption for AID. At one point, Chairman Dingell made the following statement to a State Department official:

You see, we don’t write legislation in this country so that the State Department or Interior or Defense or the Congress of the United States can say, “We don’t agree with that particular statute, and, therefore, we are not going to do it.” This room has just been full of people who are going to have problems under this statute, and some of them are going to have big problems because of me, because I am going to do all within my power to see that this statute is fairly cleared up. If you are not covered, just tell me why you are not covered. Give me a specific statutory authority. You said we don’t cover what goes


176. An earlier commentator on the extraterritoriality of NEPA believes that this phrase means that AID must comply with the Act only where there is no conflict with the Executive’s foreign policy. This “saving feature,” he writes, “preserves the constitutionality of applying the Act to AID.” Strausberg, The National Environmental Policy Act and the Agency for International Development, 7 INT’L LAWYER 46, 59 (1973).

177. The intent of a statute as expressed by a subsequent Congress has some weight, but not so much as the intent expressed by the Congress which enacted it. Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 90 (1958); Banco Nacional de Cuba v. Farr, 383 F.2d 166, 175 (2d Cir. 1967).


179. See ANDERSON, supra note 133, ch. 1.


181. Id. 1133-34 (Colloquy between Rep. Dellenback and Mr. Herter).
on in Nigeria or the United Kingdom or wherever else. Where is your exemption? . . . I have to tell you that I don't see where you can find the exemption.\textsuperscript{182}

3. The Boomerang

Including foreign aid programs within the scope of NEPA will assist the strong governmental interest in seeing that such programs are a success. But if it is decided that NEPA was not created for the protection of other countries, there remain situations in which U.S. actions abroad will affect this country's environment. These possibilities should be studied in the way that NEPA mandates.\textsuperscript{183}

There are indications that pesticide pollution is becoming a problem of worldwide scope. The government-financed export of pesticides is therefore one situation likely to have repercussions in the United States. Pesticides applied in West Africa are being blown back toward us by the Atlantic trade winds.\textsuperscript{184} Pesticides used abroad may also cause contamination of goods which we import. For example, Dieldrin used in Colombian forests penetrates into the wood of teak trees. The trees are cut and shavings from the logs are shipped to Canada for cow litter. The cows munch on the shavings and the result is an unacceptable level of Dieldrin in their milk.\textsuperscript{185}

The nuclear export program is also likely to cause environmental damage here. Congressman Les Aspin has recently charged that hundreds of pounds of plutonium, enough to cause a major nuclear disaster, are being exported through New York City's Kennedy Airport.\textsuperscript{186} The Nuclear Regulatory Commission admits that such shipments exist but refuses to halt them, despite a pending lawsuit brought by the State of New York.\textsuperscript{187} Another boomerang problem is that reprocessing and disposal of spent nuclear fuels from U.S.-supplied reactors abroad may be conducted here.\textsuperscript{188}

Many American-aided foreign projects cause polluted discharges into the oceans. The State Department acknowledges that NEPA was

\begin{itemize}
  \item \textsuperscript{182} \textit{Id.} 1143.
  \item \textsuperscript{183} The State Department, oddly enough, has "no doubt" that NEPA applies to the reverse situation, a project in the U.S. with environmental impact elsewhere. \textit{State Dep't Memo, supra} note 161, at 552. But neither common sense nor the Act itself gives any support for this interpretation. Such a theory would require an EIS for a dam in Arizona which might injure the Mexican fishing industry, but not for a U.S.-financed nuclear reactor in Mexico which could have the same effect.
  \item \textsuperscript{184} \textit{Risebrough, Pesticides: Transatlantic Movements in the Northeast Trades, 159 Science} 1233 (1968).
  \item \textsuperscript{185} \textit{DASMANN ET AL., supra} note 7, at 156.
  \item \textsuperscript{186} \textit{ENVIRONMENT, June} 1975, at 24; \textit{Wall St. J., Mar.} 28, 1975, at 15, col. 5.
  \item \textsuperscript{187} \textit{S.F. Examiner-Chron., July} 6, 1975, at B9, col. 7.
  \item \textsuperscript{188} \textit{See} note 291 \textit{infra} and accompanying text. The facts in this area are disputed and very difficult to determine.
\end{itemize}
meant to protect the high seas and other areas outside of any sovereign jurisdiction, including Antarctica and outer space.\(^{189}\) Thus, U.S.-sponsored projects abroad and at home are equally responsible for ocean pollution, and both should be subject to NEPA review.

Applying NEPA to an overseas project with repercussions here would be consistent with some of the antitrust and trademark cases which interpret U.S. statutes as regulating actions abroad which cause harm to U.S. commerce.\(^{190}\) However, this “boomerang” interpretation, if adopted, might lead to an unsatisfactory result: the preparation of truncated Statements covering only environmental effects on the United States and on the world’s oceans.\(^{191}\)

4. Case Law

a. People of Enewetak; People of Saipan

The first two judicial decisions on the extraterritoriality of NEPA deal with the extension of the Act to the Pacific Trust Territory. The first case, *People of Enewetak;*,\(^{192}\) had its origin in 1947, when the United States removed the people of Enewetak Atoll, in the Marshall Islands, to the “smaller, rocky, barren, rat-infested and remote Atoll of Ujelang,” 200 miles distant.\(^{193}\) The government had in mind another use for the Atoll: the testing of nuclear weapons. Between 1948 and 1958, more than 30 nuclear explosions took place at Enewetak, including the world’s first hydrogen bomb test.\(^{194}\) More recently, the people of Enewetak have been asking for permission to return. In April 1972 they were told that they would be allowed to return by the end of 1973.\(^{195}\) In the meantime, the Pentagon planned for the Atoll the “Pacific Cratering Experiments,” a $5 million series

\(^{189}\) State Dep’t Memo, supra note 161, at 551. For a general analysis of environmental protection in these areas, see Glazer, *The Maltese Initiatives Within the United Nations—A Blue Planet Blueprint for Trans-national Space*, 4 ECOLOGY L.Q. 279 (1974).

\(^{190}\) United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945); Branch v. FTC, 141 F.2d 31 (7th Cir. 1944). See also Note, *Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act*, 20 VAND. L. REV. 1030, 1037-41 (1967).

\(^{191}\) Apparently, the Energy Research and Development Administration (ERDA) is following this interpretation: its draft EIS on the nuclear export program considers only domestic effects. *International Application of NEPA: Environmentalists Challenge Pesticide Aid Program*, 5 ELR 10086 (1975); ERDA, Draft Environmental Statement: U.S. Nuclear Power Export Activities (2 vols., Aug. 1975). The stipulation in *EDF v. AID*, supra note 138a, at 3, specifically provides that the environmental reports shall cover impacts on humans and wildlife wherever they occur.


\(^{193}\) Complaint at 3.

\(^{194}\) S.F. Examiner-Chron., Sept. 8, 1974, at A14, col. 5.

\(^{195}\) Complaint at 5.
of high explosive blasts, which were to be set off exclusively for the purpose of studying the craters they would form. Plaintiffs, the 400 people of Enewetak, as represented by their hereditary and elected leaders, feared that the tests would cause the further destruction and contamination of their islands, including reintroduction of residual radiation from the nuclear test period.

The Defense Department had already prepared and filed a draft environmental statement on the project, but without notifying the Enewetakese. The Air Force denied a request for a public hearing on Ujelang Island. Clearly, the Defense Department had no intention of using the EIS process to assess environmental damage or to consider alternative test sites; their compliance was pro forma only.

A trial on the merits of the case was never held. Judge King of the District of Hawaii granted an injunction against the tests and the preliminary drilling of core samples. The Defense Department soon afterwards gave up the entire plan for the cratering experiments.

An analysis of the case starts with the rule that federal legislation is not automatically applicable to the Trust Territory; Congress must manifest its intention in each statute, usually by defining appropriately the terms "State" or "United States." Despite the lack of such specific language in NEPA, the judge had no trouble finding the Act applicable. The decision is based, in part, on the broad language of the substantive and policy section of NEPA, including the use of the words "Nation" and "person," rather than "United States" and "American." In dicta helpful to further litigation, the judge states: "Moreover, NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment—not merely United States' citizens located in the fifty states."

The court also noted that the Defense Department's own regulations admit the application of NEPA to the Trust Territory. The regu-

197. Personal communication from plaintiffs' attorney. However, it now appears that the return of the Enewetakese will be further delayed because of dangerous radioactivity and the high cost ($50 million) of making the island habitable again. Note 194 infra; S.F. Chron., Mar. 28, 1975, at 8, col. 1. The Defense Department has issued a draft EIS on the cleanup, rehabilitation, and resettlement of Enewetak Atoll. Draft EIS D-DNA-K39003-TT. The EPA has found this to be inadequate and has requested more information and further study of alternatives. 4 102 Monitor, Jan. 1975, at 76.
199. The court also relied on the special duties of the United States toward the Trust Territory, as expressed by the United States Representative before the U.N. Security Council: "the United States intends to treat the trust territory as if it were an integral part of the United States." Id. at 819, 4 ERC at 1931 (emphasis added by the court).
200. Id. at 816, 4 ERC at 1930.
lations stated that EIS's are required for actions conducted anywhere in the world, except in areas under the jurisdiction of another nation.\textsuperscript{201} Possibly the whole decision could have been based on this narrow point; namely, that the Department had failed to follow its own regulations.

In the second suit, \textit{People of Saipan}.\textsuperscript{202} decided at the district court level by the same judge, environmentalists have not been so successful, though the \textit{Enewetak} decision was reaffirmed. The action challenged was the grant of a lease by the High Commissioner of the Trust Territory to Continental Air Lines for the purpose of building and operating a large resort hotel on land adjacent to Micro Beach on the island of Saipan, in the Marianas chain. The plaintiffs are a class consisting of the island's residents, represented by a local member of the Micronesian Congress. The Beach is a favorite spot of the people of Saipan and was set aside for their use even under German and Japanese occupation. The elected representatives of the people of the island were vehemently opposed to the hotel. Plaintiffs alleged that the hotel would deprive them of the use of their beach, burden the island's power and water supplies, and pollute the ocean and reef with sewage discharges. The defendants, the Department of the Interior and its appointee the High Commissioner, apparently did not even pretend to comply with NEPA.

The judge ruled in plaintiffs' favor on several issues. Though urged to reconsider the \textit{Enewetak} decision, he again held that NEPA applies to the Trust Territory.\textsuperscript{203} He also ruled that the lease was "major action" within the meaning of the Act. However, he concluded that the Trust Territory government is not a federal agency subject to review under NEPA or the Administrative Procedure Act\textsuperscript{204} and dismissed the complaint.\textsuperscript{205} Although it is a long road from \textit{Enewetak}...

\begin{flushleft}
\textsuperscript{201} 32 C.F.R. \textsuperscript{\textcopyright} 214.5(b) (1973); now changed to 32 C.F.R. \textsuperscript{\textcopyright} 214.6(b) (1975). According to the regulations, an EIS may or may not be done for actions in another country, but a search of the CEQ's monthly \textit{Monitor} fails to disclose any such report having been filed by the Defense Department.


\textsuperscript{203} People of Saipan, 356 F. Supp. at 649, 5 ERC at 1161.

\textsuperscript{204} See 5 U.S.C. \textsuperscript{\textcopyright} 701(b)(1)(C) (1970): "'agency' . . . does not include . . . the governments of the territories or possessions of the United States."

\textsuperscript{205} Although the Trusteeship Agreement with the United Nations requires the United States to "promote the economic advancement and self-sufficiency of the inhabitants, and to this end . . . regulate the use of natural resources" and to "protect the inhabitants against the loss of their lands and resources," the district court ruled that the Agreement does not create a judicially enforceable obligation. \textit{id.} at 657-58, 5 ERC at 1166-67. The Ninth Circuit disagreed and decided that, under a principle of comity, suit might be brought before the High Court of the Trust Territory. The court adds cryptically that the High Court can be guided in its decision by a recently enacted Trust
\end{flushleft}
and Saipan to a foreign aid project, these cases provide an excellent first step toward full extraterritorial application of NEPA.

b. Nuclear Export—Sierra Club v. AEC

All of the issues involved in applying NEPA to foreign aid were raised in a recent case, but most of them were settled without judicial decision. In Sierra Club v. AEC,206 four environmental organizations filed suit against the Atomic Energy Commission, the Department of State, and the Export-Import Bank to force compliance with NEPA in regard to the export of nuclear power plants and nuclear fuels. Though Eximbank denied that its contribution to these activities amounted to a "program," it is unquestionable that all the defendants are involved in the export of nuclear materials. The export process begins when the AEC and the State Department conclude a Cooperation Agreement with the recipient country.207 The AEC then lets out a contract for the enrichment of necessary nuclear fuel.208 It is at this point that Eximbank is asked to provide funding assistance, usually by the American contractor.209 The Bank, as of April 1974, had made such loans, totalling $1.6 billion, to eleven countries.210 The final step

Territory environmental statute, by relevant principles of international law and resource use, and by "the general direction, although not necessarily the specific provisions, of NEPA." People of Saipan, 502 F.2d at 99, 6 ERC at 1957 (emphasis added). This is not a promising remedy. The High Court, which consists of three U.S. citizens appointed by the Secretary of the Interior, had already refused to halt the bulldozers. See Complaint at 22.

It now appears that the plaintiffs' worst fears are coming to pass. The hotel, the seven-story Saipan Continental, is already completed; the Pan American Intercontinental Inn is under construction. U.S. officials have approved construction of a new airport, and with the help of heavy Japanese investment, are turning Saipan into the Las Vegas of the Pacific. Slot machines were suddenly legalized by the Saipan City Council on a day when the High Commissioner and his deputy were away from the island. On the same day, 200 slot machines instantly made their appearance. S.F. Chron., Mar. 15, 1975, at 9, col. 1. Not coincidentally, the Pentagon is planning a $300 million military base on nearby Tinian Island. Gale, Gambling Boom in the Pacific, S.F. Examiner-Chron., Dec. 15, 1974, Sunday Punch at 5, col. 5.


Plaintiffs alleged that, as of November 1973, negotiations were under way which could lead to a possible $553.8 billion in enrichment contracts and had pending applications for the export of 113,794 kilograms of enriched nuclear fuel. Id. 65.


210. Plaintiffs' Memo, supra note 208, at 57-58; Sierra Club v. AEC, 6 ERC at 1981.
is the procurement of an export license for a power generating system or for special nuclear materials from the AEC.\textsuperscript{211}

Plaintiffs were concerned with many hazards inherent in this program: insufficient standards, procedures, and expertise in the operation of nuclear facilities overseas; the uncertainty of transporting nuclear materials by sea; the danger of terrorist attack, nuclear blackmail, and diversion of nuclear technology for military purposes; and the fear that radioactive wastes would be dumped in the ocean, stored in inadequate containers, or returned to the United States, where disposal space is already scarce.\textsuperscript{212} They sought a declaratory judgment which would establish that all three agencies' participation in the program was subject to NEPA. They asked that the agencies be required to prepare an EIS covering the effects of the whole program,\textsuperscript{213} as well as individual export agreements and licenses, on the national and international environment. They also asked that further licenses and contracts be enjoined until the requirements of NEPA were met.

The AEC put up the least resistance to the lawsuit. Perhaps fearing a strongly worded judicial opinion and a possible injunction, the AEC agreed to prepare an EIS on the nuclear export program. The State Department, which had already published regulations acknowledging its duties under NEPA, agreed to participate.\textsuperscript{214} Eximbank, which continued to claim a total exemption from NEPA,\textsuperscript{215} did not join the settlement. The Bank asked for summary judgment on four grounds: (1) that it has no "nuclear export program" and does not authorize any exports, but only provides financial support; (2) that plaintiffs have no standing; (3) that the claims involved are nonjusticiable

\begin{itemize}
\item \textsuperscript{211} 42 U.S.C. §§ 2073(a)(1), 2133 (1970).
\item \textsuperscript{213} The AEC was required to do a similar long-range EIS on the Liquid Metal Fast Breeder Reactor Program by the court in \textit{Scientists' Institute for Public Information v. AEC}, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973).
\item \textsuperscript{214} Notice of commencement of the EIS and an invitation to submit suggestions appear at 39 Fed. Reg. 20835 (1974). The State Department regulations appear at 37 Fed. Reg. 19167 (1972). The parties were unable to resolve the time within which the EIS was to be prepared. The AEC wanted 18-24 months, but the court allowed only one year from August 3, 1974. The Agency has apparently fallen far behind this timetable, and plaintiffs have found the Agency's preliminary efforts "woefully inadequate." \textit{NAT'L PARKS & CONSERV. MAG.}, July 1975, at 23-24.
In March 1975, the Nuclear Regulatory Commission, successor to the AEC, announced that it would cease issuing export permits while it reviewed its environmental and safety regulations. Wall St. J., Mar. 28, 1975, at 15, col. 5. Three days later, it reversed itself and decided against a moratorium. Wall St. J., Mar. 31, 1975, at 16, col. 5. The latter decision is defended in \textit{Proposed Findings Supporting Determination in Regard to International Nuclear Export Activities Pending Preparation of an Environmental Statement}, which is summarized at 40 Fed. Reg. 15438 (1975).
\item \textsuperscript{215} \textit{Sierra Club v. AEC}, 6 ERC at 1981.
\end{itemize}
political questions; and (4) that NEPA does not apply extraterritorially.216 Various Bank officials filed affidavits claiming that compliance with NEPA would be "impossible;"217 that preparation of an EIS would increase the Bank's costs, eroding its position as a competitive lender on the world credit market;218 and that compliance would subject sensitive diplomatic negotiations and documents to discovery, public hearing, and injunction.219

The court denied both sides' motions for summary judgment and declined to order Eximbank to participate in the preparation of the EIS. NEPA requires that only one EIS be prepared by the agency solely or primarily responsible for the proposed project. In this case the lead agency is clearly the AEC and not Eximbank.220 NEPA requires that the official who prepares the EIS "consult with and obtain the comments of" other agencies involved in the project or having expertise in the relevant environmental areas.221 But the court put the burden of obtaining this assistance on the AEC and thus left the Bank without guidelines for compliance with NEPA.

The issues posed by Sierra Club v. AEC were again raised when the Environmental Defense Fund filed a NEPA suit against AID, calling for an environmental impact statement on AID's pesticide export program. A stipulation in which AID agrees to comply fully with NEPA was signed by Judge Sirica in December 1975.222

B. Foreign Aid and Political Questions

In Sierra Club v. AEC, according to defendants, the court was being asked to review executive decisions, to balance sensitive foreign policy issues, and perhaps to grant discovery of confidential state documents, all matters solely within the discretionary power of the executive branch. Eximbank claimed that the case therefore presented a nonjusticiable political question.223 This section will consider the basis and

216. Motion of Defendant Export-Import Bank of the United States for Summary Judgment at 6-7 (hereinafter cited as Defendant's Motion).
217. Affidavit of C.E. Houston, Vice-President, Project Development Division, Export-Import Bank of the United States, at 1.
218. Id. 3-4.
219. Defendant's Motion, supra note 216, at 23.
220. Sierra Club v. AEC, 6 ERC at 1982.
222. EDF v. AID, Civil No. 75-0500 (D.D.C., filed Apr. 8, 1975). See EDF Letter, May 1975, at 1; International Application of NEPA: Environmentalists Challenge Pesticide Aid Program, 5 ELR 10086 (1975). The complaint asked for a declaratory judgment that NEPA applies with full force to the activities of AID and for a mandatory injunction that AID promulgate procedures for environmental impact assessment and file an EIS on its pesticide financing program. Complaint at 15-16. See also note 138a and accompanying text.
223. Defendant's Motion, supra note 216, at 20-25.
validity of such claims in relation to international environmental lawsuits.

1. The Constitutional Sources of Power

The allocation in the Constitution of the foreign relations powers of government between the executive and legislative branches is very unclear.

The foreign relations powers appear not so much “separated” as fissured, along jagged lines indifferent to classical categories of governmental power: some powers and functions belong to the President, some to Congress, some to the President-and-Senate; some can be exercised by either the President or the Congress; some require the joint authority of both.224

There is a large area of overlapping jurisdiction, with the result that the branch which is able to reach a decision first is able to exercise power. Most often the executive has moved first, and Congress has ratified the executive action or has tacitly acquiesced.225

At present, there is very little precedent as to the limits of legislative power. Congress could undoubtedly assert itself more vigorously.226 Both the commerce clause and the appropriations clauses of the Constitution are powerful grants of authority to Congress in foreign relations. The commerce clause is said to operate at least as widely over foreign commerce as it does domestically.227 Through the appropriations power, Congress can curtail executive programs and set conditions on the use of appropriated funds, though there are certainly political limits and possibly constitutional barriers to this kind of control.

The President, on the other hand, receives his constitutional authority over foreign relations chiefly from the treaty-making clause and the “executive power” clause of article II.228 The President may also...


225. Id. 105. According to Sen. Fulbright, the President's foreign relations powers have been bolstered by “thirty years of war, cold war, and crisis.” He feels, however, that especially in the foreign aid area there is no need for the President's authority to remain supreme. J.W. Fulbright, in Stennis & Fulbright, The Role of Congress in Foreign Policy 35 (1971).

226. Senator Stennis, for one, feels that Congress may retain nearly absolute power over foreign relations if it desires to exercise it. Stennis & Fulbright, supra note 225, at 2-3. Some recent congressional decisions, such as the termination of military assistance to Turkey, may indicate that Congress will be more active in the future. Foreign Assistance Act of 1974, § 22, adding 22 U.S.C. § 2370(x), Pub. L. No. 93-559, 88 Stat. 1795.

227. Henkin, supra note 224, at 319, n.9, and cases cited therein.

228. Montesquieu wrote that executive power over matters covered by the law of nations is one of the three powers of every government. He also identified it with “the executive power of the state.” It is this power which is granted to the President by article II, section 1, clause 1. This, according to Henkin, makes ours an eighteenth century constitution. Henkin, supra note 224, ch. XI.
have additional power inherent in the "external sovereignty" of the nation, which was not ceded by the individual states and thus need not be granted by the Constitution.\textsuperscript{229}

2. Constitutionality of Applying NEPA to Foreign Aid Projects

Does the Constitution vest in the President exclusive control over foreign relations, so that Congress may not extend the requirements of NEPA to foreign aid projects? An affirmative answer can be based only on scant authority but has been advocated by a former AID attorney.\textsuperscript{230} He argues that Congress could not, for example, withhold funds for the staffing and maintenance of an embassy in Moscow because the withholding would interfere with the President's prerogative to conduct diplomatic relations.\textsuperscript{231} He also questions whether Congress could divide up the foreign aid appropriations by country, specifying how much money should be given to each; and he sees no clear distinction between this case and the former.\textsuperscript{232}

This argument virtually asserts that the President has all the power over foreign relations and that Congress has none. But foreign assistance depends on the exercise of the spending power, and necessarily the taxing power, both of which are entrusted to Congress to be used in a manner consistent with the welfare of the United States.\textsuperscript{233} Moreover, bills have been passed and signed which interfere more with the discretion of the President in foreign affairs than NEPA ever could. For example, the 1973 amendments to the Foreign Assistance Act specify the permissible uses of AID funds.\textsuperscript{234} The newest foreign assistance legislation\textsuperscript{235} reveals an even deeper congressional concern with uses of the funds. The 1974 Act scrutinized most carefully expenditures in Indochina, severely cut AID funds for South Viet Nam, Cambodia, and Laos, and narrowly divided all assistance for those

\textsuperscript{229} This theory of Justice Sutherland is propounded in United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). For detailed analysis and criticism, see Levi- tan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 YALE L.J. 467 (1946); HENKIN, supra note 224, at 18-28.

\textsuperscript{230} Wallace, The President's Exclusive Foreign Affairs Power over Foreign Aid, Part I, 1970 DUKE L.J. 293; Part II, id. 453.

\textsuperscript{231} Id. at 324. There were unsuccessful attempts in Congress to do exactly this in 1940. Id. at 316. Wallace also suggests that Congress may not be free to prescribe minimum interest on a loan to India. Id. at 481. He reserves for Congress some power over "administrative detail" of the workings of executive agencies. This includes some "operating procedures," a category perhaps wide enough to cover environmental impact assessment; but he draws the line where congressionally prescribed procedures would have "a considerable impact on the effect of United States aid programs abroad." Id. at 307, 480.

\textsuperscript{232} Id. at 327.

\textsuperscript{233} See HENKIN, supra note 224, at 109-14.

\textsuperscript{234} See text accompanying notes 119-20 supra.

countries into specific categories.\textsuperscript{236} The 1975 Act goes even further in setting conditions on aid.\textsuperscript{237}

In contrast, NEPA does not limit expenditures or indicate what course foreign policy should follow. It requires, as one part of the decisionmaking process, that environmental consequences be taken into account and that alternative means of achieving the goals of the proposed project be considered. While compliance with NEPA may be an important factor in a particular decision, NEPA does not say what that decision should be. It acts only to temper executive decisions with environmental awareness. Thus, it is hard to see how Congress would have exceeded its constitutional authority if NEPA were construed to apply to foreign aid projects.\textsuperscript{238}

3. Possible Nonjusticiability of an International NEPA Case.

But the above analysis does not solve the problem. To bring an international NEPA case as the Act is currently written, plaintiffs must argue that either AID or the State Department has failed to satisfy one of NEPA's conditions. NEPA is not the only statute under which an executive foreign relations decision might be challenged. For example, a gift of surplus army trucks to Turkey might constitute congressionally forbidden "military assistance." If a judicial remedy were sought, the court would have to decide whether it has the power to review the propriety of an executive foreign relations decision. This requires consideration of the political question doctrine.

Whereas the issue has thus far been the division of power between Congress and the executive branch, the focus now shifts to the division of power between the executive and the judicial branches. The question as presented to a court would be: Has the Constitution granted a decision to the Executive's complete discretion, so that the judicial branch is foreclosed from reviewing it? Certainly the Executive has some exclusive prerogatives: for example, recognizing the legitimacy

\textsuperscript{236} Id. \S\S 20, 38-40. Limitations are also placed on spending for Chile (\S 25), South Korea (\S 26), and India (\S 27).

\textsuperscript{237} Foreign Assistance and Related Programs Appropriations Act, 1975, Pub. L. No. 94-11 \S\S 101-13, 89 Stat. 17. The Act prohibits all aid to North Vietnam (\S 111), aid for police or prisons in South Vietnam (\S 112), pension payments to foreign military personnel (\S 103), and also sets standards for reclamation and other water resources projects abroad (\S 101).

\textsuperscript{238} The nearest parallel is provided by the Steel Seizure Case, in which the Supreme Court held that President Truman had violated the principle of separation of powers. Youngstown Sheet \& Tube Co. v. Sawyer, 343 U.S. 579 (1952). See also Kent v. Dulles, 357 U.S. 116 (1958), in which the Court held that the State Department, without the authorization of Congress, could not deny a passport to an alleged Communist. The opinion suggests that the President acting on his own would also be prohibited from issuing the passport denial. See HENKIN, supra note 224, at 98-99.
of a foreign government or determining the territorial boundaries of the United States. In *Baker v. Carr*, the legislative reapportionment case, the Supreme Court gave some guidelines for identifying nonjusticiable political questions in several areas, including foreign relations. Initially, the Court recognized that not every dispute involving foreign affairs involves a political question; each case must be separately examined. It then identified two important tests for justiciability of a question. The first criterion is the "susceptibility to judicial handling in the light of its nature and posture in the specific case." A court should abstain from reviewing the merits of a decision if there are no precedents, judicial or legislative, to guide the decision. This may often be the case in foreign relations matters, where much relevant information can only be gained from confidential international negotiations, intelligence sources, or sources otherwise unavailable to the court. But as congressional activity and consensus on specific international issues increase, the courts will find it more appropriate to render decisions in those areas. Judicial handling is not likely to present much difficulty in the area of developmental assistance, where most of the evidence is likely to be of a technical nature, not politically embarrassing material subject to executive privilege. Especially under

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240. Jones v. United States, 137 U.S. 202 (1890). In *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959), cert. denied, 361 U.S. 918 (1959), the court said that the President's designation of certain countries as off-limits to U.S. citizens was an unreviewable political decision, but then sustained it on the merits.
242. *Id.*

> They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.


> Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive. But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs . . . .


245. Of course, plaintiff's discovery in these cases is bound to run into claims of executive privilege. In a NEPA action to enjoin an underground nuclear bomb test on Amchitka Island, Alaska, AEC officials claimed absolute privilege not to produce documents, without offering any reasons. Nevertheless, the D.C. Circuit affirmed an order to produce the documents for in camera inspection. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971). The district court judge later released some, but not all, of the documents to plaintiffs. *Comm. for Nuclear Responsi-
NEPA, there is no lack of judicial precedent: an international NEPA suit will pose the same questions of law that have been dealt with in hundreds of previous cases over domestic projects.

The second Baker test for political questions concerns the possible repercussions on foreign policy if a court were to reverse an executive decision. The rationale for this test, according to the cases, is the importance of the nation “speaking with a single voice” in foreign affairs. There is obvious potential for contravening this policy if an AID official assures a foreign government that a loan has been approved and the project is then halted by a court for failure to comply with NEPA. An overseas project, as well as a domestic one, may be challenged by those who object to it on political or economic rather than environmental grounds. A suit might be brought by a party who seeks to use NEPA merely to hinder or embarrass U.S. foreign policy.

The usual political question case is one in which a private interest challenges a presidential action which was taken with the approval of Congress. Thus the case law does not define the limits of the power

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246. However, the Constitution also dictates a situation where discord is at times inevitable in foreign affairs. The President or his diplomatic representatives may negotiate a treaty with a foreign nation, but the treaty cannot be ratified unless two-thirds of the Senate consent. U.S. Const. art. II, § 2. On the history of treaty rejections by the Senate and the Senate’s power to accept treaties with reservations or on conditions, see HENKIN, supra note 195, at 130-36. It is undoubtedly to obviate the necessity of Senate consent that the President does most of his international business by informal agreement. For examples of agreements for the provision of enriched nuclear fuels of the type at issue in Sierra Club v. AEC, see Agreement for Cooperation with the Republic of Korea Concerning Civil Uses of Atomic Energy, 24 U.S.T. 775, TIAS 7583 (1973) (authorizing transfer of 12,900 kilos of U-235); Protocol Amending the Agreement for Cooperation with Japan Concerning the Civil Uses of Atomic Energy, 24 U.S.T. 2323, TIAS 7758 (1973) (authorizing transfer of 365 kilos of plutonium).

247. For example, a federal judge in Sacramento came close to halting the flow of Vietnamese refugees into the U.S. when a group of Sacramento businessmen asked for an injunction on the ground that no EIS had been prepared. The judge found that the refugees’ entry was within the scope of NEPA but was excepted by the emergency nature of the program. Delta Citizens Group v. Kissinger, Civil No. 75-329 (E.D. Cal., May 12, 1975). McPhillips, Judge Refuses to Order Halt to Refugee Flow, S.F. Chron., May 8, 1975, at 14, col. 6; S.F. Chron. May 13, 1975, at 6, col. 4.

In another case pending in the federal appellate courts, a resident of Austin, Texas, is bringing a taxpayer’s challenge against government aid to Israel on the ground that it constitutes an illegal support of religion. The complaint was dismissed by a three-judge court for lack of standing and as a non-justiciable political question. Dickson v. Nixon, 379 F. Supp. 1345 (W.D. Tex. 1974). The Supreme Court has recently vacated judgment and directed appeal to the Fifth Circuit. Dickson v. Ford, 419 U.S. 1085 (1974).

248. In United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936), the challenged action was a presidential proclamation, pursuant to a congressional joint resolution, that sale of arms to certain warring countries in South America would be detrimen-
of either branch acting alone. When the President acts contrary to the will of Congress, his foreign affairs powers are at their lowest ebb. In a case of conflict between the branches, resolution by the judiciary would seem essential. This would be the situation in a NEPA case in which the complaint alleged that the executive branch had approved a foreign aid project without having complied with NEPA.

A common misinterpretation of the political question doctrine is that the doctrine commands courts to stay out of disputes over the allocation of political power. A survey of the cases shows that the Supreme Court seldom avoids such disputes, and has never done so in the foreign relations area. In fact, the Court does resolve “political questions” on their merits: namely, by holding that a challenged action was taken by the executive branch in a manner consistent with the constitutional grant of political authority. The important distinction is that the judiciary, not the political branches, decides the limit of the political power.

This misinterpretation has caused some courts to abstain from decision on controversial questions of political power, even when they admittedly have jurisdiction over the subject matter. It has been persuasively argued that a court with jurisdiction has neither the duty nor the power to avoid decision in such a case. The federal courts have used the political question doctrine as a device to avoid ruling on the constitutionality of the Viet Nam war. But the doctrine has been obstructive less often in other areas and has been specifically rejected in suits against AID and the Inter-American Development Bank.

tal to peace. The proclamation triggered a clause in the joint resolution which made weapon sales a crime. The Court upheld the joint action of the two branches against a claim of unconstitutional delegation of legislative power.

Another example is Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), in which the Court held that presidential approval of an international air route permit under the Civil Aeronautics Act was not judicially reviewable.


250. Henkin, supra note 224, at 213.


253. In Sarnoff v. Connally, 457 F.2d 809 (9th Cir. 1972), cert. denied, 409 U.S. 929 (1972), taxpayers brought an action to challenge the constitutionality of military aid to Viet Nam under the Foreign Assistance Act. The Ninth Circuit dismissed the suit as raising a nonjusticiable political question.

4. Avoiding the Political Question Doctrine

Plaintiffs in *Sierra Club v. AEC* advanced a theory which could neatly avoid the political question issue. They claimed that the political question doctrine applies only to review of discretionary decisions, those in which the official must balance the relative importance of various considerations. It does not apply to the filing of an EIS, which is a clearly defined ministerial duty imposed on executive agencies by statute. In an international NEPA case, judicial review centers on two questions: whether a project will have a significant effect on the environment and whether the EIS has adequately dealt with alternatives to the proposed project. Neither of these questions requires the balancing of sensitive diplomatic issues. The only case in which the administrator uses discretion is the decision to go ahead with the project despite adverse environmental consequences predicted in the EIS. This decision cannot be judicially reviewed under present NEPA law, so that it is immaterial whether a political question is involved. The Sierra Club's argument is generally supported by the cases.

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1967). *CONCICA* involved an AID loan to a Central American development bank. The Government of Nicaragua obtained a subloan for road construction and awarded a contract to plaintiff. All contractors had to be approved by the bank and by AID. After plaintiff was rejected as a contractor by AID in Washington for lack of experience, it brought this action for review against the AID Administrator. The district court dismissed the complaint; on appeal, the circuit court saw no political question or interference with agency discretion but only a narrow matter of contract law and therefore reinstated the complaint.

In *Lutcher*, the Inter-American Development Bank, an international lending institution, had made a $5 million loan to a Brazilian paper mill. The plaintiff, a competing paper mill, sued for damages and an injunction on the grounds that the loan constituted interference with plaintiff's business and violated an implied contract that the Bank, in having made a loan to plaintiff, would protect it from competition. The district court dismissed on several grounds, notably that Presidents Eisenhower and Kennedy had granted the Bank special immunity by Executive Order and that a court should not interfere with these discretionary actions, especially where “delicate, complex issues of international economic policy are involved.” 253 F. Supp. at 570. On appeal, Judge (now Chief Justice) Burger affirmed the dismissal on the rather obvious ground that the complaint did not state a cause of action either for contract or tort. However, the court briefly rejects the notion that a court should refuse jurisdiction over this supposedly delicate and complex issue. Rather, the complaint “purports to allege what at best is a simple breach of agreement and possible tort.” 382 F.2d at 460.

Another good example of a court refusing to be frightened away from decision in a sensitive political and international area is *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967), rev'd 259 F. Supp. 162 (D.D.C. 1966). The court held that the Secretary of Defense could not exclude plaintiff's newspaper from military newsstands in Viet Nam, even though this choice would normally be unreviewable as being within the national defense power and the military procurement power.

255. See note 157 supra and accompanying text.

256. Most of the political question cases which deny reviewability do so in terms of the President's "determinations" or "decisions" or the "propriety of his decisions," rather than of his "actions." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302
The argument is that preparing an EIS does not involve political decisionmaking. The question is not whether a dam should be built, but whether the decisionmaker should consider alternatives to the dam which might be environmentally more sound.

C. Standing

The trend of federal law has been to loosen the requirements of standing which plaintiffs must meet in order to challenge governmental action. The Supreme Court, now sharply divided on many basic issues, seems more and more to be using standing and other procedural barriers in order to avoid decision of controversial cases on the merits.\textsuperscript{257} But the recent Supreme Court cases should not be a barrier to suits brought under statutory provisions in which Congress has indicated a desire to provide protection and relief to an identifiable class of people.\textsuperscript{258} In an international NEPA case, standing can be upheld on a basis consistent with existing law. If the challenged project involves a clear environmental abuse, the named plaintiffs are properly chosen, and the complaint is well drafted, plaintiffs' task of persuading a court to grant standing should not be difficult.

1. The Law of Standing

Two recent cases have held that, in order to gain standing, plaintiff must satisfy two tests: "injury in fact" and "zone of interest."\textsuperscript{259} What

\textsuperscript{257} In United States v. Richardson, 418 U.S. 166 (1974), a taxpayer claimed that article 1, section 9 of the Constitution requires Congress to publish a statement of its expenditures on the CIA. In Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), anti-war activists sued as taxpayers and citizens, arguing that the 'incompatibility clause,' article 1, section 6, requires the Defense Department to discharge reserve officers who are also members of Congress. Standing was denied in both cases. Both of these were novel legal questions which the Court obviously was not anxious to settle on the merits. The law of standing is sufficiently flexible to make it a useful tool for avoiding such cases.

\textsuperscript{258} Of course, Congress cannot create standing where it is precluded by the case and controversy requirement of article 3. Muskrat v. United States, 219 U.S. 346 (1911). However, denials of standing are not generally (and never in environmental cases) based on strict constitutional grounds, but rather on a judicial rule of self-restraint.

\textsuperscript{259} Association of Data Processing Service Organizations, Inc. (ADPSO) v.
constitutes "injury in fact," or why this should be a test for standing, has never been made clear. The injury which the plaintiff must allege need not be economic; it may be aesthetic, conservational, recreational, or spiritual. But a plaintiff must allege more than a purely intellectual or ideological interest in the outcome of the dispute and must be personally affected by, not just displeased with, the government's action. Normally, the injury test is not difficult to meet in the environmental area. Perhaps because much environmental damage is indirect, subjective, or involves an unmeasurable, though substantial, risk of serious harm, courts tend to be lenient.

The second test is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." This test often becomes confused with the merits of the case, since the object of the litigation is precisely to show that plaintiffs are within the protection of the statute or constitutional provision. In the normal NEPA case, domestic plaintiffs have no difficulty showing that they are within the protection of the Act, so long as they are asserting an interest in protecting the environment. But in an international case, this will be a problem. For example, a delta fisherman in Africa whose catch will be reduced by an upstream dam faces undeniable injury, but he cannot maintain a NEPA action unless the Act was passed to protect him. In order to satisfy the "zone of interest" test, arguments for standing in such a case must deal with two separate issues: the fact that the project is located outside the United States and the fact that the plaintiff is not a U.S. citizen or resident. These should be kept separate. In a suit brought by a U.S. environmental group only the first issue needs to be faced. In a suit by an alien, both problems will have to be overcome.

There are several types of plaintiffs who might attempt an international NEPA suit. These will be considered separately.

Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Some cases mention a third test, namely that a challenged action not be made judicially unreviewable by statute or be specifically committed to agency discretion by law. This, of course, must be satisfied in every case, but it is not properly an element of standing.


261. APDO, 397 U.S. at 153.

262. Justices Brennan and White objected to the zone of interest test for the reason that it is unnecessary, constitutionally irrelevant, and easily confused with the merits of the case. Barlow, 397 U.S. at 168-70 (Brennan, J., concurring in result).

263. As to whether an industry plaintiff can assert a NEPA claim, e.g., to protect a competitive business interest or to delay governmental environment protection action, see ANDERSON, supra note 133, at 39-44.

264. This issue is treated at text accompanying notes 223-56 supra.
2. Suits by U.S.-based Environmental Groups

Since environmental groups in the United States have the most experience with NEPA litigation, it is to be expected that they are the most likely to bring an international NEPA suit. There are three possible bases on which a U.S. group might allege standing.

a. The Environmental Organization as Private Attorney General

Some environmental groups believe that their activities confer benefits upon the entire national and international population and upon unborn generations as well. If they do in fact act to benefit all of us, then they should be given standing to challenge on our behalf environmental abuses of the U.S. government which harm people anywhere in the world.265

Although the private attorney general concept has considerable legal support, particularly in the environmental area, the Supreme Court has severely curtailed its use in the federal courts. In Sierra Club v. Morton,266 plaintiff sued to enjoin the granting of a permit for a highway and a power line which were to run through Sequoia National Park into a resort in Mineral King Valley. The Sierra Club, in what seems to have been a test case, alleged injury only to the scenery and ecology of the area, not to itself or any of its members. The Court held that this was insufficient to confer standing.267 In other words, the Club

266. 405 U.S. 727 (1972).

[Plaintiffs] do not allege a specific threatened injury to themselves, apart from others, but rather set themselves up as protestants, on behalf of all mankind, against the risks of nuclear contamination in common with people generally. Standing to sue . . . does not arise out of such general and indefinite allegations of injury.

The Sierra Club v. Morton opinion can also be read narrowly to mean that a group which only represents the interests of a segment of the public cannot claim to be a private attorney general:

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. 405 U.S. at 735 (emphasis supplied).

Even if this distinction were to be sustained, it would not aid the proponents of an international NEPA suit.
failed the test of injury in fact. It must therefore be assumed that in a foreign NEPA suit, a U.S.-based environmental group will have to rest its standing on some other basis.

b. Standing to Sue on Behalf of Members

An organization generally has standing to challenge an action which is harmful to one or more of its members. Unlike the situation in Sierra Club v. Morton, the members’ injury must be different from that of the public at large. It is sufficient if one member of the plaintiff organization has used and enjoyed the river, forest, or park which will be affected, or that he lives near the area, or that he will suffer from increased traffic flow, ugliness, or deprivation of open space. Even a small injury will suffice, and it need not be unique to that person. Once a plaintiff has standing to challenge the action, he will be able to assert the interests of the general public.

Present law seems to give an environmental group standing to challenge a foreign aid project if any of its members are harmed thereby. In Sierra Club v. AEC, plaintiff alleged that 1,243 of its members lived outside the United States. Some of these apparently lived in the vicinity of nuclear facilities which Eximbank was financing. This alone should be a sufficient allegation of injury to maintain the action. Unless the intent of NEPA is to protect only American citizens, it should make no difference whether or not the members residing abroad are Americans.


269. In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973), an organization founded by five law students challenged, for failure to include an EIS, a refusal of the Interstate Commerce Commission to suspend temporarily an increase in railroad freight rates. They alleged that the rate increase would inhibit the use of recycled materials and make collection of paper, glass, and metal litter unprofitable. This, they said, would harm them as users of local parks and forests. The Court allowed them to maintain the suit on this basis, though it held that the challenged ICC action was judicially unreviewable. The SCRAP doctrine survives the more recent Supreme Court decisions and is expressly approved in Schlesinger, 418 U.S. at 223.

270. This is as much of the private attorney general doctrine as remains after SCRAP. United States v. SCRAP, 412 U.S. at 687. See also Sierra Club v. Morton, 405 U.S. at 737-38; Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972).

271. Answers of the Sierra Club to Defendants' First Set of Interrogatories at 1.

272. As of the 1970 census, 1,737,836 Americans were living in other countries, of whom 1,057,776 were in the Armed Forces. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, AMERICANS LIVING ABROAD vii (1973).
c. Injury to the Organization Itself

Since injury to the organization itself is seldom the sole basis for standing in environmental cases, it is difficult to say how receptive courts would be to a claim of this sort. Certainly a group should have standing to challenge a government project that would have the effect of preventing or inhibiting the group from engaging in its normal activities, such as outings, camping trips, or wildlife study. The Sierra Club, for one, conducts trips and expeditions to many parts of the world. If a development project interferes with one of these specific locations, the group should not be denied standing to oppose it.

Standing to challenge an action which does violence to the tenets or beliefs upon which an organization is founded is much more problematical. Certainly an organization cannot gain standing in all environmental cases merely by demonstrating that it exists only for the protection of the world's environment. On the other hand, an organization with a tradition of interest in a particular locality or natural attraction might have standing on this basis alone. In the international area, it would probably not suffice to form an *ad hoc* group (Concerned Environmentalists Against Mekong River Dams) for the purpose of litigation. Still, some pre-existing groups might be found with sufficient interest in a specific area.

One of the possible interpretations of NEPA is that it protects Americans everywhere. *See* 42 U.S.C. §§ 4331(a) and (b)(2) (1970). *Cf.* Reid v. Covert, 354 U.S. 1 (1957) (basic constitutional guarantees apply to Americans anywhere in the world).

273. *See*, e.g., Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971), where standing was granted to individual plaintiffs, but denied to environmental groups which failed to allege harm to any of their outdoor activities. This is questionable as precedent, since the Ninth Circuit, reversing on the merits, granted a conditional injunction. In doing so, it declined to review the lower court decision on the groups' standing, since the individual plaintiffs were able to present all the relevant issues. Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972).

274. For 1975-76 the Club is planning trips to Nepal, Japan, Indonesia, Malaysia, Kenya, Ethiopia, Venezuela, Colombia, Peru, and other countries. *Sierra Club Bull.*, Jan. 1975, at 27.

275. *Cf.* Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969), a NEPA case in which one plaintiff was granted standing solely on the basis of being "a guide who conducts wilderness trips into East Meadow Creek."

276. An example is West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235 (4th Cir. 1971): [Plaintiffs'] interest and the injury they would suffer are much more particularized and specific than those of Sierra Club and its members in a portion of Sequoia National Park.

This was decided before the Supreme Court affirmed the Ninth Circuit in *Sierra Club v. Morton*, but after it had granted certiorari.

277. One possible example is Indigena, a group which supports the interests of native populations in Central and South America, particularly in the Amazon Basin.
3. **Suits by Aliens**

To extend NEPA to cover consideration of the whole world's environment solely for the enjoyment of Americans who wish to live or travel abroad is illogical and suggests a form of environmental imperialism. If NEPA is to be extended overseas, it ought to be done for the benefit of the foreign nation and its citizens. At present, the idea of a Pakistani tenant farmer bringing a NEPA action to protect his land may be a practical impossibility. However, environmental activism is spreading to the Third World, and the prospect of a foreign organization or individual, other than the case of the Pacific Trust Territory, seeking to enforce NEPA is a possibility that must be considered.

In general, foreigners, regardless of their residence, have access to both state and federal courts. As yet, the fact that plaintiffs are not U.S. citizens has been no obstacle in environmental litigation. In *Wilderness Society v. Morton*, a NEPA suit involving the federal permit to construct the trans-Alaska pipeline, a Canadian group and a Canadian individual were allowed to intervene over the objection of the pipeline company. The court reasoned that intervention was desirable because the interests of the American and Canadian environmentalists conflicted: each wanted the pipeline in the other's territory. Since the Canadians were allowed to plead their claim in a NEPA suit, it would seem to follow that the statute affords their country some protection. With this decision as precedent, the court in *People of*

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279. Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578 (1908). In Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), a large group of assorted plaintiffs, including several black members of Congress who had been denied entry into Rhodesia, sued to enjoin imports of Rhodesian chromium. The court held that Congress had abrogated the treaty commitment which had prohibited such imports, leaving plaintiffs without a remedy. Two of the plaintiffs who were granted standing were native Rhodesians unable to return to their homeland. Id. at 464 n.1. See also *Constructores Civiles*, 459 F.2d 1183 (D.C. Cir. 1972); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961). Dicta to the effect that aliens are not protected by the Constitution or laws of this country in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Pauling v. McElroy*, 278 F.2d 252, 254 n.4 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960) have apparently been repudiated by the D.C. Circuit and should be ignored. See *Constructores Civiles*, 459 F.2d at 1189, 1190 n.13. Exceptions to the standing of aliens are made only for wartime enemies and for subjects of unrecognized governments. *Ex parte* Colonna, 314 U.S. 510 (1942); *The Penza*, 277 F. 91 (E.D.N.Y. 1921).

280. 463 F.2d 1261 (D.C. Cir. 1972).
Enewetak and People of Saipan had no trouble granting standing to the Trust Territory islanders. There is no reason why the Pakistani farmer should do any worse.

4. **Standing to Obtain Information**

One clear purpose of NEPA is to make available to the public, as well as to federal and state officials, information about the possible environmental consequences of government action. Interested officials and members of the public normally have the opportunity to examine and comment on draft environmental statements. The final statement must be responsive to such comments and is also circulated to the public. No “standing” is necessary to obtain an EIS or to participate in the review process. Thus, anyone who can profit from the information in an EIS is an intended beneficiary of NEPA. If such a person can demonstrate a need for information and is being harmed by the lack of it, that person ought to be able to gain judicial enforcement of the Act. This was the avenue by which plaintiffs obtained standing in Scientists’ Institute for Public Information (SIPI) v. AEC. In this case, the court required the AEC to produce an EIS on its research and development program for the liquid metal fast breeder reactor. SIPI, by virtue of its activities, which include “making available to the public scientific information relevant to important social issues and stimulating and informing public discussion of the scientific aspects of public policy,” was awarded standing. It might be inferred that an organization which demonstrates that it needs the information for its own purposes may also bring a NEPA action.

One class of people who have a demonstrable need for environ-

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281. See also Michie v. Great Lakes Steel Div., Nat’l Steel Corp., 495 F.2d 213 (6th Cir. 1974), a common law nuisance action for air pollution damage, in which Canadian property owners were allowed to sue industrial polluters in Michigan. The court assumes that the foreign plaintiffs would also have been entitled to ask for an injunction under the Clean Air Act. Id. at 216 n.2.


283. 40 C.F.R. §1500.2(b) (1974).

284. 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973). The former Federal Corrupt Practices Act was another statute enacted for the purpose of providing information to the public, or at least to all voters. A voter who was deprived of that information by the Act’s non-enforcement was granted standing to bring an enforcement action in Nader v. Kleindienst, 375 F. Supp. 1138 (D.D.C. 1973). By the time of the appeal, the Act had been repealed; therefore plaintiff had lost his injury and his standing. Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974). Cf. Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966), where responsible representatives of the listening public were allowed to challenge the license renewal of a broadcaster who was presenting a one-sided view of race issues.

285. SIPI, 481 F.2d at 1087 n.29, 5 ERC at 1422.
mental impact information is the members of Congress. In several in-
stances the findings contained in environmental studies have led Con-
gress to reconsider major projects and appropriations. Congress has
also, on occasion, "repealed" NEPA as applied to certain projects
(most notably the trans-Alaska pipeline), directing that the project be
completed despite any adverse environmental effects. Remitting to
Congress such decisions, which may require balancing large economic
and environmental interests, is entirely proper and is a valuable func-
tion of the Act.

It would not be surprising, therefore, to find a member of Con-
gress bringing a NEPA suit, perhaps against a locally unpopular federal
project in the member's district. The doctrine of congressional
standing has not yet been fully developed. So far, it has been liberally
and effectively employed in several cases.

A member of Congress has standing in that official capacity to
challenge actions which interfere with legislative duties. In the case
of a NEPA suit, the relevant duty would be the grant or withholding
of further appropriations for an environmentally questionable project.
That this would be a proper basis for standing is implied by Mitchell
v. Laird, in which 13 members of Congress sought unsuccessfully
to enjoine the war in Indo-China. The circuit court dismissed the ap-
peal on "political question" grounds, but it stated in a dictum that the
members of Congress might have standing based on interference with
their duties to consider appropriations to support the war and their duty
to consider impeachment. Since virtually everything the executive
branch does has some bearing on congressional appropriations, the
Mitchell case would seem to grant members of Congress standing to
challenge any agency action. The dictum is obviously overbroad.
Still, in the NEPA case, where Congress has enacted a disclosure law

286. For example, Patsy Mink (D.-Ha.), along with 32 other members of Congress,
brought a suit under the Freedom of Information Act for disclosure of adverse EPA
comments on a nuclear test in Alaska, which Hawaiians feared would damage their state.
See EPA v. Mink, 410 U.S. 73, 4 ERC 1913 (1973), rev'd 464 F.2d 742 (D.C. Cir.
1973); P. Mink, The Cannikin Papers: A Case Study in Freedom of Information, in
SECRET AND FOREIGN POLICY 114-31 (T. Franck & E. Weisband eds. 1974).
Sen. Kennedy obtained a judgment that President Nixon's pocket veto of a law was un-
constitutional. The relevant duties were the Senator's vote which he had cast for the
bill and his potential vote to override the veto. See also Nader v. Bork, 366 F. Supp.
to the firing of Special Prosecutor Archibald Cox. For analysis of the emerging doc-
trine of congressional standing, see Comment, Congressional Standing to Challenge Ex-
ecutive Action, 122 U. PA. L. REV. 1366 (1974); Note, Standing to Sue for Members
289. Id. at 614.
partly for its own benefit, it would seem that non-compliance by the executive branch would be a sufficient interference with legislative duties to allow Congress to seek judicial enforcement.

5. Other Possibilities

There remain certain possibilities which may only confer standing in special situations or which seem to be completely foreclosed by present law but are nonetheless worth mentioning. For example, the government of a country adjacent to a foreign aid recipient might challenge a U.S. pesticide program or a dam which would reduce the plaintiff country’s water supply or alter its climate. Such a challenge might be motivated by jealousy or political opposition as well as by concern for the environment. It is more likely that international NEPA cases will be brought because of the boomerang effect. A U.S. resident could claim that an international development program resulted in a harmful change in the U.S. environment. Climatic effect and pesticide residue in imported goods are two possibilities. An allegation was made in Sierra Club v. AEC that, as part of the nuclear export program, spent nuclear fuels were shipped here for recycling and that large amounts of radioactive wastes were being returned to the U.S. for disposal. These allegations, if provable, would appear to be an excellent basis for standing of U.S. citizens who reside near nuclear fuel processing and shipping facilities.

It might seem that any taxpayer would have the right to challenge the spending of federal funds in violation of a statute or constitutional provision. However, the Supreme Court has limited such actions to those which oppose spending in violation of the first amendment estab-

290. AID is aware that this situation could provoke a diplomatic incident:

It’s one thing to work with country X on a project or program where whatever the environmental effect, it’s purely domestic to that country. But the World Bank has already run into this, and the day will come when we will run into this, where project X in country Y has its adverse environmental impact on country Z.

Remarks of James R. Fowler, Exec. Dir., AID Comm. on Environment and Development, in AID, ENVIRONMENT & DEVELOPMENT PROCEEDINGS (1973). Fowler goes on to cite an example where the World Bank worked out a settlement with “country Z” which was about to be hit with air and water pollution from a new copper smelter in “country Y.” Id.

In such a situation it is possible that under principles of international law the United States as well as “country Y” would be held strictly liable for damage to “country Z.” See Trail Smelter Arbitration (United States v. Canada), 3 U.N.R.I.A.A. 1905, 1967 (1938, 1941); Lac Lanoux Arbitration (France v. Spain), 12 U.N.R.I.A.A. 281 (1957).

291. Complaint at 17, Sierra Club v. AEC, Civil No. 1867-73, Memorandum Opinion at 6 ERC 1980 (D.D.C. 1974). The defendants denied that any of these activities were taking place (Answer at 7), and Eximbank denied that it financed any transportation of spent fuel. Defendant’s Motion, supra note 216, at 28.
lishment of religion clause. This is not, however, a strict constitutional doctrine, and there remains the possibility that Congress might enact legislation allowing wider use of taxpayers' suits.

CONCLUSION

The recent decision of AID to begin full compliance with NEPA will undoubtedly lead to more official recognition of environmental problems and better results in development programs. The next target of litigation will likely be the Export-Import Bank, which remains un convinced of the value of environmental planning.

Even against AID, further litigation may be necessary on individual projects. In such suits, the standing and political question doctrines will present difficult legal barriers. However, if NEPA is to provide anything more than a delaying tactic, its value will depend on the good faith and objectivity of officials in government agencies far more than on the rulings of courts.

There are still many opportunities for high benefit, low cost development projects if planning is carried out consistent with environmental values. The world population continues to grow and poverty is worsening in many areas. Some environmental degradation will inevitably occur along with even the best development programs. But development without environmental awareness will be to everyone's detriment.

George D. Appelbaum

292. See supra note 257. A taxpayer's suit to enforce the establishment clause was allowed in Flast v. Cohen, 392 U.S. 83 (1968). The Supreme Court has never ruled on a taxpayer's suit to enforce a statute.