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NEPA and Indirect Effects of Foreign Activity: Limiting Principles from the Presumption Against Extraterritoriality and Transnational Lawmaking

I. INTRODUCTION

One of the major statutory tools in the fight against the adverse effects of climate change is the National Environmental Protection Act (“NEPA” or “The Act”).¹ Enacted in 1970, NEPA requires all federal agencies to prepare a “detailed statement” on the environmental impact of all “major Federal actions.”² While it is indisputable that NEPA applies to federal actions within the domestic sphere, recent commentators have advocated using NEPA’s requirements more aggressively as a weapon against global activities that may be harmful to the earth’s climate.³ This new wave of litigation and environmental advocacy not only asserts that domestic activity falls within NEPA’s requirements, but that extraterritorial activity which may have a potential impact on climate change should also be evaluated in federal agencies’ Environmental Impact Statements and Environmental Assessments.⁴

The application of NEPA to extraterritorial activity has been examined in numerous journals and forums.⁵ However, recent

1. See 42 U.S.C. § 4332 (2012).

2. *Id.*

3. Frederick R. Anderson & Geraldine E. Edens, *Climate Change and the National Environmental Policy Act*, 2006 No. 1 RMMLF-INST Paper No. 12A (2006) (“The use of NEPA to address climate change has barely begun [T]he cases which climate advocates have said they plan to file, already show the contours of the new ‘campaign.’”).

4. See, e.g., Maura M. Kelley, Note, *Environmental Responsibilities Overseas: The National Environmental Policy Act and the Export-Import Bank*, 34 B.C. ENVTL. AFF. L. REV. 335, 354 (2007) (arguing that “[d]espite a lack of explicit language making NEPA applicable to extraterritorial federal actions, the statute should not be limited to solely domestic projects”).

5. See, e.g., Randall S. Abate, *Dawn of A New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87 (2006); Barry N. Breen, *International Application Of The National Environmental Policy Act*, C806 A.L.I.-A.B.A. 419; Caleb W. Christopher, *Success by A Thousand Cuts: The Use of Environmental Impact Assessment in Addressing Climate Change*, 9 VT. J. ENVTL. L. 549 (2008); Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543 (1991); Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act*, 62 GEO. WASH. L. REV. 757 (1994); Scott C. Whitney, *Should the*

arguments from non-governmental organizations and other groups challenging a coal company's application to export coal to Asia under Washington's State Environmental Protection Act ("SEPA"),⁶ Washington's version of NEPA, warrants a closer examination of whether federal agencies should be required to consider *indirect effects* from extraterritorial activity in their NEPA analysis.⁷ This Comment will attempt to fill two gaps in the current scholarship. First, this Comment will address whether NEPA requires the consideration of indirect effects of extraterritorial activity. Next, it will examine the extraterritorial reach of NEPA by applying international law and transnational lawmaking factors that have largely been ignored by commentators. Ultimately, this Comment concludes that U.S. agencies should not be required under NEPA to include in their reporting requirements the indirect effects of activities that take place within a foreign, sovereign nation for two reasons. First, U.S. courts should apply the presumption against extraterritorial application of U.S. law on foreign state activities committed by foreign actors. Second, there should be broad consensus in solving environmental concerns, and applying NEPA to foreign activity could inhibit this crucial international lawmaking process.

Part II of this Comment introduces NEPA and explains the brewing controversy regarding coal exports from U.S. shipping terminals. Part II also describes the argument from environmental groups that the indirect effects of extraterritorial activity should be included in the analysis of environmental impacts required under NEPA. Part III discusses the federal common law presumption against the extraterritorial application of U.S. law. Part IV examines three factors of international law and transnational lawmaking—the

National Environmental Policy Act Be Extended to Major Federal Decisions Significantly Affecting the Environment of Sovereign Foreign States and the Global Commons, 1 VILL. ENVTL. L.J. 431 (1990); Sara E. Baynard, Note, *The Extraterritorial Reach of NEPA and the Creation of a Foreign Policy Exemption*, 28 VT. L. REV. 173 (2003); Deirdre Goldfarb, Comment, *NEPA: Application in the Territorial Seas, the Exclusive Economic Zone, the Global Commons, and Beyond*, 32 SW. U. L. REV. 735 (2003); Karen A. Klick, Note, *The Extraterritorial Reach of NEPA's EIS Requirement After Environmental Defense Fund v. Massey*, 44 AM. U. L. REV. 291 (1994); Silvia M. Riechel, Note, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115 (1994); Douglas J. Rosinski, Note, *The Environmental Impact on Foreign Territory from a Proposed Federal Action*, 4 S.C. ENVTL. L.J. 177 (1995).

6. See *infra* note 24 and accompanying text.

7. Indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2013). See also *infra* notes 14–15 and accompanying text.

link of the activity to the territory of the regulating nation; the importance of the regulation to the international political, legal, and economic systems; and the interest of another county in regulating the activity—and argues that these factors limit the reasonableness of the U.S.’ jurisdiction to prescribe law related to the extraterritorial application of NEPA. The Comment concludes in Part V with the recommendation that NEPA analysis should not be required for the indirect effects of extraterritorial activity.

II. NEPA AND THE WEST COAST COAL TERMINAL DISPUTES

A. NEPA and the EIS Requirement

NEPA was enacted in 1970 to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment,” and “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the . . . welfare of man”⁸ However grand the stated purpose of the Act may be, NEPA’s substantive provisions are limited to federal administrative agencies and are almost wholly procedural.⁹ In order to foster informed federal decision making and ensure that environmental factors are considered, the Act requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for any “major Federal action[s] significantly affecting the quality of the human environment.”¹⁰ In some circumstances, an agency may first

8. 42 U.S.C. § 4321 (2013).

9. See, e.g., Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 A.L.I.-A.B.A. 757, 759 (“Neither an EIS nor NEPA itself dictates any particular result. NEPA is essentially a procedural statute; it establishes procedural steps, such as the preparation of an EIS, which, once satisfied, do not dictate any particular substantive decision.”).

10. 42 U.S.C. § 4332(2)(A)–(C). The relevant statutory language states
The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be

prepare an Environmental Assessment (“EA”), the ambit of which is more limited and less involved than an EIS, to determine if the effects of the federal action are significant enough to require an EIS.¹¹ Although an agency is required to prepare an EIS or an EA for any major federal action, the findings or suggestions of these analyses are not prescriptive.¹²

Federal regulations require that an EIS consider both the direct and indirect effects of a proposed agency action.¹³ Direct effects are “caused by the action and occur at the same time and place.”¹⁴ Indirect effects are those that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”¹⁵ These indirect effects may include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”¹⁶

Courts have interpreted the NEPA regulations that require indirect effects in an agency’s EIS to include climate change considerations. One reported decision from the Eighth Circuit regarding NEPA’s consideration of greenhouse gas emissions is noteworthy because it suggests that NEPA analyses should include even generalized impacts from climate change. In *Mid States Coalition for Progress v. Surface Transportation Board*, the court remanded a railroad expansion project to transport coal from the Powder River Basin back to the approving agency to prepare a supplemental EIS to consider “the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.”¹⁷ Significant to the extraterritorial discussion, the *Mid States* court did not comment

involved in the proposed action should it be implemented.

Id.

11. 40 C.F.R. § 1501.4.

12. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

13. 40 C.F.R. § 1502.16.

14. *Id.* § 1508.8.

15. *Id.*

16. *Id.*

17. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550 (8th Cir. 2003).

about the increase of coal consumption internationally, but kept its analysis to the domestic utilities market.¹⁸

The requirements of an EIS are often costly and time-consuming as the process of creating an EIS from draft to a final report can take years, sometimes nearly a decade.¹⁹ As a result, the ultimate timing for the resolution of the EIS process and the final costs of the EIS are usually unpredictable. Not surprisingly, opponents of development projects often use NEPA as a litigation tactic to delay, and ultimately derail, a project.²⁰ One frequently used litigation tactic is challenging the sufficiency of EA and EIS analyses.²¹ In fact, many environmental groups have increasingly resorted to NEPA litigation

18. *Id.* at 549 (“The increased availability of inexpensive coal will at the very least make coal a more attractive option to future entrants into the utilities market when compared with other potential fuel sources, such as nuclear power, solar power, or natural gas. Even if this project will not affect the short-term demand for coal, which is possible since most existing utilities are single-source dependent, it will most assuredly affect the nation’s long-term demand for coal . . .”).

19. *See, e.g.,* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 918 (2002) (noting a Federal Highway Administration Study that reported an average EIS required 3.6 years to complete, with some EISs taking up to 12 years to complete).

20. For example, a geothermal power plant proposed in California was the subject of an EIS issued in 1998. Ironically, while that project (if built) would supply clean, renewable energy to northern California, it has been the subject of almost constant litigation requiring additional consideration of impacts to cultural resources and still has not been constructed. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069 (9th Cir. 2010). According to counsel for the project proponent, the U.S. Forest Service and the Bureau of Land Management are about to commence preparation of a new EIS for the project, which could take two to four more years. *See Telephone Interview with Craig Galli, Partner, Holland & Hart* (Nov. 26, 2012). *See also* Steven W. Weston & Barbara Biles, *National Environmental Policy Act: Issues Impacting Construction*, 14 CONSTR. LAW. 4, 4 (1994) (“[I]n practice the environmental review process required by NEPA often has been used by opponents of development projects as a delay tactic. In the years since NEPA’s enactment, project opponents have become increasingly sophisticated in their ability to challenge projects on NEPA grounds both before and after project approval. Their broadside attacks now include asserting intricate procedural arguments, bombarding agencies with a plethora of suggested alternative sites and mitigation measures, and initiating complicated litigation even after a project has been approved and is under way. As a result, the NEPA review process has become time-consuming, expensive, and uncertain.”).

21. *See, e.g.,* Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 340 (2004) (“NEPA litigation—either to decide whether an EIS is required or to determine its adequacy once it is produced—adds further costs and delays. Fear of judicial review pushes agencies toward ever-lengthier and more elaborate EISs, responding to all major comments received in the public notice and comment period. NEPA thus becomes a highly effective tool that environmental NGOs and others can use to raise the financial and political costs of projects they oppose and stretch out decisions over an extended time frame, giving time to rally political opposition. In some cases these delays and associated financial and political costs may be enough to derail the project entirely.”).

as a vehicle to address greenhouse gas emissions.²² Although the majority of these cases focus on domestic activity, a few observers, citing the need for the U.S. to take a stronger leadership role to reign in climate change, have called for a broader application of NEPA to extraterritorial activity.²³ One example of this recent development is being played out with recent plans to export coal from the U.S. to Asia.

B. A Brewing Controversy in the Development of U.S. Coal Export Shipping Terminals

Non-governmental organizations and other environmental groups have employed the NEPA and SEPA²⁴ litigation tactic recently during the permitting process against companies that have proposed building shipping terminals in the U.S. to export coal to Asia.²⁵ In the last three years, at least four companies have proposed

22. See, e.g., *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124 (9th Cir. 2011); *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466 (D.C. Cir. 2009); *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Coal. for a Sustainable 520 v. U.S. Dep't of Transp.*, C11-1461RSM, 2012 WL 3059404 (W.D. Wash. July 25, 2012); *Black Mesa Water Coal. v. Salazar*, 11-CV08122-PHX-GMS, 2012 WL 2848437 (D. Ariz. July 11, 2012); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 10-2008-CM-DJW, 2011 WL 2579799 (D. Kan. June 28, 2011); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Martin*, 2:10-CV-1346-BR, 2011 WL 2493765 (D. Or. June 23, 2011); *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118 (D.N.M. 2011); *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1236 (W.D. Wash. 2009).

23. See, e.g., Silvia M. Riechel, Note, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 139 (1994) (arguing that the federal government must do more to apply NEPA abroad because "NEPA is among the most effective ways the U.S. government can monitor and control its impact on the global environment").

24. WASH. REV. CODE ANN. § 43.21C.030 (West). SEPA is Washington's version of NEPA; just as NEPA requires federal agencies to prepare EA and EIS reports, SEPA requires state agencies to

[i]nclude in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

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

Id.

25. Craig Welch, *Fights Brewing Over Massive Coal-Export Plans for the Northwest*, SEATTLE

constructing shipping terminals throughout approximately six sites along the Washington and Oregon coasts.²⁶ Once the terminals are built, these companies plan to export coal from the Powder River Valley deposits in Wyoming and Montana to energy-hungry countries in Asia.

1. Washington permit dispute

The first company to apply for a permit to build a shipping terminal to ship coal to Asia on the West Coast was Millennium Bulk Terminals (“MBT”), a U.S. subsidiary of an Australian-owned energy and natural resource company.²⁷ Although MBT initially received a permit from Cowlitz County in Washington, MBT withdrew its application after a coalition of conservation groups, led by Earthjustice, appealed the decision to Washington’s Shorelines Hearings Board.²⁸

In its appeal, Earthjustice claimed that Cowlitz County violated SEPA when Cowlitz County concluded that issuing a permit for the construction of MBT’s proposed coal terminal “would not have a significant adverse impact” and therefore did not require an EIS.²⁹ Earthjustice argued that the state agency did not consider the environmental impacts of “transporting coal long distances to the [coal terminal], and the impacts of commodity ship traffic in the Columbia River and the Pacific Ocean”³⁰ More significantly, Earthjustice contended that the agency did not consider the impacts of the “combustion of exported coal in Asia, and the influence of increased exports on supply, demand, and the price of coal in international markets.”³¹ Further, Earthjustice maintained that an increase in the supply, and a corresponding decrease in price, would

TIMES (May 20, 2012), <http://seattletimes.com/avantgo/2018245897.html>.

26. Erik Olson, *Rising Chinese Demand Could Mean Coal Export Boom for West Coast*, DAILY NEWS ONLINE (March 27, 2012), http://tdn.com/news/local/rising-chinese-demand-could-mean-coal-export-boom-for-west/article_3d2d744c-7874-11e1-a248-0019bb2963f4.html.

27. See Welch, *supra* note 25.

28. Jim Efstathiou Jr., *Ambre Energy Drops U.S. West Coast Port Permit After Complaints*, BLOOMBERG (Mar. 16, 2011), <http://www.bloomberg.com/news/2011-03-16/ambre-energy-drops-u-s-west-coast-port-permit-after-complaints.html>.

29. Petition for Review at 2, Shoreline Mgt. Substantial Dev. Permit No. SL10-0916, *Climate Solutions v. Cowlitz County* (Wash. Shorelines Hearings Bd. Dec. 13, 2010), available at <http://earthjustice.org/sites/default/files/LongviewPetition121310.pdf>.

30. *Id.* at 4.

31. *Id.* at 5.

likely impact “the energy planning decisions in other countries” and cause adverse environmental effects by “encouraging greater use of coal.”³²

Because MBT withdrew its application before a ruling on the merits,³³ the Washington Shorelines Hearings Board did not issue a ruling on Earthjustice’s appeal. However, MBT has continued its effort to secure a permit for its shipping terminal project. In September 2012, the Army Corps of Engineers (“Corps”) announced that it will begin its review of the project with an EA and will not require an EIS for the project.³⁴ Although the Corps could decide at any time to require an EIS for the project,³⁵ the absence of an EIS almost certainly promises more litigation under NEPA regarding the adequacy of the environmental review process for the project.

The prospect of future litigation over MBT and other similar coal shipping terminal construction and operating permit issuance prompts questions concerning Earthjustice’s argument explained above in its appeal to the Washington Shorelines Hearings Board.³⁶ Must an agency consider the indirect effects of coal combustion in foreign markets? Does NEPA require an agency to assess the environmental impacts caused by a foreign sovereign’s energy consumption decisions, as influenced by a change in the international price of a commodity? Taken more broadly, does NEPA require an agency to assess the indirect effects of extraterritorial activity within a foreign nation? The answers to these questions have wide-ranging implications for future climate change litigation.

Part III will examine important factors that lead to the conclusion that agencies should not be forced to include the indirect effects of extraterritorial activity in their NEPA analyses. This Part will first examine the federal common law presumption against extraterritoriality. Next, Part IV argues that international solutions to man’s role in climate change, as implemented through international law and transnational lawmaking channels, severely inhibit the use of NEPA as an extraterritorial tool in attempting to

32. *Id.*

33. *See* Efstathiou, *supra* note 28.

34. Stover E. Harger III, *Army Corps Will Not Require Stricter Coal Export Review*, PORTLAND TRIB. (Sep. 27, 2012), <http://portlandtribune.com/pt/9-news/115876-army-corps-will-not-require-stricter-coal-export-review>.

35. *Id.*

36. *See supra* notes 29–32 and accompanying text.

expose and influence activity in foreign sovereign nations.

III. PRESUMPTION AGAINST EXTRATERRITORIALITY

Federal agencies should not be required under NEPA to consider the indirect effects of extraterritorial activity that occurs in sovereign nations in an EIS or EA because of the longstanding presumption against the extraterritorial application of U.S. domestic law.³⁷ This federal common law canon of construction, recently reaffirmed by the U.S. Supreme Court, expresses the principle that “unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, [the Court] must presume [a statute] is primarily concerned with domestic conditions” and should not be applied extraterritorially.³⁸

A. History and General Application

The presumption against extraterritoriality has been applied in U.S. courts since the early nineteenth century.³⁹ In his seminal statement for the presumption against extraterritoriality, Justice Holmes explained in 1909 that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”⁴⁰ However, the next seven decades of jurisprudence gradually eroded the presumption against extraterritoriality such that the Restatement (Third) of Foreign Relations Law, published in 1987, observed that the presumption was no longer applicable in U.S. law.⁴¹

37. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–285 (1949))).

38. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248).

39. See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630–32 (1818) (“Every nation provides for such offences the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.”).

40. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

41. See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 *BERKELEY J. INT’L L.* 85, 85–86 (1998) (“While paying lip service to *American Banana*, both the Supreme Court and lower federal courts began to ignore its holding in antitrust cases. . . . The Restatement (Third), which appeared in 1987, dispensed with the presumption altogether.

Since the Restatement (Third) was published, two major Supreme Court cases have revived and arguably strengthened the presumption against extraterritoriality.⁴² Beginning with its decision in *E.E.O.C. v. Arabian American Oil Co.* (“*Aramco*”), and most recently in *Morrison v. National Australian Bank Ltd.*, the Supreme Court readdressed extraterritoriality and clarified the appropriate scope of the canon to transnational cases.⁴³

1. *Aramco*

In *Aramco*, a U.S. citizen filed an action under Title VII of the Civil Rights Act of 1964 against his American employer for alleged discrimination that occurred while he was working in Saudi Arabia.⁴⁴ The employer argued that the district court lacked subject matter jurisdiction over the action because Title VII did not extend to citizens employed in foreign territories. Writing the opinion of the Court, Chief Justice Rehnquist suggested that the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁴⁵ He explained that Title VII did not apply extraterritorially, noting that whether or not Congress has exercised its authority to apply a statute extraterritorially “is a matter of statutory construction.”⁴⁶ Chief Justice Rehnquist reasoned that certain provisions in Title VII cited by the U.S. employee as indicating Congress’s intent to apply the statute abroad—such as a clause extending the law to a United States employer that affects trade “between a State and any place outside thereof”—was “boilerplate language” not relevant to applying the statute beyond the U.S. territorial borders.⁴⁷ He suggested that only

It . . . observed that [Justice Holmes’s statement in *American Banana*] . . . ‘does not reflect the current law of the United States.’” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415, Reporter’s Note 2 (1987)).

42. *Id.* at 86. (“In its 1991 decision in *E.E.O.C. v. Arabian American Oil Co.* (“*Aramco*”), the Supreme Court applied the presumption against extraterritoriality to Title VII What was remarkable about *Aramco* was not just the fact that the court again applied the presumption, but the apparent strength of the presumption it applied.”).

43. *See generally* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

44. *Arabian Am. Oil Co.*, 499 U.S. at 247.

45. *Id.* at 248.

46. *Id.*

47. *Id.* at 249–52.

a “clear statement” from Congress was enough to overcome the presumption against limiting the effects of the statute to U.S. territory.⁴⁸

2. *Morrison v. National Australia Bank Ltd.*

Even after *Aramco*, questions remained about the strength and viability of the presumption against extraterritoriality. Within many areas of law, including antitrust legislation, trademark protection, and federal securities law,⁴⁹ the presumption against extraterritoriality seemed to have been set aside “in favor of presumptions that provided for the extraterritorial application of U.S. law to activities that had a sufficiently close nexus to the U.S.”⁵⁰ The Court sought to address some of this confusion in 2010 with an examination of the presumption in the context of federal securities law.⁵¹ In *Morrison v. National Australia Bank Ltd.*, Australian investors, who had purchased shares of National Australia Bank (“National”) on the Australian stock exchange, filed suit against the bank in federal district court under §10(b) of the Securities and Exchange Act.⁵² The investors alleged that National had manipulated its financial models and reports in connection with the purchase and operation of a U.S.-based mortgage servicing company.⁵³ Dismissed for lack of jurisdiction by both the district court and the Court of Appeals for the Second Circuit, the case was granted certiorari by the Supreme Court to consider whether §10(b)

48. *Id.* at 258. In his dissent, Justice Marshall, joined by Justice Stevens and Justice Blackmun, vehemently opposed Chief Justice Rehnquist’s characterization of the presumption against extraterritoriality as a clear statement rule:

But contrary to what one would conclude from the majority’s analysis, this canon is *not* a ‘clear statement’ rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. Rather, as our case law applying the presumption against extraterritoriality well illustrates, a court may properly rely on this presumption only after exhausting all of the traditional tools ‘whereby unexpressed congressional intent may be ascertained.’

Id. at 261 (Marshall, J., dissenting) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

49. Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1, 29–46 (1992).

50. *Id.* at 29.

51. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

52. *Id.* at 2875.

53. *Id.* at 2875–76.

of the Securities and Exchange Act provided a cause of action for plaintiffs suing a foreign defendant for misconduct related to securities traded on a foreign exchange.⁵⁴ Prior to *Morrison*, the Second Circuit had disregarded the presumption against extraterritoriality when interpreting the Securities and Exchange Act, instead promulgating an “effects” test⁵⁵ and a “conduct” test⁵⁶ to aid in determining whether §10(b) should apply extraterritorially.⁵⁷

Writing for the majority, Justice Scalia explained that the presumption against extraterritoriality “preserves a stable background against which Congress can legislate with predictable effects,” and should be applied in all cases.⁵⁸ He noted that the “presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”⁵⁹ Furthermore, Justice Scalia explained that even when “a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its term.”⁶⁰

Finding no clear statement of extraterritorial effect in § 10(b), the Court held that the statute does not apply extraterritorially.⁶¹ Next, the Court addressed the investors’ argument that sought only domestic application of the law because a substantial portion of National’s misconduct occurred in the U.S.⁶² Justice Scalia noted that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some*

54. *Id.* at 2876.

55. *See* *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998) (“In outlining the extraterritorial reach of these provisions, courts have reasoned . . . that Congress would want to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States, or ‘effects.’”).

56. *See* *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (“Under the conduct test, a federal court has subject matter jurisdiction if (1) the defendant’s activities in the United States were more than ‘merely preparatory’ to a securities fraud conducted elsewhere . . . and (2) these activities or culpable failures to act within the United States ‘directly caused’ the claimed losses.”).

57. *Morrison*, 130 S. Ct. at 2878.

58. *Id.* at 2881.

59. *Id.* at 2878.

60. *Id.* at 2884.

61. *Id.* at 2883. Although the Court specifically stated that § 10(b) lacked “a clear statement of extraterritorial effect,” the Court noted that the presumption against extraterritoriality is not a clear statement rule; the statute’s context may also be consulted to determine the statutory meaning. *Id.*

62. *Id.*

domestic activity is involved in the case.”⁶³ Citing the employment dispute in *Aramco*, Justice Scalia explained that the “focus” of congressional concern in Title VII was not international issues such as the country of hiring or the nationality of the employee “but rather domestic employment.”⁶⁴ In the Securities and Exchange Act, the Court concluded that the “focus” of § 10(b) is “not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”⁶⁵ Thus, domestic activity may be enough to bring extraterritorial conduct into the range of a statute as long as the “focus” of the statute is upon the domestic activity.

B. The Presumption against Extraterritoriality and NEPA

1. Statutory language and legislative history

The first and most important step in determining whether a statute applies extraterritorially is to examine its text for clear, affirmative language from Congress indicating legislative intent.⁶⁶ A substantial review of the statutory text and the legislative history of NEPA has already been conducted elsewhere and is beyond the scope of this Comment;⁶⁷ however, a general summary of the issue is worth mentioning.

Despite arguments to the contrary,⁶⁸ the overriding consensus from both the courts and literature indicates that the text and legislative history of NEPA is unclear and inconclusive with respect to its extraterritorial application.⁶⁹ Advocates of a more expansive

63. *Id.* at 2884.

64. *Id.*

65. *Id.*

66. *See id.* at 2878 (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

67. *See* Gonzalez-Perez & Klein, *supra* note 5, at 777–85.

68. *See* Baynard, *supra* note 5, at 190–94.

69. *See, e.g.,* Greenpeace USA v. Stone, 748 F. Supp. 749, 759 (D. Haw. 1990) (“Although the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems, it does not explicitly provide that its requirements are to apply extraterritorially.”); Joan R. Goldfarb, *supra* note 5, at 557 (“While each of these statements provides a vehicle by which extraterritorial application may be inferred, none of these statements expressly addresses extraterritorial actions. . . . Thus, like the statutory language, the legislative history is too general to provide definitive answers. Thus, courts have been forced to develop their own standards for NEPA application.”); Gonzalez-Perez & Klein, *supra* note 5, at 784 (“The preceding analysis of the text, statutory structure, legislative history, and agency interpretations of NEPA demonstrate that there is no clear answer to the

view of NEPA focus on the broad language of the Act, which they contend indicates a purposeful directive to apply NEPA extraterritorially.⁷⁰ Proponents of this expansive view note that when Congress declared a national environmental policy in the Act, it did so “recognizing the profound impact of man” on his environment, and directed all agencies to “maintain conditions under which man and nature can exist in productive harmony.”⁷¹ These proponents also maintain that Congress directed federal agencies to include a detailed environmental report on all “major federal actions significantly affecting the quality of the human environment” to the “fullest extent possible.”⁷²

This language cited by the expansionists, however, seems to be exactly the type of “boiler plate language” Chief Justice Rehnquist deprecated in *Aramco*.⁷³ The language fails to present the clearly expressed affirmative intention that is required to overcome the presumption against extraterritorial application of the law.⁷⁴ Although NEPA’s language does indicate that Congress was concerned about the global environment, it lacks any clear requirement to apply NEPA extraterritorially.⁷⁵

2. *Case law*

Since the enactment of NEPA, courts have taken on the question of the extent that NEPA applies extraterritorially within a variety of contexts. In his 2006 article, Randall Abate argued that, in general, these cases can be categorized into different points along a “continuum of territories,” with one end of the continuum belonging to activity that occurs in the U.S. and the other end subsuming activity that occurs in foreign sovereign nations.⁷⁶ In the middle,

question of whether NEPA applies to agency actions abroad.”).

70. See Baynard, *supra* note 5, at 190–94.

71. 42 U.S.C. § 4331(a) (2006) (National Environmental Policy Act).

72. 42 U.S.C. § 4332(2)(A)–(C). See also Baynard, *supra* note 5, at 192.

73. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 249–52 (1991).

74. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

75. See, e.g., *Greenpeace USA v. Stone*, 748 F. Supp. 749, 759 (D. Haw. 1990) (“Although the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems, it does not explicitly provide that its requirements are to apply extraterritorially.”).

76. Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 89 (2006).

Abate recognizes the “global commons”⁷⁷ as areas in which a court may or may not apply the presumption against extraterritorial application, depending on additional foreign policy concerns.⁷⁸ Abate’s continuum presents an interesting and effective approach to understanding cases in which a party has attempted to apply NEPA extraterritorially. The next sections present a summary of cases organized under Abate’s “continuum of territories” concept.

a. United States-controlled territory. Although the application of NEPA within the U.S. is not contested, a few courts have considered whether NEPA should apply in territories controlled by the U.S. In *People of Enewetak v. Laird*, the U.S. District Court of Hawaii held that the U.S. military is subject to NEPA when engaging in seismic studies and drilling operations within U.S. controlled trust territory⁷⁹ near the Johnson Atoll.⁸⁰ The district court emphasized the amount of control that the U.S. had over the Trust Territory and the fact that the people living within the territory did not have an independent government that would protect them from environmental actions caused by the U.S. that may be harmful to the environment.⁸¹

In *People of Saipan v. U.S. Department of Interior*, the Ninth Circuit Court of Appeals affirmed a district court’s ruling that “NEPA applies to federal agencies operating in the Trust Territory,” but determined that the Trust Territory government was not a federal agency for the purposes of NEPA and thus not subject to NEPA’s requirements.⁸² Thus, both *Enewetak* and *People of Saipan* indicate

77. Abate uses the term “global commons” to mean Antarctica, areas in the exclusive economic zone (EEZ), and the high seas. *See id.* at 89 n.12.

78. *Id.* at 89.

79. In 1945, the United Nations, in order to promote political and social advancement in certain regions, established an International Trusteeship System for the management of Trust Territories placed under it by agreement with individual States administering the territories. *See The United Nations and Decolonization*, UNITED NATIONS, <http://www.un.org/en/decolonization/its.shtml> (last accessed Sept. 10, 2013).

80. *People of Enewetak v. Laird*, 353 F. Supp. 811, 813, 818 (D. Haw. 1973) (“In view of this expressed concern with the global ramifications of federal actions, it is reasonable to conclude that the Congress intended NEPA to apply in all areas under its exclusive control. In areas like the Trust Territory there is little, if any, need for concern about conflicts with United States foreign policy or the balance of world power.”).

81. *Id.* at 818.

82. *People of Saipan by Guerrero v. U.S. Dep’t. of Interior*, 502 F.2d 90, 94–95 (9th Cir. 1974).

that activities by federal agencies in U.S. controlled trust territories are subject to NEPA and its reporting requirements.

b. Global commons. The question of NEPA's extraterritorial application becomes less clear as the activity regulated by NEPA shifts from U.S.-controlled territory to areas within the global commons over which the U.S. does not exercise full control.

In *Environmental Defense Fund v. Massey*, the D.C. Circuit examined whether the National Science Foundation was required to prepare an EIS for activity conducted in Antarctica.⁸³ In considering the question of extraterritoriality, Judge Mikva described three categories in which the presumption against extraterritorial application does not apply.⁸⁴ First, Mikva contended that the presumption does not apply when there is an affirmative action of Congress to extend the scope of a statute to conduct occurring beyond the borders of the U.S.⁸⁵ Next, he contended that the presumption is inapplicable when failure to extend the scope of the statute to a foreign setting will result in adverse effects within the U.S.⁸⁶ Finally, Mikva posited that the presumption is not valid where the conduct regulated by the government occurs within the U.S. borders, even though the effects are entirely extraterritorial.⁸⁷

Applying these three factors to NEPA, the D.C. Circuit Court argued that the application of NEPA to activity abroad would not raise any extraterritorial concerns because NEPA is designed to regulate the decisions of U.S. federal agencies, which are "uniquely domestic" because the decision making processes occur "almost exclusively in this country and involve the workings of the United States government."⁸⁸

Despite this seemingly dispositive analysis, the court ultimately retreated from such a broad determination of NEPA's extraterritorial reach, which essentially relegated its application of the three factors

83. *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993). Antarctica is part of the "global commons" in that it has been reserved for mutual peaceful cooperation by multilateral treaty. *See* Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

84. *Massey*, 986 F.2d at 531.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 532.

to mere dictum.⁸⁹ Instead of basing its holding on the location of government decision makers, the court turned to the unique status of Antarctica as a sovereign-less continent as strong evidence that the presumption should not apply.⁹⁰ The court noted that the U.S. had some measure of control over transportation and rescue activities and research stations in Antarctica.⁹¹ Citing to the lack of any conflict between the laws of the U.S. and any foreign nation, the *Massey* court concluded that U.S. foreign policy interests do not outweigh the EIS requirement imposed by NEPA.⁹² In the end, the court expressly declined to decide whether NEPA applied in cases dealing with actual foreign sovereigns and limited its holding to the National Science Foundation's activities in Antarctica.⁹³

c. Foreign territories and the foreign policy exception. Courts are usually hesitant to apply NEPA to activities that occur abroad in foreign sovereign nations. In general, courts cite two reasons for this reluctance. First, courts have suggested that foreign relations factors that may affect the diplomatic relations between the U.S. and a foreign sovereign should act as a restraint in extending U.S. law extraterritorially.⁹⁴ This inquiry often leads the courts to ask whether the advantages of an EIS would outweigh U.S. foreign policy interests.⁹⁵ Second, courts have indicated that international law principles, including treaties and other agreements, should not be intruded upon by the extraterritorial application of NEPA.⁹⁶

89. *Id.* at 534.

90. *Id.*

91. *Id.*

92. *Id.* at 535.

93. *Id.*

94. *See, e.g.,* Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1357 (D.C. Cir. 1981) [hereinafter *NRC*] ("We do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours. This calls for a thorough understanding of our interests as defined by Congress we can then reasonably balance the scope of our own regulation alongside the rightful regulatory jurisdiction of the [other foreign sovereign].").

95. *See Massey*, 986 F.2d at 535 (considering whether U.S. foreign policy interests would be threatened if NEPA were to be enforced).

96. *See NRC*, 647 F.2d at 1357 ("[T]he exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct." (quoting *F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315 (D.C. Cir. 1980))); *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 468 (D.D.C. 1993) (explaining that "the presumption against extraterritoriality [particularly applies]" in cases

In *Natural Resources Defense Council v. Nuclear Regulatory Committee (NRC)*, the Nuclear Regulatory Commission (“Commission”) approved the application of a license to export nuclear materials to the Philippines.⁹⁷ The Natural Resources Defense Council argued that NEPA applies to the Commission’s decision and an EIS should have been prepared in relation to the application approval.⁹⁸ The D.C. Circuit held that NEPA does not apply to nuclear export decisions, reasoning that important foreign policy concerns and deference to the executive’s “prerogative” in foreign relations limit the extraterritorial reach of the statute.⁹⁹ The court explained that the foreign policy concerns of non-proliferation and the importance of a global nuclear cooperation to solve a global problem countervail America’s interest in unilateral environmental standards.¹⁰⁰ To support the idea that “cooperation, not unilateral action” consistent with U.S. foreign policy should be enough to limit the extraterritorial application of NEPA, the *NRC* court cited NEPA itself and its charge to:

[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 the international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.¹⁰¹

The *NRC* court interpreted this provision as evidence that Congress intended any extraterritorial application of NEPA to be balanced with foreign policy considerations and cooperation with foreign sovereigns.¹⁰²

Other courts have applied the foreign policy exception delineated in *NRC*. In *Greenpeace USA v. Stone*, the District Court of Hawaii applied the foreign policy exception to a military operation occurring overseas.¹⁰³ The U.S. Department of Defense planned to dispose of

involving “clear foreign policy and treaty concerns”).

97. *NRC*, 647 F.2d at 1350.

98. *Id.* at 1355.

99. *Id.* at 1348.

100. *Id.*

101. *Id.* at 1366 (citing 42 U.S.C. § 4332(2)(F) (1976) (emphasis added)).

102. *Id.*

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

chemical weapons it had been storing in Germany by shipping the weapons to the Johnson Atoll.¹⁰⁴ The disposal was to occur in three stages—the transport of weapons through Germany, the transport of weapons through the high seas, and the final disposal of weapons in the U.S.-controlled Johnston Atoll.¹⁰⁵ The agency prepared three EISs for the project.¹⁰⁶ Greenpeace claimed that the agency's segmentation of its disposal plan into separate parts was improper and a full EIS should have been performed to include the transport of the weapons through Germany.¹⁰⁷ The court held that foreign policy implications barred extraterritorial application of NEPA to the movement of munitions in Germany, reasoning that the President's commitment to Germany to dispose of the weapons was probably a result of diplomatic efforts and other policy concerns that are "beyond the purview of [the] court's review."¹⁰⁸

Significantly, the court explained that its decision was limited to environmental impacts of the Germany transport segment and suggested that "NEPA may require a federal agency to prepare an EIS for action taken abroad, especially where U.S. agency's action abroad has direct environmental impacts within this country, or where there has clearly been a total lack of environmental assessment by the federal agency or foreign country involved."¹⁰⁹ With this suggestion, the court seemed to indicate that direct environmental impacts that fall within the foreign country may be enough to trigger NEPA reporting requirements on extraterritorial activity. However, the court did not discuss whether indirect effects would be enough to trigger a NEPA EIS requirement.

A treaty relation between the U.S. and a foreign sovereign nation is a second factor that triggers the foreign policy exception and acts as a bar to applying NEPA extraterritorially. In *NEPA Coalition of Japan v. Aspin*, the D.C. District Court held that U.S. military bases in Japan were not subject to NEPA's EIS requirement.¹¹⁰ The court explained that unlike the Antarctica continent in *Massey*, where the U.S. exercised some legislative control over aspects of Antarctica, the

104. *Id.* at 752.

105. *Id.* at 753.

106. *Id.*

107. *Id.* at 759.

108. *Id.* at 760.

109. *Id.* at 761.

110. *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993).

U.S.' control of its military base in *Aspin* was subject to treaties with Japan.¹¹¹ The court maintained that applying NEPA to the military

bases in Japan would risk interfering with longstanding treaty relations between the U.S. and Japan.¹¹²

The foreign relations analysis is not always consistently applied. In *Friends of the Earth v. Mosbacher*, environmental organizations brought an action for declarative and injunctive relief against two federal agencies, the Overseas Private Investment Corporation ("OPIC") and Export-Import Bank, which had loaned money to fund international fossil fuel projects within various foreign sovereign nations (mostly in Africa) but did not prepare EISs for the projects.¹¹³ Citing the presumption against extraterritoriality, the court denied the agencies' motion for summary judgment, which argued that NEPA should not be applied to projects located in foreign nations for three reasons. First, the court noted and accepted the environmental organizations' argument that NEPA should apply to the agencies' funding decisions because the projects would significantly affect the domestic environment.¹¹⁴ Second, the court, following Judge Mikva's reasoning in *Masse*, explained that the decision processes of OPIC and Export-Import Bank occurred in the U.S. and therefore did not govern conduct abroad.¹¹⁵ Finally, in a terse one-sentence wave-of-the-hand,¹¹⁶ the court rejected any arguments regarding foreign policy.¹¹⁷ OPIC had argued that foreign policy concerns should bar the application of NEPA to the projects it funded abroad.¹¹⁸ Specifically, OPIC asserted that it operated in particular countries pursuant only to presidential directive, and that each project required implementation and approval from the host

111. *Id.*

112. *Id.*

113. *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889, 892 (N.D. Cal. 2007).

114. *Id.* at 908.

115. *Id.*

116. "[N]otwithstanding [the agencies'] arguments regarding foreign policy relations, there is evidence to suggest that the [the agencies] may have control over the manner in which these projects operate." *Id.*

117. *Id.*

118. Defendant OPIC's Cross Motion for Summary Judgment, Memorandum in Support and Opposition to Plaintiffs' Motion for Summary Judgment at 22, *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (No. 02-4106), 2006 WL 398003.

country.¹¹⁹ The court rejected that argument, contending that the agencies “may have control over the manner in which [the] projects

operate,” possibly implying that the agency is not as beholden as it contended in its briefs to strict executive control.¹²⁰

Although *Mosbacher* only determined the appropriateness of the parties’ cross-motions for summary judgment, the case is important because it brought out many of the arguments that have been presented in favor of applying NEPA extraterritorially. These include the position that NEPA does not impose a substantive requirement to govern conduct abroad and the position that extraterritorial activity affects the domestic environment.¹²¹ More significantly, *Mosbacher* signaled potentially strained reasoning in the question of the extraterritorial application of NEPA. The *Mosbacher* court seemed to accept Judge Mikva’s position that NEPA’s regulation of agency decision making, which occurs domestically, should not be considered extraterritorial regulation, even if the activity that must be included in an EIS occurs extraterritorially.¹²² *Mosbacher* embraces this position without also engaging in substantive examination of potential foreign policy concerns.¹²³ This analysis ignores the reasoning behind the *Massey* court’s narrow holding and its deep investigation into the foreign relations concerns that may arise from applying NEPA beyond U.S. borders.¹²⁴ The court in *Massey* explained that an important factor in determining whether the presumption against extraterritoriality applies is the extent of legislative control over the territory at issue.¹²⁵ In *Massey*, the territory in question was sovereign-less Antarctica; however, *Mosbacher* concerned actual foreign sovereigns, an even stronger reason for the court to take a harder look at foreign relations

119. *Id.*

120. *Mosbacher*, 488 F. Supp. 2d at 908.

121. *Id.* This opinion was issued before the Supreme Court decided *Morrison v. National Australian Bank Ltd.* The argument that extraterritorial activity should be regulated under NEPA when there are some domestic effects was arguably addressed and dismissed in *Morrison*. See *supra* notes 59–72 and accompanying text.

122. *Mosbacher*, 488 F. Supp. 2d at 918.

123. See *supra* notes 114–20 and accompanying text.

124. See *supra* notes 89–93 and accompanying text.

125. *Env’tl. Def. Fund v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993).

concerns.¹²⁶

3. Indirect effects

Until recently, most of the cases that have addressed the extraterritoriality of NEPA have not dealt with the issue of whether indirect effects that occur extraterritorially should be included in an agency EIS or EA. The environmental group plaintiffs in *Mosbacher* argued that Export-Import Bank should consider both direct and indirect greenhouse gas emissions from the projects that it financed.¹²⁷ However, the court did not deal with the issue of indirect greenhouse gas emissions in its ruling on petitions for summary judgments.

In *Sierra Club v. Clinton*, environmental groups led by the Sierra Club challenged the sufficiency of an EIS prepared by federal agencies for the permits for two pipelines that would cross the U.S.-Canada border.¹²⁸ The Sierra Club argued that the agencies' EIS failed to consider the indirect and cumulative impacts of the pipeline, including the transboundary impact of increased greenhouse gas emissions due to a likely increase in the exploitation of Canadian tar sands oil fields.¹²⁹ The court held that the agencies' decision not to include the transboundary impact of increased tar sands oil production complied with NEPA requirements, finding that there was "not a sufficient causal relationship between the [pipeline] and the development of the oil sands."¹³⁰ The court noted the fact that the tar sands oil development is located within the jurisdiction of Canada, and concluded that "because the activities in Canada . . . are beyond the review of NEPA, the [EIS] is not insufficient for its failure to consider or attempt to mitigate transboundary impacts."¹³¹

Although the presumption against extraterritoriality acts as a wall that limits applying NEPA to activity conducted within a foreign sovereign, it is less clear what the presumption does when, as in the

126. *Id.* at 529; *Mosbacher*, 488 F. Supp. 2d at 892.

127. *Mosbacher*, 488 F. Supp. 2d at 902.

128. *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1028 (D. Minn. 2010).

129. *Id.* at 1043.

130. *Id.* at 1045.

131. *Id.* at 1046.

coal shipping terminal example, the foreign sovereign activity arises as *indirect effects* (burning coal) from domestic activity (transporting coal). Should a domestic connection neutralize the presumption and require an agency to consider in its EIS activity that occurs extraterritorially? Should the presumption break the connection between the domestic activity and the foreign activity, thus relieving the agency from considering the indirect effects of conduct that occurs within a foreign state? Although the law is relatively silent on this matter, the strength of the presumption against extraterritoriality should act as a barrier that shields the indirect effects of activity that occurs in a foreign sovereign from the NEPA EIS requirement.

IV. INTERNATIONAL LAW AND TRANSNATIONAL LAWMAKING FACTORS

In cases like the recent coal shipping terminal conflict on the West Coast, the main activity to be regulated—here, the transport and shipping of coal across state lines to its ultimate exit point on the West Coast—takes place within the territorial borders of the U.S. Under principles of international law, this activity, and arguably any indirect effects that may result from the activity, may be regulated by the U.S. under the territorial recognition of jurisdiction to prescribe law.¹³² However, just because a domestic activity *may* be regulated under the territorial principle of international law does not mean that all of its indirect effects *should* be regulated under international law. When an activity has connections with another country, other relevant factors may preclude a state from exercising jurisdiction over the activity.¹³³ If an exercise of the jurisdiction to

132. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(a) (1987) (“[A] state has jurisdiction to prescribe law with respect to conduct that, wholly or in substantial part, takes place within its territory”); see also Browne C. Lewis, *It’s A Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act*, 25 CARDOZO L. REV. 2143, 2176 (2004) (“Because environmental pollution is mobile, there is always the possibility that a project in a foreign country can have adverse effects on the environment of the United States. As a consequence, an American governmental agency should not be allowed to sponsor a project in a foreign country without doing any type of environmental analysis. The territorial principle thus supports the application of United States laws, including NEPA, to prevent environmental pollution from negatively impacting the territory of the United States.”).

133. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1) (1987) (“Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”).

prescribe is “unreasonable,” then a state may not exercise jurisdiction over the activity.¹³⁴ The Restatement (Third) of Foreign Relations Law (“Restatement”) lists eight factors to consider when determining if jurisdiction over a person or activity is reasonable.¹³⁵ Three factors are relevant in examining whether a federal agency must include in its reporting the indirect effects from extraterritorial activity. These factors include the link of the activity to the territory of the regulating State, the importance of the regulation to the international political, legal, and economic systems, and the interest of another State in regulating the activity.

A. Link of the Activity to the Territory of the Regulating State

The first factor that the Restatement suggests to analyze when determining whether jurisdiction to prescribe over an activity would be reasonable is the “the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory.”¹³⁶ Although the direct effects of climate change, along with the direct effect of any transboundary air pollution that may occur from extraterritorial activity,¹³⁷ would clearly bolster the case for jurisdiction, the evidence is less persuasive with indirect effects caused from extraterritorial activity. In fact, by definition, “indirect effects” seem to cut against the linkage requirement that an activity must have a “substantial, *direct*, and foreseeable effect upon the territory.”¹³⁸

B. Importance of the Regulation to the International Political, Legal, and Economic Systems

The second factor that cuts against the application of NEPA to indirect effects from extraterritorial activity is the importance of

134. *Id.*; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 821 (1993) (Scalia, J., dissenting).

135. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(a)–(h) (1987).

136. *Id.* § 403(2)(a).

137. See, e.g., *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938).

138. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(a) (1987) (emphasis added). See also *United States v. LSL Biotechnologies*, 379 F.3d 672, 688 (9th Cir. 2004) (applying a “direct effects” requirement in a case involving the extraterritoriality of the Sherman Act).

international law in creating a global solution to climate change.¹³⁹ International efforts by the U.N. and other organizations to broker agreements by nations to limit greenhouse gas emissions should not be imposed on by domestic laws applied extraterritorially that distend unilateral environmental standards from a single nation. Domestic law should implement international environmental agreements, not the other way around. Although NEPA does not create domestic law, NEPA analysis is significant to inform agency decisions.

1. *The UNFCCC and the Kyoto Protocol*

Human-invoked climate change is a global problem. Although individual states influence in various degrees the amount of greenhouse gas emitted into the atmosphere, unilateral action absent international agreements by individual sovereign nations will not solve the global warming problem.¹⁴⁰ Instead, a solution should come through international agreements brought on by international consensus.¹⁴¹

Recognizing this concept, the United Nations ratified the United Nations Framework Convention on Climate Change (“UNFCCC”) in 1992, which contains principles and obligations to address the problem of climate change.¹⁴² This agreement acknowledges that “the global nature of climate change calls for the widest possible cooperation by all countries”¹⁴³ However, the agreement cautions that in order to be “effective,” countries should cooperate “in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”¹⁴⁴ Consequently, the UNFCCC includes different

139. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(e) (1987).

140. Lakshman D. Guruswamy, *Global Warming: Integrating United States and International Law*, 32 ARIZ. L. REV. 221, 222 (1990) (“There is no doubt that global warming cannot be arrested by the actions of individual states acting unilaterally. Only global norms and international standards that are universally accepted will suffice. Such standards alone can provide for the reduction of trace gases that are causing global warming.”).

141. See *id.* at 254. (“Safeguarding the world requires a truly global effort. This effort must include the domain of international law.”).

142. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. No. 102-38, 1771 U.N.T.S. 107.

143. *Id.*

144. *Id.*

responsibilities for developed countries and developing countries.¹⁴⁵ For example, the developed countries that ratified the UNFCCC committed to measures not required by developing countries, such as the obligations to adopt national policies to mitigate climate

change, to calculate emissions of GHGs, and to provide financial resources to developing countries.¹⁴⁶

In 1997, five years after signing the UNFCCC, the UNFCCC's "supreme body," the Conference of the Parties ("COP"), met again in Kyoto to discuss and enact protocols targeted to make the UNFCCC more effective. What followed was the Kyoto Protocol, which required thirty-nine developed countries and the European Union to meet targets for greenhouse gas emissions by percentages ranging from an 8 percent reduction in emissions to a 10 percent increase in emissions,¹⁴⁷ with the total combined target for greenhouse gas emissions equivalent to a 5.2 percent reduction.¹⁴⁸ Like the UNFCCC, the Kyoto Protocol recognized differences between developing and developed countries and adjusted its requirements accordingly.¹⁴⁹ In fact, three major developing countries—China, India, and Brazil—did not even sign the Kyoto Protocol.¹⁵⁰ The U.S. signed the agreement, but the Senate did not ratify it.¹⁵¹

The structure and provisions of these two important international agreements cut against the appropriateness of applying NEPA to indirect effects that occur extraterritorially. By applying NEPA extraterritorially, the U.S. would effectively bypass

145. *Id.*

146. *Id.*

147. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

148. Clare Breidenich et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT'L L. 315, 320 (1998).

149. *See id.* (reporting that the base year for emission targets was adjusted due to economic and other country-specific factors: "For most parties, 1990 is the official base year. However, certain countries with economies in transition are authorized by a decision of the Conference of the Parties to use a different base year, and other countries with economies in transition may apply to use a different base year.")

150. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 509 (2007).

151. *Id.* *See also* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *supra* note 147.

international negotiations and signal to other countries that it wishes to compel its own standards on activity that occurs outside its borders. This imposition of U.S. environmental standards ignores key features of the UNFCCC and the Kyoto Protocol, namely the idea that individual countries, especially developing countries, should be subject to different emission standards than other countries. Some may contend that the Senate's failure to ratify the Kyoto Protocol might indicate that the U.S. has not fully negotiated an international standard, thus mitigating any signal of defiance from the U.S. However, the U.S. president's signature, along with U.S. diplomatic actions during the treaty negotiations, is what other nations see when the treaty is signed in their presence—not a Senate vote conducted weeks or months later.

In addition, at least in the case of U.S. coal exports, requiring an EIS compliance to include the indirect effects of extraterritorial greenhouse gas emissions that result from an export of commodities ignores the overarching international solution proposed by the Kyoto Protocol whereby each nation is responsible for its own emissions, not its exports of material that potentially may be emitted by another country. In fact, there has been no serious proposal or discussion in any international forum that has addressed the regulation of commodity exports to other countries as a means of reducing global emissions. This dearth of proposals likely exists because the international community has recognized that emissions targets and monitoring schemes like those proposed in the Kyoto Protocol are the most effective way to measure greenhouse gas emissions and hold nations accountable for these emissions—not through the regulation of such attenuated channels as raw materials exports or manipulation of the price of commodities.¹⁵² Although the approach of the Kyoto Protocol arguably contains many flaws¹⁵³—the most critical being that the world's largest emitters of greenhouse gases (including the U.S.) are not subject to any of its

152. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *supra* note 147, at 22.

153. See, e.g., Denee A. Diluigi, Comment, *Kyoto's So-Called "Fatal Flaws": A Potential Springboard for Domestic Greenhouse Gas Regulation*, 32 GOLDEN GATE U. L. REV. 693, 709 (2002) (noting that the Bush administration identified two main concerns with the Kyoto Protocol: "(1) the lack of binding reduction and limitation commitments on developing countries during the first compliance period and (2) the perceived potential for adverse economic impact on Kyoto-compliant industrialized countries.").

binding provisions—the eventual aim of a systematic and unified international agreement to regulate greenhouse gases is an important reason to limit the extraterritorial application of NEPA.

Some may contend that applying NEPA extraterritorially is not a matter of the U.S. imposing unilateral standards because NEPA does not prescribe action—it merely forces federal agencies to take a “hard look” at its actions.¹⁵⁴ Other commentators have argued that because NEPA is only a procedural regulation, the potential clashes with the laws and other standards of foreign sovereigns are virtually nonexistent.¹⁵⁵ However, despite the seemingly passive nature of NEPA requirements, regulations that have effect beyond domestic boundaries—often referred to by Harold Koh, legal advisor of the State Department and former dean of Yale Law School, as “transnational law”—may bring consequences that are often unpredictable. For example, evidence from state practice indicates that environmental regulations are often mirrored by other states.¹⁵⁶ Moreover, extraterritorial application by one country can elicit retaliation and contention.¹⁵⁷ This potential for unpredictability and international discord is discussed below.

2. Transnational legal process and unpredictable retaliation

In his seminal article on why nations obey international law, Dean Koh reintroduced the concept of transnational legal process, the “theory . . . of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of

154. See Chertok, *supra* note 9, at 775–76.

155. See, e.g., Lewis, *supra* note 132, at 2184 (“Because NEPA is a procedural statute, it is unlikely to conflict with the laws of a foreign country. Procedural statutes like NEPA seldom clash with the laws of a foreign country. NEPA’s application is limited to major federal actions, thus, it would not directly interfere with projects that private companies implement in foreign countries.”).

156. See, e.g., Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 *ECOLOGICAL L.Q.* 615, 627 (2009) (reporting that one pathway of an emerging global environmental law is transplantation, “the deliberate copying and adaptation of significant portions of statutes or particular doctrines of law by one country from another”).

157. See, e.g., Shi-Ling Hsu & Austen L. Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 *VA. J. INT’L L.* 1, 6 (2007) (forecasting that the extraterritorial application of U.S. laws by U.S. courts to solve transboundary disputes will prompt Canadians to “explore the extraterritorial application of their own domestic laws to remedy transboundary environmental harm”).

transnational law.”¹⁵⁸ Dean Koh argues that part of the reason that actors obey international law is due to repeated interaction with other governmental and nongovernmental actors.¹⁵⁹ This interaction, over time, causes states to “*internalize* international law by incorporating it into their domestic and political structures,

through executive action, legislation, and judicial decisions,” taking into account international norms.¹⁶⁰

One way that states interact with international law is through the process of transplantation.¹⁶¹ Professor Alan Watson describes transplantation as the “moving of a rule or a system of law from one country to another, or from one people to another.”¹⁶² One of the most significant examples of legal transplantation in international environmental law is the spread of environmental impact assessment requirements across the globe.¹⁶³

Beginning with NEPA in the U.S., many other nations have adopted their own requirement for environmental impact assessments.¹⁶⁴ For example, China, Japan and Korea have all adopted environmental impact assessment rules.¹⁶⁵ Since the 1990s, many multilateral agreements have included environmental impact assessments provisions, including the UNFCCC, the Stockholm Convention on Persistent Organic Pollutants, the North American Agreement on Environmental Cooperation, and the U.N. Economic Commission for Europe.¹⁶⁶ The U.N. Economic Commission for Europe requires environmental impact assessments in transboundary situations and obligates states “to notify and consult each other on all major projects under consideration that are likely to have significant adverse environmental impact across boundaries.”¹⁶⁷

158. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996).

159. *Id.* at 203.

160. *Id.* at 204 (emphasis added).

161. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21–22 (2d ed. 1993).

162. *Id.* at 21.

163. *See* Yang & Percival, *supra* note 156, at 627.

164. *Id.* at 628.

165. *International Environmental Impact Assessment (EIA) Agencies*, NAT'L ENVTL. POL'Y ACT, <http://ceq.hss.doe.gov/nepa/eia.html> (last visited Nov. 26, 2012).

166. *See* Yang & Percival, *supra* note 156, at 629.

167. *Id.* (quoting *Introduction to Espoo Convention*, UNITED NATIONS ECON. COMMISSION FOR

The fact that so many nations have adopted the EIS concept from NEPA, at first glance, seems to support the argument that NEPA should be applied extraterritorially so that the U.S. can continue to be a leader in the fight against global climate change. However, instead of leading in the fight against climate change, an extraterritorial push of U.S. climate standards might generate a retaliatory spark as other nations attempt to mimic the U.S.' application of its EIS statute. Rather than leading the fight against climate change, the application of NEPA extraterritorially might actually create a hodgepodge of attempts by countries to analyze the indirect effects of their exports based on similar provisions into their own EIS statutory scheme. Such efforts could result in embarrassing diplomatic misunderstandings and even restrictions or disruptions to international trade while they conduct environmental assessments of conduct occurring in other nations.

One example of how this retaliation might occur comes from the antitrust arena. Since 1945, the Supreme Court has held that the Sherman Act has extraterritorial effect.¹⁶⁸ Other countries have responded to this encroachment into their jurisdiction by enacting retaliatory legislation of their own.¹⁶⁹

While it may be argued that international discord is an important aspect of the transnational lawmaking norm creating process because it facilitates cross-nation negotiation, the potential economic and diplomatic consequences of such discord should not be ignored. Even if in the long run, as the transnational process theorists posit,¹⁷⁰ negotiations create a solidified international norm and help lead to a more unified climate change agreement, the interim

EUR., <http://www.unece.org/env/eia/eia.html> (last visited on Mar. 8, 2013)).

168. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945).

169. Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 324 (“The flagrant use by the United States of extraterritorial measures, particularly in the antitrust field, has led to a variety of foreign retaliatory measures, such as blocking and claw-back statutes. Such retaliation harms U.S. interests, both by interfering with U.S. law enforcement and, much more importantly, by destroying a spirit of cooperation and common purpose in solving international economic problems.”).

170. *See, e.g., Koh, supra* note 158, at 204 (“[D]omestic decision-making becomes ‘enmeshed’ with international legal norms, as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes. It is through this repeated process of interaction and internalization that international law acquires its ‘stickiness,’ that nation-states acquire their identity, and that nations define promoting the rule of international law as part of their national self-interest.”).

economic pain may not be worth the effort.¹⁷¹

3. Leakage

Another economic reason that vitiates the case for extraterritorial application of NEPA is the concept of leakage. Leakage of emissions occurs because regulation that is only implemented in a few regions or territories encourages emission activities to move, or “leak,” to under-regulated areas.¹⁷² In the case of coal exports, a strict environmental policy that makes it prohibitively difficult for U.S. coal producers to trade with Asian countries might encourage other coal producing countries (like China, Indonesia, and Australia) to invest more money in their coal mining industry. These countries might produce coal that burns less cleanly than U.S. coal, or whose coal industries are subject to coal mining regulation that is less severe than in the U.S. The leakage theory posits that the net emissions will not be affected by the restricting regulation by a single country or territory, and might even increase due to the regulation.¹⁷³

One of the main drivers of leakage is local, or sub-global, regulation of emissions; asymmetrical regulation schemes act as an impetus for the relocation of emission sources.¹⁷⁴ The application of NEPA to indirect effects of extraterritorial activity increases the sub-global regulation of greenhouse gas emissions. Although NEPA is wholly procedural and does not dictate any decision, its burdensome compliance requirements and regulatory uncertainty may cause energy companies and other entities to exit the U.S. market and relocate operations to other territories. While some may laud this as a victory for the environment, the leakage effect may indicate that such a relocation will not cause a net change to emissions, but may actually increase the global amount of greenhouse gas emissions, in addition to possibly proliferating other harmful environmental practices.

171. As economist John Maynard Keynes famously observed, “In the long run we are all dead.” JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (1923).

172. See, e.g., Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1967 (2007).

173. See, e.g., *id.* at 1969 n.26 (citing a study that showed an international greenhouse gas leakage rate of up to 130%, “meaning that [greenhouse gas] control policies in . . . industrialized countries may actually lead to higher global emissions”).

174. *Id.* at 1968.

4. *Practical political considerations*

Practical political and foreign relations considerations should also limit the application of NEPA to extraterritorial activity. Federal agencies are responsible for preparing project EIS and EA analyses, although outside consultants may prepare the analysis if independently reviewed by the agency.¹⁷⁵ This preparation is conducted in stages, which include a scoping of the issues, a circulation of the draft, and the submission of the final analysis.¹⁷⁶ Within the draft stage, the agency is required to seek notice and comment from the public and other interested groups and agencies.¹⁷⁷ During this comment period, agencies often turn to the project proponent or other interested parties for information not available to the agency.¹⁷⁸ In addition, project proponents often seek to involve themselves in the pre-scoping process in order to help define the project's scope and facilitate the preparation of the scoping draft.¹⁷⁹

The importance of participation between the agency, the public, and the project proponents shows the difficulty an agency might have in adequately analyzing the indirect effects of foreign activity. Agencies and NEPA consultants are not well suited to gather facts and analyze impacts from extraterritorial activity, such as a foreign country's consumption of coal. In order for an environmental impact analysis to be done correctly and comprehensively, the agency should obtain information from the importing country. A scenario where the Wyoming office of the Bureau of Land Management or a Montana U.S. Forest Service agent conducts meetings and negotiations with representatives of the Chinese government without encroaching upon other U.S. political and foreign relations interests is hard to imagine. Such an approach would present countless opportunities for political embarrassment and misunderstandings. Moreover, the practical consideration of coordination between agencies and foreign governments should also

175. 40 C.F.R. § 1506.5 (2012).

176. Chertok, *supra* note 9, at 781.

177. 40 C.F.R. § 1506.6(b). Notice is required to be published in the Federal Register for actions of national interest.

178. Craig Galli, *The Project Proponent, Third-Party Contractors, and the Administrative Record*, 2010 No. 4 RMMLF-INST Paper No. 9 (2010).

179. *Id.*

be taken into account. It is also likely that most federal agencies do not have Chinese or Japanese translation capabilities or foreign policy expertise.

C. Interest of Another State in Regulating the Activity

Finally, the third factor this Comment will examine from the Restatement involves examining “the extent to which another state may have an interest in regulating the activity.”¹⁸⁰ Federal agencies should not have to apply indirect effects from extraterritorial activity to NEPA reporting requirements because other foreign states have an important interest in creating their own environmental standards. Furthermore, states also have an important interest in establishing their own standards for importing and exporting raw materials. Therefore, in the context of coal exports from the U.S., applying NEPA to the indirect effects of activity occurring extraterritorially in Asian nations would not only intrude upon these countries’ environmental standards, it would also conflict with their import and export standards.

Courts have recognized that NEPA reporting requirements may conflict with the export and import interests of foreign states. In *NRC*, the court examined whether the domestic decision process of a federal agency constituted an American intrusion on the sovereignty of a foreign nation.¹⁸¹ The court noted that “[t]he export of any commodity across national boundaries calls into play, and sometimes into conflict, the national interests of the exporter-country and the importer-country.”¹⁸² The court concluded that “conditioning exports licenses on the satisfaction of standards fashioned in the United States may unnecessarily displace domestic regulation by the government of the [foreign sovereign].”¹⁸³

Other foreign nations will place different priorities on interests that they have to weigh in creating these standards. By unilaterally imposing our standards on other countries, we are straight-jacketing them into weighing the interests in the exact same way that we do. This is especially problematic when the science is so uncertain.

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(c) (1987).

181. *NRC*, 647 F.2d 1345, 1356 (D.C. Cir. 1981). See *supra* notes 97–102 and accompanying text.

182. *NRC*, 647 F.2d at 1356.

183. *Id.*

In many of its treaties and agreements, the U.S. has recognized the important interest of foreign states to regulate their own environmental standards. For example, in recent free trade agreements with Chile, South Korea, Australia, Oman, and Panama, the U.S. has recognized “the right of each Party to establish its own levels of environmental protection and its own environmental development priorities.”¹⁸⁴ Not only do these treaty provisions show the importance of each state developing its own standards for environmental regulation, but they also imply recognition by the U.S. that foreign sovereign states are *entitled* to determine their own level of environmental regulation. For example, China or South Korea should not be constrained by U.S. environmental policies to determine its best source for coal. If a sovereign nation wants to import coal from the U.S. rather than create more domestic production, it should be able to do so without the U.S. limiting exports through delays and project derailment imposed by NEPA examining the foreign nation’s domestic activity. If U.S. courts interpret NEPA as requiring federal agencies to consider indirect effects from foreign sovereigns in their EIS and EA, the U.S. would in effect be applying its own environmental standards to other foreign sovereigns, which is contrary to a reasonable application of jurisdiction to prescribe principles and contrary to the U.S. executive’s own understanding of the right of foreign nations to develop their own levels of environmental protection.

V. CONCLUSION

The battle over U.S. coal exports detailed above is just a preview of the burgeoning effort by environmental organizations to use

184. Free Trade Agreement between the United States of America and the Republic Of Korea, U.S.-S. Kor., Mar. 15, 2012, T.I.A.S. No. 12-0315, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. *See also* United States–Australia Free Trade Agreement, with Annexes and Related Exchange of Letters, May 18, 2004, 43 I.L.M. 1248, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>; United States–Chile Free Trade Agreement, with Annexes and Related Exchanges of Letters, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; Agreement between the Government of the United States of America and the Government of the Oman on the Establishment of a Free Trade Area, U.S.-Oman, Jan. 19 2006, 19 U.S.C. 3805, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; United States–Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, Pub. L. No. 112-43, 125 Stat. 407, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>.

NEPA to limit adverse effects of global climate change. NEPA's reporting requirements are certainly important because they force U.S. agencies to consider the environmental impacts of their decisions. However, NEPA should not be stretched and pulled in order to encompass more activity than it was meant to bear. The application of NEPA to indirect effects of extraterritorial activity violates the presumption against extraterritorial application of U.S. law, diminishes the effectiveness of international efforts to solve global climate change, and may cause discord with foreign relations between the U.S. and other sovereign nations. Federal agencies, therefore, should not be required to consider indirect effects of extraterritorial activity under NEPA.

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