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International Decisions. Environmental Defense Fund v. Massey. 986 F.2d 528. U.S.Court of Appeals, D.C. Cir., Jan. 29, 1993

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in this case is that three states must now contemplate sharing a narrow strip of some two hundred miles long by 13.75 miles wide: a cartographic (and navigational) absurdity. To this extent, there is a similarity to the result in the June 1992 decision of the court of arbitration in the *Canada/France* arbitration regarding St. Pierre and Miquelon.<sup>48</sup>

The Chamber's decision also reiterates the reluctance of the International Court of Justice to perform a specific delimitation unless instructed to do so specifically by the parties to the dispute. In relation to the El Salvador/Honduras land frontier, a specific request was made by the parties, and the Court delimited the six disputed zones. In the maritime part of the case, however, the Chamber balked at effecting a delimitation because of the lack of consent by the parties. The Chamber's decision on the maritime dispute—giving Honduras access to the Pacific Ocean—further confirms the Court's longstanding position of protecting the interests of states affected by an adverse geographical condition.<sup>49</sup>

The primary importance of the principle of *uti possidetis juris* in delimiting boundaries in Latin America was also reaffirmed. The role accorded to evidence of effective occupation was limited to cases lacking clear evidence of *uti possidetis juris*, and acquiescence in such an effective occupation could be identified. The amount of evidence reviewed by the Chamber was enormous, and once again the Court showed that it is able to digest vast amounts of evidence, in different areas of law, with "exacting care."<sup>50</sup>

The Chamber in its delimitation of the land frontier awarded Honduras two-thirds of the territory in dispute. Loss of territory due to a judicial decision is possibly the ultimate test of the Court's authority. The pledge made by both states to abide by the decision is an indication of the Court's status and a demonstration of its capacity to resolve similar disputes in the future. Moreover, the caution expressed by the Chamber—the determination of sovereignty over only those islands that were clearly in dispute and its reluctance to effect a maritime delimitation—is a clear signal to future litigants that the Court will seek to limit the remedy strictly to the jurisdiction in which it is invited to operate.

GIDEON ROTTEM

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*Environment—extraterritorial effects of activities of federal agencies—waste disposal in Antarctica—National Environmental Policy Act of 1969*

ENVIRONMENTAL DEFENSE FUND, INC. v. MASSEY. 986 F.2d 528.  
U.S. Court of Appeals, D.C. Cir., Jan. 29, 1993.

In this action for declaratory and injunctive relief, a private environmental organization challenged a decision of the National Science Foundation (NSF or Foundation) to incinerate food wastes in Antarctica. The United States Court of Appeals for the District of Columbia Circuit reversed the lower court's dismissal

<sup>48</sup> Delimitation of the Maritime Areas between Canada and France (June 10, 1992), reprinted in 31 ILM 1145 (1992), summarized in 87 AJIL 452 (1993).

<sup>49</sup> See North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Feb. 20).

<sup>50</sup> HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 48 (1958).

of the complaint for lack of subject matter jurisdiction and remanded the action for consideration of the merits of plaintiff's claim, alleging a violation of the National Environmental Policy Act of 1969 (NEPA or Act).<sup>1</sup> With this case, the latest juncture in an ongoing controversy concerning the scope of NEPA, the D.C. Circuit became the first court expressly to hold that NEPA applies to the activities of federal agencies that have impacts beyond the territorial jurisdiction of the United States.

NEPA has been described as the "environmental constitution."<sup>2</sup> The Act establishes requirements for the analysis of the potential effects of anticipated "major Federal actions significantly affecting the quality of the human environment"<sup>3</sup> in a formal document known as an environmental impact statement (EIS). Regulations<sup>4</sup> promulgated by the Council on Environmental Quality (Council), located in the executive office of the President and charged by the statute<sup>5</sup> and executive order<sup>6</sup> with oversight of the application of NEPA by all federal agencies, supplement the requirements of the statute.

According to the Council's regulations and a considerable body of case law, an EIS must contain the following elements: (1) a description of the proposed action; (2) an analysis of the potentially affected environment; (3) a description of the direct and indirect potential impacts on that environment resulting from the proposed action; (4) a consideration of alternatives, including the alternative of no action, and the potential impacts of those alternatives; and (5) an analysis of mitigating measures. The Council's regulations further direct federal agencies to commence consideration of the nature and extent of potential environmental impacts of a proposed activity at an early stage through a process known as "scoping." The Council's rules assure public participation in the preparation of an EIS through, at a minimum, an opportunity for public comment on a draft statement and the requirement that agencies respond to those comments in the final document. The authorizing federal agency must make its final resolution of environmental concerns public in a document known as a "record of decision" before the proposed action analyzed in the EIS may be undertaken. The availability of judicial review of the procedural adequacy and substantive content of an EIS pursuant to the Administrative Procedure Act<sup>7</sup> has long been established.<sup>8</sup>

The National Science Foundation, a federal agency, operates and exercises exclusive control over the McMurdo Station, a research facility that is one of three year-round installations the United States has established in Antarctica. Previously, the agency had disposed of food wastes from McMurdo Station by dumping them at sea and burning them in an open pit. The Foundation had decided to discontinue this practice by October 1991 and, after asbestos was discovered in

<sup>1</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4370 (1988).

<sup>2</sup> *City of Roswell v. New Mexico Water Quality Control Comm'n*, [1973] 3 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,181, 20,183 (N.M. Ct. App. Nov. 22, 1972). *Cf.* 40 C.F.R. §1500.1 (1992) (NEPA is "basic national charter for protection of the environment").

<sup>3</sup> 42 U.S.C. §4332(2)(C) (1988).

<sup>4</sup> 40 C.F.R. §§1500-1508 (1992). *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (Council on Environmental Quality's NEPA regulations entitled to "substantial deference").

<sup>5</sup> 42 U.S.C. §4342 (1988).

<sup>6</sup> Exec. Order No. 11,991, 3 C.F.R. 123 (1978) (amending Exec. Order No. 11,514, 3 C.F.R. 531 (1971)), *reprinted in* 42 U.S.C. §4321 app. at 971 (1988).

<sup>7</sup> 5 U.S.C. §§701-706 (1988).

<sup>8</sup> *See, e.g., Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (1971).

the landfill, curtailed the burning even earlier. Instead, NSF decided to dispose of food wastes in an "interim incinerator" until a state-of-the-art incinerator could be delivered. The Environmental Defense Fund (EDF), a nonprofit group, challenged that decision on the grounds that the Foundation had failed adequately to analyze the environmental consequences of the proposed action under NEPA.

The court of appeals concluded that the United States District Court for the District of Columbia, in dismissing EDF's complaint, had erred in relying on the presumption against extraterritorial application of United States law articulated by the Supreme Court most recently in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*.<sup>9</sup> The D.C. Circuit devoted the bulk of its opinion to distinguishing EDF's NEPA claim from the situation in *Aramco*, which concerned the application of a civil rights statute to the employment practices of U.S. corporations that employ American citizens in a foreign jurisdiction.

By contrast with the legislation at issue in *Aramco* and other cases, NEPA is an internal rule of governance addressed to governmental entities and officials within the United States. NEPA does not attempt to regulate the activities of private parties abroad. NEPA, concluded the D.C. Circuit, "binds only American officials and controls the very essence of the government function: decisionmaking. Because the decisionmaking processes of federal agencies take place almost exclusively in this country and involve the workings of the United States government, they are uniquely domestic."<sup>10</sup> According to the court of appeals, the procedural, as opposed to substantive, focus of NEPA further reinforces the domestic character of the conduct prescribed by the statute. In contrast to the statutory provisions at issue in *Aramco* and other legislative enactments to which the presumption against extraterritoriality applies, "NEPA would never require enforcement in a foreign forum or involve 'choice of law' dilemmas"<sup>11</sup> that could arise in situations in which U.S. law conflicts with that of a foreign sovereign.

The D.C. Circuit devoted a portion of its opinion to those characteristics that make Antarctica legally unique, particularly its status as "a sovereignless continent."<sup>12</sup> Because of the prohibition on new territorial claims contained in the Antarctic Treaty,<sup>13</sup> observed the court, that continent is part of the "global commons" and lies outside the jurisdiction of any state. In the absence of any potentially conflicting sovereign authority, the court of appeals underscored the "substantial interest and authority"<sup>14</sup> and "real measure of legislative control"<sup>15</sup> the United States exercises there, particularly with respect to McMurdo Station, a U.S. government installation. Accordingly, concluded the court of appeals, these factors "compel[] the conclusion that the [*Aramco*] presumption against extraterritoriality is particularly inappropriate under the circumstances presented"<sup>16</sup> by EDF's complaint.

NSF then argued that, even conceding the domestic character of NEPA and the remote likelihood of conflict with foreign law, the potential for interference with

<sup>9</sup> 111 S.Ct. 1227 (1991).

<sup>10</sup> 986 F.2d 528, 532.

<sup>11</sup> *Id.* at 533.

<sup>12</sup> *Id.* at 534.

<sup>13</sup> Dec. 1, 1959, 12 UST 794, 402 UNTS 71. The Antarctic Treaty, Article II of which establishes "[f]reedom of scientific investigation in Antarctica," presumably is the international legal authority under which NSF and the United States Government established McMurdo Station.

<sup>14</sup> 986 F.2d at 536.

<sup>15</sup> *Id.* at 533.

<sup>16</sup> *Id.* at 534. *Cf.* *Sale v. Haitian Centers Council, Inc.*, 61 U.S.L.W. 4684 (U.S. June 21, 1993) (applying *Aramco* presumption against extraterritoriality to executive branch action on high seas).

foreign relations undermined the plaintiff's proffered interpretation of the statute. The Foundation asserted that future international cooperation on environmentally beneficial undertakings in Antarctica could be impeded if the executive branch were to be subject to judicially imposed and managed requirements like those contemplated by the plaintiff's request for injunctive relief. The court of appeals rejected this argument, concluding that NEPA is consistent with existing and anticipated international obligations of the United States, including the Protocol on Environmental Protection to the Antarctic Treaty.<sup>17</sup>

More generally, the court was "not convinced that NSF's ability to cooperate with other nations in Antarctica will be hampered by NEPA injunctions."<sup>18</sup> In reaching this conclusion, the *EDF* court distinguished two D.C. Circuit cases, *Natural Resources Defense Council v. Nuclear Regulatory Commission (NRDC v. NRC)*<sup>19</sup> and *Committee for Nuclear Responsibility v. Seaborg*,<sup>20</sup> that had considered the availability of injunctions under NEPA to a nuclear export-licensing proceeding and an underground nuclear test, respectively. The *EDF* court asserted that the results in those other NEPA cases, in which the requested relief had not been awarded, turned on the potential for interference with United States foreign policy. There might be occasions when "the foreign policy interests at stake are particularly unique and delicate"<sup>21</sup> and in such situations foreign policy concerns might "outweigh the benefits derived from preparing an EIS."<sup>22</sup> Nevertheless, the court of appeals rejected the executive branch's assertions of harm to those interests in the case before it, concluding that adjudicating the merits of EDF's complaint "would result in no . . . threat to foreign policy."<sup>23</sup>

Last, the agency argued that, even in the absence of the presumption against extraterritoriality, NEPA's statutory language precludes the Act's application to impacts abroad. The court of appeals rejected this argument as well. Contrary to the executive branch, which asserted that language in the statute directing federal agencies to "recognize the worldwide and long-range character of environmental problems"<sup>24</sup> ought to be interpreted narrowly, the D.C. Circuit concluded that this intent informs all governmental activity addressed by the Act. Similarly comprehensive language in NEPA that is not specifically directed toward international environmental problems reinforces this conclusion.

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<sup>17</sup> Oct. 4, 1991, S. TREATY DOC. NO. 22, 102d Cong., 2d Sess. (1992), *reprinted in* 30 ILM 1461 (1991) (not in force). The United States has signed the Protocol and the Senate has given its advice and consent to ratification. The U.S. instrument of ratification has not been deposited, however, because implementing legislation has not yet been enacted.

<sup>18</sup> 986 F.2d at 535.

<sup>19</sup> 647 F.2d 1345 (D.C. Cir. 1981). The federal action challenged in this case was the issuance by the Nuclear Regulatory Commission of a license for the export of nuclear materials and reactor equipment to the Philippines. There was no majority opinion in the case; two members of the panel filed separate opinions and the third took no part in the disposition of the case. *See id.* at 1346.

<sup>20</sup> 463 F.2d 796 (D.C. Cir. 1972). In this case, the challenged action was an underground nuclear explosion on Amchitka Island, Alaska. *See id.* at 797. Unlike *EDF* and *NRDC v. NRC*, *Committee for Nuclear Responsibility* concerned activities occurring within the territory of the United States with impacts on the domestic environment. *Compare Committee for Nuclear Responsibility*, 463 F.2d at 797 (involving activities within the United States) *with* *EDF v. Massey*, 986 F.2d at 529 (involving activities within Antarctica) *and* *NRDC v. NRC*, 647 F.2d at 1347 (involving trading activities with impacts in foreign state).

<sup>21</sup> 986 F.2d at 535.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 536.

<sup>24</sup> 42 U.S.C. §4332(2)(F) (1988).

The appeals court's straightforward opinion gives little indication of the long and complex legal and policy history of the so-called NEPA abroad question, which has persisted sporadically for more than twenty-three years. By the late 1970s, nearly a decade after the statute was enacted, litigation,<sup>25</sup> legislation<sup>26</sup> and regulatory policy making<sup>27</sup> dealing with the statute's applicability to environmental effects outside the United States substantially elevated the profile of the generic issue. The Carter administration, after long and acrimonious internal battles, responded in an across-the-board fashion by promulgating Executive Order No. 12,114<sup>28</sup> on the environmental effects abroad of major federal actions. The Executive Order, published in 1979 and applied since as the principal legal authority for analyzing overseas environmental impacts, has been widely criticized for falling short of the statutory requirements.<sup>29</sup> Dissatisfaction with the Executive

<sup>25</sup> *E.g.*, National Org. for the Reform of Marijuana Laws v. United States Dep't of State, 452 F.Supp. 1226 (D.D.C. 1978), *appeal dismissed*, [1979] 9 *Envl. L. Rep.* (*Envl. L. Inst.*) 20,517 (D.C. Cir. Apr. 24, 1979) (applicability of NEPA to pesticide spraying in Mexico to destroy marijuana plants assumed without deciding); *Gemeinschaft zum Schutz des Berliner Baumbestandes v. Marienthal*, [1979] 9 *Envl. L. Rep.* (*Envl. L. Inst.*) 20,011 (D.D.C. Nov. 9, 1978) (construction of apartment complex in West Berlin not a federal project); *Sierra Club v. Coleman*, 405 F.Supp. 53, 421 F.Supp. 63 (D.D.C. 1975, 1976) (assuming applicability of NEPA to highway through Panama and Colombia), *vacated sub nom.* *Sierra Club v. Adams*, 578 F.2d 389, 391 n.14 (D.C. Cir. 1978) (declining to decide issue in view of impacts in United States); *Environmental Defense Fund, Inc. v. United States Agency for Int'l Dev.*, [1976] 6 *Envl. L. Rep.* (*Envl. L. Inst.*) 20,121 (D.D.C. Dec. 5, 1975) (stipulation requiring Agency for International Development to promulgate regulations on environmental analysis of activities with effects outside United States); *Sierra Club v. Atomic Energy Comm'n*, 6 *Env't Rep. Cas.* (BNA) 1980, [1974] 4 *Envl. L. Rep.* (*Envl. L. Inst.*) 20,685 (D.D.C. Aug. 3, 1974) (ordering agency to prepare EIS for nuclear power export activities); *People of Enwetak v. Laird*, 353 F.Supp. 811, 816 (D. Haw. 1973) (application to U.S. trust territory).

<sup>26</sup> S. 3077, 95th Cong., 2d Sess. §5 (1978) (proposing to exempt foreign activities of Export-Import Bank from NEPA).

<sup>27</sup> *See, e.g.*, Comment, *Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries*, [1978] 8 *Envl. L. Rep.* (*Envl. L. Inst.*) 10,111 (June 1978); Comment, *Renewed Controversy Over the International Reach of NEPA*, [1977] 7 *Envl. L. Rep.* (*Envl. L. Inst.*) 10,205 (Nov. 1977).

<sup>28</sup> Exec. Order No. 12,114, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. §4321 app. 978 (1988) [hereinafter Executive Order]. The promulgation of the Executive Order immediately affected pending NEPA litigation concerning overseas environmental impacts. *See, e.g.*, National Org. for the Reform of Marijuana Laws v. United States Dep't of State, [1979] 9 *Envl. L. Rep.* (*Envl. L. Inst.*) 20,517 (D.C. Cir. Apr. 24, 1979) (stipulation of dismissal of claims based on extraterritorial impacts in light of Executive Order), 508 F.Supp. 1, 1 n.1 (D.D.C. 1979) (approving environmental analyses of foreign impacts prepared pursuant to Executive Order); *Natural Resources Defense Council, Inc. v. Export-Import Bank*, [1979] 9 *Envl. L. Rep.* (*Envl. L. Inst.*) 20,145 (D.D.C. Feb. 23, 1979) (stipulation of dismissal without prejudice of claims based on extraterritorial impacts in light of Executive Order). In 1992 NSF adopted regulations implementing the Executive Order for activities in Antarctica. 45 C.F.R. pt. 641 (1992), 57 Fed. Reg. 40,339 (Sept. 3, 1992). *See generally* David A. Wirth, *International Technology Transfer and Environmental Impact Assessment*, in *TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE* 83, 93 n.32 (Günther Handl & Robert Lutz eds., 1989) (citing regulations of federal agencies implementing Executive Order).

<sup>29</sup> *See generally* Sanford E. Gaines, "Environmental Effects Abroad of Major Federal Actions": An Executive Order Ordains a National Policy, 3 *HARV. ENVTL. L. REV.* 136 (1979); Francis M. Allegra, Note, *Executive Order 12,114—Environmental Effects Abroad: Does It Really Further the Purpose of NEPA?*, 29 *CLEV. ST. L. REV.* 109 (1980); J. D. Head, Comment, *Federal Agency Responsibility to Assess Extraterritorial Environmental Impacts*, 14 *TEX. INT'L L.J.* 425 (1979); Christopher C. Lehmann, Note, *The International Application of the National Environmental Policy Act of 1969: A New Strategy*, 1979 *WASH. U. L.Q.* 1063; Comment, *NEPA's Role in Protecting the World Environment*, 131 *U. PA. L. REV.* 353 (1982); John C. Peirce, Note, *Exports and Environmental Responsibility:*

Order and cases like *NRDC v. NRC*, in which the courts declined to apply NEPA to environmental impacts outside the United States, have kept the "NEPA abroad" debate alive in Congress, where legislative solutions to the underlying problem have intermittently been proposed.<sup>30</sup>

The precise relationship between the statute and the Executive Order, which, "[w]hile based on independent authority, . . . furthers the purpose of [NEPA],"<sup>31</sup> is unclear. In any event, by contrast with the statute, "nothing in [the Executive Order] shall be construed to create a cause of action."<sup>32</sup> Accordingly, to the extent that the Executive Order applies, judicial review may be precluded.<sup>33</sup> The Executive Order exempts sweeping categories of actions from its coverage altogether, including situations in which the foreign nation affected by the action participates with the United States, all votes in international organizations, and export-licensing proceedings except those involving nuclear technologies. For many of those actions not excluded from its scope, the Executive Order requires only a minimal environmental analysis. For example, instead of a full-blown EIS, the analysis of some impacts outside the United States might consist only of "concise reviews of the environmental issues involved, including environmental assessments [or] summary environmental analyses."<sup>34</sup>

Although the court of appeals distinguished a number of precedents from its own circuit, it failed to mention *Greenpeace USA v. Stone*,<sup>35</sup> the only other post-Executive Order "NEPA abroad" case to consider impacts on the global commons and a case that reached a result contrary to that in *EDF v. Massey*. *Greenpeace* concerned a plan of the United States Army and the Department of Defense, together with the German army, to remove obsolete chemical weapons from a storage site in Clausen, Germany. The weapons were to be transported by rail and ship to Johnston Atoll, a U.S. territory in the Pacific Ocean, pursuant to a congressional mandate directing the destruction of the entire U.S. chemical weapons inventory by 1997. EISs required by NEPA had been prepared for the federal actions on Johnston Atoll. But potential environmental impacts on the high seas had been analyzed only pursuant to the 1979 Executive Order. Effects within Germany were not analyzed even under the Executive Order, presumably because the removal of the arsenal was considered exempt from that instrument by virtue of the German Government's participation. Plaintiffs challenged the executive

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*Applying NEPA to the Export-Import Bank*, 12 CORNELL INT'L L.J. 247 (1979); Glenn Pincus, Note, *The "NEPA-Abroad" Controversy: Unresolved by an Executive Order*, 30 BUFF. L. REV. 611 (1981); Sue D. Sheridan, Note, *The Extraterritorial Application of NEPA under Executive Order 12,114*, 13 VAND. J. TRANSNAT'L L. 173 (1980); Therese M. Welsh, Note, *Agency Responses to Executive Order 12,114: A Comparison and Implications*, 14 CORNELL INT'L L.J. 481 (1981); Matthew T. McGrath & Carl T. Gulliver, Recent Development, *Executive Order on Extraterritorial Environmental Impacts*, 13 J. INT'L L. & ECON. 455 (1979); Comment, *President Orders Environmental Review of International Actions*, [1979] 9 Envtl. L. Rep. (Envtl. L. Inst.) 10,011 (Jan. 1979).

<sup>30</sup> See, e.g., S. 1278, 102d Cong., 1st Sess. (1991); H.R. 1271, 102d Cong., 1st Sess. (1991); S. 1089, 101st Cong., 1st Sess. (1989); H.R. 1113, 101st Cong., 1st Sess. (1989).

<sup>31</sup> Executive Order, *supra* note 28, §1-1.

<sup>32</sup> *Id.* §3-1.

<sup>33</sup> See *EDF v. Massey*, 986 F.2d at 530 (in summarizing Executive Order, noting that "what is at stake in this litigation is whether a federal agency may decide to take actions significantly affecting the human environment in Antarctica without complying with NEPA and without being subject to judicial review"). Cf. *supra* note 7 (judicial review of agency compliance with NEPA available under Administrative Procedure Act).

<sup>34</sup> Executive Order, *supra* note 28, §2-4(a)(iii).

<sup>35</sup> 748 F.Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991).

branch's failure to prepare a comprehensive EIS covering all aspects of the transportation and disposal of the European stockpile, including transit through Germany and transport over the ocean.

After denying plaintiffs' motion for a temporary restraining order prohibiting the removal of the stockpile from Germany,<sup>36</sup> the United States District Court for the District of Hawaii denied a subsequent motion for a preliminary injunction.<sup>37</sup> Rejecting exhortations from the executive branch, the court explicitly declined to hold that the Executive Order superseded NEPA for all environmental impacts outside the territorial jurisdiction of the United States. Nonetheless, the court concluded that in the case before it the Executive Order, and not the statute, articulated an acceptable standard for analyzing effects on the global commons—in that case, the high seas. Although its reasoning is rather opaque, the court was plainly influenced by the “compelling” foreign policy context of the case.<sup>38</sup> The executive branch had made representations to the German Government that the United States would remove the stockpile by a “date certain,” a deadline that might slip if the court granted the requested relief. Transit over the ocean, observed the court, was interrelated with, and a “necessary consequence” of, this promise.<sup>39</sup> The court also appeared to be swayed by the executive branch's acknowledgment that some environmental analysis was necessary, which reduced the case to a dispute only over the content of that documentation. By the time the case reached the Ninth Circuit, the munitions had already been removed and the court did not reach the merits.<sup>40</sup>

Even before *EDF v. Massey*, no court had concluded that NEPA does not apply to extraterritorial impacts or that the 1979 Executive Order supersedes the statute for overseas effects. The two cases that presented these questions prior to *EDF v. Massey*—*NRDC v. NRC*<sup>41</sup> and *Greenpeace*<sup>42</sup>—held only that NEPA did not govern the situation before the court on a case-by-case basis. The courts in those cases accepted alternative environmental analyses prepared pursuant to the Executive Order only after concluding that NEPA was inapplicable.

Although the D.C. Circuit did not directly state as much, its holding in *EDF v. Massey* inescapably leads to the conclusion that the Executive Order is insufficient as legal authority for the assessment of the effects in Antarctica presented by that case. First, the court noted that before the Executive Order was promulgated, NSF had adopted regulations that applied NEPA's EIS requirement with full force to proposed agency decisions affecting Antarctica. Toward the end of its opinion, the court noted that, at least prior to the adoption of the Executive Order, the Council on Environmental Quality had similarly asserted NEPA's application to impacts in Antarctica. Otherwise, the *EDF* court merely summarized the requirements of the Executive Order but declined to apply the prescriptions of that instrument as a rule of decision in the case.

The court of appeals decided *EDF v. Massey* only days after the Clinton administration took office. Soon after the decision was handed down, the Department of Justice, arguing that the opinion could be construed to have very broad application to overseas impacts, solicited the views of other agencies concerning the desirability of further review in the courts. Reportedly, the Departments of State,

<sup>36</sup> *Greenpeace USA v. Stone*, [1991] 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,378 (D. Haw. Aug. 9, 1990).

<sup>37</sup> *Greenpeace*, 748 F.Supp. at 768.

<sup>39</sup> *Id.*

<sup>41</sup> 647 F.2d 1345, 1366 (D.C. Cir. 1981).

<sup>38</sup> *Id.* at 763.

<sup>40</sup> *Greenpeace*, 924 F.2d 175 (9th Cir. 1991).

<sup>42</sup> 748 F.Supp. 749, 761 (D. Haw. 1990).

Defense and Justice, as well as other federal agencies with foreign policy responsibilities, supported filing a petition for rehearing and suggestion of rehearing *en banc*, a course that was opposed by the Environmental Protection Agency and the Council. Anecdotal accounts suggest that the question was ultimately resolved by the President himself with a decision not to pursue further judicial process.<sup>43</sup> On March 15, 1993, the Department of Justice released a press statement, supposedly the *quid pro quo* for the decision not to seek further judicial remedies, that reads in its entirety as follows:

In declining to seek a rehearing in [*EDF v. Massey*] today, the administration has decided not to challenge the Court's precise holding—namely, that the National Environmental Policy Act applies to the National Science Foundation's activities in Antarctica [*sic*] described in the opinion. However, the administration does not embrace language in the opinion which may be interpreted to extend beyond this holding.<sup>44</sup>

The time limitation for filing a petition for certiorari seeking review by the Supreme Court has also now expired. As part of its response to the case, the executive branch is said to have initiated a review of the applicability of NEPA to overseas environmental effects, which may include modifications to the 1979 Executive Order.

\* \* \* \*

Regardless of the executive branch's interpretation of the case, *EDF v. Massey* breaks new ground by (1) rejecting application of a presumption against extraterritoriality to NEPA cases involving impacts outside the jurisdiction of the United States; (2) concluding that the plain language of the Act applies to those impacts; and (3) rejecting on their merits the executive branch's assertions of adverse foreign policy implications if the statutory requirements were to apply. But the court of appeals specifically declined to speculate as to how the holding in the case before it might apply to other NEPA cases of environmental impacts within the territory of a foreign state, as opposed to the global commons,<sup>45</sup> or to situations involving application of other U.S. statutes in Antarctica. Leaving aside the perhaps greater potential for adverse effects on foreign policy, the D.C. Circuit's analysis for the most part would appear to apply with equal validity to all extraterritorial environmental impacts under NEPA. On the other hand, the *EDF* court's identification of aspects it described as unique to the legal status of Antarctica—a substantial U.S. presence, interest and authority—might distinguish that continent even from other areas beyond national jurisdiction like the high seas, which were the subject of the *Greenpeace* case. Because the *EDF* court did not articulate the analytical significance of these distinctive features, it is difficult to determine with precision to what extent they were determinative of the outcome in the case.

*EDF v. Massey* also leaves open the important question of the role, if any, of foreign policy concerns in NEPA cases. Although in the case before it the *EDF*

<sup>43</sup> Cf. LEAGUE OF CONSERVATION VOTERS, 1992 PRESIDENTIAL PROFILES 34 (1992) (statement by presidential candidate William Clinton in debate that "I support legislation to apply the National Environmental Policy Act to federal actions overseas").

<sup>44</sup> Statement by the Department of Justice on *EDF v. Massey* (Mar. 15, 1992 [*sic*]).

<sup>45</sup> At least one case pending in the D.C. Circuit raises this question. *NEPA Coalition of Japan v. Cheney*, Civ. No. 91-1522 (D.D.C. filed June 20, 1991), is an action seeking to compel the Department of Defense to comply with NEPA with respect to certain of that agency's specified activities in Japan.

court expressly rejected assertions by the executive branch of harm to foreign policy, the court explicitly left open the possibility that foreign policy overtones might affect the outcome in another, different situation. However, the court gave little insight into the appropriate legal and analytical treatment of prudential foreign policy considerations, an inquiry that has historically created difficulties for the courts in crafting and implementing judicially manageable standards.<sup>46</sup> The *EDF* court did not overtly address the relationship, if any, between the legislative mandate and the foreign policy context of a particular case. *NRDC v. NRC* and *Greenpeace* might be read to suggest the existence of an implied "foreign policy exception," not found in the statutory language, that might affect the applicability of NEPA on an ad hoc, case-by-case basis. But the better view, as the D.C. Circuit held in *Committee for Nuclear Responsibility v. Seaborg*<sup>47</sup> and suggested in *EDF v. Massey*, is probably that the foreign policy milieu of a particular case affects only the availability of injunctive relief, a discretionary equitable remedy, and not the merits.<sup>48</sup>

More generally, the *EDF* opinion effectively rebuts arguments, often voiced by the executive branch,<sup>49</sup> that the application of NEPA to effects outside the United States implies the imposition of regulatory requirements that offend principles of international jurisdiction.<sup>50</sup> Instead, after *EDF v. Massey*, it is clear that the statute governs activities at the core of domestic jurisdiction, namely, the operation of the United States Government. NEPA, moreover, is not in a strict sense a regulatory statute that prescribes the behavior of private parties; rather, it prescribes an outcome-neutral, process-oriented approach involving primarily the collection and analysis of information by governmental authorities. Merely because the subject of a governmental analysis lies outside the territory of the United States does not suggest that performing that analysis is an extraterritorial application of U.S. law. Indeed, a considerable body of international law establishes that it is both desirable and necessary for states to perform a NEPA-like analysis before authorizing proposed activities that might have environmental effects abroad.<sup>51</sup>

Depending on one's point of view, *EDF v. Massey* might be read either to clarify or to complicate further a previously unsettled area of the law. In any event, the

<sup>46</sup> See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); Thomas M. Franck, *Courts and Foreign Policy*, FOREIGN POL'Y, Summer 1991, at 66.

<sup>47</sup> See 463 F.2d 796 (D.C. Cir. 1972).

<sup>48</sup> Cf. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (political question doctrine inapplicable to questions of statutory interpretation involving foreign relations concerns). See generally *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (violation of environmental statute found, but no injunctive relief awarded).

<sup>49</sup> See, e.g., Letter from Jennifer Joy Wilson, Assistant Administrator for External Affairs, United States Environmental Protection Agency, to Gerald Studds, Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, United States House of Representatives (Apr. 11, 1989) (asserting that "application of existing NEPA requirements [to impacts abroad] could raise sovereignty issues"), reprinted in *Appropriation Authorization for the Office of Environmental Quality for Fiscal Years 1989-1993 and Oversight of the National Environmental Policy Act: Hearing on H.R. 1113 Before the Subcomm. on Fisheries and Wildlife of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 111 (1989).

<sup>50</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 (1987) (bases of jurisdiction to prescribe).

<sup>51</sup> E.g., Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, reprinted in 30 ILM 802 (1991) (not in force, but signed by United States). See generally Wirth, *supra* note 28 (discussing additional international instruments).

D.C. Circuit's ruling tends to increase the opportunities for private parties like the plaintiff in this case to participate in and obtain judicial relief with respect to executive branch decision making on matters related to foreign policy. There is little doubt that these recent developments will reinvigorate the "NEPA abroad" debate.

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*Sovereign immunity—commercial activity of an instrumentality of a foreign state not having a direct effect in the United States—waiver of immunity*

KAO HWA SHIPPING CO. v. CHINA STEEL CORP. 816 F.Supp. 910.  
U.S. District Court, S.D.N.Y., March 23, 1993.

Plaintiff, a Panamanian corporation having an office and place of business in Kaohsiung, Taiwan, Republic of China, brought an action against China Steel Corp. (CSC) alleging that CSC had negligently loaded and stowed a moisture-laden cargo on plaintiff's vessel, causing the cargo to shift and the vessel to founder. CSC failed to answer the complaint and a default judgment was entered. Subsequently, CSC moved to set aside the default and to dismiss the complaint for lack of both subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA),<sup>1</sup> as well as for lack of personal jurisdiction under New York law and *forum non conveniens*. Plaintiff countered that CSC at material times was engaged in commercial activity having a direct effect in the United States within the meaning of the FSIA's commercial activity exception to jurisdictional immunity<sup>2</sup> and that, in any event, CSC had implicitly waived immunity under the FSIA.<sup>3</sup> The district court granted the motion to set aside the default and dismiss the complaint, holding that the court lacked subject matter jurisdiction because (1) CSC was an agency or instrumentality of a foreign state, (2) CSC's commercial activity did not have a direct effect in the United States, and (3) CSC had not implicitly waived immunity.

In 1989 CSC sold to Spacific Commercial Corp. (Spacific) 16,500 metric tons of a product known as Metallurgical Coke Breeze and was paid by Spacific under an irrevocable letter of credit. The product was divided into three parcels, each of 5,500 metric tons, and the parcels were delivered by CSC to Spacific in Kaohsiung. Two parcels were sold by Spacific to buyers in Kaohsiung and a third to a Philippine company. Spacific chartered plaintiff's vessel *Kao Hwa III* to lift the third parcel on the chartered voyage from Taiwan to the Philippines. En route the vessel sank, resulting in the total loss of her cargo and part of her crew. Plaintiff produced a bill of lading of doubtful provenance purportedly covering the shipment, which named CSC as shipper and provided that the bill of lading was to be construed in accordance with Japanese law and that disputes were to be referred to the High Court of Justice in Taiwan.

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<sup>1</sup> 28 U.S.C. §§1330, 1602-1611 (1988).

<sup>2</sup> *Id.* §1605(a)(2).

<sup>3</sup> *Id.* §1605(a)(1).