FREEPORT McMoRAN'S MIDAS TOUCH: TESTING THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO FEDERAL AGENCY ACTION GOVERNING MULTINATIONAL CORPORATIONS

The pressures of modern society frequently require us to search for the balance between the benefits of technology and development and the harms to environmental and social systems. This Comment attempts to illustrate this precarious balance by focusing on international jurisdictional issues through a contemporary empirical study. Specifically, this Comment will explore extraterritorial jurisdiction and the National Environmental Policy Act of 1969 (NEPA),[1] in the context of the Freeport McMoRan mining operation on the island of New Guinea. The analysis will focus on whether U.S. corporations operating in foreign countries should be required to conduct environmental impact studies on their operations, pursuant to domestic U.S. agency regulations, in order to receive foreign investment insurance or other governmental protection.

Congressional legislation is driven primarily by domestic concerns. Accordingly, courts have developed a presumption against extraterritorial extension of domestic law in disputes involving a U.S. national. The doctrine of extraterritoriality mitigates the potential of conflicts with foreign laws. However, the presumption is subject to exceptions.

These exceptions, as well as strong policy considerations, buttress the argument that NEPA should be applied extraterritorially. NEPA has been interpreted as primarily a procedural directive. It was enacted to ensure that U.S. administrative agencies consider the environmental impact of corporate actions, in applicable situations.[2] However, NEPA requirements that bind multinational corporations (MNCs) are justified only where the corporation is subject to preexisting substantive federal law.

American MNCs working outside the jurisdiction of U.S. laws are principally bound by the laws of their host country. NEPA provides

1. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

2. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980).

that only "major federal actions"[3] are subject to its procedural requirements. Therefore, ordering American MNCs to conduct an Environmental Impact Statement or an Environmental Assessment, pursuant to NEPA guidelines for any and all behavior in foreign countries, would clearly go beyond the scope and authority of the statute and would contradict international customary law. In other words, transnational corporations are not obligated under the procedural strictures of NEPA merely because they are incorporated in the United States—a stronger affiliation is required.

Additionally, because a developing host country and an MNC operating in that country both can benefit substantially from the MNC's financial venture, inherently, each has a motive to allow the potential financial success of the venture outweigh any natural benefits from restrictive environmental laws imposed by the host country. Indeed, it is often far better in the short term for a host country to adhere to a policy of relaxed enforcement of its environmental laws so that it can assist the MNC in developing new wealth and resources. For this reason, the dire environmental and social consequences of MNCs operating outside of NEPA's jurisdiction are manifest when they operate in countries with less stringent environmental laws. Arguably, the strong U.S. interest in promoting sustained global development should not be promoted to the extent that it results in environmental destruction.

This Comment advocates applying NEPA's procedural requirements to U.S. agencies and corporations operating in foreign countries, within the constraints of international law. American courts have utilized sweeping environmental legislation in the international sphere. The federal government has the duty to enforce its authority over corporations which utilize and profit from U.S. laws and policies.

This Comment will investigate the Freeport McMoRan's operations at the Grasberg Mine in Irian Jaya. It will be asserted that the Overseas Private Investment Corporation, a U.S. federal agency, and Freeport McMoRan, a U.S. MNC, should be required to conduct environmental impact studies pursuant to NEPA. Part I will discuss the presumption against extraterritorial application of domestic laws and the operation of extraterritoriality within the U.S. legal system. Part II will examine NEPA, and the judicial principles behind application of the

3. NEPA, *supra* note 1, § 102(C).

statute beyond U.S. territory. Part III will present the facts of the situation in Irian Jaya. Part IV will discuss related international issues as well as Indonesian and U.S. conservation management laws. Finally, Part V will advocate the application of NEPA to the Grasberg mining operation in Irian Jaya and propose a hypothetical analysis. It will be argued that NEPA's jurisdictional reach should be extended to apply to U.S. agency action affecting foreign countries. This argument is supported by the statute's language, judicial precedent, and the United States' continuing dedication to protecting local and global environments.[4]

I. APPLYING U.S. LAWS INTERNATIONALLY: THE PRESUMPTION AGAINST EXTRATERRITORIALITY

A. The Basic Presumption Against Extraterritoriality

U.S. courts have long held that the application of domestic laws beyond the limits of the enacting state is contrary to certain principles of international conduct and national sovereignty. The extraterritoriality principle is "essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders."[5]

One of the first U.S. cases to apply the extraterritoriality principal was *American Banana Co. v. United Fruit Co.*[6] In *American Banana*, the government of Costa Rica seized banana plantations owned by United Fruit Company, an Alabama corporation. The seizure damaged the plaintiff's business and violated the Sherman Antitrust Act.[7] The

4. Although NEPA has brought about major changes in the way agencies make their decisions, there is much evidence to show that NEPA has failed to actually halt projects that may have detrimental effects on the environment. The "action forcing" provisions of NEPA require all federal agencies to conduct an Environmental Impact Statement (EIS) on any project that will foreseeably have a significant effect on the environment. NEPA, *supra* note 1, § 102(C). The statute has not, in reality, been as effective as might have been hoped. Relatively few EISs are performed in a given year; however, the number is rising. For example, in 1990, 477 total federal EISs were performed, with the Department of Agriculture and the Department of Transportation executing the highest number per agency. *Environmental Impact Statements filed by federal agencies during 1990, Table 5-6*, 21 CEQ ANN. REP. 236-38 (1990). Moreover, courts are rarely willing to grant injunctions in NEPA challenges of federal action. Only seven of the 91 total cases filed in 1988, and five of 57 filed in 1989, actually resulted in injunctions. *Cumulative NEPA litigation survey, 1970-1989, Table 5-1*, 21 CEQ ANN. REP. 233-34 (1990).

5. Environmental Defense Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993).

6. 213 U.S. 347 (1909).

7. *Id.* at 350.

Supreme Court stated, the "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."[8] As applied, the Court asserted that if it were to deem the actions of the Costa Rican government as unlawful under U.S. antitrust laws, the American court would be interfering with the national sovereignty of Costa Rica.[9] In its reasoning, the Court maintained that in questionable cases, statutes are to be "confined in their operation and effect to the territorial limits" of the enacting legislature's legitimate domain.[10] Therefore, the defendant's acts were beyond the reach of the Sherman Act which applied only to those subject to U.S. legislation.

Similarly, in *Foley Bros. v. Filardo*,[11] the Supreme Court stated that (1) Congress intends for U.S. laws to apply only domestically, unless there is explicit determination included in the statute for application abroad,[12] and (2) Congress does not intend for legislation to contravene the basic legal principles of other nations.[13] In this case, an American citizen alleged that his employer, an American contractor operating in Iran and Iraq under agreement with the United States, was in violation of the Eight Hour Law.[14] This statute established a maximum workday and applied to "[e]very contract made to which the United States . . . is a party . . . ."[15] The Court found that the "intention . . . to regulate labor conditions, which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose."[16] Consequently, the statute's language was interpreted to apply only to private property in the United States. This, in turn, dispelled the argument that the Eight Hour Law was binding extraterritorially.

An important clarification of the extraterritoriality principle was made in *United States v. Mitchell*.[17] Here, the Fifth Circuit Court of Appeals reversed an American citizen's criminal conviction under the

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8. *Id.* at 356.
9. *Id.*
10. *Id.* at 357.
11. 336 U.S. 281 (1949).
12. *Id.* at 285; *see also* Susan K. Selph, *Potential Ramifications of* Environmental Defense Fund v. Massey *Illustrated by an Evaluation of United States Agency for International Development Environmental Procedures*, 17 WM. & MARY J. ENV. LAW 123, 129 (1993).
13. *Id.* at 292 (Frankfurter, J., concurring); *see also* Selph, *supra* note 12, at 129.
14. 40 U.S.C. §§ 324-26 (1994) (repealed 1962).
15. *Id.* § 324.
16. *Foley Bros.*, 336 U.S. at 285-86.
17. 553 F.2d 996 (5th Cir. 1977).

Marine Mammal Protection Act (MMPA)[18] for capturing dolphins within the three-mile limit of the Commonwealth of the Bahamas.[19] The court reiterated that Congress has the authority to reach beyond its borders to dictate the action of its citizens; however, the intent to do so must be explicitly demonstrated in the statute.[20] The court stated that the MMPA was firmly grounded in the recognition of a sovereign's power to regulate the natural resources within its territorial jurisdiction.[21] This understanding operated against an extraterritorial application of the Act.[22]

The most recent Supreme Court case to discuss the extraterritoriality principle is *EEOC v. Arabian American Oil Co.* (Aramco).[23] In *Aramco*, the Court reviewed a petition arguing for the application abroad of Title VII of the Civil Rights Act of 1964.[24] The Civil Rights Act prohibits practices which discriminate on the basis of race, color, religion, sex, or national origin.[25] The discriminatory conduct was allegedly perpetrated by a U.S. firm operating in Saudi Arabia.[26] The Court adhered to the presumption against extraterritoriality despite (a) the Act's broad language that encompassed all employers engaged in an "industry affecting commerce,"[27] (b) the definition of the term "commerce" as "between a State and any place outside thereof,"[28] and (c) the EEOC's position that the Civil Rights Act should be applied extraterritorially.[29] The Court held that the statutory construction and legislative intent were not clear enough to interpret the statute's intent as imposing U.S. employment discrimination laws upon a foreign corporation "operating in foreign commerce."[30] The court also found it problematic that laws would inevitably clash as a result of the extraterritorial application of the Civil Rights Law.[31] In response, Congress enacted a bill extending the geographical coverage of the Civil

18. 16 U.S.C. §§ 1361-1407 (1988).
19. *Mitchell*, 553 F.2d at 1005.
20. *Id.* at 1001-02.
21. *Id.* at 1003-04.
22. *Id.* at 1005.
23. 499 U.S. 244 (1991).
24. 42 U.S.C. § 2000e (1988).
25. *Id.* § 2000e-2(a).
26. *Aramco*, 499 U.S. at 247.
27. *Id.* at 248-56; *see also* 42 U.S.C. § 2000e(h).
28. 499 U.S. 248-56; *see also* 42 U.S.C. § 2000e(g).
29. *Aramco*, 499 U.S. at 255.
30. *Id.* at 255-56.
31. *Id.*

Rights Act of 1991 and the Act now covers U.S. citizens working in foreign countries.[32]

B. Exceptions to the Presumption Against the Extraterritorial Application of U.S. Laws

1. The "Clear Intent" Exception

Despite the judiciary's position in refusing to extend the reach of U.S. laws to foreign territories, there are several instances when statutes can be interpreted to apply abroad. In *Environmental Defense Fund, Inc. v. Massey*,[33] outlined three of these circumstances,[34] which are referred to herein as: the "clear intent" exception, the "adverse effects" exception, and "the location of conduct" exception. First, a court will not contravene the legislative intent to extend a law's jurisdictional reach when these intentions are explicitly stated in the statute.[35] Moreover, a court normally does not extend jurisdiction abroad if the wording of the statute is ambiguous regarding the "long-arm" reach of the statute. In the *Aramco* opinion, Chief Justice William Rehnquist imposed a higher burden of proof regarding extraterritorial application of U.S. laws by requiring the petitioner to prove an *affirmative* intent by Congress to apply the law extraterritorially.[36]

Congress has exercised its authority to regulate U.S. actors abroad on several occasions. For example, the Foreign Corrupt Practices Act of 1977 (FCPA)[37] prohibits bribery of foreign government officials by U.S. citizens subject to the jurisdiction of Securities and Exchange Commission.[38] Certain bankruptcy and taxation statutes also include language that specifically calls for extraterritorial application.[39]

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32. *See* 29 U.S.C. §§ 630(f); 632(h)(1) (1994); Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991) (codified as amended at 42 U.S.C. § 2000e(f) (1988)).

33. 986 F.2d 528, 531 (D.C. Cir. 1993).

34. *Id.*

35. *Id.* (citing *Aramco*, 499 U.S. at 255).

36. *Aramco*, 499 U.S. at 255, 259 (Rehnquist, C.J.) (emphasis added).

37. Foreign Corrupt Practices Act (FCPA) § 101, 15 U.S.C. §§ 78dd - 78*ll* (1988).

38. FCPA, *supra* note 37, § 103, 15 U.S.C § 788dd-1. The FCPA regulates a wide range of actors working on behalf of the corporation, as well as stockholders. *Id.* § 103(a), 15 U.S.C. § 78dd-1(a). Foreign and domestic subsidiaries of any U.S. corporation are also covered. *Id.* § 104(a), 15 U.S.C. § 78dd-2. The FCPA mandates specific recordkeeping and accounting procedures. *Id.* § 102, 15 U.S.C. § 78m(b). The FCPA also makes it a federal crime to use the U.S. postal system or any other means of interstate commerce to accomplish such prohibited acts. *Id.* § 103(a)(1), (3), 15 U.S.C. § 78dd-1(a)(1), (3). The FCPA was amended by the Omnibus Trade

2. The "Adverse Effects" Exception

The presumption against extraterritoriality is overcome when failure to extend a statute to a foreign country would adversely affect the rights of U.S. nationals or impair the functioning of the U.S. government.[40] For example, the jurisdiction of the Sherman Antitrust Act,[41] the Trade-mark Act of 1946, also known as the Lanham Act,[42] and other "market" statutes have been extended to provide protection for U.S. citizens dealing in international trade and commerce.[43] Antitrust and securities statutes are tested for extraterritorial application under slightly different standards, depending on the intended situs. These tests inquire as to whether: (1) any negative intended or actual effects have impaired the ability of Americans to compete abroad;[44] (2) fraudulent foreign acts have caused adverse domestic effects;[45] or (3) a conflict of laws is unavoidable.[46]

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and Competitiveness Act of 1988. Foreign Corrupt Practices Act Amendments of 1988 (FCPAA), Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415-25 (1988) (codified at 15 U.S.C. §§ 78m, 78dd-1, 78dd-7 and 78ff (1988)).

39. For tax code provisions, see, e.g., 26 U.S.C. § 61 (1988); 26 C.F.R. § 1.1-1B (1993); 26 C.F.R. § 1.11-1 (1993). For bankruptcy statutes, see, e.g., 11 U.S.C. § 109 (1988); 11 U.S.C. § 303(b)(4) (1988).

40. *See* Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

41. 15 U.S.C. §§ 1-7 (1994); *see also* United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2nd. Cir. 1945).

42. 15 U.S.C. §§ 1051-1127 (1994).

43. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1994); Securities Act of 1933, 15 U.S.C. §§ 77a-77 bbbb (1994). Several other statues that do not deal with the regulation of market forces are applied extraterritorially because of the heinous nature of the offense the statute seeks to prohibit. These include the Federal Child Pornography Statute, 18 U.S.C. §§ 2251-57 (1988 & Supp. V 1993), and the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1901-1904 (West Supp. 1995). *See generally* Silvia Riechel, Note, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 131, nn.129 & 141(1994); Jonathon Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 610 (1990); Jennifer K. Rankin, *U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of* Aquinda v. Texaco, Inc., 18 B.C. INT'L & COMP. L. REV. 221, 230 (1995).

44. *See, e.g., ALCOA*, 148 F.2d at 443 (court applied Sherman Act extraterritorially to cover ALCOA's attempt to monopolize import of aluminum ingot because of effect of this action on American marketplace).

45. *See* Turley, *supra* note 43, at 615.

46. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937-39 (D.C. Cir. 1984); EEOC v. Arabian American Oil Co., 499 U.S. 244, 244 (1991). Furthermore, the Ninth Circuit articulated a three-part test, and consequently rejected a "substantial effects test," for antitrust cases. Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 615 (9th Cir. 1976). The test asks: (1) Does the alleged restraint affect, or was it intended to affect, the

The extraterritoriality doctrine is flexible enough to allow these exceptions to periodically eclipse the rule when extending the jurisdiction of a statute furthers compelling U.S. interests.[47] Courts tend to not to question whether Congress "clearly expressed intent" that a statute be applied extraterritorially when important market forces are at issue. Nor is express intent a concern when extending a statute's jurisdiction would not greatly infringe upon foreign laws.

3. The "Location of Conduct" Exception

Finally, the extraterritoriality presumption is rebutted when the statute regulates conduct which occurs in the United States, but the primary effects are felt in foreign nations.[48] This raises the threshold question of whether the action is extraterritorial in nature.[49] Assuming the statute is extraterritorial in nature, if the statute governs conduct that takes place in the United States, the presumption is not employed unless foreign policy issues are plainly implicated. Therefore, Executive, Legislative, and agency decisions which ostensibly take place in the United States would fall under this exception, subject to the first two exceptions.

The Ninth Circuit Court of Appeal's conclusion in *Massey* hinged on the nature of the statute because the lower court failed to consider the threshold question concerning the locus of the regulated conduct.[50] However, Antarctica's unique sovereignless nature dispelled the vexing problems associated with the extraterritorial application of NEPA.[51] The *Massey* court noted that areas such as the high seas and outer space were other examples of sovereignless regions where conflicts with other nations would only be minor, especially when the focus is the application

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foreign commerce of the United States?; (2) Was the effect a cognizable violation of the Sherman Antitrust Act?; and (3) Is the assertion of U.S. jurisdiction abroad reasonably prudent regarding international comity and fairness? *Id.* at 615; *see also* Rankin, *supra* note 43, at 229-30.

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

48. *Id.* at 531-32 (citing *Laker Airways*, 731 F.2d at 921; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 17, 38 (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 492(1)(a)-(b) (1987)).

49. *See Massey*, 986 F.2d at 531 ("By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.").

50. *Id.*

51. *Id.* at 532-35.

of NEPA's procedural demands.[52] In these locations NEPA would serve to safeguard and preserve the environment of the global commons.[53] *Massey* was subsequently remanded to determine if the previously prepared EIS actually complied with NEPA.[54]

Although the *Massey* court limited its decision to the particular facts,[55] the language of the opinion leaned heavily towards extending NEPA abroad. The *Massey* court stated: "Far from employing limiting language, Section 2 states that NEPA is intended to 'encourage productive and enjoyable harmony between man and his environment' as well as 'promote efforts which will prevent or eliminate damage to the environment and biosphere.'"[56]

Arguably, the *Massey* court's interpretation of the doctrine of extraterritorial jurisdiction can be grounded in two judicial duties. First, courts have the duty to respect foreign or international law. Second, the courts are bound to uphold the separation of powers doctrine under the U.S. Constitution, especially in the area of foreign policy. Extraterritorial application of statutes would not impinge on either of these obligations.

II. EXTRATERRITORIALITY ISSUES APPLIED TO NEPA

A. NEPA

NEPA is a broad-based procedural statute requiring agencies to consider and account for the environmental impacts of agency decisions.[57] Its purpose is:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich

52. *Id.* at 534-35.
53. *Id.* at 534.
54. *Id.* at 535-36; NEPA, *supra* note 1, § 102(2)(C).
55. *Massey*, 986 F.2d at 536 ("We find it important to note, however, that we do not decide today how NEPA might apply to foreign sovereigns or how other U.S. statutes might apply to Antarctica. We only hold that the alleged failure of NSF to comply with NEPA before resuming incineration in Antarctica does not implicate the presumption against extraterritoriality.").
56. *Id.* (construing NEPA, *supra* note 1, § 101, 42 U.S.C. § 4321).
57. *See* NEPA, *supra* note 1, § 101.

> the understanding of the ecological systems and natural resources important to the Nation . . . .[58]

NEPA is one of the earliest and broadest efforts by Congress to protect the environment by statute.[59] NEPA applies to all federal agencies reporting on or recommending proposed "major federal actions" that may significantly influence the environment. Agencies are required to prepare an Environmental Impact Statement (EIS) outlining the potential environmental impact of the proposed activities, and alternatives to the planned conduct.[60]

Under NEPA, an agency must categorize the proposed action to determine whether it automatically requires an EIS to be prepared.[61] If the project requires an EIS, the federal agency must compose an Environmental Assessment (EA) pursuant to the regulations enforced by the Council on Environmental Quality (CEQ).[62] This analysis concisely projects the environmental impacts of a proposal, and the agency can then determine whether or not the project will significantly affect the environment.[63] If the agency determines that the proposal is a major federal action that will adversely effect the surrounding ecology, an EIS is required under NEPA section 102(2)(C).[64] The agency must then

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58. *Id.* § 4321.

59. Many important environmental statutes were enacted in the 1970s after NEPA passed. *E.g.*, Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994) (enacted in 1976); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993) (enacted in 1972); Clean Air Act, 42 U.S.C. §§ 7401-7671g (1994) (enacted in 1972).

60. NEPA, *supra* note 1, § 4332(2)(C). NEPA § 102(2)(C) states:

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

Id.

61. 40 C.F.R. § 1508.4 (1995).

62. *Id.* §§ 1501.4(a)-(b); 1507.3, 1508.25 (1995).

63. *Id.* §§ 1501.3, 1508.9 (1995).

64. *Id.* §§ 1502.3, 1502.4; *see also supra* note 60 and accompanying text for NEPA, *supra* note 1, § 102 requirements. If the agency determines that the environment will not be significantly affected by the action, a "finding of no significant impact" (FONSI) must be prepared by the

determine the scope of the study and the focus of the EIS.[65] A draft EIS is written, is supplemented as necessary, and a final version is eventually prepared.[66] Normally, outside consultants are hired to prepare these statements. A minimum forty-five day public comment period is required for review of the draft EIS.[67] Often projects become subject to lengthy litigation due to NEPA's expansive scope and vague language.[68]

Title II of NEPA created the CEQ, which operates within the Executive Branch.[69] The CEQ's duty is to implement and enforce the statute by gathering and studying environmental information and data; promulgating regulations in accordance with the objectives stated in § 101 of the statute; advising other agencies on compliance with NEPA; and assisting the President in the direction of national environmental policy.[70] CEQ's interpretation of NEPA is generally granted "substantial deference" in the courts and in administrative determinations.[71] However, the CEQ's authority has become emasculated because its advisory potential has not been fully utilized or uniformly followed.[72]

Congress intended NEPA to require federal agencies considering proposed developments to take a "hard look" at the environmental impacts of agency actions.[73] An agency's alleged failure to follow NEPA's procedures is subject to judicial review, as governed by the Administrative Procedure Act (APA).[74] Under the APA, "final agency

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agency. *Id.* §§ 1501.4(e), 1508.13 (1995). The FONSI must include sufficient evidence to support the agency's determination.

65. 40 C.F.R. § 1501.7 (1995).

66. *Id.* § 1502.9.

67. *Id.* § 1506.10(c).

68. *See Table 5-1.—Cumulative NEPA litigation survey, 1970-1989*, 21 CEQ ANN. RPT. 233-34 (1990).

69. NEPA, *supra* note 1, § 202.

70. *See id.* § 204.

71. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989).

72. *See* Riechel, *supra* note 43, at 120.

73. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97-98 (1983); *see also* Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

74. 5 U.S.C. §§ 701-706 (1994). Section 702 states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." This introduces the somewhat unclear question of standing under environmental statutes. The scope of this comment cannot adequately address such a vexing topic. Sierra Club v. Morton, 405 U.S. 727 (1972), and United States v. Students Challenging Regulatory Agency Procedures (SCRAP I), 412 U.S. 669 (1973), set liberal standing requirements. However, the Supreme Court recently decided Lujan v. National Wildlife

actions"[75] are unlawful if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[76] or "without observance of procedure required by law."[77] Moreover, the APA does not apply to NEPA (or any other statute) when agency action is committed to its discretion by law.[78]

NEPA was written, and is applied, as a statute regulating agency procedure. In *Strycker's Bay Neighborhood Council v. Karlen*,[79] the Supreme Court, cited its earlier decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[80] and maintained that NEPA, "while establishing 'significant substantive goals for the Nation,' imposes upon agencies duties that are 'essentially procedural.'"[81] In *Robertson v. Methow Valley Citizens Council*,[82] the Court held that the CEQ regulations intended to mitigate environmental impacts were not substantive requirements demanding a specific result from the proposed mitigation procedures.[83] Consequently, NEPA merely authorizes an agency to investigate and consider environmental factors when determining the appropriate course of action. Moreover, the court's

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Federation, 497 U.S. 871 (1990), and Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). Both indicate a more constrained interpretation of the standing requirements. In these cases, the Court held that a tenuous, third party nexus linking the plaintiffs' injury to the government agency's action was Constitutionally insufficient. The plaintiffs failed to show that they were, in fact, injured directly as third parties. Therefore, the burden of production required to survive a motion for summary judgment seems to be a showing of sufficient evidence of a judicially cognizable injury which is closely related to government action. Furthermore, a court will usually not allow a case to proceed if all administrative remedies have not been exhausted. *See* PATTON, BOGGS & BLOW**,** BUREAU OF NATIONAL AFFAIRS INC., ENVIRONMENTAL LAW HANDBOOK 470-72 (Timothy A. Vanderver, ed. 1994); *see generally* Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996 (1993).

75. 5 U.S.C. § 704 (1994).

76. *Id.* § 706(2)(A).

77. *Id.* § 706(2)(D). Section 706 also instructs the reviewing court to set aside agency action, findings, and conclusions found to be "contrary to constitutional right, power, privilege, or immunity," § 706(2)(B); in "excess of statutory jurisdiction, authority, or limitations, or short of statutory right," § 706(2)(C); unsupported by "substantial evidence in a case subject to § 556 and 557" of the Act or otherwise reviewed in the agency record, § 706(2)(E); or "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court," § 706(2)(F).

78. *Id.* § 701(a)(2).

79. 444 U.S. 223 (1980) (per curiam).

80 435 U.S. 519 (1978).

81. *Id.* at 227 (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978)).

82. 490 U.S. 332 (1989).

83. *Id.* at 353.

role in adjudicating controversies is only to determine whether the agency followed its procedural guidelines by carefully reviewing the environmental consequences of the proposal or recommendation. The court will not dictate the agency's decision. This implies that the primary legal remedy available to environmental plaintiffs must be gleaned from other more substantive acts when NEPA's procedural provisions have not been violated.

Despite the foregoing analysis, a plaintiff's options may not be as constrained as this case law suggests. When reviewing an agency action, the trier of fact may determine whether the agency's decision was unfounded under the evidence presented in the administrative record. This allows the court to review the merits of the controversy and gives the NEPA review process substantive potency.

The Eighth Circuit Court of Appeals has established such a standard of review. In *Environmental Defense Fund v. Froehlke,*[84] the Eighth Circuit instructed the district court to determine whether the agency had reached a decision after a full, good faith consideration of environmental factors made according to NEPA, and whether the actual balance of costs and benefits struck by the agency was arbitrary or clearly gave insufficient weight to environmental factors.[85] The court maintained: "District courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA."[86]

The Fifth Circuit Court of Appeals applied this test in *South La. Environmental Council, Inc. v. Sand.*[87] The *Sand* court held: "NEPA, then permits, at most, a narrowly focused, indirect review of the economic assumptions underlying the project described in an impact statement."[88] By implication, a court should engage in an inquiry that

84. 473 F.2d 346 (8th Cir. 1972).

85. *Id.* at 353.

86. *Id.*

87. 629 F.2d 1005 (5th Cir. 1980).

88. *Id.* at 1011. Specifically, the trial court must "consider whether the economic considerations, against which the environmental considerations are weighed, were distorted so as to impair fair consideration of those environmental consequences." *Id.* If such a distortion is proven, the court must determine whether the agency's balance of costs and benefits under NEPA standards was arbitrary or clearly gave insufficient weight to environmental factors. *Id.* at 1012. *See Froehkle*, 473 F.2d at 356. The court is not empowered to make an entirely independent review of the economic benefits claimed by the agency. *Id.* Essentially, the court implied that agency

monitors the procedural actions of an agency through an analysis of the government's valuation of environmental factors as disclosed in the administrative record.

B. Extraterritorial Issues Regarding NEPA

The complexity and ambiguity concerning NEPA as applied domestically has affected whether NEPA should be applied abroad. The legislative history of the statute fails to address the issues of international application.[89] However, the statute contains broad language which could be interpreted to encompass environmental effects of U.S. actions in foreign countries, as well as transboundary impacts of such actions.[90] Section 102(2)(F) of NEPA provides that all federal agencies must, "recognize the worldwide effects and long-range character of environmental problems and where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[91] In 1989, a bill that ultimately failed was introduced in the Senate to amend NEPA to apply extraterritorially.[92] This amendment would have changed section 102(2)(C),[93] by inserting after "major federal actions," the following: "including extraterritorial actions (other than those taken to protect the national security of the U.S., actions taken in the course of armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative, civil or criminal enforcement actions)."[94] Furthermore, the amendment proposed to amend section 204 of NEPA to require the promulgation of NEPA regulations to assure "full consideration of the environmental impacts of proposed major Federal actions on geographic, oceanographic, and atmospheric areas within as well as beyond the jurisdiction of the United States and its territories and

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decisions should be given deference when the conclusion is not in full derogation of policy or common sense.

89. *See* Natural Resources Defense Council v. Nuclear Regulatory Comm'n (NRC), 647 F.2d 1345, 1367 (D.C. Cir. 1981) ("NEPA's legislative history illuminates nothing in regard to extraterritorial application.").

90. NEPA, *supra* note 1, § 102(2)(F).

91. *Id.*

92. S. 1089, 101st Cong., 1st Sess. (1989).

93. 42 U.S.C. § 4332(2)(C) (1982 & Supp. V 1987).

94. S. 1089, 101st Cong., 1st Sess. (1989).

possessions."[95] The proposal represents progress in the campaign to align the U.S. legislative agenda with global environmental concerns. However the bill's failure indicates the implicit primacy of international foreign policy considerations associated with environmental regulations.[96]

Inconsistent judicial interpretation of NEPA increases the ambiguity surrounding the issue of whether NEPA should have extraterritorial application. Federal courts have continually declined to extend NEPA beyond the borders of the United States; however they have limited their holdings to the facts of the particular case.[97] Jurists have, on occasion, appreciated the responsibility incumbent on the United States to preserve the global environment,[98] but, the Supreme Court has not addressed the issue.

The CEQ has also vacillated in its stance concerning NEPA's extraterritoriality. In the late 1970s, CEQ espoused a view that NEPA and EIS requirements should be applied to major federal actions having significant effects "in the United States, in other countries, and in areas outside the jurisdiction of any country . . .,"[99] but pressure from the State Department forced CEQ to drop the clauses relating to the global commons and foreign countries.[100] CEQ regulations do not currently address NEPA's application abroad.[101]

Furthermore, Executive Order 12,114,[102] issued by President Carter in 1979, put another spin on NEPA's extraterritoriality question. This document purportedly "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by agencies to further the purpose of [NEPA] with respect to

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95. *Id.*

96. *Id.*

97. *E.g.*, Natural Resources Defense Council v. Nuclear Regulatory Comm'n (NRC), 647 F.2d 1345, 1366 (D.C. Cir. 1981); *Massey*, 986 F.2d at 537.

98. *See Natural Resources Defense Council*, 647 F.2d at 1366 (Judge Wilkey quoting Section 102(2)(F) in discussing legislative responsibilities incumbent upon U.S. agencies in determining actions to undertake abroad).

99. CEQ, MEMORANDUM ON THE APPLICATION OF THE EIS REQUIREMENT OR ENVIRONMENTAL IMPACTS ABROAD OF MAJOR FEDERAL ACTIONS (1976), *reprinted in* 442 Fed. Reg. 61,066, 61,068 (1977).

100. *See* Sue D. Sheridan, Note, *The Extraterritorial Application of NEPA Under Executive Order 12,114*, 13 VAND. J. TRANSNAT'L L. 173, 201-02 (1980).

101. *See generally* 40 C.F.R. §§ 1500-17 (1995).

102. Exec. Order No. 12,114, 3 C.F.R. 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1988).

the environment outside the United States . . . ."[103] However, the language of Order 12,114 differs quite markedly from the requirements of NEPA. First, Order 12,114 presents Constitutional problems. Executive action of this nature encroaches upon the domain of legislative authority and short-circuits the democratic process. The Separation of Powers doctrine requires that a decision significantly affecting U.S. legislation and policy should be determined by the legislature. Second, the Executive Order differs substantively from NEPA's provisions. In most situations, Order 12,114 requires federal agencies to perform an "environmental assessment," a pared-down version of NEPA's EIS requirement.[104] Order 12,114 also defines "environment" to exclude "social, economic and other environments;"[105] whereas NEPA encompasses these areas within its definition. Third, Order 12,114 only applies to federal actions which "[do] significant harm;"[106] NEPA, in comparison, defines the phrase "significantly affects the environment" as "affecting the quality"[107] of the environment. Finally, Order 12,114 does not provide a private cause of action.[108] From this comparison, it seems apparent that Order 12,114 cannot be taken as a conclusive determination of NEPA's extraterritorial issues.[109]

C. Judicial Interpretation of the Extraterritorial Application of NEPA

Two early NEPA cases questioned whether NEPA applied to U.S. trust territories. In *People of Enewetak v. Laird*,[110] the District Court of Hawaii held that NEPA applied to a federal project to test explosives on a U.S. island territory.[111] The court noted that NEPA's terminology included the broader term "nation" where "United States" would have served more effectively if Congress had intended to limit the jurisdiction

103. *Id.*
104. *Id.* §§ 2-3, 3 C.F.R. 357-59 (1980).
105. *Id.* § 3-4, 3 C.F.R. 360.
106. *Id.*
107. NEPA, *supra* note 1, § 102(2)(c).
108. *See* Exec. Order No. 12,114, *supra* note 102, § 4321; Environmental Defense Fund v. Massey, 772 F. Supp. 1296, 1298 (D.D.C 1991), *rev'd on other grounds*, 986 F.2d 528 (D.C. Cir. 1993).
109. Executive Order 12,114 has not been rescinded.
110. 353 F. Supp. 811 (D. Haw. 1973).
111. *Id.* at 819.

of the statute.[112] The holding that NEPA applied to trust territories was reaffirmed in *People of Saipan v. U.S. Department of Interior.*[113] However, on appeal, the Ninth Circuit, held that, under these specific circumstances, NEPA did not apply because the government of Saipan was not a "federal agency" under the provisions of NEPA.[114]

Several courts have summarily assumed that NEPA applies to federal action with international implications. These decisions were based on the statute's expansive language, the degree of U.S. federal involvement in the action, and the domestic effects of the action. In *Sierra Club v. Adams*,[115] the District of Columbia Circuit Court of Appeals assumed without deciding that NEPA applied to a U.S.-sponsored highway project in Panama and Columbia because a cattle epidemic presented a health risk to U.S. citizens assisting in the construction of the highway.[116] Weighing into the court's decision was the fact that the federal government had already prepared an EIS for the project.[117] Accordingly, in *National Organization for the Reform of Marijuana Laws (NORML) v. U.S. Department of State*,[118] the court assumed without deciding that NEPA applied to U.S. involvement in a Mexican herbicide program to eradicate marijuana and poppy plants in Mexico.[119] The court assumed that NEPA applied to the U.S. portion of the program because of the adverse side-effects that American users were experiencing.[120] However, the court further stated that health reactions in Mexico also factored into their decision.[121] Therefore, the court implied that federal actions in foreign countries that have effects on the international realm may be governed by the procedural mandates of NEPA.

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112. *Id.* at 816.

113. 356 F. Supp. 645, 649-50 (D. Haw. 1973), *modified on other grounds*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

114. *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90, 96 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

115. 578 F.2d 389 (D.C. Cir. 1978).

116. *Id.* at 394-95. The court found that the final EIS was adequate as required by NEPA and, subsequently, vacated the preliminary injunction. *Id.* at 397. However, the court required further certification of the Department of Agriculture addressing the control of the disease in Columbia before any highway construction could restart. *Id.*

117. *Id.* at 391-92 n.14.

118. 452 F. Supp. 1226 (D.D.C. 1978).

119. *Id.* at 1232-33.

120. *Id.* at 1232.

121. *Id.* at 1233.

In two other NEPA challenges to federal agency action, courts adhered to the presumption against extraterritoriality on foreign policy grounds; yet, both courts limited their decisions to the facts of each case. In *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission*,[122] the D.C. Circuit Court held that NEPA did not apply to the exportation of a nuclear reactor to the Philippines.[123] The issue hinged on whether the decision to issue an export license triggered the NEPA requirement of an EIS when the only significant environmental impacts would be felt in the importing country.[124] The court stated that NEPA focuses on "cooperation, not unilateral action, in a manner consistent with our foreign policy," and that the EIS requirement for nuclear exports would be "incongruous in the nuclear exports/nuclear nonproliferation context."[125]

In *Greenpeace USA v. Stone*,[126] The District Court for Hawaii held that NEPA's conditions must yield when foreign policy conflicts are implicated.[127] Petitioners alleged that the Army failed to comply with NEPA because it did not prepare a comprehensive EIS before transporting chemical munitions from the Federal Republic of Germany (FRG) to the U.S. territory of Johnston Atoll in the central Pacific Ocean.[128] The court asserted that the application of NEPA to this specific federal action taking place outside the United States would clash with foreign policy considerations and interfere with the decision-making ability of officials both domestically and internationally.[129] The court

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122. 647 F.2d 1345 (D.C. Cir. 1981). The opinion gives a comprehensive analysis of extraterritoriality issues in the context of a NEPA challenge to government action.

123. *Id.* at 1366.

124. *Id.*

125 *Id.*

126. 748 F. Supp. 749 (D. Haw. 1990), *dismissed as moot*, 986 F.2d 175 (9th Cir. 1991).

127. *Id.* at 759-61.

128. *Id.* at 757-58.

129. *Id.* at 759-61. The Army prepared three EISs prior to the filing of the complaint: one for the construction and operation to destroy the stockpile of chemical munitions that were already stored at the Johnston Atoll Chemical Agent Disposal System; one for the disposal of the solid and liquid wastes associated with the process; and one for the impacts of the handling, storage, and destruction of the munitions to be moved from the FRG. Additionally, the Army prepared a Global Commons Environmental Assessment pursuant to Executive Order 12,114, *supra* note 102, which took into account the environmental impacts of the transoceanic movement of the munitions. *Id.* at 752-54. Petitioners alleged that the EA failed to comply with NEPA due to the fact that the EA did not cover environmental impacts on the FRG. *Id.* Furthermore, Greenpeace contended that a comprehensive EIS covering the removal, shipment, and destruction of the munitions was required. *Id.* at 754.

stated, "[C]ongress intended to *encourage* federal agencies to consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially."[130] However, "the court *must* take into consideration the foreign policy implications of applying NEPA within a foreign nation's borders to affect decisions made by the President in a purely foreign policy matter."[131] By the time the case was appealed to the Ninth Circuit, the transport had taken place and the issue was moot.[132]

Most recently, the D.C. Circuit Court decided *Environmental Defense Fund, Inc. v. Massey*,[133] which concerned the application of NEPA to an incinerator operated by the National Science Foundation in Antarctica.[134] The court reversed and remanded the case to the district court, grounding its decision in the rationale that there would be no foreign policy conflicts because Antarctica constitutes a unique sovereignless region.[135] In essence, the controversy did not even present extraterritorial questions.[136]

From the foregoing discussion, it appears that neither the legislature, executive, or judicial branches, or an administrative agency, has reached a definitive conclusion regarding the extraterritorial application of NEPA. As this defines the current state of the law regarding the extraterritoriality of NEPA, the ensuing discussion of Freeport McMoRan's mining operation in Irian Jaya attempt to provide an empirical basis for an argument calling for the application NEPA to the federal government's involvement with the foreign mining project.

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130. *Greenpeace USA*, 748 F. Supp. at 759 (emphasis in original).

131. *Id.* The court noted that the Army's need to investigate the impacts of its actions on the FRG were mitigated by foreign policy considerations. "Imposition of NEPA requirements to that operation would encroach on the jurisdiction of the FRG to implement a political decision which necessarily involved a delicate balancing of risks to the environment and the public and the ultimate goal of expeditiously ridding West Germany of obsolete chemical unitary munitions." *Id.* at 760.

132. Greenpeace USA v. Stone, 924 F.2d 175 (9th Cir. 1991).

133. 986 F.2d 528 (D.C. Cir. 1993); *see also supra* Part I.B.1.

134. *Id.*

135. *Id.* at 533.

136. *Id.* at 533-36.

III. THE PROBLEM ILLUSTRATED—THE GRASBERG MINE

A. Case Study: The Grasberg Mining Operation

The Indonesian province of Irian Jaya is home to thriving rain forests, diverse cultures, and phenomenal deposits of gold, copper, silver, and natural gas.[137] The mountain mine at the center of this discussion constitutes one of the richest mineral deposits in the world and is estimated to have a metallic lode in the range of 38.2 billion pounds of copper, 47.6 million ounces of gold, and 108.5 million ounces of silver.[138] The mineral resources have an estimated market value total of sixty billion dollars.[139]

In 1966, Freeport Minerals Company, predecessor to Freeport McMoRan Copper and Gold Inc., was the first multinational corporation to undertake a foreign investment and development project in Indonesia.[140] The Indonesian economy, wrenched by a failed communist coup that was followed by a brutal revolt, made a dramatic turnaround in the following years due largely to President Suharto's pro-development stance.[141] The country's economy grown considerably; evidenced by its gross national product increases of more than seven percent per year for the past twenty five years.[142] The country's vast natural resources on the archipelago are the driving force behind Indonesia's economic development.

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137. Pratap Chatterjee, *Indonesia - Migration: Poverty Tracks Provincial Migrants*, INTER PRESS SERVICE, Feb. 7, 1996, *available in* LEXIS, NEWS Library, WIRES file. Ninety percent of the island is covered by dense rain forest. It is estimated that 250 distinct cultures totaling about 1.3 million people live on the island. *Id.*

138. Stewart Yerton, *Criticism Undermines Freeport-McMoRan Image. A Rock and A Hard Place: Trouble in the Jungle for Freeport's Mountain Mine*, NEW ORLEANS TIMES-PICAYUNE, Jan. 28, 1996, at A16, *available in* LEXIS, NEWS Library, NOTPIC file. Daily production is estimated at three million pounds of copper (worth about $3.7 million), five thousand ounces of gold (worth about $2 million), and 12,600 ounces of silver (worth about $60,000). *Id.*

139. *Id.*

140. *Id.*

141. Stewart Yerton, *And Then the Soldiers Came: Mine Distances Itself from Army, Abuse, A Rock and a Hard Place: Trouble in the Jungle for Freeport's Mountain Mine*, NEW ORLEANS TIMES-PICAYUNE, Jan. 28, 1996, at A21, *available in* LEXIS, NEWS Library, NOTPIC File.

142. *Id.* The Indonesian economy continues to expand with the manufacture of aircraft, ships, and other technology-intensive products. The country's strengths in palm oil and wood, along with extensive deposits of liquefied natural gas and other minerals, are buttressed by research and investment in agriculture and foodstuffs. Jim Landers, *Split Decision: Indonesia Faces Dichotomy of Economic-Planning Needs*, DALLAS MORNING NEWS, Feb. 2, 1996, at 1D, *available in* Westlaw, ALLNEWSPLUS Database.

Freeport-Indonesia, a subsidiary of Freeport McMoRan, and the Indonesian government have worked in conjunction to develop the western half of the island of New Guinea. Freeport currently strip mines about 125,000 metric tons of ore a day with increases expected to reach 160,000 metric tons/day, and finally 190,000 metric tons/day in 1998.[143] The mining area is divided into "Block A" comprising 24,700 acres and "Block B" comprising 3.25 million acres.[144] In exchange for the mining concession, Freeport-Indonesia has implemented outreach programs for local leaders and tribes, built schools and clinics for the natives, and established business programs to increase local resident participation in the burgeoning economy.[145] Thus far, Freeport has invested three billion dollars in the project and has built an extensive infrastructure on the mountain for the mining operation and facilities for Freeport employees.[146] The company invested four hundred million dollars to construct a modern town for its employees, complete with paved roads, sewer systems, power generators, health clinics, schools, a luxury hotel, and a golf course.[147]

The mining project is a critical link in the continued development and financial health of both the Indonesian government and Freeport-McMoRan.[148] The Indonesian government works with Freeport to protect the country's ten percent interest in the Grasberg mine. The government has profited from taxes, dividends, and local purchases, which exceeded $256 million in 1994 and are expected to increase to $480 million in 1996.[149] The company estimates the mountain mine contains enough mineral resources to continue mining for forty years.[150]

The blistering pace of development, however, is reflected in the drastic changes occurring in the surrounding landscape. The mining

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143. *Freeport-McMoRan Continues Exploration in Indonesia—FCX*, DOW JONES NEWS SERVICE, Feb. 26, 1996, *available in* Westlaw, ALLNEWSPLUS Database.

144. Yerton, *Criticism Undermines Freeport*, *supra* note 138, at A1.

145. *The Freeport-McMoRan Tangle*, AUSTIN AMERICAN-STATESMAN, Feb. 7, 1996, at A11, *available in* LEXIS, NEWS Library, AUSTIN File. An arts center, malaria control program, and experimental cattle-breeding project are also included in the fourteen million dollar a year Freeport-Indonesia program. Yerton, *supra* note 138, at A1.

146. Yerton, *Criticism Undermines Freeport*, *supra* note 138, at A1.

147. *Id.*

148. *Id.* Freeport McMoRan Copper and Gold's stock price on the New York Stock Exchange has risen steadily from $21.25 in late January 1995 to $29.13 on January 26, 1996. *Id.*

149. *Id.* Another Freeport subsidiary is also exploring a 2.5 million acre area for further mining. *Id.*

150. *Id.*

operation produces daily over 114,000 tons of "tailings," or ground waste rock.[151] This material is discharged directly into the Ajkwa River,[152] which has silted at its mouth. The silting has caused flooding in the low-lying areas surrounding the mountain.[153] Additionally, the volume of sediment in the river has damaged surrounding wetlands and caused land masses to develop, which distort the direction of the river.[154] Freeport is leveeing the lower portions of the river to arrest any further flooding; however, the company is encountering difficulties due to the increased strength of the channel and the intensity of daily rains.[155] Tailings have already claimed 15.4 square miles of rain forest and poisoned a mountain lake with acid runoff.[156] Furthermore, of primary concern is the threat of tailings entering and harming the Lorentz Nature Reserve, home to thirty-four ecosystems.[157]

There is evidence that the tailings may be toxic due to the volume of the waste rock deposited.[158] Freeport has denied these allegations and maintains that the "[A]jkwa River is very similar to other river systems tested in the number of aquatic species present and the abundance of those species."[159] However, indigenous people within a 300-kilometer area have increasingly reported complaints of health problems since the opening of the mine.[160] Furthermore, it is reported to be difficult for the natives to find the fish and vegetation they formerly relied upon for

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151. Stewart Yerton, *As A River Runs Over, The Rain Forest Is Besieged. A Rock and A Hard Place: Trouble in the Jungle for Freeport's Mountain Mine*, NEW ORLEANS TIMES PICAYUNE, Jan. 28, 1996, at A18, *available in* LEXIS, NEWS Library, NOTPIC File.

152. *Id.* In comparison to this practice, U.S. environmental statutes require the storage of these contaminants in ponds or a dam. 42 U.S.C. §§ 6944-45. However, the mining procedures are legal under Indonesian law. *Id*

153. *Id.*

154. *Id.*

155. *Id.*

156. Yerton, *As a River Runs Over*, *supra* note 150. It is estimated that the true damage is 21.1 square miles of dead rain forest. *Id.*

157. *Id.* The Lorentz is seventy-five percent larger than Yellowstone National Park. The construction of the levee is crucial to preventing tailings from reaching the Reserve because the Ajkwa indirectly flows into the Reserve through two other tributaries. Moreover, the construction of the levee is critical to Freeport's public reputation due to its heightened status in the media and politics. *Id.*

158. Pratap Chatterjee, *Indonesia—Health: A Copper Mine of Death, or Misplaced Blame?*, INTER PRESS SERVICE, Feb. 8, 1996, *available in* LEXIS, NEWS Library, INPRES File.

159. *Id.* (quoting Edward Pressman, spokesman for Freeport-Indonesia's head office in Jakarta).

160. Chatterjee, *supra* note 158. Stomach aches, skin rashes, and spitting up blood were noted as symptoms.

sustenance.[161] An independent environmental audit has been completed, but the results have not yet been made public.[162]

The Grasberg Mine represents may financial benefits for Indonesia and Freeport. Yet, the environmental consequences are indicative of the costs associated with an operation of this size.

B. OPIC: U.S. Federal Agency Involvement in the Grasberg Mining Operation

The Overseas Private Investment Corporation (OPIC) was established by Congress as a federal agency under the Foreign Assistance Act of 1961.[163] OPIC's purpose is to loan money and offer political risk insurance to private corporations for direct international investment in developing countries.[164] Its primary offices are located in Washington,

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161. Chatterjee, *supra* note 137; *see also* Stewart Yerton, *Government Policy on Land Rights Puts Freeport Smack in Middle: Tribes Confused by Contracts. A Rock and A Hard Place: Trouble in the Jungle for Freeport's Mountain Mine.* NEW ORLEANS TIMES-PICAYUNE, Jan. 29, 1996, at A6, *available in* LEXIS, NEWS Library, NOTPIC File.

162. *Worldview Indonesia: Government Will Verify Freeport's Enviro Audit,* AM. POL. NETWORK, Apr. 12, 1996, at 22. Dames and Moore, a U.S. corporation, conducted the audit and made multiple suggestions. The Indonesian government has verified these results after conducting field inspections to check the credibility of the audit. *Id.*

163. 22 U.S.C. § 2191(3) (1994). *See generally* George Thomas Ellinidis, *Foreign Direct Investment in Developing and Newly Liberalized Nations*, 4 J. INT'L L. & PRAC. 299, 321-26 (1995). When a party brings a contract claim against OPIC for money damages over $10,000, the Tucker Act governs the controversy. 28 U.S.C. § 1346(a) (1988 & Supp. V 1993). The U.S. Claims Court has exclusive jurisdiction for this type of claim. *Id.* § 1491(a)(1). Specifically, an action can be maintained in the U.S. Claims Court only if it is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *Id.*; *see also* Reforestation de Sarapiqui v. United States, 26 Cl. Ct. 177 (1992) (jurisdiction only valid in U.S. Claims Court for case against OPIC when brought in contract). Accordingly, the court in Optiperu, S.A. v. Overseas Private Investment Corporation, 640 F. Supp. 420, 423-425 (D.D.C. 1986), held that OPIC was an "instrumentality of the Federal government," and, therefore, vulnerable to contractual claims in the U.S. Claims Court due in part to the fact that compensation must come from federal funds when damages are awarded against OPIC. *Id.*

164. 22 U.S.C § 2199 (1994). The Congressional statement of purpose is:

> To mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United State, there is hereby created the Overseas Private Investment Corporation . . ., which shall be an agency of the United States under the policy guidance of the Secretary of State. . . . In carrying out its purpose, the Corporation, utilizing broad criteria, shall undertake—

D.C., and the agency is structured like a private corporation.[165] OPIC operates at no cost to the U.S. taxpayer and produced a net income in 1994 of $167 million.[166] OPIC represents the government's initiative to encourage U.S. international development and commerce. For example, in 1994, OPIC supported 113 new projects in forty-eight countries worldwide, with a total investment of over eleven billion dollars.[167] OPIC's insurance commitments doubled from 1993 to 1994 to reach six billion dollars.[168] Finally, OPIC's new financing quadrupled from $415 million in 1993 to $1.7 billion in 1994.[169] OPIC insures only U.S. investors' portions of development interests and can cover up to ninety percent of the U.S. investment in the project or one hundred percent of a U.S. lender's exposure. Current OPIC maximum exposure to a project is two hundred million dollars.[170] OPIC political risk insurance covers inconvertibility of foreign capital into U.S. dollars;[171] loss of investment due to expropriation or confiscation by action of a foreign government;[172] loss due to war, revolution, or civil strife;[173] or interruption of business due to the previously mentioned risks.[174]

Since 1985, OPIC has been authorized to decline projects solely on the basis of their environmental impacts.[175] The enabling provisions in OPIC's charter explicitly state that OPIC is required to "refuse to insure, reinsure, guarantee, or finance any investment in connection with a project which the Corporation determines will pose an unreasonable or

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> (a) to conduct financing, insurance, and reinsurance operations on a self-sustaining basis . . .
> (b) to utilize private credit investment institutions . . .
> (d) to conduct its insurance operations with due regard to principles of risk management including efforts to share its insurance and reinsurance risks . . . .

Id.

165. *See* Frederick E. Jenney, *Mitigating the Political Risk of Infrastructure Projects with OPIC Political Risk Insurance*, 734 PLI COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES § 1.4.

166 *Id.* at 1.6.

167. *Id.*

168. *Id.*

169. *Id.*

170. 22 U.S.C. § 2195(a) (1988), *amended* 1992 Amendments. Pub. L. 102-549, §104(a)(2).

171. 22 U.S.C. **§** 2194(a)(1)(A) (1994). See Jenney, *supra* note 165, § 3.0 *et seq.* (Jan. 1996), for an extensive outline relating the specific nuances of these provisions.

172. *Id.* at (a)(1)(B).

173. *Id.* at (a)(1)(C).

174. *Id.* at (a)(1)(D).

175. Kenneth Berlin, *Environmental Issues in International Business Transactions—Keeping Out of the Abyss*, C990 ALI-ABA 377, 398-400 (1995).

major environmental health, or safety hazard, or will result in the significant degradation of national parks or similar protected areas."[176] OPIC's procedure for determining whether to audit a project begins by a categorization of the project into one of four "tiers," each tier representing the project's potential for adverse environmental effects.[177] Projects with significant potential for environmental degradation are required to undertake a NEPA-like environmental assessment. The assessment must evaluate the project's potential environmental effects according to the requirements prescribed by the project country as well as OPIC's technical standards.[178] Usually, OPIC's environmental standards incorporate World Bank guidelines as a baseline; however, OPIC will frequently raise the industry or government standards to more stringent levels. This is illustrated in certain mining projects and in projects in temperate forests overseas.[179] Once an application for insurance is approved, long-term monitoring and reporting are required. OPIC representatives visit sites to ensure compliance with the monitoring and reporting requirements.[180]

C. Political Developments

On October 31, 1995, OPIC canceled a one hundred million dollar political risk insurance policy issued to Freeport for the Grasberg Mine.[181] The policy was canceled after twenty-five years of coverage due to alleged violations of the contract terms.[182] Specifically, OPIC stated that Freeport had committed "material breaches" by going beyond the scope of the original agreement.[183] This conclusion was based on the

176. 22 U.S.C § 2199(n).

177. Berlin, *supra* note 175, at 401.

178. *Id.*

179. *Id.*

180. *Id.* at 401.

181. *International Environment: OPIC Case Against U.S. Firm in Indonesia Seen Challenging Project Scope, Authority*, DAILY ENVTL. REP., Nov. 28, 1995, at d12 [hereinafter *OPIC Case Against U.S. Firm*].

182. *Id.* OPIC refunded a pro-rated premium amount of $971,885.21 for the current year. A Freeport spokesman stated that the refund would not be received while the issue was being considered by the American Arbitration Association. *Id.*; *see also* Stewart Yerton, *Activists Sway Agency Policy, Freeport Claims: A Rock and a Hard Place: Trouble in the Jungle for Freeport's Mountain Mine*, NEW ORLEANS TIMES-PICAYUNE, Jan. 31, 1995, at A4, *available in* LEXIS, NEWS Library, NOTPIC File.

183. *OPIC Case Against U.S. Firm*, *supra* note 180, at d12.

agency's monitoring activities,[184] reviews of the data provided by Freeport,[185] conversations with Freeport employees, and a consideration of the impact that the mine was having on the forest, rivers, and environment.[186]

Freeport challenged the cancellation on both the pollution allegations and contractual terms, stating that the policy was not violated because no restrictions were put on the scope of the project.[187] Freeport also stated they would oppose the cancellation because it exceeded OPIC's statutory authority and was antithetical to the agency's mission of furthering private investment in developing countries.[188] The Chief Executive Officer of Freeport McMoRan, James Moffett, asserted that the mining project was "currently fully permitted under Indonesian law[.] We have built this mine to internationally accepted environmental standards . . . ."[189]

Freeport contends that the OPIC cancellation is part of a larger political agenda promoted by the Clinton administration to de-emphasize overseas investment that has controversial human rights and environmental implications.[190] Moffett stated that he felt Clinton's policy of discouraging governmental financing in foreign lands was wrong because the federal government was dictating its domestic policies to other governments while also hampering the competitive ability of U.S. corporations abroad.[191]

This complex drama epitomizes the dilemma created by the ongoing interaction between multinational industry, foreign governments, and a pristine ecology critically damaged by industrial usurpation. Linking the U.S. government to the occurrences in the Irian jungle is

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184. Yerton, *supra* note 182. OPIC decided to begin monitoring the mine in May, 1994. *Id.*

185. *Id.* Officials at OPIC sought information on the concentration of chemicals from the mine in surrounding rivers and data on the amount of industrial garbage originating from Freeport's port facility. Information was also requested on an alternative proposal to construct a pipeline to carry the tailings that Freeport rejected because it was too costly. *Id.*

186. *OPIC Case Against U.S. Firm, supra* note 181.

187. *Indonesia: Groups Urge Backers of U.S.-Owned Mine to Consider Threat to Local Environment,* DAILY ENVTL. REP., Nov. 30, 1995, at d21 [hereinafter *Groups Urge Backers*].

188. *OPIC Case Against U.S. Firm, supra* note 181, at d12.

189. *Groups Urge Backers, supra* note 187.

190. Stewart Yerton, *Freeport's Battle with OPIC Sparks Debate About Helping U.S. Companies in Foreign Lands. Series: A Rock and Hard Place: Trouble in the Jungle for Freeport's Mountain Mine,* NEW ORLEANS TIMES PICAYUNE, Jan. 31, 1996, at A1, *available in* LEXIS, NEWS Library, NOTPIC File.

191. *Id.*

OPIC, a small federal agency that insures and finances U.S. corporations against political upheaval in foreign countries.[192] In the search for a viable theory that would adequately regulate the practices of U.S. multinational corporations abroad to countervail the harmful consequences of development, the application of NEPA to U.S. multinational corporations provides an appropriate safeguard.

IV. INTERNATIONAL AND DOMESTIC POLICY CONCERNS

"North-South" development issues resonate in different degrees within the complex political web surrounding the Irian mountain mine.[193] This section will help illustrate the legal and political paradigms that structure and generate the prevailing attitudes influencing such North-South controversies that result from the struggle between industrial production and environmental protectionism. The section will discuss several of the problems operating in international trade and commerce, and it will review several statutes regarding mining and conservation management enacted in Indonesia and the United States. This analysis will show the importance and necessity of applying NEPA abroad, in light of a global public policy.

A. International Policy Considerations

Under the theory of extraterritoriality neither U.S. nor foreign courts typically extend a domestic statute's authority across national lines. MNCs that locate in foreign countries are governed by the laws of the host country. Consequently, a host country's sovereignty is to be respected and recognized by both MNCs and their home country's legal and political branches.

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192. *See* 22 U.S.C. § 2191-2197 *et seq.* (1994); *see generally* Frederick E. Jenney, *Mitigating the Political Risk of Infrastructure Projects with OPIC Political Risk Insurance* (734 PLI Commercial Law and Practice Course Handbook Series 199 (Order No. A4-4494), Jan. 1996).

193. *See generally* Rankin, *supra* note 43, at 251-57. The issues presented in the Aquinda v. Texaco, Inc. complaint allege many of the same general problems faced by the native Irian peoples. In that case, Ecuadorian nationals filed suit in a U.S. District Court alleging that Texaco caused extensive damage to the environment during drilling. The Rankin article is helpful in suggesting litigation theories upon which foreign plaintiffs can assert jurisdiction in an American court for wrongs caused by an American multinational in a foreign country. The author concludes by stating that the Alien Tort Claims Act may be one of the most effective statutes in which to ground a claim. *Id.*

With respect to environmental regulations, extraterritoriality can be financially and administratively advantageous for MNCs because less developed countries frequently have lower production standards and regulatory constraints. For example, pollution abatement technology is expensive and cumbersome to implement. Training programs, monitoring policies, and maintenance costs also demand substantial time and capital outlays. Freeport's ability to take advantage of less stringent pollution control standards under Indonesia law than those imposed by U.S. law allows the company to realize higher profit margins due to lower environmental compliance costs.

Developing countries that are dedicated to conservationism face the challenge of balancing the need for economic growth against environmental concerns. This challenge is demonstrated by the international disparity between environmental enforcement policies and practices. Frequently, a country may have enacted substantive environmental laws, but fail to enforce these laws.[194] Regulations such as environmental quality standards, uniform emission rates, and guidelines and procedures for environmental assessments are typically unclear, incomplete, or absent.[195] Political forces can also serve to inhibit the effective application of environmental laws. Certainly, a host government has vested interests in the development of its natural resources. However, conflicting interests or an excessive bureaucracy often make efficient and standardized monitoring and even-handed enforcement impossible.[196] Additionally, the cash poor nature of developing countries, coupled with inadequate funding from outside sources, make developing countries susceptible to foreign investment projects that bolster economies but adversely effect the environment. Furthermore, the belief that increased environmental enforcement will decrease foreign direct investment discourages consistent enforcement and environmental protection in less-developed nations.

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194. Thomas Kerr, *What's Good for General Motors is Not Always Good for Developing Nations: Standardizing Environmental Assessment of Foreign-Investment Projects in Developing Countries*, 29 INT'L LAW. 153, 159 (1995).

195. *Id.*

196. *Id. See generally* Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1 (1995).

B. Comparison Study: Indonesian and U.S. Mining and Environmental Laws

Indonesian property law differs markedly from U.S. laws of appropriation and ownership; as do the countries' pollution control and waste disposal laws. Under Indonesian law, the State owns all land unless ownership of a house or farm can be proven.[197] In an effort to compensate the natives for the taking of tribal hunting grounds and other undeveloped lands, the Indonesian government constructs schools and clinics.[198]

Indonesia expressed its commitment to the sustained development of its natural resources and its interest in the environment in the Basic Law on Environmental Management (BLEM).[199] Essentially, the law provides that any plan likely to affect the environment must undergo an environmental impact assessment.[200] These assessments are also required under provisions which cover concessionaire practices that may create environmental degradation.[201] However, the BLEM inadequately protects the Indonesian environment from harmful and excessive development. Despite the Indonesian government's theoretical commitment to environmental sustenance, the need to increase the economic viability and political stability of the country are higher priorities. The Indonesian Constitution mandates the exploitation of its natural resources.[202] Thus, application of U.S. environmental statutes to the Indonesian-governed mining project is difficult due to foreign policy concerns, treaty conflicts, and mutually vested-interests in the project advancing at the fastest and cheapest rate of investment.[203]

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197. *Tribes Confused*, *supra* note 150.

198. Chatterjee, *supra* note 158.

199. REPUBLIC OF INDONESIA, BASIC PROVISIONS OF THE MANAGEMENT OF THE LIVING ENVIRONMENT, Act. No. 4 of 1982, § IV, art. 16, *reprinted in* KOESHADI HARDJASOEMANTRI, ENVIRONMENTAL LEGISLATION IN INDONESIA 23-41 (1985) [hereinafter BASIC PROVISIONS]. *See generally* Duane Gibson, *Sustainable Development and the Forestry Law of the Tongass National Forest and Indonesian Forests*, 31 WILLIAMETTE L. REV. 403 (1995).

200. BASIC PROVISIONS, *supra* note 199, art. 16. Regulation No. 29 of 1986 specifies that an environmental impact assessment must include the impacts on human, organic, and inorganic natural resources. *Id.*

201. *See* MINISTRY OF FORESTRY, REPUBLIC OF INDONESIA, CURRENT STATUS REPORT OF PROGRESS TOWARD THE SUSTAINABLE MANAGEMENT OF TROPICAL FORESTS IN INDONESIA (TARGET 2000) 4-5 (1991). Environmental impact statements analyze physical and nonphysical impacts, including socio-cultural effects.

202. INDON. CONST. ART. XXXIII, § 3; *see also* Gibson, *supra* note 199.

203. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

Although the United States has been a leader in environmental legislation in many areas, supervision of mineral prospecting, mining, and waste disposal is not completely regulated. The U.S. Congress has traditionally had a laissez-faire attitude toward mineral prospecting and removal due to the country's interest in exploiting its natural resources, especially in the western United States.[204] Under the Mining Law of 1872, much of which is still in effect,[205] any person may stake a claim on federal lands and prospect or explore for minerals,[206] utilizing any method that is "necessary" or "reasonably incident" to locating such resources.[207] The prospector is entitled to enter federal land at all times; however, exploration is limited to activities that cause no more than minimal disturbance of surface resources.[208] If a lode is discovered, a person may procure the minerals after filing a notice and/or may apply for a patent.[209] The right to a patent is automatically granted,[210] if the Bureau of Land Management determines that there is a "valuable mineral deposit" (VDM) on the land and the miner complies with several other

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204. *See* John Jacus & Thomas Root, *The Emerging Federal Law of Mine Waste: Administrative, Judicial and Legislative Developments*, 26 LAND & WATER L. REV. 461, 465-66 (1991).

205. Ch. 152, 17 Stat. 91 (surviving portions of the Act appear at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-42, 47 (1994)).

206. 30 U.S.C. § 22 (1994).

207. *Id.* § 612(a). The section provides, "Prospecting, mining, or processing operations. Any mining claim of the United States shall not be used, prior to the issuance of patent thereof, for any purpose other than prospecting, mining or processing operations and uses reasonably incident thereto." *Id.*; *see also* United States v. Richardson, 599 F.2d 290 (9th Cir. 1979). The court in *Richardson* held that the defendant's methods of mining in a national forest were "unnecessary and . . . unreasonably destructive of surface resources and damaging to the environment." *Richardson*, 599 F.2d at 296. This implies that courts will look to various techniques for mitigating environmental damage when deciding if the miner has the right to continue prospecting in a particular way.

208. 43 U.S.C. § 299(b)(1)(B) (1988 & Supp. V 1993). The use of "mechanized earthmoving equipment, explosives, the construction of roads, drill pads, or the use of toxic or hazardous materials" is prohibited. *Id.* The prospector is also required to prepare a plan of operations that provides for the minimization of damage to crops, tangible improvements, grazing, and other uses of the land by the surface owner. *Id.* § 299(f)(1). The Secretary of the Interior must approve the final plan and has the authority to subsequently suspend or revoke a plan of operations if the Secretary determines that the person conducting the mineral activities is in substantial noncompliance with the terms and conditions of an approved plan and has failed to remedy a violation after notice from the Secretary. *Id.* § 299(f)(3)(D).

209. 30 U.S.C. §§ 26, 28, 29. If the claimant complies with current mining laws, staking a claim essentially confers upon the miner the same present and exclusive possessory rights as would a patent. *See* Wilber v. United States, 280 U.S. 306, 316-17 (1929).

210. 30 U.S.C. § 29 (1994); South Dakota v. Andrus, 614 F.2d 1190, 1993-95 (18th Cir. 1980).

procedural requirements.[211] The patent transfers title from the federal government to the applicant at a charge of five dollars per acre.[212]

Also, the U.S. Congress has not fully regulated the disposition of mine waste materials, or "tailings." For most of the country's existence, common law governed the disposal of mine waste under the tort doctrines of trespass, negligence, and nuisance. The nation's first mining statute, the General Mining Law of 1872, did not mention the disposal of mine waste.[213] Under the Mining and Minerals Policy Act of 1970,[214] Congress stated that it is the Federal government's continuing policy to foster and encourage private enterprise in the development of economically sound domestic mining and minerals industries, as well as study and develop methods for the "disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen the adverse impact of mineral extraction and processing upon the physical environment . . . ."[215]

U.S. legislation did not address the problem of mine waste disposal until the enactment of the Resource Conservation and Recovery Act in 1976 (RCRA),[216] which amended the Solid Waste Disposal Act of 1965. RCRA established a comprehensive regulatory program for hazardous waste,[217] and provided broad federal guidelines for solid waste disposal,[218] yet failed to specifically regulate mine waste as either "hazardous waste" or "solid waste." Ultimately, tailings were categorized

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211. 30 U.S.C. §§ 28-29 (1994); United States v. Coleman, 390 U.S. 599, 602-03 (1968). The Supreme Court stated that the correct test to determine if a mineral deposit is valuable and, consequently if the land is patentable, is the "marketability test." This refinement of the "prudent man test" sets slightly more onerous standards for the determination of the VDM and validity of the patent application. The "marketability test" asks if the mineral can be "extracted, removed, and marketed at a profit," and gives the former test objective standards. *Id.* at 602. In accordance with this holding, South Dakota v. Andrus, 462 F. Supp. 905, 908 (D.S.D. 1978), stated that the costs of complying with pollution control regulations must be considered in evaluating the VDM. *Id.* at 908.

212. 30 U.S.C. § 29. Results of a 1991 survey found that over three million acres of public land have been sold under the patenting process since the codification of the patenting system. Michael Satchell, *The New Gold Rush*, U.S. NEWS & WORLD REPORT, Oct. 31, 1991, at 46.

213. Ch. 152, 17 Stat. 91. The surviving portions of the Act appear at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-42, 47 (1988).

214. 30 U.S.C. §§ 21-54 (1994).

215. *Id.* § 21a.; *see also* Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994) (development and administration of renewable resources in national forests); Wild and Scenic Rivers Act, 16 U.S.C. § 1280 (1994).

216. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

217. *Id.* § 6921-6939(b).

218. *Id.* § 6941-6949(a).

as a solid waste due to the high volume and low hazard qualities of the rock.[219] However, mine waste management is only provisionally mentioned in the Act. Although RCRA represents a starting point for mine waste regulations, full appreciation of the magnitude of the problems presented by relatively unchecked mining and excavation activities deserves more legislative attention in the United States. Strict application of RCRA and other conservation statutes would fail to address environmental problems caused by tailings at the Mountain Mine in Irian Jaya. This realization makes the application of NEPA to the federal activities in Irian Jaya even more compelling.

V. APPLICATION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY TO THE GRASBERG MINE

A. Exceptions to the Presumption Against Extraterritoriality as Applied to the Grasberg Mine

The three exceptions to the presumption against extraterritoriality are flexible enough to allow for the application of NEPA to the Freeport activities at the Grasberg Mine. The first exception, the "clear intent" test, established that laws should not be applied extraterritorially absent a clear expression of such legislative intent. However, when drafting environmental legislation, Congress rarely uses language that clearly indicates an intent to apply the statutes internationally.

The policy goals of environmental laws are written in broad terms that seek to protect "nature" and "ecology," without defining the limits of the protection. This may be to facilitate the ease or flexibility with which agencies, private citizens, and corporations can comply with the new mandates, or it may be to foster environmentalism. It may also be the result of a long debate and ideological conflict in the legislature. Regardless, the spirit of the federal laws supports the notion of the United States' sustained development and reclamation of natural resources. It seems logical to extend these laws to other countries to encourage such environmental protection. It is argued that NEPA and other statutes which look to the preservation and restoration of the environment should not be expelled from the pool of laws that can arguably be applied extraterritorially just because they are broad in scope or contain language that could be integrated in various ways.

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219. *Id.* § 6921(b)(3)(A).

This argument does not propose to hold multinational corporations responsible for all U.S. environmental laws that bind corporations functioning in the United States. NEPA only regulates federal agency action, regardless of whether the agency is operating in the United States or abroad.[220] The limited application of NEPA for the regulation of agency decision-making governing specific MNC behavior supports the underlying tenets of the APA. Furthermore, MNCs that have invested in development projects in Third World countries have accepted a large risk and are legitimately governed by the laws and regimes of the host country. It would be an infringement of the host country's autonomy to mandate this type of compliance, not to mention the impossibility of monitoring and enforcing such comprehensive extensions of U.S. federal laws. In essence, this would mean the host country would have to have two reviewing systems, one pursuant to its environmental laws, and one pursuant to U.S. environmental laws. However, resolution of this problem is not to limit the jurisdiction of all environmental laws to only the U.S. boundaries. NEPA's procedural thrust, paired with the contractual relationship connecting U.S. agencies and MNCs, support the market principles and development, while ensuring informed, environmentally conscious decision-making. Instead of rigidly adhering to the presumption against extraterritoriality as interpreted in the "clear intent" test, perhaps a more lenient guideline should be adopted when a law's usefulness and protection would be largely eviscerated by the arbitrary "carving out" of U.S. actors operating in international trade and development.[221]

The second exception considers whether if there would be adverse domestic effects caused by the overseas conduct. An argument extending NEPA under this theory is relatively weak in the Freeport situation. In order to justify the exercise of extraterritorial jurisdiction, courts usually require an injury more acute than global warming, loss of biodiversity, or rain forest depletion. Correspondingly, the Second Circuit Court of Appeals has stated that the adverse effects alleged in a

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220. *See* Environmental Defense Fund v. Massey, 986 F.2d 528, 535 (D.C. Cir. 1993).

221. *See* United States v. Bowman, 260 U.S. 94, 98 (1922). "The necessary locus [of a state's reach], when not specifically defined, depends on the purpose of Congress . . . ." *Id.* at 97-98. *See generally* Andrew Smith, Comment, *The Extraterritorial Application of the National Environmental Policy Act: Formulating a Reliable Test for Applying NEPA to Federal Agencies Abroad*, 34 NAT. RESOURCES J. 751 (1994).

complaint must be "*intended*."[222] Many jurists take the view that problems affecting the global commons concern the international community and warrant attention multilaterally, not unilaterally.[223] Some fear that granting petitioners standing in U.S. courts for such diffuse environmental harm could create a flurry of litigation and would contravene international codes of comity and undermine the prominence of foreign law. Furthermore, it would be impossible for individuals dealing in international commerce to determine what was acceptable conduct and operating standards. Concededly, evidence of domestic environmental harm from the allegedly substandard mining practices in Irian Jaya is minimal at best. Freeport-McMoRan's intended domestic effects from the Irian Jaya mine can be presumed to be largely aspirations to increase Freeport's stock values.[224]

The third exception to the extraterritoriality principal operates when the conduct being regulated under the statute occurs within the United States, even if the primary effects of enforcing the statute are felt in foreign nations. The issue in applying this exception to the Grasberg Mine revolves around what activity took place in the United States. Direct application of U.S. law regarding mine waste disposal would not fall under this exception because Freeport's operations are undeniably on foreign soil. Furthermore, the U.S. District Court for the Southern District of New York held in *Amlon Metals, Inc. v. FMC Corp.*,[225] that RCRA did not apply extraterritorially to give a British corporation and its American agent a cause of action against a Delaware corporation.[226]

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222. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (1945) (emphasis added).

223. *See* RESTATEMENT (THIRD), *supra* note 48, § 402 and comments.

224. *See* Rankin, *supra* note 43, at 250-51. One might assert unfair competition to be an intended domestic effect. Freeport is not required under Indonesian law to implement stringent environmental pollution control devices and therefore is able to earn a larger profit from its investment in the mine. With respect to oil drilling overseas, Rankin states:

> The potential effect is that companies who have the benefit of the concession agreements with developing companies make windfall profits at the expense of the local indigenous peoples, while domestic drilling companies operate at a lower profit margin, because they must meet higher environmental standards and still compete with the price of imported oil.

Id. at 251. Although intrinsic notions of fairness might support an unfair competition argument, the fact that Freeport has not utilized U.S. business practices to gain this advantage makes it largely untenable. *See* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2898 (1993).

225. 775 F. Supp. 668 (S.D.N.Y. 1991).

226. *Id.* at 672-76. The court based its opinion on the reasoning in *EEOC v. Aramco*, which determined that U.S. laws should only be applied extraterritorially upon a finding of clear

However, the procedural demands of NEPA are not limited to such a shallow analysis. NEPA requirements will apply to the federal action—in this case, OPIC's granting and renewal of the one hundred million dollar political risk insurance policy—if the decision to implement the government policy takes place in the United States and foreign policy conflicts are not implicated. Additionally, Freeport must comply with U.S. securities regulations, licensing and export/import procedures, as well as financing qualifications. The decision-making bodies constituting these agencies are also located within the United States and control issues that bear upon the United States and its citizens primarily.

The federal action to which NEPA would arguably regulate would not demand the host country revolutionize its administration or enforcement of law. NEPA would require U.S. government agencies responsible for such conduct to partake in a NEPA review and EIS analysis before consenting to, or approving, government action and, indirectly, MNC behavior. Therefore, by strictly limiting the exception, it can be argued that U.S. laws directed at federal licensing, monitoring, and financing, can be applied to transnational corporations because the laws regulate the conduct of governmental decision-making which regularly takes place in the United States. It has been commented, "[i]f the court determines that the basic decisions concerning the proposed action are to be made in the United States, no question of extraterritoriality exists and NEPA will apply."[227] Even though there are foreign policy considerations when a federal agency makes a decision regarding the conduct of multinational corporations, the agency has a duty to determine what is in the best interests of the United States.[228] Therefore, domestic interests must come before an analysis of the foreign relations implications. If there are no apparent conflict of laws, the agency must act according to its enabling act, otherwise its decisions are arbitrary and capricious and should be overturned by the judiciary.[229] Consequently, requiring agencies to comply with NEPA is a pragmatic policy and serves

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congressional intent. *See supra* note 36 and accompanying text. Because RCRA does not contain provisions for its application abroad, the case was dismissed. *Id.*; *see also* Lee Raiken, *Extraterritorial Application of RCRA: Is Its Exportability Going to Waste?*, 12 VA. ENVTL. L.J. 573 (1993). *See generally* Mary McDougall, Comment, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435 (1991).

227. Smith, *supra* note 112.

228. *See* Selph, *supra* note 12, at 133.

229. *See generally* 5 U.S.C. § 706 (1994).

the democratic process. The agency is required to consider environmentally efficient modes of operation, taking all social, business, environmental, and cultural considerations into account.

B. Hypothetical: NEPA Applied to the Grasberg Mining Operation

Until the international issues presented by Freeport's operations in Irian Jaya came to the public eye, no case or controversy had questioned OPIC responsibilities under NEPA. The basic presumption against extraterritoriality excludes statutes which do not contain explicit statutory language authorizing their application abroad. By adopting *Massey* as the jurists' guide to future extraterritorial application of NEPA, courts will give greater consideration to international environmental issues and concerns. Gradually, this may diminish the judiciary's loyal, yet outmoded, marriage to the doctrine of extraterritoriality. Through a hypothetical case analysis, the following part will explore the application of NEPA to regulate OPIC's conduct and, indirectly, the behavior of Freeport-Indonesia.

1. Is This "Major Federal Action?"

In order for NEPA to become binding on the government agency's action, it must be a "major federal action." Compared to other NEPA actions, the financial support and control over the provisions of the OPIC insurance policy imply that Freeport's activities were "major." In *Almond Hill School v. United States Department of Agriculture*,[230] the Ninth Circuit held that funding was a key factor in transforming a project into a "major federal action."[231] In *Save Barton Creek Association v. Federal Highway Administration*,[232] the Fifth Circuit believed that significant federal participation and involvement with a nonfederal activity was the touchstone of a "major federal action."[233] However, the determination of this factor in the test is ultimately governed by "careful

230. 768 F.2d 1030 (9th Cir. 1985).

231. *Id.* at 1039 (5th Cir. 1992). The court held that the state's beetle eradication project was a state project because no federal funds had been sought and the employment of three federal officials on the state's Japanese beetle advisory board was insufficient to deem this a federal project *Id.*

232. 950 F.2d 1129 (5th Cir. 1992).

233. *Id.* at 1135-38 (highway proposal and construction in Texas using state funds was not closely connected to federal involvement).

analysis of all facts and circumstances surrounding the relationship."[234] The Third Circuit Court of Appeals in *NAACP v. Medical Center, Inc.*,[235] held that the Department of Health, Education and Welfare's ministerial approval of a capital expenditures plan under section 1122 of the Social Security Act did not constitute a "major federal action" under NEPA.[236] The Department provided no direct support to the development of the plan. Its sole responsibility was to give ministerial approval to the plan; there was no nexus between federal approval of the private project and the project's impact on the environment.[237] However, capital investment and federal backing constitute just one aspect of the test.

There is a strong argument that OPIC's decision to insure Freeport for one hundred million dollars is a "major federal action." Political risk insurance in a foreign investment project is critical due to the political instability often associated with developing nations. Federal agency underwriting allows hundreds of U.S. foreign ventures to proceed annually. Adequate insurance is a fundamental concern to all investors, regardless of whether they are insuring a three billion dollar investment in a copper mine or a $25,000 automobile. Political risk insurance to Freeport benefits Indonesia's economy which encourages political stability. The insurance also increases the value of Freeport's stock, strengthens the United States export/import base, and produces economic gains.[238]

The agreement to insure Freeport was contingent upon OPIC's statutory obligation to monitor and, if necessary, conduct a review of the environmental effects of the development. OPIC's enabling act directs the Corporation to "refuse to insure, reinsure, or finance any investment in connection with a project which the Corporation determines will pose an unreasonable or major environmental, health, or safety hazard, or will result in the significant degradation of national parks or similar protected areas."[239] Officials at OPIC stated that if the agency had known of the

234. Enos v. Marsh, 769 F.2d 1363, 1371 (9th Cir. 1985) (quoting Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 329 (9th Cir. 1975)). The *Enos* court held that NEPA was not violated by a failure to discuss environmental effects of a state-planned shoreside facility that included berthing areas, roads, and other improvements. *Id.*

235. 584 F.2d 619 (3rd Cir. 1978).

236. *Id.* at 629-33.

237. *Id.*

238. *See* Ellinidis, *supra* note 163, at 321-26.

239. 22 U.S.C. § 2191(n) (1994).

level of mining and tailings deposits in the Ajkwa and the subsequent environmental consequences, it would have never approved the policy.[240] The Freeport renewal application for OPIC funding in 1990 asserted that the maximum output of the mine would be 52,000 metric tons/day;[241] however, the company now expects to mine over 60,000 metric tons/day and plans to increase mining activity.[242] Essentially, Freeport's activity that went beyond the scope of their contract with OPIC is grounds for further investigation into the alleged breach of contract.

OPIC's insurance of the Mountain Mine project constitutes a "major federal action" under NEPA in three ways. First, OPIC review of the Grasberg Mine project, coupled with the subsequent one hundred million dollar insurance policy, is a major federal action. Second, OPIC's statutory mandate requiring the agency to monitor and to conduct environmental reviews of Freeport's operations indicate major federal action. Third, judicial and/or administrative proceedings against Freeport for the alleged breach of contract claims are a "major federal action." None of these factors independently may be sufficient to constitute a major federal action. However, when considered together, the magnitude of OPIC's involvement with the Grasberg Mine project is undoubtedly "major."

2. Did This Action "Significantly Affect the Quality of the Human Environment"?

OPIC's decisions regarding Freeport's mining activity may also fall under NEPA because the operation "significantly affect[s] the quality of the human environment." Dynamite, plastic explosives, and heavy machinery, lower the height of the mountain by about four hundred feet daily. This excavation is expected to produce a 3,500-foot-deep crater in

240. *OPIC Case Against U.S. Firm*, *supra* note 180**.** Furthermore, Freeport recognized its errors in gauging the ability of the Ajkwa River to handle the tailings. Bruce Marsh, Freeport's Senior Manager for Environment and Public Affairs conceded that it and Crescent City Laboratories, a Freeport contractor created to investigate the consequences of such river loading, "totally missed the mark on the transport capacity of the river." Mr. Marsh said, "It's kind of a joke in the company, this river study, and the (Indonesian) government." Yerton, *As a River Runs Over*, *supra* note 151.

241. *OPIC Case Against U.S. Firm*, *supra* note 181.

242. *See supra* note 142 and accompanying text.

the next thirty years; at that time mining will continue in tunnels.[243] The massive amounts of waste produced by the mining are poured directly into a nearby river.[244] The high sediment content of these tailings are flooding and destroying the rainforests.[245] Even with the levee system currently under construction that is designed to channel the river and curtail flooding, it is estimated that about fifty square miles of rainforest will be destroyed.[246].

Additionally, human rights abuses have been alleged against Indonesian military forces protecting the country's interest in the mine.[247] In early February, 1996, a government news agency stated that a soldier was tried in Jakarta by an Indonesian military court for "giving unclear orders to subordinates, which caused the deaths of other people" in skirmishes with the Free Papua Movement (OPM) in Timika, Irian Jaya in July, 1995.[248]

Allegations of human rights and environmental violations have sparked a native separatist movement. The OPM seeks independence from Indonesia, claiming it can better run the Irian environment and protect its natural resources.[249]

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243. Stewart Yerton, *Bringing Down the Mountain Series: A Rock and A Hard Place: Trouble in the Jungle for Freeport's Mountain Mine*, NEW ORLEANS TIMES-PICAYUNE, Jan. 28, 1996, at A17, *available in* LEXIS, NEWS Library, NOTPIC File.

244. *Id.*

245. *Id.*

246. *Id.* The Study and Information Center for Papuan Peoples (PaVo) in the Netherlands estimates that twenty to forty kilometers of the Ajkwa will be hazardous to water foul and humans for about fifteen years. Chatterjee, *supra* note 158. It also stated that a thirty-five square kilometer area in the floodplains and a one-hundred square kilometer area in the estuary will be contaminated for thirty-five years. *Id.* Without the levee, the tailings would eventually claim about 230 square miles of rainforest. Yerton, *supra* note 243.

247. *See Irian People Protest Against Human Rights Violations*, JAPAN ECON. NEWS, Feb. 27, 1996, *available in* LEXIS, NEWS Library, JEN File [hereinafter *Irian People Protest*]; Stewart Yerton, *And Then the Soldiers Came: Mine Distances Itself from Army, Abuse Series: A Rock and A Hard Place: Trouble in the Jungle for Freeport's Mountain Mine.* NEW ORLEANS TIMES-PICAYUNE, Jan. 28, 1996 at A21, *available in* LEXIS, NEWS Library, NOTPIC File.

248. *Trial Over Deaths in Indonesia's Irian Jaya Begins*, ASIAN POL. NEWS, Feb. 5, 1996, *available in* Westlaw, APOLN Database. Timika is located within the operational areas of Freeport-Indonesia's mining concession. The defendant ordered his subordinates to shoot local people who tried to escape. Many others were said to disappear during the massacre. The military court sentenced the officer to sixteen months in jail for the violations. He was also fired from the military and fined 5,000 rupiahs. *Army Officer Gets Prison Term Over Deaths in Irian Jaya*, JAPAN ECON. NEWS, Feb. 15, 1996, *available in* LEXIS, CRNEWS Library, JEN File.

249. *Irian People Protest*, *supra* note 247. The Movement maintains that the Indonesian government discriminates against the Irian people in employment and other entitlements. *Id.* Also, the OPM alleges that the military is allowing Freeport to abuse the Irian environment without

The human consequences of the Freeport mining operation are manifest in many ways. On January 8, 1996, a band of about two hundred OPM separatists took seven European environmentalists and about nineteen natives into captivity in the Irian jungle. The separatists were demonstrating their opposition to Freeport-Indonesia and the Indonesian government's alleged environmental destruction.[250] Jacop Pattipi, Irian Jaya governor, stated that the OPM may have mistaken the Europeans for Freeport employees.[251] Twelve hostages were being held against their will in a remote hideout.[252]

The tense relations between the Irian people, Freeport employees and the Indonesian military came to a pinnacle on March 12, 1996. Approximately three thousand natives rioted in the cities of Timika and Tembagapura, protesting the island's poor economic and social conditions and the lack of respect given to tribal traditions.[253] In the wake of the riots, four people were killed, many others were injured, and there was substantial property damage.[254] Freeport closed the mine as a precautionary measure, but there was no damage to the mill or mining operation.[255] Freeport's Moffett met with tribal leaders and the military on April 13, 1996 to discuss how the situation might be ameliorated.[256] Reportedly, Freeport pledged one percent of its income per year to the local community and agreed to employ more Irians at the mine.[257]

The Grasberg Mine operation significantly affects the quality of the human environment. The insurance policy OPIC granted Freeport to operate the mine allows Freeport to minimize investment risk in a volatile

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requiring it to compensate the native peoples. Moreover, the OPM claims that the military is guilty of physically abusing and torturing the natives. Anthony Spaeth & Michael Shari, *Prisoners of Nature: Europeans and Indonesians are Held Hostage by Ecology-Mined Tribesmen in Irian Jaya*, TIME INT'L, Feb. 5, 1996, at 36.

250. *Irian People Protest*, *supra* note 247.

251. *Id.*

252. *Soldiers Sent to Quell Tension in Irian Jaya, Moffett Making Rounds*, AUSTIN AM.-STATESMAN, Mar. 15, 1996, at A10, *available in* LEXIS, NEWS Library, AUSTIN File.

253. *Id.*

254. *Freeport Mine Boss Pledges Cash for Local Community*, AGENCE FRANCE-PRESSE, Apr. 13, 1996, *available in* LEXIS, NEWS Library, AFP File [hereinafter *Freeport Mine Boss*]. Reports stated that dozens of buildings were attacked by the rioters and that the airport was among the targets of the disorder. Richard Borsuk, *Indonesia Is Said to Quell Riots Near Freeport Mine*, ASIAN WALL ST. J., Mar., 14, 1996, at 3, *available in* LEXIS, NEWS Library, AWS File. The riot was sparked when a Freeport truck hit a native and rumor mistakenly had it that the man died. *Id.*

255. *Id.*

256. *Freeport Mine Boss*, *supra* note 254.

257. *Id.*

political climate. The debris from the mining has altered the physical landscape. The environmental effect from the infrastructure created to support Freeport's employee village may also be significant. So too are the effects of the operation on the culture of native peoples. When rivers change their course, ancient rainforests die, and impoverished indigenous people riot, the nature of the human environment is being significantly affected.

VI. CONCLUSION

The question of whether the presumption against extraterritoriality prescribes application of NEPA to U.S. agencies is difficult to answer when considering the competing global interests of environmental protection and the economic development of nations. However, nations must strive to achieve that balance in order to protect environmental resources and sustain economic growth. Agencies such as OPIC should strongly consider the environmental consequences of Freeport's mining activities when reviewing future applications for agency approval.

The decision to insure, finance, or reinsure foreign investors is made in Washington and concerns domestic policies. This fact underlies the application of NEPA to the Grasberg Mine operation. By canceling Freeport's policy, OPIC rebuked an international actor under the demands and duties outlined in its enabling statute. This sent an alarm to the world that harmful environmental consequences would not be brushed aside in the wake of frenzied development. The extension of NEPA to actions such as OPIC's is not inevitably an issue of applying NEPA extraterritorially. Nor is it one that necessarily implicates U.S. foreign relations or a conflict of laws dilemma. Holding agencies responsible for NEPA initiatives on a global basis is a logical extension demanding accountability of federal agency decision-making under NEPA. It also serves to regulate the behavior of MNCs in a manner which respects international comity and autonomy.

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