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The Darien Gap Case - Can Mere Words Interfere with the Sovereignty of a Foreign Nation? *Sierra Club v. Adams*, No. 76-2158 (D.C. Cir. Mar. 14, 1978)

Stuart Weinstein-Bacall

NOTE

The Darien Gap Case — Can Mere Words Interfere with the Sovereignty of a Foreign Nation?

STUART WEINSTEIN-BACALL*

I. INTRODUCTION

On March 18, 1978, in *Sierra Club v. Adams*,[1] the United States Court of Appeals for the District of Columbia Circuit in holding the appellant Government's Final Environmental Impact Statement[2] (FEIS), as required by the National Environmental Policy Act[3] (NEPA) for the Darien Gap

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1. Sierra Club v. Adams, No. 76-2158 (D.C. Cir. Mar. 14, 1978).

2. Appellants are the Secretary of Transportation of the United States, currently Brock Adams, Jr., and the Administrator of the Federal Highway Administration, currently William M. Cox.

3. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970). Section references in text and footnotes refer to Pub. L. No. 91-190. Section 102(2)(C) of the Act requires that:

> "to the fullest extent possible . . . (2) all agencies of the Federal government shall . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the environment, a *detailed statement* (EIS) 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.
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes. (emphasis added)

Highway project[4] (the Highway) adequate and sufficient, cleared the way for the completion of the Pan-American Highway System. When the system is completed it will stretch continuously from Prudhoe Bay, on the north coast of Alaska, to Santiago, Chile[5] and beyond, connecting numerous capital cities of the Western Hemisphere. In reviewing on appeal the injunction requested by appellees[6] and granted by the United States District Court for the District of Columbia[7] the circuit court *held:* vacated and remanded, the Government's FEIS *was* adequate, and the district court's holding that the FEIS was deficient was, in view of the appropriate tests,[8] erroneous.

II. BACKGROUND

The injunction granted by the district court prohibiting any further construction of the Highway was thereby terminated, and the Department of Transportation was authorized to continue construction on the Darien Gap Highway in Panama,[9] paving the way for the completion of the final

4. Pub. L. No. 91-605, 23 U.S.C. § 216, which reads in pertinent part:

(a) The United States shall cooperate with the Government of the Republic of Panama and with the Government of Colombia in the construction of approximately two hundred and fifty miles of highway in such countries in the location known as the 'Darien Gap' to connect the Inter-American Highway authorized by section 212 of this Title with the Pan American Highway System of South America. Such highway shall be known as the 'Darien Gap Highway.' Funds authorized by this section shall be obligated and expended subject to the same terms, conditions, and requirements with respect to the Darien Gap Highway as are funds authorized for the Inter-American Highway by subsection (a) of section 212 of this title.

See also Agreements with Panama (October 5, 1972 and June 12, 1974) and Colombia (August 18, 1973), U.S.T. 2485; T.I.A.S. No. 7482, 24; Agreement between the United States of America and Panama (May 6, 1971) 22 U.S.T. 602; Agreement between the United States of America and Colombia (May 6, 1971), 22 U.S.T. 617. These Agreements provide that the United States will pay for two-thirds of the Highway and Panama and Colombia will be responsible for the remaining one-third, and for rights of way, engineering personnel and maintenance of the Highway.

5. D.C. Cir. No. 76-2158 at 2. Presently, the portion of the highway from Prudhoe Bay, Alaska to the Darien Gap is known as the Inter-American Highway, and the portion below, the Pan-American Highway. When completed, the entire project will be known as the Pan-American Highway.

6. Appellees are the Sierra Club, National Audobon Society, Friends of the Earth, Inc., and International Association of Game, Fish and Conservation Commissioners.

7. The District Court for the District of Columbia, in Sierra Club v. Coleman, 405 F. Supp. 53 (D.D.C. 1975), enjoined the building of the Highway for the Government's failure to comply with the procedural and substantive requirements of NEPA by failing to file an EIS as required by section 102(2)(C) of NEPA. On rehearing, Sierra Club v. Coleman, 421 F. Supp. 63 (D.D.C. 1976), the district court held that by filing an EIS, the Government had complied with the procedural requirements of NEPA, but that in view of the court's determination that the EIS was inadequate, had failed to comply with NEPA's substantive requirements. The injunction was therefore continued pending submission of an adequate EIS in compliance with the substantive requirements of NEPA.

8. *See* notes 23, 40, 73, 75, 79, 85, 86, 94 *infra* and accompanying text for discussion of those tests.

9. *See* Brief for the Federal Appellants, at 8: "There will be no construction until aftosa control actually exists, as certified by the United States Department of Agriculture." *See* notes 18, 19, 45, 68-73 *infra* and accompanying text for a discussion of aftosa. *See also* notes 11, 69, 71 and 103 *infra.*

portion of the Pan-American Highway System.[10] Completion of the Highway, when the Department of Agriculture (USDA) gives its final approval,[11] will, for the first time by road, connect the North and South American continents.

On June 27, 1975, the appellees sued in the United States District Court for the District of Columbia to temporarily enjoin further construction of the Darien Gap Highway, and alleged that appellants, Secretary of Transportation and Administrator of the Federal Highway Administration, had failed to prepare a FEIS, as required by NEPA, evaluating the spectrum of potential environmental impacts of the Darien Gap Highway. On October 10, 1975, after hearing arguments, the district court granted appellees' motion and enjoined further construction efforts on the Highway until the Government complied with the procedural requirements of NEPA.[12] On June 15, 1976, the Government announced that it had completed preparation of its FEIS, and submitted same for the district court's approval, requesting that the injunction be vacated.[13] Appellees moved the district court to continue the injunction on the grounds that the FEIS was inadequate in its discussion of the possible environmental impacts of the project.[14] The district court, although holding that appellants had complied with the procedural requirements of NEPA,[15] granted appellees' motion,[16] holding the FEIS inadequate on the three grounds urged by appellees:[17] (1) Possible effects of an outbreak of an epidemic of aftosa,[18] or foot-and-

10. *See* Brief for the Federal Appellants at 3. The Darien Gap Highway will run approximately 400 kilometers (250 miles) from Tocumen, Panama to Rio Leon, Colombia.

11. D.C. Cir. No. 76-2158 at 17. The Circuit Court remanded the case to the district court with the instruction that the Department of Agriculture certification with regard to aftosa control in Colombia be filed with the district court and the appellees prior to the initiation of any construction in that country.

12. *See* 405 F. Supp. 53 (D.D.C. 1975).

13. D.C. Cir. No. 76-2158 at 4.

14. 421 F. Supp. at 64.

15. *Id.* at 65.

16. *Id.* at 68.

17. *Id.*

18. Brief for Appellees at 4:

Aftosa, or foot-and-mouth disease (FMD), is highly contagious and is considered to be the most serious communicable livestock disease, attacking cattle and swine, also sheep, goats, deer, elk, and bison. It may be spread by infected or carrier animals, or by contaminated vehicles.

See also notes 119, 45, 68-73 *infra* and accompanying text for a further discussion of aftosa.

mouth disease;[19] (2) alternate routes or plans for the highway;[20] and (3) primary and secondary effects of development on the Cuna and Choco Indian tribes who inhabited the Darien Gap region[21] [hereinafter the "Indians" issue]. The district court, in agreeing with appellees' allegations, extended the injunction until the enumerated deficiencies were remedied, forbidding appellants or

> their agents, officers, servants, employees and attorneys, and any persons in active concert or participation with them . . . from entering into any contract, obliging any funds, expending any funds, or taking any other action whatsoever in furtherance of construction of the Darien Gap Highway, except as specified by the Court's Order of December 23, 1975 . . . .[22]

III. THE CIRCUIT COURT'S DECISION

Appellants arguments

The Government appealed to the United States Circuit Court of Appeals for the District of Columbia,[23] asserting that the court should vacate the district court's injunction on the grounds that the FEIS *was* adequate

19. Despite a rather protracted discussion of FMD in the FEIS, including an estimate that if aftosa were to strike in the United States, the damage might create a loss of $10 billion in the first year alone (421 F. Supp. at 65), the district court found the FMD discussion of the FEIS inadequate. The court said, 421 F. Supp. at 66:

> The FEIS, in other words, does nothing more than state the goals of the program; while the discussion of the proposed operation of the Colombian program is adequately detailed, it contains no reasoned analysis whatever of the likelihood that the program will in fact become fully reliable. In light of the history of FMD control efforts in that nation, such a discussion is indispensable to consideration of whether the transmission of the disease can be effectively prevented in the near future. And without knowing the realistic likelihood of a reliable program during the relevant period, the agency cannot rationally conduct the balancing process required by NEPA. . . . In order for the agency to give any meaningful consideration to the merit of the proposed project, it must know what the possible funding requirements associated with the project may be and whether such funds are likely to be available. Without such knowledge the balancing mandated by NEPA cannot be seriously undertaken.

20. Section 102(2)(C)(iii) of NEPA requires a detailed statement of alternatives to the proposed action. The district court said, 421 F. Supp. at 67:

> Unfortunately, little of the discussion is addressed to the environmental impact of possible alternatives to the route actually selected (the Atrato route). Such a discussion of the environmental impact of other land routes, such as the Choco route, is indispensible, though they might cost more or be less feasible from an engineering perspective.

See notes 74-75, 95 and 106 *infra* and accompanying text.

21. 421 F. Supp. at 66-67. While the EIS discussed impacts on the Darien Gap Indian tribes as spanning the realm of possibilities from incorporation into the national economies to cultural extinction, the court felt that since the FEIS "makes no attempt at serious anthropological or ethnographic analysis of the impact of secondary development resulting from the the Highway on these people," the EIS's treatment of the issue did not satisfy the requirements of NEPA. For a further discussion of the "Indians" issue, *see* notes 34-37, 112, 118 *infra* and accompanying text.

22. 421 F. Supp. at 67-68.

23. D.C. Cir. No. 76-2158.

and *did* satisfy the requirements of NEPA, as well as the district court's definition of what an Environmental Impact Statement should be.[24]

The Government argued[25] that its FEIS was in compliance with what NEPA mandated in that it did "provide detailed discussion sufficient to allow the agency decision maker to fully consider in his or her decisional calculus the possible environmental effects of various alternative paths the agency might choose to pursue with respect to a given project."[26] The Government further argued[27] that it had presented the decisionmaker with ample discussion of the "worst case"[28] environmental consequences in each of the instances concerning which the district court had held the analysis inadequate. In addition, appellants alleged[29] that the FEIS clearly presented the decisionmaker with enough discussion to alert him to the problems, which was all that was required in a FEIS.[30] They pointed out to the court that the FEIS certainly provided a "hard look" at the aftosa problem, without using a "crystal ball" analysis to predict future outbreaks of aftosa in unknown locations, of unknown size, and at unknown dates.[31] The circuit court, appellant argued, had previously held that "crystal ball" gazing of such type need not be done.[32]

Appellants further contended that the FEIS discussion of alternate routes was, simply, adequate.[33]

As to the effect of the Highway on the Indian tribes located in the Darien Gap region of Panama and Colombia,[34] the Government argued that it had sufficiently presented the range of possible effects the Highway might have on the Indians,[35] and that the district court's requirement of a

24. *Id.* at 65. *See also* Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975), Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

25. Brief for the Federal Appellants at 6-13.

26. *See* 421 F. Supp. at 65. *See* note 25 *supra.*

27. Brief for the Federal Appellants at 6.

28. *Id.*

29. *Id.* at 13.

30. *See* Concerned About Trident v. Rumsfeld, 555 F.2d 817 at 829 (D.C. Cir 1977): "NEPA does not mandate that every conceivable possibility . . . must be explored in an EIS."

31. Brief for the Federal Appellants at 9.

32. *Id.*

33. *Id.* at 11. *See also* 555 F.2d at 825.

34. Brief for the Federal Appellants at 9. In assessing the district court's requirement that the EIS contain a "serious anthropological or ethnographic analysis" of the impact on the Indians, the appellant pointed out that, in putting this requirement in perspective, it was worth noting that the entire Darien Gap region of Panama contains only 1.6 percent of Panama's population, and that the Choco and Cuna Indians comprise only twenty-two and two percent of that 1.6 percent, respectively.

35. Brief for the Federal Appellants at 9-10. The appellants pointed out that the Cuna Indians are a very tightly knit tribe and were likely to resist — as they had done when they came in contact with the Spanish, Colombian and Panamanian civilizations — any assimilation into other cultures. The Choco Indians, appellants indicated, were simply expected to retreat from and reject civilization again, as they had always done before, and move further up river. The EIS further indicated that the possibilities of impact ranged from assimilation to cultural extinction.

"serious anthropological or ethnographic analysis of the impact of secondary development resulting from the Highway upon these people"[36] was not necessary.[37] Appellants argued that FEIS "was not intended to be a substitute community planning device,"[38] and that the district court was asking the FEIS "to do too much when it is asked to go deeply into local planning."[39]

The Government based its prayer for relief on the circuit court's "rule of reason" analysis,[40] and asserted that the FEIS plainly contained enough information to appraise the decisionmaker of the environmental problems, and therefore enabled him or her to make a reasoned decision.[41]

Finally, although conceding that appellees had sufficient standing to challenge the FEIS on its aftosa discussion, they asserted that appellees interest in the "alternate routes" and the "Indians" portions of the FEIS was too remote, relying on *Harrington v. Bush*,[42] and that appellees therefore lacked the requisite standing to challenge the FEIS on those issues.[43]

Appellees arguments

Appellees, on the other hand, rested their arguments to the circuit court on the rationale advanced by the district court for extending the injunction. They detailed the potential dangers of the aftosa problem,[44] pointing out the significant deficiencies in the Colombian program for aftosa control,[45] the lack of seriously adequate discussion of the Highway's impact on the Indian tribes in the region,[46] and the lack of sufficient discussion of (a) alternate routes for, and (b) alternatives to the Highway.[47]

Citing appellants concession of its standing to challenge the aftosa discussion in the FEIS,[48] appellees argued elaborately in order to convince the circuit court that that standing should extend to encompass challenges to the "alternate routes" and "Indians" portions of the FEIS.[49] Citing *Sierra*

36. *See* note 21 *supra*.

37. Brief for the Federal Appellants at 11.

38. *Id.* at 10.

39. *Id.* at 11.

40. *See generally* 555 F.2d 817: "In essence, then, '(t)he court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors.' " *See* cases cited in note 24 *supra*.

41. Brief for the Federal Appellants at 13.

42. 553 F.2d 190 (D.C.Cir. 1977).

43. Brief for the Federal Appellants at 14.

44. Brief for Appellees at 15-18. *See* notes 21, 22 *supra*.

45. Brief for Appellees at 16, 17. Appellees pointed out that the aftosa control program for Colombia does not appraise the probability of its effectiveness. It was also indicated that, at the USDA Advisory Committee on Foreign Animal and Poultry Disease, in June 1976, it was concluded "that the precautions taken to date by Colombia are not adequate." Also discussed by appellee was the extreme cost of aftosa control as evidenced by other projects.

46. Brief for Appellees at 19-25.

47. *Id.* at 25.

48. *Id.* at 30.

49. *Id* at 30-35.

Club v. Morton[50] and *Warth v. Seldin*,[51] appellees urged that their standing to challenge one portion of the FEIS properly entitled them to "argue the public interest in securing faithful performance by the defendant of their statutory duties."[52] Appellees also contended[53] that, in any event, *they* were injured by appellant's failure to adequately discuss the problems of the Indians and the alternate routes for the Highway, in that their members would be injured in their use and enjoyment of "the Dairen Gap area in its virgin state as the result of Defendant's failure to comply with NEPA."[54] Additionally, they alleged that the failure to adequately discuss these consequences adversely affected the dissemination of information and the educational activities of appellees' respective organizations.[55]

The circuit court, although agreeing with appellees' contention that its standing on the aftosa issue entitled it to challenge the FEIS on the "alternate routes" and "Indians" issues, via its "public interest" argument,[56] found, after considerable discussion, that the Government's FEIS *was* adequate and did comply with the requirement of NEPA.[57] An analysis of that discussion follows.

The Court's reasoning

The circuit court's reasoning on the issue of appellees' standing to challenge alleged deficiencies in the FEIS, particularly as regards the environmental effects of secondary development along the Highway on the Choco and San Blas Cuna Indians, has subtle but potentially significant impact in the areas of international law and the conduct of United States foreign relations.[58] Those profound implications will be discussed subsequent to an evaluation of the court's rationale in holding the FEIS to be adequate.

The circuit court found that since there were no material facts in dispute, the appeal would constitute "an essentially *de novo* review," because the court was "in as good a position as the district court to determine . . . what could reasonably be demanded of the EIS in issue."[59] Citing *Aberdeen and Rockfish Railroad v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[60] the circuit court indicated that "the question of the proper scope of review by a court of the adequacy of an environmental impact statement" was "still open."[61] Further, the court said that it was governed

50. 405 U.S. 727 (1972).
51. 422 U.S. 490 (1975).
52. Brief for Appellees at 30.
53. *Id* at 34.
54. *Id.*
55. *Id. See also* 481 F.2d 1079.
56. D.C. Cir. No. 76-2158 at 7.
57. *Id.* at 14.
58. *See generally* Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirements*, 74 Mich. L. Rev. 349 (1975); *See also* text accompanying notes 108-113,128,149 and 167 *infra* for further discussion.
59. D.C. Cir. No. 76-2158 at 9.
60. 422 U.S. 289 at 326-27 n.28 (1975).
61. D.C. Cir. No. 76-2158 at 9.

by a "rule of reason," as determined by it in such cases as *Carolina Environmental Study Group v. United States*,[62] "to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors."[63] Guided by these principles, the circuit court found on the merits, contrary to the evaluation of the district court, that the FEIS was filed in good faith and met the requirements of NEPA.[64] Citing several cases,[65] the court noted that one indication of the good faith submission of an EIS is the manner in which the Government agency responds to the comments of adverse interests to its project.[66] The court determined that the Government had done this more than adequately in its EIS with respect to the adverse comments of appellees.[67]

Aftosa

In considering the possible environmental impact of aftosa, the court separated the effects of that consideration with respect to Panama from that regarding Colombia.[68] Since aftosa has been controlled north of the Colombian border, the court felt that the FEIS' handling of that problem was more than adequate. Since the Highway portion in Colombia could not be opened until the USDA had certified that aftosa control in Colombia was adequate[69] (and since aftosa control program in Panama was already effective[70]) the court concluded that the discussion of aftosa — which said that since USDA certification was required prior to the opening of the Colombia portion of the Highway the increased risk of an outbreak of aftosa in the United States due to the construction of the Darien Gap Highway in Panama was insignificant[71] — was sufficient to apprise the decisionmaker of the environmental consequences.[72] Therefore, the court concluded, the requirements of NEPA, as enunciated in *Concerned About Trident v. Rumsfeld*,[73] were met.

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62. 510 F.2d 796 (D.C. Cir. 1975).

63. D.C. Cir. No. 76-2158 at 10. *See also* 510 F.2d at 819.

64. D.C. Cir. No. 76-2158 at 11. The Court felt it significant that neither the Council on Environmental Quality (CEQ) nor the Environmental Protection Agency (EPA) objected to the draft statement. In fact, the Court noted, the EPA remarked that the draft "adequately sets forth the environmental impact of the proposed action." The Court commented that this was particularly noteworthy because of the crucial roles of both the CEQ and the EPA in the environmental area. *See also* Aberdeen and Rockfish Railroad v. SCRAP, 422 U.S. at 328 (Douglas, J., dissenting).

65. *See* National Helium Corp. v. Morton, 486 F.2d 995, 1003 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Sierra Club v. ICC, No. 76-1557, *slip.op.* at 14-15 (D.C. Cir. Feb. 21, 1978).

66. D.C. Cir. No. 76-2158 at 11.

67. *Id.*: "Most notably, counsel for appellees submitted eight pages of comments, and the Government included these pages and five pages of responses in the FEIS."

68. *Id.* at 12.

69. *See* note 11 *supra*.

70. *Id.*

71. D.C. Cir. No. 76-2158 at 13.

72. *Id.* at 14.

73. 555 F.2d 817 (D.C. Cir. 1977).

Alternatives

Citing *National Resources Defense Council v. Morton,*[74] where the circuit court enunciated the "rule of reason" test with regard to the FEIS, the court felt that, since the FEIS explored the various non-highway alternatives as well as a "no-action" alternative, and briefly but adequately discussed less feasible routes within the Darien Gap region, the exposition of alternatives was ample.[75]

Indians

As to the impact of development of the Cuna and Choco Indian tribes, the court was disturbed by the Government's rather cursory treatment of that issue,[76] but allowed that the discussion was adequate to satisfy NEPA[77] in that it considered the entire range of possible effects — from assimilation to extinction — thereby allowing the decisionmaker to balance the appropriate environmental factors.

IV. ANALYSIS OF THE CIRCUIT COURT'S OPINION

The Environmental Impact Statement

It is submitted that in holding the Government's FEIS adequate, the court was exercising proper judgment in evaluating the plethora of pronouncements found in its numerous antecedent decisions delineating the scope of NEPA's FEIS requirement.[78] Although, as the court indicated, the proper scope of review by a court of the adequacy of an EIS is still open,[79] the parameters of the review have been relatively well defined by the Circuit Court's previous decisions. The District of Columbia Circuit's long history of litigation involving the FEIS process and its application to major federal projects has interpreted section 102 of NEPA very broadly, until virtually any federal action can be brought within the scrutiny of NEPA's EIS requirement.[80]

The history of EIS analysis in the District of Columbia Circuit from *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,*[81] in which Circuit Judge J. Skelly Wright pronounced that the courts have the power to require agencies — in that case the Atomic Energy Commission (AEC) — to comply with the procedural requirements of NEPA ("our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal

74. 458 F.2d 827 (D.C. Cir. 1972).

75. D.C. Cir. No. 76-2158 at 15.

76. *Id.* at 16. *See also* note 34 *supra.*

77. D.C. Cir. No. 76-2158 at 16.

78. *See generally* cases cited in note 24 *supra. See also* note 80 *infra.*

79. D.C. Cir. No. 76-2158 at 9-10. *See also* 422 U.S. at 326-27 n.28. The Court indicated, though, that the contours of the review were relatively well defined, alluding to the "rule of reason," "objective good faith," and "balancing of environmental factors" tests previously enunciated by it and other circuit courts.

80. *See generally* Friedman, The Environmental Impact Statement Process, *Case and Comment,* Nov.-Dec., 1977, at 28-37.

81. 449 F.2d 1109 (D.C. Cir. 1971).

bureaucracy"),[82] to *Rumsfeld*,[83] where the court held that there was no support for the Navy's argument that there was an implied "national defense" exemption from the requirements of NEPA,[84] indicates that NEPA's requirement of submission of an EIS be interpreted and evaluated by the courts using a "rule of reason."[85] As the court said in *Carolina Environmental Study Group*, "the AEC is required by NEPA to set forth the factors involved, to the end that the ultimate decision on a proposed course of action shall be enlightened by prior recognition of its impact on the quality of the human environment."[86] As the court recently enunciated in *Rumsfeld*, "the FEIS does not mandate that every conceivable possibility which someone might dream up must be explored in an EIS."[87]

Considering the guidelines it had developed over the years, the court properly found that the appellants' FEIS complied with the procedural and substantive requirements of NEPA. Significantly, the court pointed out that neither of the agencies most intimately concerned with the content of the EIS, the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA), objected to the Government's assertion that its EIS adequately "set forth the environmental impact of the proposed action."[88] Further, citing *National Helium Corp. v. Morton*[89] and *Sierra Club v. ICC*[90] the court commended the FEIS inclusion of comments on its proposals, particularly the inclusion of the eight pages of adverse comments submitted by counsel for the appellees.[91]

The court properly found that the FEIS discussion of aftosa,[92] which was quite frank,[93] supplied "in reasonable detail the information a decisionmaker would require to balance and to consider fully the environmental factors of a decision to proceed, and this is all the NEPA requires."[94]

The FEIS discussion of alternatives as required by NEPA was, as previously indicated,[95] "when read as a whole . . . an ample exposition, from an environmental standpoint, of the relative merits of both the chosen and alternative routes."[96] As set out in *Natural Resources Defense Council*, the discussion of alternatives did not require a "crystal ball" analysis,[97] but rather a reasonable discussion, which, as the court indicated, was provided in the FEIS.[98]

82. *Id.* at 1111.
83. 555 F.2d 817 (D.C. Cir. 1977).
84. *Id.* at 823.
85. *Id.* at 827.
86. 510 F.2d at 799. This would apply as well to any other federal agency involved.
87. 555 F.2d at 829.
88. D.C. Cir. No. 76-2158 at 10. *See also* note 64 *supra*; FEIS at 12.1.
89. *See* note 65 *supra*.
90. *Id.*
91. D.C. Cir. No. 76-2158 at 10.
92. *See* notes 18, 19, and 45. 69 *supra* and accompanying text.
93. D.C. Cir. No. 76-2158 at 13.
94. *Id.* at 14.
95. *See* notes 20, 74-75 *supra* and accompanying text.
96. D.C. Cir. No. 76-2158 at 15.
97. 555 F.2d at 827. *See* text accompanying notes 31 and 32 *supra*.
98. D.C. Cir. No. 76-2158 at 16.

The court, in pointing out that the FEIS discussion of the environmental impact on the Cuna and Choco Indians was one of its most detailed discussions,[99] concluded that, in view of the previous pronouncements of the court on the applicability of NEPA, "because the decisionmaker was presented with the entire range of these interpretations, in sufficient detail to allow him to balance the appropriate environmental factors, we believe NEPA's requirements have been met."[100] The court therefore properly, in light of the interpretative history of NEPA's EIS requirement, vacated the district court's injunction, and permitted the Government to continue construction of the Darien Gap Highway's Panama portion,[101] an action which will surely enhance the position of the United States *vis-à-vis* its relationships with the nations of Latin America and, perhaps, other developing nations.

One interesting and amusing sidelight to the decision is worth noting. Apparently confident that its oral argument had won the hearts and minds of the circuit court judges, the Government prematurely implemented the fruits of its anticipated victory. It included in the United States' 1979 fiscal budget the statement: "Construction (of the Darien Gap Highway) has been delayed for two construction seasons by the courts pending satisfactory completion of certain environmental requirements. *These requirements have been met.*"[102] (court's italics). The court, somewhat disturbed by the Government's anticipatory confidence, closed its opinion by saying,

> "(H)owever, because the Government may be a bit too anxious to complete this project, we remand this case to the district court with the instruction that the Department of Agriculture certification with regard to aftosa control in Colombia be filed with the district court and the appellees prior to the initiation of any construction in that country."[103]

The court stated further:

> The fact that this document [the Budget request] was submitted to Congress on *January 20, 1978,* after oral argument but before final decision in this case, leads us to continue judicial supervision of the project. While we recognize that oversights can occur in an undertaking as vast as preparing a $500 billion budget, we must also recall that vitally important environmental concerns are present in this case.[104]

The Court's Standing Determination

Although no quarrel can be had with the court's finding that appellees had standing to sue with respect to the issues of aftosa control[105] and alter-

99. D.C. Cir. No. 76-2158 at 16. *See also* FEIS at 6-27 to 6-31.

100. D.C. Cir. No. 76-2158 at 16.

101. *Id* at 17.

102. *Id.* at 17. *See* Budget of the United States Government, Fiscal Year 1979, appendix 1037 (1978).

103. D.C. Cir. No. 76-2158 at 17.

104. *Id.* at 17 n.43 (Court's italics).

105. *Id.* at 5. *See also* Brief for the Federal Appellants at 14.

natives to the proposed Highway,[106] strong exception is taken to the court's determination that the appellees be allowed standing to sue with respect to alleged deficiencies in the FEIS discussion of the impacts of secondary development on the Cuna and Choco Indians in the Darien Gap region.[107] The determination that appellees could sue to have rendered deficient that portion of the FEIS dealing with what is purely a domestic Panamanian concern is pregnant with international implications and potential repercussions, and may in fact constitute interference by the court in affairs which, based on the Separation of Powers Doctrine, are soley within the purview of the Executive and Legislative branches,[108] and within the exclusive domestic jurisdiction of Panama.[109] The precedent is clearly a dangerous one, and its possible ramifications will be evaluated below.

In holding that, since appellees had established an "independent basis" for standing to challenge the FEIS, they also had standing to argue the "public interest" in support of their claim that the portion of the FEIS dealing with the Choco and Cuna Indians was inadequate,[110] the court expanded much too far the cited dicta in *Sierra Club v. Morton.*[111] *Sierra Club v. Morton* was a purely domestic case, and before extending its pronouncements beyond domestic borders, the circuit court should first have considered, as "intimated" by appellants,[112] that the applicability of NEPA might not extend to "purely local concerns"[113] of a foreign sovereign nation.

Perhaps a brief discussion of standing, particularly as it applies to the NEPA process, is in order prior to evaluating the potential dangers of the court's decision. The construction of section 102(2)(C) of NEPA has been specific enough to allow it to be the basis of a cause of action, and standing has been liberally granted by the courts.[114] With respect to challenges to federal agency action abroad, standing could be claimed in several ways: (1) Plaintiff could allege an "injury in fact," caused by the federal action

106. *Id.* at 6-9. Section 102(C)(iii) of NEPA provides for the FEIS to contain a detailed statement on alternatives to the proposed action. It thus appears that courts would be rather liberal in allowing standing to challenge inadequacies in discussions of these alternatives.

107. *Id.* at 9.

108. *See* note 58 *supra* and accompanying text.

109. *See* text accompanying notes 113, 150-171 *infra.*

110. D.C. Cir. No. 76-2158 at 6-9.

111. 405 U.S. at 727.

112. D.C. Cir. No. 76-2158 at 6. Supplemental briefs were furnished at the Court's request on the question of the applicability of NEPA to construction in Panama. The Government, although not challenging NEPA's general applicability, intimated (though it should have *asserted*) that the position might not apply to "purely local concerns (Indians and Alternate Routes)."

113. *Id.*

114. *See* notes 58 and 80 *supra* and accompanying text.

abroad;[115] (2) plaintiff could allege a right provided by NEPA to be informed by, and offer comments on, the impact statement required for any federal action, domestic or foreign;[116] or (3) plaintiff, as a foreigner affected by the federal action,[117] could allege an "injury in fact."[118]

The appellees questioning of the FEIS as it applies to the Indian tribes falls along none of these avenues to standing. While it is not disputed that the "use of the term *human* environment in section 102(2)(C) of NEPA reflects an intent to cover environmental impacts beyond U.S. borders,"[119] the question is, *who* can get standing to challenge *which* impacts.

While no case has yet held that an interest in one issue in a case permits a party to litigate all other issues,[120] the court relied on dicta in *Sierra Club v. Morton*,[121] and allowed appellees to argue the "Indians" issue. The requisites for standing to sue — save by the court's analysis and application of *Sierra Club v. Morton* — do not appear to be met here:

> The essence of the standing question, in its constitutional dimension "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[122]

The Supreme Court, in *Warth v. Seldin*, also went on to indicate that even if the plaintiff's injury is shared by a large class of other possible litigants, it must still allege a "distinct and palpable injury to itself."[123] The

115. This was how appellees obtained standing originally in Sierra Club v. Coleman, 405 F. Supp. 61. This ground for standing was not disputed by appellant. *See* United States v. SCRAP, 412 U.S. 669 for a more detailed analysis of this requirement.

116. *See* Brief for Appellees, at 34. Appellees contended that

> [d]efendants' failure to prepare, circulate for comment, make available to the public, and consider an EIS under NEPA concerning the Highway also adversely affects the dissemination of information and educational activities of their organizations.

See also Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

117. *See* note 58 *supra*. *See also* Wilderness Society v. Morton, 463 F.2d 1261 (D.C. Cir. 1972) (Canadian citizen and Canadian environment group allowed to intervene in NEPA action); People of Enewetack v. Laird, 353 F. Supp. 811, 820 n.14. (D. Haw. 1973) (granting standing to nonresident aliens living in U.S. trust territory).

118. It appears that the Cuna and Choco Indians would therefore be the proper parties before the Court challenging deficiencies in the FEIS as it applied to a discussion of the environmental impacts on their tribes.

119. Council on Environmental Quality: Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad, Sept. 24, 1976.

120. Brief for the Federal Appellants at 15.

121. 405 U.S. at 737.

122. Warth v. Seldin, 422 U.S. 489-490, quoting Baker v. Carr, 369 U.S. 186, at 204. *See also* Village of Arlington Heights v. Metropolitan Housing Development Corporation, 97 S. Ct. 555 (1977).

123. 422 U.S. at 501. *See also* United States v. SCRAP, 412 U.S. 669 (1973).

Supreme Court added,[124] and the circuit court relied heavily on this statement:[125]

> But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.[126]

It is submitted that the circuit court's use of this principle to allow the Sierra Club standing to challenge the "Indians" portion of the FEIS was a misapplication of the Supreme Court's intent. Although it can be and has been implied that NEPA was intended by Congress to be applied extraterritorially,[127] it is a long way from that conclusion to holding that a party can, once standing is obtained on an issue as to which that party can allege a specific injury, argue any other issues it wishes to raise whether specifically related to it or not. An illustration employing the case presently under consideration, *Sierra Club v. Adams,* may be useful here in indicating the dangers of the circuit court's reasoning. If the circuit court's findings were altered slightly, it is entirely possible that the court could have found that the FEIS of the Government was inadequate, and therefore not in compliance with the substantive requirements of NEPA, solely on the basis that its discussion of the potential environmental impacts on the Indian tribes was deficient. The Highway construction could then have been enjoined on this ground alone. The potentially dangerous implications with respect to the conduct of American foreign policy in situations of this type should be clear — any organization which could obtain standing to challenge any federal action abroad could allege frivolous deficiencies in a FEIS solely in order to delay or disrupt that action.[128] The Government, in fact, argued to the court that "[t]he plaintiff's only interests in the Indians are that they be studied as long as possible, and that the road be pictured as very damaging to them . . . As far as the Choco Indians are concerned, plaintiff's interest may be opposite to the Tribes."[129]

Furthermore, there is no apparent public interest here for the Sierra Club to champion (except perhaps that of Panamanians and Colom-

124. 422 U.S. at 501.

125. D.C. Cir. No. 76-2158 at 8. The Court here cited a number of older cases to bolster its evaluation of the situation: Scripps Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477 (1940); National Wildlife Federation v. Snow, 561 F.2d 227, 237 n.1 (D.C. Cir. 1976); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 1000-10006. (D.C. Cir. 1966). These cases, though, have not consistently been followed.

126. 422 U.S. at 501. *See also* 405 U.S. at 737; 309 U.S. at 477.

127. *See generally* CEQ Memorandum, *supra* note 119; 74 Mich. L. Rev. 349, *supra* note 58. *See also* 15 I.L.M. 679 (1976); 15 I.L.M. 984 (1976).

128. Since standing to challenge an EIS may be allowed by challenging the alternative's discussion (§ 102(C)(iii) of NEPA) or the dissemination requirements of § 102(C), it would be easy for a plaintiff to then challenge other aspects of the EIS which have absolutely no application to or bearing on that plaintiff.

129. Brief for the Federal Appellants at 15.

bians),[130] and the court's acknowledgement of appellees argument is a fine example of judicial legerdemain — a superficial attempt to find a basis for the Sierra Club's standing to challenge the "Indians" portion of the FEIS. Perhaps the court was "throwing a bone" to the appellees since, on the merits of the case, it found against them. Regardless of the court's motivation in allowing appellees standing to argue the "Indians" issue, the potential effect of the decision, as indicated above,[131] could be devastating.

Prior to advancing other policy arguments cautioning against the court's analysis of the standing requirements, it is worth noting two cases heavily relied upon by appellant in attempting to defuse appellees standing allegations. In *Metcalf v. National Petroleum Council*,[132] the circuit court denied standing to Senator Lee Metcalf of Montana to challenge alleged improper influence of petroleum industry special interests on the National Petroleum Council. The court found that the Senator had alleged no "particular concrete injury" which amounted to "a claim of *specific* present *objective* harm or a threat of *specific* future harm."[133] In its conclusion, the court said:

> The Supreme Court has stated that the standing doctrine "is founded in concern about the proper — and properly limited — role of the courts in a democratic society."[134] The requirements relating to standing have been developed to ensure that a party invoking a federal court's jurisdiction does not do so in a manner inconsistent with the constitution or *sound prudential limitations* . . . Such a role as the "continuing monitors of the wisdom and soundness of Executive action"[135] is clearly inappropriate for the courts.[136]

In *Harrington v. Bush*,[137] the court said that "the proper inquiry is whether the illegality does injury to an interest of the complaining party," and "there is no single test or formula to be derived from the case law to determine if a particular party has standing to sue."[138] In *Harrington v. Bush*, the case most heavily relied upon by appellants in denying appellees standing to sue on the "Indian" question,[139] the District of Columbia Circuit Court indicated that four requirements must be met before allowing a party standing: Injury, interest, causation, and, as enunciated recently by the Supreme Court in *Simon v. Eastern Kentucky Welfare Rights Organization*,[140] a plaintiff must be able to show "an injury that is likely to be redressed by a favorable decision."[141] This is not possible in the situation

130. *See* note 118 *supra*.
131. *See* text accompanying notes 108-113, *supra*.
132. 553 F.2d 176 (D.C. Cir. 1977).
133. 553 F.2d at 183. (Court's italics).
134. *See* 422 U.S. at 498.
135. *See* Laird v. Tatum, 408 U.S. 15 (1972).
136. 553 F.2d at 189-190. (Court's italics).
137. 553 F.2d 190 (D.C. Cir. 1977).
138. *Id.* at 205.
139. Brief for the Federal Appellants at 15.
140. 426 U.S. 26.
141. 426 U.S. at 38.

here under scrutiny. This requirement "insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied."[142] The court said that the requirement of an "injury in fact" was a Constitutional requirement designed to implement in part the Article III limitation on federal judicial power to "cases or controversies."[143]

The circuit court went on to say that "were the rules of standing otherwise, a court either would have to accept the subjective feelings of injury expressed by litigants, or would have to make these judgments itself on a subjective basis,"[144] and indicated that the problems there, as here, were obvious.

Furthermore, the court said, "[j]ust as it is well established that a mere 'interest in a problem' . . . is not sufficient by itself,[145] neither is the mere relevance of a challenged activity to an asserted interest sufficient to invoke the power of the federal judiciary."[146] In view of the circuit court's recent analysis of the standing issue in the above noted cases, it is difficult to comprehend why the court relied on such antiquated cases as it did[147] in allowing appellees standing to sue on the Indian question in the FEIS.

In allowing appellees standing in this regard the court has created, although perhaps unintentionally, the precise situation it cautioned against in *Harrington v. Bush*, when, in answer to its own *quaere* as to the consequences of too lenient standing requirements, it admonished:

> To accept these grounds for standing would in effect allow *any* Congressional suit to challenge Executive action, and an individual legislator would have a roving commission to obtain judicial relief under most circumstances. This would lead inevitably to the intrusion of the courts into the proper affairs of the co-equal branches of government.[148]

The analogies to the case herein being reviewed are readily apparent. Similar to those discussed in *Harrington v. Bush*, challenges by environmental groups of federal agency actions abroad, if allowed even when frivolous simply by being attached to a valid claim for which there is standing, would seriously impair the efforts of Executive agencies, with the aid of Congress, toward the effective implementation of foreign policy decisions.

142. 553 F.2d at 205 n.68, *quoting* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 at 222 (1974).

143. 553 F.2d at 206, *quoting* Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 at 151 (1970).

144. 553 F.2d at 205 n.18.

145. *See* 405 U.S. at 739.

146. 553 F.2d at 209.

147. *See* cases cited in note 125 *supra*.

148. 553 F.2d at 214. What is said here about a Congressional suit and an individual legislator would also apply to an environmental group's suit or an individual environmental group.

If federal agency actions abroad are to be challenged, as has already been conceded that they may justifiably be,[149] they should only be challengable on the grounds that the group or individual challenging them can allege a specific injury caused by the agency action being challenged.

V. THE INTERNATIONAL IMPLICATIONS

An analysis of the documents of such international and regional organizations as the United Nations and the Organization of American States, as well as of the United Nations Law of the Sea Conference's Informal Composite Negotiating Text (ICNT), [150] argues rather cogently on behalf of the above proposition. It has been said by one commentator regarding the extraterritorial application of NEPA that "neither the denial of United States assistance nor the imposition of conditions on assistance would appear to be an infringement upon foreign sovereignty."[151] In view of the pronouncements contained in the documents to be discussed below, it is vigorously submitted that that proposition is untrue. If cultural, economic or political concessions are to be extracted as a *quid pro quo* for United States' foreign assistance, such demands should be made *prior* to the promising of aid, and the appropriation thereof by the Congress, rather than through the courts as was potentially the case in *Sierra Club v. Adams after* the money has been appropriated and is in the process of being spent abroad.

The CEQ has said [152] that "we believe such analysis [NEPA review] can be accomplished without imposing U.S. environmental standards on other countries, and without interfering with the execution of foreign policy."[153] It is again submitted that this analysis is incorrect.

In view of the fundamental restructuring of the global political framework which has been occurring with increasing rapidity since World War II, especially as can be seen in the current United Nations Third Conference on the Law of the Sea, the nations of the earth are currently engaged in developing and delimiting what has been termed the New International Economic Order (NIEO).[154] These alterations of the global framework have been accelerating at a phenomenal pace, as can be seen by evaluating the numerous documents which have emanated from the United Nations and

149. *See* note 80 *supra* and accompanying text.

150. *See* United Nations Third Conference on the Law of the Seas (UNLOS III), Informal Composite Negotiating Text (ICNT), UN Doc A/Conf. 62/WP. 10, *adopted* July 15, 1977.

151. *See* 74 Mich L. Rev. *supra* note 58, at 378.

152. *See* CEQ Memorandum, *supra* note 119.

153. *Id.* at 2.

154. Declaration on the Establishment of a New International Economic Order (NIEO), G.A. Res. 3201 (S-VI), *adopted* May 9, 1974, U.N. Doc. A/Res/3201 (S-VI), *reprinted in* 13 I.L.M. at 715 (1974).

other regional organizations in the past decade,[155] as well as by considering the sheer numerical increase (to over 150) of the nations presently participating in global decisionmaking processes.

A survey of these documents indicates that the conclusions of the CEQ and other commentators on the subject, as well as the "standing" portion of the decision of the circuit court in *Sierra Club v. Adams* as it relates to the "Indians" issue, may well be erroneous, or at least anachronistic, in view of the realities of the NIEO. It would appear from these documents that permitting environmental groups to have standing to challenge issues which arise wholly within the domestic jurisdiction of a foreign sovereign and have no injurious impact on the group alleging standing would, in the view of the developing countries at least, constitute an interference with their sovereign rights.

These international documents are replete with acknowledgements by the developing nations of their perceptions of the shrewdness in the techniques which they feel may be employed by the developed nations in dealing with them. A good policy argument against the type of indirect intervention under scrutiny here is what has been termed "environmental imperialism"[156] that is, "an imposition of our environmental standards" on foreign nations in exchange for United States dollars.[157] If in fact this is to be done by the United States — conditioning foreign aid on particular environmental concessions — it is again submitted that the conditions should be imposed *prior* to the granting of aid, as granted in this case by the Darien Gap Resolution and the Agreements appurtenant thereto.[158] Otherwise, a situation could easily develop where courts not only interfere with the Executive's conduct of foreign policy, but where a court's "mere words could interfere with the sovereignty of a foreign state."[159]

A few selections may serve to illustrate the Third World's concept of the NIEO, and demonstrate its inherent wariness of the developed nations power and methods.

Article 18 of the Charter of the Organization of American States[160] admonishes:

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155. *See generally* ICNT, note 150 *supra*; UN Charter of Economic Rights and Duties of States, *adopted* Jan. 15, 1975, G.A. Res. 3281, U.N. Doc. A/Res/3281 (XXIX), *reprinted in* 14 I.L.M. at 251 (1975); Declaration on the NIEO, note 154 *supra*; Declaration of the United Nations Conference on the Human Environment, (Stockholm Convention), *adopted* June 16, 1972, UN Doc. A/Conf. 48/14, *reprinted in* 11 I.L.M. at 1416 (1972); United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, U.N.G.A. Res. 2625 (XXV), *adopted* Oct. 24, 1970, *reprinted in* UN Monthly Chronicle, November 1970; Charter of the Organization of American States (OAS Charter) (1948) 21 U.S.T. 607, T.I.A.S. No. 6845 (*as amended*, Feb. 27, 1967), Pan American Union, Treaty Series, No. 1B.

156. *See* 74 Mich. L. Rev., *supra* note 58, at 378.

157. *Id.*

158. *See* note 4 *supra*.

159. Thanks must be given to Professor Bernard Oxman of the University of Miami Law School for assistance in the formulation of this concept.

160. *See* OAS Charter, *supra* note 155.

> No State or group of States has the right to intervene, directly or *indirectly*, in the *internal* or external affairs of any other state. The foregoing principle prohibits not only armed force, but also *any other form of interference* or attempted threat against the personality of the State or against its political, economic, and *cultural* elements.[161]

A United Nations Resolution[162] of May 1974 calls for "Extension of active assistance to developing countries by the whole international community, free of any *political* or military conditions."[163] This would seem to apply to allowing NEPA's EIS to be challenged on a "purely local" issue.[164]

The United Nations Charter of Economic Rights and Duties[165] states:

> Every state should cooperate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of states and *free of any conditions derogating from their sovereignty*.[166]

This appears to contemplate the type of activity under consideration here.

Although, of course, the liberal granting of standing to environmental and other groups and individuals to challenge Environmental Impact Statements does not *per se* constitute interference with a foreign nation's sovereignty, a case has herein been made to indicate the delicate nature of the considerations involved in an issue which was readily glossed over by the United States Circuit Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Adams*.

Keeping in mind such declarations as the Stockholm Convention[167] and the Government's concessions to its significance,[168] it would certainly be in the best interests of the United States and its concomitant foreign policy — as well as healthy for its world image — for the Supreme Court[169] to reevaluate the rather liberal standing requirements the District of Columbia Circuit Court has established for challenging the discussions of an environmental — and in the issue at hand, perhaps more of a *cultural* — impact wholly within the domestic jurisdiction of a foreign state, before a flood of litigation befalls them as various philosophically motivated interest groups

161. *Id.* at Art. 18 (emphasis added).
162. *See* note 154 *supra*.
163. *Id.* at 718 (emphasis added).
164. *See* note 112 *supra*.
165. *See* note 155 *supra*.
166. *Id.* at 258 (Art. 17) (emphasis added).
167. *See* Stockholm Convention *supra* note 155.
168. *See* CEQ Memorandum, *supra* note 119, at 2.
169. It is submitted that the Circuit Court should certify to the Supreme Court the question of whether or not an alleged deficiency in an EIS filed pursuant to a federal agency action abroad can be challenged by an individual or an organization which alleges no injury, either direct or indirect, with regard to the particular environmental impact analysis sought to be challenged, simply by appending it to a claim on which the plaintiff can obtain standing to sue.

attempt to subvert or delay United States foreign projects throughout the world. The United States would be far more respected and appreciated in the Third World if it would, as a developed country, follow the proclamation of the Stockholm Declaration and:

> allow less developed countries [in this instance Panama] to direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to close the "*gap*" between themselves and developing countries.[170]

VI. CONCLUSION

Despite the foregoing arguments, on the merits of the case of *Sierra Club v. Adams*, the circuit court rendered a correct decision, and in so doing, enabled the United States to contribute to the closing of the "gap"[171] between itself (a developed country) and Panama (a developing country). In this case, the "gap" being closed is the Darien Gap. Soon it will be possible to take that long awaited drive from Prudhoe Bay to Tierra del Fuego.

170. *See* Stockholm Convention, *supra* note 155, at 716 (emphasis added).
171. *Id.*