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EXTRATERRITORIAL JURISDICTION OF THE PROPOSED FEDERAL WASTE EXPORT CONTROL ACT

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INTRODUCTION

The United States government's sporadic efforts to strengthen solid waste export controls have generated limited results thus far.[1] The Waste Export Control Act (WECA or the bill), introduced by Representatives Michael Synar (D-OK) and Howard Wolpe (D-MI), offers a practical remedy and provides a comprehensive approach to regulating solid waste exports.[2] The current version of WECA has its genesis in legislation of the previous Congress.[3] The current version, like its predecessors, remains before the House Committee on Energy and Com-

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1. *See infra* notes 36-74 and accompanying text (addressing the history of the solid waste export problem in the United States).

On January 13, 1981, a "lame-duck" President Jimmy Carter promulgated Executive Order 12264 under his foreign policy power as provided by article II, section 2 of the Constitution, and under his legislatively granted powers in the Export Administration Act of 1979 (50 U.S.C. §§ 2401-20 (1988)). Exec. Order No. 12,264, 46 Fed. Reg. 4,659 (1981). This order required the Department of State to work with other agencies and officials of the federal government to coordinate export controls "no more restrictive than the controls applicable to domestic commerce and use." *Id.* at 4,662. In contrast, the proposed Waste Export Control Act, seeks to set minimum rather than maximum standards by establishing export controls "no less strict than those which would be required by the Solid Waste Disposal Act if the waste were managed in the United States." WECA, *infra* note 2, at § 2(b). On February 17, 1981, barely a month after it was enacted, President Ronald Reagan revoked Executive Order 12,264 in its entirety "to ensure that the Export Administration Act of 1979 is implemented with the minimum regulatory burden." Exec. Order No. 12,290, 46 Fed. Reg. 12,943 (1981). *See also* Lutz, *The Export of Danger: A View From The Developed World*, 20 N.Y.U. J. INT'L L. & POL'Y 629, 645 (1988) [hereinafter Lutz] (labeling President Carter's executive order as an example of an administrative approach to eliminating the "circle of poison" problem).

2. H.R. 2358, 102d Cong., 1st. Sess. (1991) [hereinafter WECA or the bill]. Reps. Synar and Wolpe introduced WECA along with 22 original co-sponsors. 137 CONG. REC. H3149 (daily ed. May 15, 1991).

3. WECA was originally introduced as H.R. 2525 on May 31, 1989 by Rep. Synar. H.R. 2525, 101st Cong., 1st Sess. (1989). It was reintroduced as H.R. 3736 on November 19, 1989 by Rep. Thomas Luken (D-OH). H.R. 3736, 101st Cong., 1st Sess. (1989) (*reprinted in Resource Conservation and Recovery Act Reauthorization — Part 1: Hearing on H.R. 3736 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 180-202 (1990) [hereinafter *Subcomm. on Trans. and Hazmat*]). *See id.* (statement of Rep. Wolpe) (explaining that H.R. 3736 changed the focus of the regulations in H.R.

merce and the House Committee on Foreign Affairs as part of a larger legislative effort to reauthorize the Resource Conservation and Recovery Act (RCRA).[4]

Unlike previous attempts to control the solid waste export problem,[5] WECA takes a novel unilateral approach in its extraterritorial application of domestic waste disposal standards.[6] The bill provides that the promulgation of international agreements, as well as the granting and revocation of export permits, must comply with standards "no less strict than that which would be required by the Solid Waste Disposal Act if the waste were managed in the United States."[7] In practice, this standard will require the application of United States waste disposal standards beyond American borders.

The application of domestic laws beyond a nation's borders raises the international legal issue of extraterritorial jurisdiction. Under international law, two independent sovereign nations may include any provision in a bilateral agreement that they deem necessary to further their mutual interests, including consent to the other country's laws.[8] Conflict may arise, however, when one sovereign unilaterally extends its jurisdiction to regulate an interest within the territorial borders of another sovereign.[9] The potential conflicts raised by WECA greatly con-

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2525 from the standards of the receiving country to the standards of the receiving facility).

There are no substantive changes from H.R. 3736, except that H.R. 2358 would explicitly implement the Basel Convention. Telephone interview with Kate English, Legislative Assistant to Rep. Wolpe (July 9, 1991). *See infra* note 231 (discussing the Basel Convention).

4. 42 U.S.C. §§ 6901-87 (1988).

5. *See, e.g.* Solid Waste Disposal Act, 42 U.S.C. §§ 6901-87 (1988) (setting forth the guidelines for solid waste disposal).

6. *See* WECA at § 2(b) (stating the Act's purpose is to ensure that solid waste is managed in a manner that protects human health and the environment). *See also*, Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ENVTL. L. REP. 10,160, 10,179-82 (Envtl. L. Inst. April 1989) [hereinafter *Leak in the System*] (outlining other legislative proposals to control the solid waste export problem).

7. WECA at § 12002(b)(1)(C) (international agreements provision). This standard is applied throughout the bill. *Accord id.* at §§ 12003(b)(8) (permit application provision), 12003(f) (permit determination by administrator provision), 12003(h) (permit terms and conditions provision), and 12003(k)(1)(B) (refusal to grant permits provision).

8. *See* Hannum & Lillich, *The Concept of Autonomy In International Law*, 74 AM. J. INT'L L. 858, 874 (1980) (discussing the restrictions on non-sovereign autonomous entities in entering international agreements).

9. SPRINGER, THE INT'L LAW OF POLLUTION: PROTECTING THE GLOBAL ENV'T IN A WORLD OF SOVEREIGN STATES (1983). *See* D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY, (1982) [hereinafter ROSENTHAL & KNIGHTON] (exploring the extraterritorial jurisdiction given United States antitrust laws and how it affects multinational

cern both international shippers of solid waste as well as other nations with their own waste disposal regulations. For example, a receiving sovereign may refuse to sign a bilateral agreement with the United States, as the bill requires, and insist on importing hazardous wastes.[10] Alter-

corporations); Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 258 (1980) (noting that international backlash can result from applying United States law extraterritorially).

10. WECA at § 12002(b). This provision requires that international agreements to export hazardous waste must include:

> (b) INTERNATIONAL AGREEMENTS.—(1) Any international agreement pursuant to which solid waste covered by this subtitle may be exported from the United States to another country shall at least include each of the following:
>
> (A) A provision for notifying the government of the receiving country of exports of such solid waste.
>
> (B) A provision for obtaining the consent of the government of the receiving country to accept any solid waste shipment.
>
> (C) A provision for the United States and the receiving country to exchange information on the manner in which any such solid waste exported from the United States will be managed in the receiving country, including provisions for the exchange of information with respect to the specific treatment, storage, and disposal facilities used for such purposes in the receiving country. Such provisions shall include mechanisms to provide the United States with the information necessary to ensure that transportation, treatment, storage, and disposal of the solid waste will be conducted in a manner which is protective of human health and the environment and which is no less strict than that which would be required by this Act if the solid waste were managed in the United States. Such mechanisms at a minimum, shall provide a means for the United States to gain access to treatment, storage, or disposal facilities used for the management of such solid waste in the receiving country in the event the Administrator determines such access is necessary to fulfill the Administrator's responsibilities under this subtitle.
>
> (D) A provision for cooperation between the United States and the receiving country on compliance with and enforcement of the agreement.
>
> (E) A provision for biennial review by the United States and the receiving country of the effectiveness of the agreement.
>
> (F) A provision for review and revision or suspension of the agreement if either party concludes that solid waste covered by this subtitle is being transported, treated, stored or disposed of in a manner that is not in accordance with the terms of the agreement.
>
> (G) A provision which prohibits further transport of such solid waste from the country of destination without the written consent of the parties of the agreement.
>
> (2) Notwithstanding the provisions of paragraph (1), any bilateral agreement concerning shipments of hazardous waste that has been entered into by the United States and that is in force on the date of enactment of the Waste Export Control Act and which remains in force shall be deemed to meet the requirements of this subsection for a period of two years following enactment of this section. Any such agreement shall comply fully with the provisions of paragraph (1) after the expiration of such two-year period.
>
> (3) The decision of the United States not to enter into an international agreement shall not be reviewable in any court.

Id.

natively, a state may prohibit American regulators from inspecting their disposal facilities, as the bill also requires.[11]

This Comment focuses on the extraterritorial application of federal environmental regulations under WECA and the relevant jurisdictional issues. Part I assesses the scope of the problem of solid waste exports from the United States into developing countries.[12] Part II reviews the history and present legal status of federal laws, as well as regulations applied extraterritorially. Part III analyzes whether WECA will improperly extend the United States Environmental Protection Agency's (EPA) regulatory authority extraterritorially and whether the international community will accept WECA. Part IV examines how WECA may be applied once it becomes law. Finally, Part V concludes that international diplomacy will become more important to WECA's success than the strength of the EPA's new enforcement powers.

I. BACKGROUND — THE SOLID WASTE EXPORT PROBLEM

A. PAST ATROCITIES

Three highly publicized incidents, in which unscrupulous entrepreneurs exported hazardous materials into the Caribbean and western Africa, strongly influenced the 100th Congress and each succeeding

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11. WECA at § 12003. This provision states that:

> [t]he Administrator shall make an inspection of a facility of any permittee and of any facility used for treatment, storage, or disposal of any waste subject to a permit under this subtitle whenever the Administrator determines that an inspection is necessary to ensure continuing compliance with this subtitle.

Id. See WECA at § 12002(b)(C) (requiring that bilateral agreements entered into by the United States contain a provision allowing the United States access to treatment, storage, or disposal facilities located in the receiving country used for the management of the exported wastes).

12. *See generally* Comment, *Exporting Hazardous Industries: Should American Standards Apply?*, 20 N.Y.U. J. INT'L & POL'Y 777, 785 (1988) [hereinafter *Exporting Hazardous Industries*] (discussing a developing country's disadvantages regarding importation of hazardous wastes). Developing countries typically are in a poor position to weigh potential benefits against potential harms resulting from their involvement in the international waste trade, unless prior informed consent includes full disclosure. *Id.* at 785.

The United Nations defines "developed economies" as those that include North America, Southern and Western Europe (excluding Cyprus, Malta and Yugoslavia), Australia, Japan, New Zealand and South Africa. *Transnational Corps, in World Development: Third Survey*, U.N. Centre on Transnational Corps., at xvii, U.N. Doc. ST/CTC/46 (1983). It defines "developing countries" as those that include Latin America and the Caribbean, Africa (excluding South Africa), Asia (excluding Japan), Cyprus, Malta and Yugoslavia. *Id.*

Congress.[13] The first incident involved Lindaco, an American corporation formed four days prior to submitting to the EPA a notification of intent to export.[14] The hazardous waste disposal contemplated, although illegal if done domestically, was not prohibited by waste export laws.[15] The three West African countries contacted refused the hazardous waste and it was never exported.[16] This incident, however, made clear that if a receiving nation gives its written consent, informed or otherwise,[17] to receive the hazardous waste, the EPA and the Department of State have no authority to intervene or to halt the shipment.[18]

The second incident involved the barge *Khian Sea* which crisscrossed the globe for twenty-seven months with 15,000 tons of non-

13. *See International Export of U.S. Waste: Hearing Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 35, 287 (1988) [hereinafter *Subcomm. on Environment, Energy, and Natural Resources*] (discussing the impact of the export of hazardous waste from the United States into foreign countries); Tiemann, *Waste Exports: U.S. and International Efforts to Control Transboundary Movement*, CRS ISSUE BRIEF, IB89123 (updated Sept. 5, 1990), at CRS-1 [hereinafter Tiemann] (stating that recent events have given a sense of urgency to policy makers); Tiemann, *Waste Exports: U.S. and International Efforts to Control Transboundary Movement*, CRS ISSUE BRIEF, IB89123 (updated March 21, 1991), at CRS-2-3 [hereinafter Tiemann Update] (tracing heightened congressional interest back to several highly publicized events in 1986).

14. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 276 (statement of Sheldon Meyers, Acting Associate Administrator for International Activities, Environmental Protection Agency). The obligation to notify the EPA of intent to export waste was first legislated in 1976. *See* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-87 (1988) (requiring exporters to notify the EPA of their intent to export hazardous waste). The requirement that exporters of hazardous materials notify the EPA of their intent to export sixty days in advance, codified at 40 C.F.R. § 262.53 (1990), was promulgated in 1980 with other EPA export regulations. Hackett, *An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 5 AM. U.J. INT'L L. & POL'Y 291, 300 n.43 (1990) [hereinafter Hackett].

15. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 283 (statement of Sheldon Meyers).

16. *Id.* at 276-77 (statement of Sheldon Meyers). The three countries were Guinea, Congo, and Guinea-Bissau. *Id.*

17. 42 U.S.C § 6938 (1988) requires that the receiving country provide written consent to the EPA before the EPA issues an export license. *See* Hackett, *supra* note 14, at 300 (pointing out that Congress amended this provision of RCRA in 1984).

18. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 283 (statement of Sheldon Meyers). In response to a hypothetical posed by Rep. Synar (D-OK) in which the export was clearly unacceptable under United States standards, Meyers stated that the EPA is:

> constrained by the terms of the law. If the notification comes in, it's correctly filled out, we're obligated to cable it through the State Department to the government on the receiving end and if after they're willing to accept it, we have no legal mechanism to say that it should not go out to the country.

Id.

hazardous incinerator ash[19] from the city of Philadelphia.[20] Eleven different countries rejected the *Khian Sea* and its cargo.[21] When the ship reached the Indian Ocean, its cargo suddenly "disappeared."[22] Along the way, the *Khian Sea's* captain disposed of 2,000 tons of the ash on a Haitian beach, creating an environmental hazard.[23] Observers assume that the remainder was disposed of somewhere in the Indian Ocean.[24] Philadelphia disavowed any responsibility or control over these events, claiming that under the terms of the disposal contract the responsibility for ultimate disposal lay with the shipper.[25] Furthermore, the EPA found itself powerless to determine the final disposition of the ash be-

19. *See* Lief, Barnes, and Zulueta, *Dirty Job, Sweet Profits*, U.S. NEWS & WORLD REPORTS, Nov. 21, 1988, at 54, 56 [hereinafter U.S. NEWS & WORLD REPORTS] (explaining that although the EPA classifies incinerator ash as "non-hazardous," the ash often contains lead, mercury, and dangerous toxins). *See also Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 35 (statement of Rep. Synar) (noting that even though the EPA classifies the *Khian Sea's* ash as non-hazardous under RCRA, the ash "still requires care in handling"). For a legal analysis of this distinction between hazardous and non-hazardous waste in the context of exports, see Comment, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM. U.L. REV. 885, 890-92 (1991) (cautioning that not all non-hazardous waste is hazard-free); Gilmore, *The Export of Nonhazardous Waste*, 19 ENVTL. L. 879 (1989) [hereinafter Gilmore] (discussing the problems and solutions associated with non-hazardous waste); Lutz, *supra* note 1, at 635-38 (1988) (explaining the difficulties regulators encounter from an unstable definition of "hazardous technologies").

20. *See* U.S. NEWS & WORLD REPORTS, *supra* note 19, at 54-56 (recounting the events surrounding the *Khian Sea* incident).

21. *Id.* at 56. The *Khian Sea* tried to get its cargo accepted by authorities in the Bahamas, Honduras, Puerto Rico, Antilles, Dominican Republic, Guinea-Bissau, Jamaica, Panama, Caymen Islands, Haiti, and The Cape Verde Islands before reaching its final destination in the Indian Ocean. *Id. See Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 35 (statement of Rep. Synar) (reporting the factual basis underlying the *Khian Sea* incident).

22. *See Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 34-270 (containing the entire record, including embassy communications, chemical analysis of the ash dumped in Haiti, and the *Khian Sea's* manifests, as well as testimony from representatives of the EPA and the City of Philadelphia); Gilmore, *supra* note 19, at 879-83 (detailing events from what the author terms the Philadelphia Experience); U.S. NEWS & WORLD REPORTS, *supra* note 19, at 54 (examining the lucrative economics behind *Khian Sea* schemes in which "waste brokers still find ways to clean up").

23. U.S. NEWS & WORLD REPORTS, *supra* note 19, at 56. Some analysts estimate that as much as 4,500 tons were dumped near the port of Gonaives, Haiti. Gilmore, *supra* note 19, at 880. As of June 1991, the ash remains on the same Haitian beach frustrating local officials who still demand its removal by the United States. Press Conference Statement by Representative Ed Towns (D-NY) in Rayburn House Office Bldg. 2 (June 6, 1991) [hereinafter Rep. Towns].

24. U.S. NEWS & WORLD REPORTS, *supra* note 19, at 56.

25. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 37 (statement of Bruce Gledhill, Deputy Streets Commissioner, Department of Streets, City of Philadelphia, PA). Rep. John Conyers (D-MI), however, was disturbed that the "City of Brotherly Love" felt no obligation whatsoever for the ash dumped on the shores of Haiti. *Id.* at 255.

cause the *Khian Sea's* operators, Coastal Carriers Corporation (Coastal), ignored the Agency's requests for information.[26]

The third incident also involved an incinerator ash shipment from Philadelphia. Under contract with the Norwegian shipping company, A.S. Bulkhandling, Philadelphia planned to ship 250,000 tons of incinerator ash to Panama for use as a roadbed in an inland wetlands region.[27] Prior to beginning deliveries, Philadelphia attempted to verify the Panamanian municipality's consent.[28] After 30,000 tons had been transferred to the shipper, however, higher Panamanian officials denied consent and blocked the shipment.[29] A.S. Bulkhandling loaded half of this ash onto the *S.S. Bark* and exported it to an island quarry in Guinea off the West African coast.[30] After the *S.S. Bark* dumped the ash, however, the Guinea government demanded the ash's immediate removal.[31] Only the intervention of the Norwegian government prevented an international incident.[32]

While these events reflect the impotence of United States export regulations on solid waste, they were unique only in the amount of public-

26. *Id.* at 243. During congressional hearings before the House Subcommittee on Environment, Energy, and Natural Resources, Adam Kushner, EPA Region III Office of the Regional Counsel, admitted that the EPA had no "legal handle" to compel Coastal to provide the information. *Id.*

27. Gilmore, *supra* note 19, at 881-82. The conditions of the disposal would not have been allowed within the United States. *See Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 244 (listing exchange between Rep. William Clinger (R-PA) and Bruce Gledhill, Deputy Streets Commissioner, Department of Streets, City of Philadelphia, PA). In fact, when asked by A.S. Bulkhandling to issue a statement regarding the non-hazardous nature of the ash, the EPA refused, stating that the ash may present a hazard once in the ecological system. *Id.*

28. *See Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 37 (statement of Bruce Gledhill) (explaining that Gledhill accompanied a contingent of contractor representatives to Panama to verify that the contractor had the authority represented in the contract).

29. Gilmore, *supra* note 19, at 882.

30. *Id.* The other half was sent to a qualified landfill in Ohio for disposal. *Id.*

31. *Id.*; Klein, *No Dumping Zone: Africa and Greenpeace Fight U.S. Waste Dumping*, THE NATIONAL ALLIANCE, July 7, 1988. While Guinea originally consented to the dumping, the entrance of foreign waste into the country violated a two-year prohibition against such activity. CENTER OF INVESTIGATIVE REPORTING & B. MOYERS, GLOBAL DUMPING GROUND: THE INTERNATIONAL TRAFFIC IN HAZARDOUS WASTE, at 26-27 [hereinafter GLOBAL DUMPING GROUND].

32. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 27 (explaining how Guinean officials detained the Norwegian Consul-General until A.S. Bulkhandling arranged for the removal of the ash to the United States). *See also* Comment, *Issues and Policy Considerations Regarding Hazardous Waste Exports*, 11 HOUS. J. INT'L L. 373, 376 (1989) (relating how Nigeria detained an Italian ship until the Italian government agreed to remove highly toxic drums abandoned by Italian businessmen).

ity they received.[33] The United States has an ongoing problem controlling such exports.[34] Its current hazardous waste export provisions are fundamentally too weak to act as a deterrent.[35]

B. PRESENT REGULATIONS CONTROLLING THE EXPORTATION OF HAZARDOUS MATERIALS FROM THE UNITED STATES

1. The Current Regulatory Regime

Congress authorized the EPA to regulate the export of hazardous waste in RCRA.[36] Although commentators initially heralded RCRA's "cradle to grave" approach to waste management as comprehensive,[37] Congress soon realized that international borders could frustrate RCRA's extensive documentation and tracking requirements.[38] Consequently, in 1984, Congress passed the Hazardous and Solid Waste Amendments (HSWA) to RCRA, which included specific requirements for waste exports to foreign countries.[39]

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33. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 37 (statement of Bruce Gledhill, Deputy Street Commissioner, Department of Streets, City of Philadelphia, PA); *Leak in the System*, *supra* note 6, at 10,179.

34. *See* Hackett, *supra* note 14, at 294 (remarking that in 1988 the United States accounted for 265 of the more than 300 million metric tons of worldwide hazardous waste and that Western Europe contributed 35 million metric tons in 1988). *Id.*

35. *See* Handley, *Exports of Waste from the United States to Canada: The How and Why*, 20 ENVTL. L. REP. 10,061 (Envtl. L. Inst. Feb. 1990) [hereinafter *Exports to Canada*] (detailing illegal and legal solid waste export scams); Tiemann & Fletcher, *International Environment: Overview of Major Issues*, CRS ISSUE BRIEF IB89057, Sept. 6, 1990, at CRS-6 [hereinafter Tiemann & Fletcher] (outlining the gaps in the current program).

36. 42 U.S.C. § 6938 (1988); 40 C.F.R. §§ 262-263 (1990); *see* Hackett, *supra* note 14, at 298-302 (outlining the EPA's statutory authority and regulations promulgated in accordance with this authority).

37. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 9 (stating that under a "cradle to grave" system financial liability for any future damage from the waste remains with the producer). The EPA's manifest system tracks waste from generation to disposal through the filing of uniform documents with the government. Hackett, *supra* note 14, at 299-300.

38. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 9 (noting that "[t]his legislation provided incentives for sending waste abroad, giving manufacturers a way to dodge their new open-ended liability").

39. 42 U.S.C. § 6938 (1988); Hackett, *supra* note 14, at 300. The regulations promulgated in accordance with these amendments require that the receiving country give written consent to the dumping. 40 C.F.R. §§ 260-262, 271 (1990). *See generally* Comment, *International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference?*, 5 AM. U. J. INT'L L. & POL'Y 393, 397-401 (1990) (presenting a brief overview of HSWA); Leak in the System, *supra* note 6 at 10173-75 (presenting a detailed summary of United States law on hazardous waste exports).

Under HSWA, a shipper must notify the EPA sixty days in advance of its intent to export.[40] Subsequently, the EPA and the Department of State must contact the intended receiving country and request written approval to export the waste.[41] Upon receipt of written consent, the EPA approves the shipment subject to any restraints imposed by the receiving country[42] and RCRA manifest requirements.[43] For effective enforcement, these regulations depend on the shipper's truthful record keeping to determine whether the waste arrived at its proper destination and in the proper disposal facility.[44] If the EPA discovers either that the waste failed to arrive at the designated facility or the waste arrived with some discrepancy, the EPA requires the shipper to file a series of reports explaining its actions.[45] Nonetheless, the EPA lacks the authority to block a shipment once the receiving country has consented — even when the EPA knows that the receiving country is technologically incapable of properly handling the waste.[46]

Shippers may also export hazardous waste pursuant to a bilateral agreement between the United States and the receiving country.[47] The exporters need not obtain written consent from the receiving country

40. 40 C.F.R. § 262.53 (1990). HSWA requires the shipper to provide minimal information to the EPA. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 14 (statement of John Martin, Inspector General of EPA). Martin explained "[e]xporters did not provide adequate descriptions, because EPA's hazardous waste export regulation is unclear on how much information the exporter has to provide in such a notification." *Id.*

41. 40 C.F.R. § 262.53(e) (1990). *See* Comment, *Prior Informed Consent: An Emerging Compromise for Hazardous Exports*, 21 CORNELL INT'L L. J. 365 (1988) (advocating that the current system of notification and consent be improved by also providing receiving countries with detailed information on the nature of the solid waste and its proper disposal needs).

42. 40 C.F.R. § 262.53(f) (1990).

43. *See* Hackett, *supra* note 14, at 301 (listing the RCRA's manifest requirements); 40 C.F.R. § 262.54 (1990) (articulating exceptions to general manifest requirements of RCRA found at 40 C.F.R. § 262.2-.23).

44. 40 C.F.R. §§ 262.54(f), 262.55 (1990). The *Khian Sea's* manifests described its cargo as "non-hazardous, non-toxic, non-flammable incinerator ash" on August 29, 1986, as "general cargo" on March 18, 1987, as "soil fertilizer ash" on October 26, 1987, and as "bulk construction material" on December 21, 1987. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 101-16.

45. *See* 40 C.F.R. §§ 262.54-.55 (1990) (requiring the shipper to file an exception report with the EPA); 40 C.F.R. § 262.57 (1990) (requiring the shipper to retain all records relating to the export); 40 C.F.R. § 262.56 (1990) (requiring the shipper to file an annual report identifying the total amount of waste it handled in that year). *See also* Hackett, *supra* note 14, at 301 n.63 (outlining other requirements of the annual report filing).

46. GLOBAL DUMPING GROUND, *supra* note 31, at 12. *See* Rep. Towns, *supra* note 23, at 3 (stating that, "[u]nder our current law, if a government says it will accept the cargo, then even if the EPA suspects that the importing country is unable to handle the waste, the EPA cannot intervene").

47. 42 U.S.C. § 6928 (1988); Hackett, *supra* note 14, at 301-02.

because the consent is expressly granted in the bilateral agreement.[48] The United States has negotiated such an agreement with Canada,[49] the largest importer of American solid waste,[50] and intends to negotiate more in the future.[51]

2. *Current Export Controls Leave The EPA Impotent*

After an empty *Khian Sea* appeared in the Indian Ocean, the EPA inquired into the ultimate disposition of the missing incinerator ash.[52] The EPA's inability to compel Coastal to supply that information exposed RCRA's weakness: the EPA's responsibility and authority under RCRA terminate at the American border.[53]

The Department of Justice often uses other regulatory schemes to prosecute international "midnight dumpers"[54] in an effort to compensate for these weak environmental laws.[55] For example, Jack and Char-

48. Hackett, *supra* note 14, at 302. The receiving country may, of course, expressly deny its consent to a particular shipment and negate the automatic provisions of the bilateral agreement with regard to that shipment. *Id.*

49. Agreement Concerning Transboundary Movements of Hazardous Waste, United States-Canada, *opened for signature* Oct. 28, 1986, *reprinted in* 26 I.L.M. 598 (1987). *See Hearings Before the Subcomm. on Human Rights and International Organizations, and the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 101st Cong., 1st Sess. 22-24 (1989) [hereinafter *Subcomms. on Human Rights, and International Policy*] (letter from D.H. Burney, Canadian Ambassador to the United States, to Rep. Sam Gejdenson (D-Conn.)) (stating Canada's support for WECA in general, but also expressing reservations about applying United States standards abroad, and the potential for United States officials "inadvertently" infringing on the receiving country's sovereignty). *But see* Agreement on the Transboundary Shipments of Hazardous Waste and Hazardous Substances, United States-Mexico, *opened for signature* Nov. 12, 1986, *reprinted in* 26 I.L.M. 25 (1987) (requiring express consent by the Mexican government for each shipment of hazardous waste); *Leak in the System*, *supra* note 6, at 10173 n.36 (pointing out that the Mexican treaty still requires written consent).

This Comment does not address bilateral agreements that expressly grant the United States government extraterritorial control over waste exports. For an analysis of bilateral agreements, see *Exporting Hazardous Industries*, *supra* note 12, at 789 (advocating international agreements as the most effective means of controlling hazardous waste exports to developing countries).

50. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 92 (noting that Canada imports about 85 percent of all exported American waste); *Exports to Canada*, *supra* note 35, at 10,061 (same). Canadian government officials estimate that the United States exports nearly 150,000 tons of toxic waste to Canada each year. *Id.* at 93.

51. Hackett, *supra* note 14, at 302.

52. *See supra*, notes 19-26 and accompanying text (relating the adventures of the *Khian Sea*).

53. GLOBAL DUMPING GROUND, *supra* note 31, at 40.

54. *See id.* at 2 (describing a "midnight dumper" as one who illegally dumps hazardous chemicals in remote areas under cover of night).

55. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 330 (statement of William Nitze, Deputy Assistant Secretary, U.S. Department of

lie Colbert had a multi-million dollar scam in which they charged many of the largest American corporations, and even the federal government, to remove hazardous materials.[56] The Colberts then sold these same waste products to developing countries for a large profit, often under false pretenses as to the exact nature of the chemicals.[57] The United States discovered this fraud when the Colberts shipped some highly toxic chemicals under the guise of dry-cleaning fluid to a Zimbabwean company that used funds from the United States Agency for International Development (USAID) for its purchase.[58] These "pioneers" of the waste trade were convicted of twenty-seven counts of conspiracy, wire fraud, mail fraud, making false statements to the government, making a false claim against the government, and one count each of obstructing justice.[59] Significantly, if the Colberts had not inadvertently received USAID funds, the federal government may have never discovered their operation.[60]

The first successful felony indictments under RCRA's export provisions were delivered in May 1990 against a Southern Californian waste broker and a Mexican truck driver.[61] The defendants transported hazardous waste through American customs and abandoned the cargo in Tijuana, Mexico.[62] The success of these convictions led to the creation of a new interagency Task Force on Environmental Prosecutions.[63] The United States-Mexico border has been described as a steady stream of hazardous waste.[64] Unfortunately, the conviction of one trucker in a transportation corridor which annually handles 130,000 trucks at a single crossing and a domestic interagency task force will not make any detectable impact on this illegal waste export market.[65]

State); *Frontline Special Report: Global Dumping Ground*, at 6 (PBS television broadcast, Oct. 2, 1990) (transcript available from Center for Investigative Reporting, Inc., 530 Howard St., San Francisco, CA 94105-3007) (statement by Bill Moyers).

56. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 34-49 (narrating events surrounding the conviction of Jack and Charlie Colbert for illegal acts involving the export of hazardous waste materials).

57. *Id.* at 35.

58. *Id.* at 42-43.

59. *Id.* at 49.

60. *Id.*

61. *See id.* at 51-56 (describing the convictions of Raymond Franco and David Torres for exporting hazardous waste across the United States-Mexico border). *See also Leak in the System*, *supra* note 6, at 10,174 (reporting successful guilty pleas under RCRA Section 3017, 42 U.S.C. § 6938 (1988), in November 1986).

62. GLOBAL DUMPING GROUND, *supra* note 31, at 54.

63. *Id.* at 56. This new task force was comprised of the Federal Bureau of Investigations, the EPA, the United States Attorney's Office, the California Highway Patrol, and Californian health department investigators. *Id.*

64. *Id.* at 57-58.

65. *Id.* at 51, 56-57.

3. *Current Export Controls Fail to Regulate Non-Hazardous Waste*

Federal agencies and legislators focus on hazardous waste because of its higher visibility and more dangerous effects.[66] In their concern over hazardous wastes, however, they overlook the dangers of non-hazardous wastes. As a result, the existing waste export regulations do not cover non-hazardous waste shipments.[67] For example, because the EPA classified the incinerator ash exported by the *Khian Sea* and the *S.S. Bark* as technically non-hazardous, the EPA did not require the shippers to meet the requirements of HSWA.[68] Subsequent laboratory analysis of the ash, however, revealed the presence of many toxins that pose long-term environmental threats.[69] At higher levels, the same toxins may cause cancer, learning disabilities, and congenital defects.[70]

Many domestic and international organizations and governments disagree with the EPA's distinction between hazardous and non-hazardous waste materials.[71] Furthermore, waste materials, which the EPA classi-

66. Gilmore, *supra* note 19, at 883.

67. *Exports to Canada*, *supra* note 35, at 10,061-62, 10,064; Tiemann, *supra* note 13, at CRS-1. The EPA distinguished between hazardous and non-hazardous wastes according to guidelines provided by Congress in RCRA. *See* 42 U.S.C. §§ 6903(5), 6903(25), 6921 (1988) (defining hazardous wastes).

See also GLOBAL DUMPING GROUND, *supra* note 31, at 104 (noting that a "great deal" of hazardous waste is unregulated). When the EPA's distinction is set aside, the true amount of dangerous waste generated by the United States each year may constitute billions of tons. *Id.*

68. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 46-47 (statement of Stephen Wassersug, Director, Hazardous Waste Management Division of the EPA, Region III). Nevertheless, the EPA recommended that workers handling the ash use protective gear. *Id.* at 53-54, 68.

69. *See id.* at 123 (reporting the toxins found in the incinerator ash); *Exports to Canada*, *supra* note 35, at 10,064 (noting the "significant threat" incinerator ash poses to the environment, and observing that there is scarce information on it due to its exemption from many regulations).

The Pan American Health Organization (PAHO), the regional office of the World Health Organization, analyzed the ash dumped in Haiti and found it to contain mineral silicates, aluminum, iron, calcium, magnesium, dioxin, and other toxins. *Subcomm. on Environment, Energy, and Natural Resources*, *supra* note 13, at 123-24. The EPA verified these results when it analyzed ash taken from the *Khian Sea's* hold during a brief return to the port of Philadelphia. *Id.* at 123. Greenpeace also analyzed the ash dumped in Haiti and found the ash to contain heavy concentrations of metal. *Id.* at 224. Although each study verified the existence of toxins, the PAHO and EPA concluded that there existed no imminent threat to human health or to the environment. *Id.* at 124, 135. The organizations also concluded that the ash's proximity to a wetlands presented a potential long-term threat to such a sensitive ecosystem. *Id.* at 124. *See also id.* at 121-240 (reprinting all of the laboratory results and conclusions).

In another incident, 15,000 tons of a substance improperly labeled as raw material for bricks was dumped on the Guinea island of Kassu. Hackett, *supra* note 14, at 297. After the death of nearby vegetation, the substance was found to be incinerator ash. *Id.*

70. Gilmore, *supra* note 19, at 885.

71. *Id.* at 890.

fies as non-hazardous, may become hazardous when a receiving country lacks the proper treatment, storage, and disposal facilities.[72] Under the right circumstances, almost all waste can be considered dangerous to some extent;[73] therefore, many developing countries have begun to eliminate the distinction and treat all waste imports alike.[74] WECA adopts this non-distinction approach.

C. THE ECONOMIC PRESSURE TO INCREASE SOLID WASTE EXPORTS IS BUILDING

In 1988, the world generated 300 million metric tons of hazardous waste.[75] The United States accounted for an estimated 265 million metric tons, and Western European countries accounted for thirty-five million metric tons.[76] In 1990, the United States singly increased this volume to 500 million metric tons.[77] As the amount of waste accumulates, solid waste exports also increase.[78] During the first half of 1988, the EPA received 522 notices of intent to export — a significant increase compared to the twelve notices that the EPA received in 1980.[79]

1. Decreasing Space Available For Domestic Disposal

A renewed environmental awareness has sensitized many Americans to the presence of toxic or solid waste disposal facilities located in their

72. *Id.* at 890, 892; Hazardous Waste Management System, Exports of Hazardous Waste, 51 Fed. Reg. 26,664, 28,670-1 (1986) (Preamble).

73. Gilmore, *supra* note 19, at 889.

74. *Id.* at 885 n.29. As of July 1988, sixteen African countries have made it a criminal offense to import any foreign waste. *Id.* In Nigeria, it is a capital offense. *Id.* at 886; Hackett, *supra* note 14, at 297.

75. Hackett, *supra* note 14, at 294.

76. *Id. See Subcomms. on Human Rights, and International Policy, supra* note 49, at 2 (statement of Rep. Yatron) (stating that "[t]he United States produces some 90 percent of all hazardous wastes generated worldwide").

77. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 103-04 (noting that experts cannot gauge the exact amount of waste the United States generates and exports).

78. *See Subcomm. on Environment, Energy, and Natural Resources, supra* note 13, at 271 (statement of Sheldon Meyers) (describing the growth of the export waste problem); GLOBAL DUMPING GROUND, *supra* note 31, at 52 (quoting American law enforcement officials along the United States-Mexico border as stating that the border traffic in toxic waste is on the rise).

Hundreds of waste export calamities have occurred in recent years as developed countries "have found themselves overrun with their own garbage." *Id.* at 2. In 1988, the EPA's inspector general issued a report which suggested that the waste export problem is out of control. *Id.* at 11.

79. *Subcomm. on Environment, Energy, and Natural Resources, supra* note 13, at 271 (statement of Sheldon Meyers).

communities.[80] Communities in which NIMBY (not-in-my-backyard) advocates enjoy political support have prevented new and legitimate facilities from opening.[81] Consequently, the amount of space available for waste disposal has grown at a slow pace.[82]

Furthermore, as the United States generates record amounts of solid waste, existing landfills and disposal facilities are reaching their maximum capacities and closing.[83] By 1993, 2,000 of the 6,000 domestic landfills, which currently accept eighty percent of our solid waste, will be closed.[84] As available space diminishes, some states soon face the threat of inadequate facilities for waste disposal.[85] As a result, these states have enacted protective legislation which prohibits other states from using their facilities.[86] New Jersey legislators passed such a law when they realized that the New Jersey landfill space would be exhausted within a few years.[87] The Supreme Court, however, has held these laws unconstitutional under the Commerce Clause as an impermissible economic protection.[88]

2. *Increasing Costs Of Domestic Disposal*

The renewed environmental awareness also encourages policy makers to strengthen existing controls and standards that govern domestic waste disposal.[89] Stronger waste disposal regulations, however, increase

80. *See* Hackett, *supra* note 14, at 294 (noting that public concern for the environment sparked an increase in national environmental legislation).

81. *Id.* at 295. *See* Gilmore, *supra* note 19, at 884 n.25 (tracing the NIMBY movement to the public backlash that grew out of the Love Canal incident).

82. Hackett, *supra* note 14, at 294.

83. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 52 (attributing the dwindling number of landfills as one reason why shippers illegally export more toxic chemicals).

84. Hackett, *supra* note 14, at 294 n.14.

85. *See infra* notes 87 to 88 and accompanying text (noting protective legislation enacted in New Jersey and Alabama, which the courts subsequently declared unconstitutional).

86. *Id.*

87. *See* Waste Control Act, N.J. Stat. Ann. § 13:1I-1 (West Supp. 1990) (prohibiting other states from using landfills located in New Jersey).

88. Philadelphia v. New Jersey, 437 U.S. 617, 623-5 (1978). In 1989, amidst concern that the state of Alabama was becoming the "hazardous waste dumping ground of the nation," the Alabama legislature enacted a similar law. Lyons, *The Garbage War Between the States*, FORBES, Oct. 15, 1990, at 92 (quoting Alabama Governor Guy Hunt). The Eleventh Circuit, relying primarily on the ruling in *Philadelphia*, declared this law violative of the commerce clause. National Solid Waste Management Ass'n. v. Alabama, 910 F.2d 713, 718-22 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2800 (1991).

89. Tiemann, *supra* note 13, at CRS-1.

disposal costs.[90] For example, in 1980, disposing one ton of hazardous waste in the United States cost approximately fifteen dollars, as compared to $250 in 1989.[91] In Africa, meanwhile, the current cost of disposal for the same ton of hazardous waste is an estimated forty dollars.[92] This stark distinction in costs reflects the economic incentives on the demand side that strongly favor exporting America's waste to developing countries whose weaker or non-existing environmental controls keep disposal costs low.[93]

3. *Developing Countries Have An Urgent Need For Foreign Currency*

The economic incentives on the supply side also strongly favor waste exports.[94] With limited resources for economic development, the potential to earn large amounts of money influences developing countries to overlook the potential health and environmental risks.[95] The financial rewards are so enticing that these countries cannot forego this trade.[96] During the past decade, this incentive has encouraged less developed countries in Africa and Asia, developed countries like Canada and England, as well as poorer European countries like Romania and the former East Germany to supplement their budgets by importing

90. *Id. See Exports to Canada*, *supra* note 35, at 10,063 (attributing rising costs to liabilities generators face in domestic disposal).

91. Tiemann, *supra* note 13, at CRS-2. *See* GLOBAL DUMPING GROUND, *supra* note 31, at 52 (blaming costs as high as $1,000 per barrel for disposal of some chemicals as a cause of the rising illegal export of toxic chemicals to Mexico); Hackett, *supra* note 14, at 294 (quoting domestic disposal costs as high as $2,000 per ton). The economic incentive exists even for the export of regular municipal garbage. Domestic disposal can cost a city between $80 to $126. Gilmore, *supra* note 19, at 884 n.24.

92. Tiemann, *supra* note 13, at CRS-2.

93. *Id.* at CRS-2. *See* Tiemann & Fletcher, *supra* note 35, at CRS-6 (explaining the economic incentives to export hazardous wastes to developing countries). *See also* Lutz, *supra* note 1, at 637 (viewing such an increase in hazardous industrial waste shipments as a growing "time-bomb" with unforeseeable environmental impacts).

94. *See* Tiemann, *supra* note 13, at CRS-2 (acknowledging that some countries are willing recipients of waste).

95. *See Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 1 (statement of Rep. Yatron) (describing an increasing trend for developing countries, desperate for foreign exchange, to accept toxic wastes absent the capacity and resources to properly dispose of the materials).

96. *See* Hackett, *supra* note 14, at 295-96 (noting that a waste importing country earns substantial revenue). For example, Guinea-Bissau hoped to earn $120 million a year for storing industrial waste from other countries, nearly equal its annual gross national product. *Id.* at 295. Public protest caused the government to cancel the deal. *Id.* at 296. *See also* Gilmore, *supra* note 19, at 884 (attributing the willingness to accept waste imports for cash to the large debt burdens many developing countries must bear).

wastes.[97] The need for foreign investment may also encourage these countries to intentionally weaken environmental regulations in their waste disposal industry.[98]

II. EXTRATERRITORIAL JURISDICTION OF EXISTING UNITED STATES LAWS AND REGULATIONS

The need to expand the EPA's enforcement powers overseas raises the issue of extraterritorial jurisdiction. The United States has long applied its regulatory powers extraterritorially.[99] In fact, the United States is one of the few countries that extend its regulatory powers beyond its borders.[100]

Commentators advance several theories to explain this development. One theory contends that because the United States legal system permits courts to obtain jurisdiction over persons of another state under long-arm statutes,[101] federal regulators, accustomed to this legal tool, instinctively attempt to apply the theory internationally.[102] Another theory proposes that the separation of powers doctrine has influenced the United States notion of sovereignty to develop as a relative concept rather than as an absolute one.[103] In any case, the fundamental application of extraterritorial jurisdiction depends on the judicially created Effects Doctrine.

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97. GLOBAL DUMPING GROUND, *supra* note 31, at 10. In the next decade, concern will continue for many of the new governments in Eastern Europe, which may be inclined to allow waste to enter their borders to boost their devastated economies. *Id.*

98. *See* Lutz, *supra* note 1, at 672 (estimating that 40% of all developing countries have *no* laws that regulate hazardous imports).

99. *Exporting Hazardous Industries*, *supra* note 12, at 786.

100. *See* ROSENTHAL & KNIGHTON, *supra*, note 9, at 3 (noting that from 1905 to 1955, nearly every developed nation opposed the United States extraterritorial extension of its antitrust laws). Traditionally, nations based economic regulatory jurisdiction on the principle of territoriality. *Id.* Territoriality has generally been defined as the principle where "a nation may generally regulate the conduct of foreigners only within its territorial boundaries." *Id. See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 comment c (1987) [hereinafter RESTATEMENT 3D] (discussing the principles of territoriality in domestic and international law). The territoriality principle is the most common basis for jurisdiction in the international community. *Id.*

Recently other authorities like the European Community and the Federal Republic of Germany have begun to apply their antitrust laws extraterritorially. ROSENTHAL & KNIGHTON, at 3-4.

101. *See* J.H. FRIEDENTHAL, M.K. KUNE, A. MILLER, CIVIL PROCEDURE, §§ 3.12-3.13 (1985) (explaining the source and application of long-arm jurisdiction).

102. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 14-15 (extrapolating that it is a "short step" for American regulators, accustomed to extending their powers beyond state borders, to also extend their powers beyond international borders).

103. *Id.* at 14.

A. THE EFFECTS DOCTRINE

The Effects Doctrine adheres to the principle that the law of a nation can no longer stop at the water's edge.[104] The Effects Doctrine permits United States courts and regulatory agencies to: (1) issue legal demands on foreign nationals,[105] (2) hold foreign nationals liable for legal actions in their home countries,[106] and (3) punish foreign nationals for prior misconduct and future non-compliance with United States laws, regulations, and court orders.[107] The Effects Doctrine demonstrates relatively little regard for foreign legal standards or foreign governmental policies as long as the regulated act in question produces an intended adverse effect in the United States.[108]

1. Goals Of The Effects Doctrine

The Effects Doctrine's underlying rationale is analogous to the long-arm jurisdiction doctrine.[109] Where long-arm jurisdiction depends on minimum contacts for success, the Effects Doctrine depends on the effects of a person's actions.[110] In many cases, the same indicia that qualify as minimum contacts also establishes an appropriate effect.[111] The Effects Doctrine, however, requires a less stringent balancing test[112] than the long-arm jurisdiction's minimal contacts test.[113] The more

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104. *Id.* at 42.
105. *Id.* at 12.
106. *Id.*
107. *Id.*
108. *Id.* at 12. Judge Learned Hand, in an antitrust case, articulated the Effects Doctrine as follows: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." United States v. Aluminum Co. [ALCOA] of America, 148 F.2d 416, 443 (2d Cir. 1945).

The Effects Doctrine's underlying rationale has failed to restrict the extraterritorial application of United States law because courts impute intent from conduct and other circumstantial evidence. ROSENTHAL & KNIGHTON, *supra* note 10, at 9.

109. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 14-15 (discussing United States legal basis for applying its laws extraterritorially).
110. *Id.*
111. *Id.*
112. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613-14 (9th Cir. 1976) (articulating the need to balance international comity and fairness against the interests of the United States in exerting jurisdiction extraterritorially). *See also* RESTATEMENT 3d, *supra* note 100, § 401 comment c (differentiating subject matter jurisdiction which defines jurisdiction for constitutional purposes based on a particular link, such as minimum contacts, from jurisdiction to prescribe a transnational activity which defines jurisdiction based on a concept of reasonableness as determined by balancing a number of factors).
113. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (enunciating that where a Missouri company has "systematic and continuous" contacts within the state of Washington, the Due Process Clause of the fourteenth amendment and its goal

rigid minimum contacts test of *in personam* jurisdiction has often resulted in American courts failing to find foreign corporations under their jurisdiction.[114] In comparison, the same slight contact within a territory that creates an effect satisfying the balancing of interests of the Effects Doctrine may not reach the threshold necessary to qualify as a minimal contact. Therefore, application of the Effects Doctrine can potentially expand federal regulators' authority.[115] Consequently, foreign nationals frequently challenge the Effects Doctrine's results as constituting an arbitrary abuse of United States regulatory power.[116]

Also similar to long-arm jurisdiction, extraterritorial jurisdiction seeks to prevent "forum shopping" for foreign jurisdictions that do not bar activities considered illegal in the United States.[117] Furthermore, extraterritorial jurisdiction permits a country to punish individuals for

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of fairness do not prevent a Washington court from having *in personam* jurisdiction over that company). *Accord* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987) (rejecting *in personam* jurisdiction over a Japanese company by a California court as an unreasonable and unfair violation of the Due Process Clause of the fourteenth amendment, where the burden placed on the foreign company was great and its only contact with the American forum was its injection of a product into the international stream of commerce); Helicopteros Nacionales De Columbia, S.A. v. Hall, 466 U.S. 408 (1984) (defining contacts of a "continuous and systematic" nature with the Texas forum, which the Due Process Clause of the fourteenth amendment and *International Shoe* require, as being more than the mere visit of the foreign company's chief executive officer and the presence of a New York bank account).

114. *Compare Asahi Metals*, 480 U.S. at 113-16 (disallowing *in personam* jurisdiction over a Japanese company cross-claimed in a California product liability suit), *and Helicopteros Nacionales*, 466 U.S. at 413-18 (disallowing *in personam* jurisdiction over a Colombian company sued in a Texas wrongful death suit), *with* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (finding jurisdiction over a Luxembourg company to enjoin it from a hostile take over of a British company with 2.5% of its stock owned by American investors constituting a "substantial effect" within the United States).

115. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 32-33 (characterizing the many federal agencies with potential extraterritorial powers as "semi-independent" and increasingly beyond the control or influence of the State Department or the President of the United States).

116. *See id.* at 14-15, 26-28 (outlining foreign criticism of the extraterritorial application of United States laws).

117. *See id.* at 4 (acknowledging that strict territoriality can make it more difficult for a nation to regulate foreign conduct impacting its interests).

Territoriality, the antithesis of extraterritoriality, can often lead to unfair results, as Rosenthal and Knighton note:

> The territoriality principle permits evasion by those so inclined. Illegal conduct aimed into the territory from outside, especially by foreigners, may be difficult to detect and deal with, for authorities whose information-gathering and enforcement practices are territorially limited. Territoriality favors unscrupulous multinationals. They can 'shop' for a place to do business to evade the territorial enforcement that their domestic competitors must accept.

Id. at 37.

causing real injuries within another country's territory.[118] The usual targets of an extraterritorial application of United States law are individuals who gain an unfair advantage from their position in an offshore business haven.[119] In sum, the primary goal of extraterritorial jurisdiction is to reach these "offshore bandits" and preserve the scope and usefulness of the statute's overall scheme.

2. *Major Criticisms Of The Effects Doctrine*

Foreign governments criticize the Effects Doctrine, claiming that it permits the United States to trample their sovereign integrity.[120] They perceive the United States' extraterritorial application of its laws as an unwelcome intrusion.[121] Foreign nationals who deliberately refrain from conducting business in the United States are especially disturbed when American courts hold them liable for their actions outside the United States.[122] These criticisms naturally derive from their stricter adherence to the principle of territorial jurisdiction — the conceptual antithesis of extraterritorial jurisdiction.

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118. *See Consolidated Gold*, 871 F.2d at 262 (settling a civil antitrust suit brought by a British company against a Luxembourg company where the "substantial effect" for purposes of jurisdiction was the transmittal of documents by third parties to American investors holding 2.5% of the British company's stock). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (denying a foreign national fourth amendment protection against an unreasonable search by United States Drug Enforcement Agency officers in Mexico where the foreign citizen had no previous significant voluntary connections to the United States prior to his deportation and, yet, the United States prosecuted him as a drug smuggler under United States law).

119. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 35 (listing the various contexts in which the United States applies its laws extraterritorially). *See e.g.*, *Consolidated Gold*, 871 F.2d at 262 (enjoining a Luxembourg company from hostilely taking over a British company where the Luxembourg company "had taken whatever steps it could" to avoid contacts with the United States that would have subjected it to its laws); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 991 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (implying that the seller of common stock should have known that some of its misleading prospectuses would have been sent to the United States even though the prospectuses explicitly stated that the shares were not being offered in the United States); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 113 n.8 (1969) (dissolving a Canadian cartel of American subsidiaries where their actions were a clear violation of United States antitrust laws).

120. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 6, 15 (viewing extraterritorial jurisdiction as a direct challenge and threat to the sovereignty of other countries).

121. *See* RESTATEMENT 3D, *supra* note 100, at 236 (noting that the United States' attempts to restrain foreign subsidiaries of corporations based in the United States often strains relations with other countries).

122. ROSENTHAL & KNIGHTON, *supra* note 9, at 28. In theory, if every country enforced its laws extraterritorially, chaos would result since any person's action would likely violate another country's laws. *See id.* at 21 (suggesting that extraterritorial jurisdiction should be employed with a "moderating sensitivity" to a foreign sovereign's concerns).

B. RESTATEMENT OF UNITED STATES FOREIGN RELATIONS LAW

The Restatement of the Foreign Relations Law of the United States, Third Edition (Restatement 3d), has adopted the Effects Doctrine in section 402(1)(c).[123] Restatement 3d recognizes the uncontroversial use of the Effects Doctrine to justify extraterritorial proscription of such acts as murder, libel, or product liability.[124] The Restatement acknowledges, however, the controversy in using the Effects Doctrine as justification for extraterritorial economic regulation.[125] Restatement 3d Section 403 applies a balancing test based on principles of comity to resolve conflicts.[126] It suggests eight non-exclusive factors to be balanced in reaching a determination of reasonableness.[127] Although such

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123. RESTATEMENT 3D, *supra* note 100, at § 402(1)(c). The full text of Section 402 reads as follows:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to
> (1)(a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. at § 402. *See* Comment, *Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L. J. 127, 138-41 (1988) [hereinafter *Third Restatement*] (tracing the origin of the Effects Doctrine back to United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)).

124. RESTATEMENT 3D, *supra* note 100, at § 402 comment d; *Third Restatement, supra* note 123, at 134.

125. RESTATEMENT 3D, *supra* note 100, at § 402 comment d.

126. *Third Restatement, supra* note 123, at 135-36.

127. RESTATEMENT 3D, *supra* note 100, at § 403(2). The balancing requires evaluation of all relevant factors, including, where appropriate:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;

a unilateral balancing has been criticized, United States courts have cited section 402(1)(c) to support using the Effects Doctrine in economic settings.[128] The extraterritorial application of antitrust laws represents the most developed application of the Effects Doctrine.

C. EXTRATERRITORIAL JURISDICTION OF UNITED STATES ANTITRUST LAWS

The development of a strong antitrust policy has influenced United States courts to extraterritorially extend their jurisdiction to adjudicate antitrust cases. They have not, however, always adhered to this view of jurisdiction. In *American Banana Co. v. United Fruit Co.*,[129] Justice Oliver Wendell Holmes refused to extraterritorially apply the Sherman Antitrust Act.[130] Justice Holmes concluded that the determination of whether an act is lawful or unlawful depended upon the law of the country where the act was done.[131] To hold otherwise, he reasoned, would be unjust, an interference with the authority of another sovereign, and contrary to the comity of nations.[132] He also denied jurisdiction based on the Act of State Doctrine which prohibits United States courts from reviewing a foreign government's acts within its own territory.[133] A mere two years after *American Banana*, however, the Su-

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(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id.

128. *See Third Restatement*, *supra* note 123, at 137 (pointing out that while restatements are not binding sources of law, they are often consulted by United States courts). *See e.g. Consolidated Gold*, 871 F.2d at 262; Laker Airways v. Sabena, Belgium World Airlines, 731 F.2d 909, 921-22 (D.C. Cir. 1984).

129. 213 U.S. 347 (1909). The American Banana Company brought a civil antitrust suit against the United Fruit Company alleging that United Fruit's actions and influence resulted in American Banana's assets being taken over by the Costa Rican military and subsequently sold to United Fruit with the help of the Costa Rican courts. *Id.* at 354-55. The court saw the military action as a manifestation of the Costa Rican government rather than of the powerful United Fruit Company. *Id.* at 357-58.

130. 15 U.S.C. §§ 1-31 (1988).

131. *American Banana*, 213 U.S. at 356. Justice Holmes summarized this view of jurisdiction when he stated that "[a]ll legislation is *prima facie* territorial." *Id.* at 357.

132. *Id.* at 356.

133. *Id.* at 358. *See* Note, *Environmental Tectonics v. W.S. Kirkpatrick and the Act of State Doctrine: An Elusive Standard*, 5 AM. U.J. INT'L L. & POL'Y 133, 135-49 (1989) (providing a detailed overview of the Act of State Doctrine).

The Foreign Sovereign Immunities Act of 1976 (FSIA) codifies the principle of immunized state action. 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1988 and Supp. 1991). Both the FSIA and the Act of State Doctrine protect foreign government officials acting in their official capacity. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (granting protection under the FSIA against adjudication in the United States for the bombing and destruction of a neutral Liberian

preme Court began to reject a strict territorial approach to jurisdiction and moved towards adopting a legal approach based on extraterritoriality.[134] In 1927, the Supreme Court implicitly reversed *American Banana* in *United States v. Sisal Sales Corp.*[135] The Court held that United States antitrust laws applied to the actions of a domestic corporation taken within the United States, Mexico, and elsewhere even though the success of the illegal monopoly depended upon favorable Mexican laws and actions by the Mexican government.[136] By focusing on the actions of the corporation and its "forbidden results within the United States" the court avoided having to apply the Act of State Doctrine to the actions and laws of the Mexican government.[137] This ruling sparked fifty years of cases in which American courts extended United States laws extraterritorially with minimal regard for other sovereigns' laws or legal integrity.[138]

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ship by the Argentine Air Force in international waters). United States courts, however, refuse to apply these defenses to the foreign government's commercial acts. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 33-34 (explaining how even foreign governments may be subject to the jurisdiction of an American court if their activity was found to be commercial, regardless of possible political purposes behind the activity); *see also*, Gregorian v. Izuestia, 871 F.2d 1515, 1523 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989) (denying a Soviet newspaper protection of the FSIA in a libel action brought by an American stock broker); International Assoc. of Machinists v. Organization of Petroleum Exporting Countries [OPEC], 649 F.2d 1354, 1358-61 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (denying extraterritorial jurisdiction over OPEC based on the inappropriateness of the judiciary in a foreign policy determination normally left to the executive branch, *i.e.*, the Act of State Doctrine).

134. *See* United States v. American Tobacco Co., 221 U.S. 106 (1911) (rejecting plaintiff's argument that the Sherman Antitrust Act was inapplicable to a British tobacco company).

135. 274 U.S. 268 (1927). *See* DeArellano v. Weinberger, 745 F.2d 1500, 1543 n.185 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985) (discrediting and distinguishing *American Banana* on the grounds that the military incursion complained of was by the United States military, not a foreign sovereign's as in *American Banana*); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1181 (E.D. Pa. 1980), *aff'd in relevant part sub nom.*, In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 319 (3d Cir. 1983) (qualifying *American Banana* as "so eroded by subsequent case law as to have been effectively limited to its specific factual pattern"); Shenefield, *Thoughts on Extraterritorial Application of The United States Antitrust Laws*, 52 FORDHAM L. REV. 350, 361 (1983) (tracing the erosion of *American Banana* over a thirty-six year period ending with ALCOA). *See also*, Mannington Mills, Inc. v. Cogoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979) (detailing the judicial history subsequent to *American Banana* where American courts have actively applied their laws extraterritorially); United States v. Noriega, 746 F. Supp. 1506, 1512-13 (S.D. Fla. 1990) (summarizing over 186 years of applying United States laws extraterritorially under the Effects Doctrine in criminal contexts).

136. *Sisal*, 274 U.S. at 276.

137. *Id.*

138. *See e.g.*, *Zenith Radio*, 395 U.S. at 113-32 (awarding the civil antitrust plaintiff treble damages despite the Canadian government's encouragement to form an illegal patent pool, and the Canadian courts' willingness to enforce patent infringements

In 1976, the Ninth Circuit broke this trend towards expanding jurisdiction in *Timberlane Lumber Co. v. Bank of America.*[139] The Ninth Circuit initiated a degree of judicial restraint by applying a balancing test to the Effects Doctrine.[140] The circuit court recognized that, similar to the Act of State Doctrine, situations existed in which the judiciary should consider the potential foreign policy implications of its actions.[141] Thus, in addition to considering whether the defendant's actions substantially effected United States commerce and whether those actions violated United States law, the Ninth Circuit also considered whether, as a matter of international comity and fairness, courts should extraterritorially apply United States law.[142] The Third Circuit in *Mannington Mills, Inc. v. Congelum Corp.*[143] adopted and expanded the Ninth Circuit's balancing test to include consideration of the consequences to the foreign national.[144]

By applying a balancing test to the Effects Doctrine, courts gain a higher degree of discretion. As a result, subsequent courts have not given the elements of the balancing test delineated in *Timberlane* and *Mannington Mills* equal weight. For example, in *In re Aircrash in Bali, Indonesia*, the Ninth Circuit held that a previous multilateral

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brought by members of the illegal pool); Schoenbaum v. Firstbrook, 405 F.2d 200, 208-09 (2d Cir.), *aff'd in relevant part*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom.*, Manley v. Schoenbaum, 395 U.S. 906 (1969) (allowing the Securities and Exchange Commission to regulate insider trading by directors of a foreign corporation who conducted isolated foreign transactions of registered stock and traded on the American Stock Exchange); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 704-08 (1962) (holding American defendants liable for antitrust conspiracy even though its success depended upon the actions of the agent of the Canadian government acting in accordance with Canadian law); United States v. Watchmakers of Switzerland Information Center, Inc., 133 F. Supp. 40 (S.D.N.Y. 1955) (holding that an Act of State Doctrine defense would succeed only if an explicit Swiss law compelled the foreign parties to engage in export restrictions illegal under United States law).

139. 549 F.2d 597 (9th Cir. 1976).

140. *Id.* at 613. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 26 (applauding *Timberlane* as one of the few times in this century that an American court considered the possibility of accommodating a foreign sovereign's interests).

141. *Timberlane*, 549 F.2d at 613.

142. *Id.* The factors the court said should be balanced against the United States' interest in regulating the activity are: (1) the degree of conflict with foreign law or policy; (2) the nationality of the parties; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States compared with the effects abroad; (5) the existence of intent to harm or affect American commerce and its foreseeability; and (6) the relative importance of conduct within the United States to the violations charged as compared with the conduct abroad. *Id.* at 614.

143. 595 F.2d 1287 (3d Cir. 1979).

144. *Id.* at 1297-98. *See supra* note 139 and accompanying text (listing the *Timberlane* balancing test).

treaty, which specifically addresses the adjudicated issue, is irrelevant.[145] The Second Circuit in *Bersch v. Drexel Firestone, Inc.*, freely implied intent despite obvious actions by the defendant to the contrary.[146] The District of Columbia Circuit in *Laker Airways v. Sabena, Belgium World Airlines* permitted a domestic antitrust case to go forward despite parallel proceedings in a British court.[147] Each of these holdings are contrary to the elements of the *Timberlane-Mannington Mills* balancing test, but nevertheless supportable due to the discretion courts have in balancing the different elements. The application of the Effects Doctrine, therefore, remains at the mercy of a court's discretion.[148]

D. EXTRATERRITORIAL JURISDICTION OF UNITED STATES ENVIRONMENTAL LAWS

In contrast to the extraterritorial application of antitrust law, American courts have been less willing to use their discretion to apply environmental protection laws beyond the United States border. The judicial discretion inherent in the Effects Doctrine permits antitrust and environmental laws to be applied differently. An analysis of three environmental protection laws reveals that the courts have often required environmental laws to satisfy the *Foley* Doctrine which creates a presumption against extraterritorial application of United States laws.[149] This presumption is overcome by showing clear evidence of congres-

145. 684 F.2d 1301, 1305 (1982) (holding that the government unreasonably impaired an individual's constitutional right to recover property damages in a state tort action by signing a multinational treaty that limits airline liability).

146. 519 F.2d at 991. In *Bersch*, the court held that the seller of common stock should have known that some of its misleading prospectuses would have been sent to the United States even though the prospectuses explicitly stated that the shares were not being offered in the United States. *Id.*

See ROSENTHAL & KNIGHTON, *supra* note 9, at 12 (depicting the ease with which American courts have implied intent).

147. *Laker Airways*, 731 F.2d at 950. In this case Justice Wilkey concluded that international law and comity allow American courts to have extraterritorial jurisdiction and issue injunctions free from foreign interference. *Id.* at 950-51.

148. Other countries' courts also exercise discretion in deciding cases based on comity. For example, in litigation involving United States and French law, a French court demanded that a United States subsidiary, which faced conflicting requirements under both laws, to fulfill its contract obligations even though these obligations contravened United States foreign policy. *See* Judgment of May 22, 1965, cour d'Appel, Paris [1965] D.S. Jur. 147, *reprinted in* 5 I.L.M. 476 (1966) (holding that Freuhauf-France, the French subsidiary of the American multinational corporation, must fulfill its contract obligations with Automobiles Berliet, S.A. to sell assemblies that would ultimately be sold to the Peoples Republic of China against the orders of the United States government).

149. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

sional intent that a law have an extraterritorial application.[150] Analysis of antitrust laws is devoid of this extra hurdle.[151]

1. *The Marine Mammal Protection Act*

In *United States v. Mitchell*,[152] an American citizen, who worked for a Bahamian company that captured and exported atlantic bottlenose dolphins to England, was convicted on twenty-three counts under the Marine Mammal Protection Act (MMPA).[153] The Bahamian government had issued the company a permit that legitimized such business under Bahamian law.[154] In reversing the indictments, the Fifth Circuit failed to find sufficient evidence that Congress intended the MMPA to apply extraterritorially.[155] The Fifth Circuit ruled in this manner despite the fact that United States laws illegalized Mitchell's act in the United States,[156] and the federal government clearly possesses the authority to control its nationals' conduct.[157]

The court in *Mitchell* examined the nature of the MMPA and determined that limiting the MMPA to the strict territorial jurisdiction of the United States would not greatly curtail its scope or usefulness.[158] The court also believed that this restricted application would not immunize "offshore bandits" from prosecution.[159] Furthermore, the court considered the Bahamian government's sovereign interest in controlling its natural resources, *i.e.* marine mammals.[160] Finally, the court recognized the Bahamian government's sovereign right to strike a balance

150. *Id.*

151. *See* Turley, *"When In Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 634-38 (1990) (stating that while American courts properly focus on the territorial question in market cases, *i.e.* antitrust and securities, they focus on the clearly expressed intent of Congress question in nonmarket cases, *i.e.* environmental, thereby creating disparate results for extraterritoriality). *See also* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 672-73 (S.D. N.Y. 1991) (denying RCRA's citizen suit provisions extraterritorial application after finding the legislative history and plain meaning of the statute void of congressional intent overcoming the *Foley* Doctrine presumption).

152. 553 F.2d 996, 997-99 (5th Cir. 1977).

153. 16 U.S.C. §§ 1361-1406 (1988).

154. *Mitchell*, 553 F.2d at 997-99.

155. *Id.* at 998.

156. *Id.* at 1002-05.

157. *Id.* at 1001 (quoting Blackmer v. United States, 284 U.S. 421 (1932), and RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965)).

158. *Id.* at 1003.

159. *Id.*

160. *Id.* at 1002.

between conservation and exploitation that substantially differs from the balance struck by the United States Congress.[161]

2. *The National Environmental Policy Act*

In *Greenpeace U.S.A. v. Stone*,[162] Greenpeace[163] attempted to compel the United States Department of Defense to fulfill its obligations under the National Environmental Policy Act (NEPA)[164] within both the territory of Germany and on international waters. NEPA requires the federal government to prepare environmental impact studies (EIS) for major federal actions "affecting the quality of the human environment."[165] The United States Army removed chemical weapons from German bases for storage and destruction at Johnson Atoll in the central Pacific Ocean.[166] Although the responsible entities prepared an EIS for the Johnson Atoll facilities and a Global Commons Environmental Assessment for the chemical weapons' transoceanic transport, no EIS was prepared for the chemical weapons' movement within Germany.[167] The Federal District Court for Hawaii balanced the interests of the United States in expanding jurisdiction overseas against the interests of comity and fairness, and held that an extraterritorial application of NEPA would disrespect German sovereignty because the United States Army worked with the German government and the German government approved the operation as not injurious to the German environment.[168] The court reasoned that ruling on the merits would require it to second guess the President and the German government.[169] The court limited its holding, however, to situations in which the executive, under his foreign policy powers, initiates a major federal

161. *Id.*

162. 748 F.Supp. 749 (D. Haw. 1990), *appeal dismissed*, 924 F.2d 175 (9th Cir. 1991).

163. *See* Gifford, *Inside the Environmental Groups*, OUTSIDE, Sept. 1990, at 73 (describing the plaintiff, Greenpeace U.S.A., as both a giant public interest group, comprised of 2.3 million members, and a multinational public relations firm that focuses on removing nuclear weapons from ships, and banning CFC's and toxins).

164. 42 U.S.C. §§ 4321-61 (1988).

165. 42 U.S.C. § 4332(2)(C).

166. *Greenpeace*, 748 F.Supp. at 752. Johnson Atoll is an unincorporated United States territory in the central Pacific Ocean which contains the Department of Defense's Chemical Weapons Disposal System. *Id.* at 752-53.

167. *Id.* at 753-54.

168. *Id.* at 760.

169. *Id.* at 759-60. Since a West German citizen group had challenged the operation in the German judicial system, the United States District Court for the District of Hawaii would also have had to review the wisdom of the West German court in denying its own citizens the very injunctive relief Greenpeace sought. *Id.* at 760.

action in conjunction with another country.[170] The court suggested, meanwhile, that an extraterritorial EIS may be required when neither the federal agency nor the foreign country involved performs an environmental assessment.[171]

The District of Columbia Circuit has also interpreted NEPA as unilaterally inapplicable to a foreign territory. In *Natural Resources Defense Counsel (NRDC) v. Nuclear Reg. Comm'n.*,[172] the District of Columbia Circuit acknowledged the potential for American "regulatory coercion" where export licenses were conditioned on health, safety and environmental standards, which the United States sought to apply extraterritorially.[173] The court concluded that NEPA did not apply extraterritorially and therefore, the Nuclear Regulatory Commission was not required to prepare a site-specific EIS for an American-made nuclear reactor located in the Philippines.[174] Similar to the antitrust cases,[175] the court's analysis included a balancing of the national interests of each country.[176] Unlike the court in *Greenpeace*, the *NRDC* court had no guidance from the legislative history of NEPA.[177] The *NRDC* court indicated its willingness to defer to congressional judgment if Congress had stated whether NEPA should have a unilateral extraterritorial application.[178]

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170. *Id.* at 761.

171. *Id.* The court also based its decision on the *Foley* Doctrine. *Id.* at 758-59.

172. 647 F.2d 1345, 1366 (D.C. Cir. 1981).

173. *Id.* at 1356-57.

174. *Id.* at 1366.

175. *See Mannington Mills*, 595 F.2d at 1297-98 (applying a balancing test which weighed United States interests against the foreign sovereign's interests); *Timberlane*, 549 F.2d at 614 (applying a balancing test that related to United States foreign policy); *supra* notes 129-148 and accompanying text (discussing case law that considered the extraterritorial application of United States antitrust laws).

176. *NRDC*, 647 F.2d at 1357. The court per Judge Wilkey said, "[w]e do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours." *Id.*

177. *Compare Greenpeace*, 748 F.Supp. at 759 (noting that NEPA was intended to be applied in a manner consistent with United States foreign policy), *with NRDC*, 647 F.2d at 1367 (noting that congressional intent to apply NEPA extraterritorially in a unilateral manner is obscure).

178. *NRDC*, 647 F.2d at 1357. The NRDC court stated that the lack of effect in the United States or the lack of involvement by a United States national would restrict this deference. *Id.* Judge Wilkey stated:

> But whatever the wisdom of restraining the extraterritorial grasp of this country in order to align ourselves with principles of international law, it would shrink before an unequivocal mandate from Congress. Where a statute directs an agency of the United States to consider foreign environmental impacts no court of the United States will contravene the will of Congress. The only exception would be if the legislature were wholly without jurisdiction to prescribe the relevant conduct: this would occur only if that conduct occurred outside the territory

3. The Endangered Species Act

Congress explicitly intended for the Endangered Species Act (ESA)[179] to apply extraterritorially. The United States District Court for the District of Minnesota, in *Defenders of the Wildlife v. Hodel*,[180] reached this conclusion based on the plain meaning of the statute.[181] Unlike the court in *Mitchell*, which found the MMPA's language vague and all-inclusive, the *Wildlife* court found the ESA's language specific in designating which portions of the law applied extraterritorially.[182]

The Eighth Circuit recently affirmed the district court's ruling.[183] The court refused to defer to the Secretary of Interior's interpretation of the ESA in light of the explicit congressional intent.[184] The Secretary opposed the ESA's extraterritorial application because of the potential for interference with foreign nations' sovereignty and interference with foreign relations.[185] The Eighth Circuit rejected the Secretary's argument on several grounds. First, a foreign government could apply for the ESA's exemption provision.[186] Second, Congress aimed the ESA at governmental actions rather than acts of foreign sovereigns.[187] And third, Congress rather than the courts should balance the foreign policy issues against the concerns for wildlife.[188]

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of the United States, had — or was intended to have — no effects within the United States, or involved no conduct of nationals of the United States.

Id. (footnotes omitted).

179. 16 U.S.C. §§ 1531-1543 (1988); 50 C.F.R. § 402 (1990).

180. Defenders of Wildlife v. Hodel, 707 F. Supp. 1082 (D. Minn. 1989), *aff'd sub nom.*, Defenders of Wildlife, Friends of Animals v. Lujan, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S.Ct. 2008 (1991) (holding that under the statutory language Congress intended to provide the ESA a worldwide application). *See* Comment, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 444-49 (1991) (reading the *Wildlife* case narrowly as applying only to actions of the United States government taken abroad).

181. *Id.* at 1084-86.

182. *Id.* at 1084-85. The court bolstered this conclusion by reference to a 1978 House conference report that endorsed the Department of Interior's global approach. *Id.* at 1085-86. The court interpreted the report's language as a congressional "'stamp of approval' of existing law and regulations governing section 7." *Id.* at 1086.

183. Defenders of Wildlife, Friends of Animals v. Lujan, 911 F.2d 117 (8th Cir. 1990).

184. *Id.* at 122-25. *See* Comment, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 SANTA CLARA L. REV. 171, 198-202 (1989) (examining ESA and its amendments, and concluding that "section 7 does not draw geographical boundaries").

185. *Wildlife*, 911 F.2d at 124-25.

186. *Id.* at 125.

187. *Id.*

188. *Id.*

As with the application of antitrust laws overseas, Congress made clear its intent that ESA be applied extraterritorially thereby protecting these statutes from an attack under the *Foley* Doctrine. The proposed Waste Export Control Act overcomes this judicial presumption as the bill's legislative record and plain meaning clearly indicate a strong congressional intent to regulate waste extraterritorially.[189] Before receiving full extraterritorial application, however, a statute must still fulfill the Effect Doctrine's requirements.

III. ANALYSIS OF THE WASTE EXPORT CONTROL ACT

A. WECA Substantially Strengthens The EPA's Control Over Waste Exports

WECA mandates EPA oversight for almost all solid waste exports[190] and provides for oversight of the waste during both transport and disposal.[191] Congress requires the executive branch to promulgate explicitly detailed international agreements, which incorporate WECA's provisions.[192] WECA establishes a standard for disposing American waste

189. *See* WECA at § 2(b)(1)(C) (requiring the implementation of bilateral agreements allowing the United States access to treatment, storage, or disposal facilities used in a receiving country).

190. WECA at § 12001(a)(1). WECA incorporates the definition of "solid waste" used in Section 1004(27) of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6903(27) (1988) (under this definition, " 'solid waste' means any garbage. . ."). WECA at § 12001(a)(1) WECA exempts

> waste paper, glass cullet, metal, or plastic that (A) has been separated from solid waste before export, (B) is exported for incorporation into new products with recycled content, and (C) is not a hazardous waste listed or identified under section 3001 [SWDA § 3001, 42 U.S.C. § 6921].

Id.

191. WECA at § 12002(b). In addition to preserving the HSWA provisions of notification and consent (WECA at § 12002(b)(1)(A) and (B)), any future international agreement, which authorized waste export, must include: (1) a provision for the exchange of information (WECA at § 12002(b)(1)(C)); (2) mechanisms providing United States inspectors access to treatment, storage, or disposal facilities in the receiving country (WECA at § 12002 (b)(1)(C)); (3) a provision for coordinated compliance and enforcement of the agreement (WECA at § 12002(b)(1)(D)); (4) a provision for regular review of the agreement's effectiveness (WECA at § 12002(b)(1)(E) and (F)); and (5) a provision for prohibiting further solid waste export where the agreement has not been followed (WECA at § 12002(b)(1)(G)).

192. WECA at § 2(b) (requiring that solid waste exports be conducted in accordance with an international agreement fulfilling the detailed mandates of WECA). The Executive has two years after WECA's enactment to comply with the EPA's export program. WECA at § 12002(b)(2). WECA does not provide judicial review of the executive's decision not to enter into an international agreement. WECA at § 12002(b)(3). After this two year period, WECA voids any international agreement that fails to comply with these mandates. WECA at § 12002(b)(2). During this two year period, WECA deems existing international agreements as complying with its requirements, thus allowing time for renegotiation. WECA at § 12002(b)(2) *See Sub-*

abroad that is at least as stringent as the applicable domestic standard for that waste.[193] WECA also delegates broad authority to the EPA Administrator to issue exemptions,[194] to promulgate regulations defining its parameters,[195] and to exercise discretion in applying its provisions.[196] Furthermore, WECA contains criminal, civil, and administrative penalties,[197] giving the Act the "teeth" that RCRA and HSWA lack.

WECA's use of international agreements may arguably alleviate the need for extraterritorial jurisdiction because the agreements could grant consent to jurisdiction. International agreements, however, are subject to negotiation, and in their final format may not include

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comms. on Human Rights, and International Policy, *supra* note 49, at 19 (statement of Reps. Miller and Conyers) (describing how the State Department and the EPA would negotiate an agreement with a potential receiving country).

When exercising its power to regulate exports under article I section 8 of the Constitution, or when exercising its appropriations power under article I section 9, Congress often enters the realm of foreign relations normally reserved for the executive branch. Rogers, *The Constitution And Foreign Affairs: Two Hundred Years*, 83 AM. J. INT'L L. 894, 898 (1989); Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750, 757 (1989); Note, *Beyond Institutional Competence: Congressional Efforts To Legislate United States Foreign Policy Toward Nicaragua — The Boland Amendments*, 54 BROOKLYN L. REV. 131, 162 (1988). *See* U.S. CONST. art. I, § 8 (stating that "The Congress shall have the Power . . . To regulate Commerce with foreign Nations [and] . . . To define and punish . . . Offenses against the Law of Nations. . ."); U.S. CONST. art. I, § 9, cl. 7 (stating that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). *See also* U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . ."); U.S. CONST. art. II, § 3 (providing that the President "shall receive Ambassadors and other public Ministers . . ."); United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936) (articulating the source of the Executive's foreign relations power as inherent in the "delicate, plenary and exclusive power of the President").

193. *See* WECA at § 2(b) (requiring that solid waste exports be conducted in accordance with an international agreement fulfilling the detailed mandates of WECA).

194. WECA at § 12001(a)(2).

195. WECA at §§ 12001(c)(5), 12003(b)(16), 12003(j) and 12004(a).

196. WECA at §§ 12002(b)(1)(C), 12003(d), 12003(f), 12003(h), 12003(k)-(m), and 12006(c).

197. WECA at § 12006. Any person in violation of WECA can be civilly liable for up to $25,000 for each violation for each day in violation. WECA at § 12006(b). When the exporter "knowingly" violates WECA, criminal penalties may include fines, up to two years imprisonment, or both. WECA at § 12006(a). A second criminal conviction doubles the maximum punishment possible. WECA at § 12006(a). The Administrator, upon finding a violation, may issue an order which mandates immediate compliance. WECA at § 12006(c). As an alternative, the Administrator may commence a civil action, which may include a temporary or permanent injunction. WECA at § 12006(c).

WECA's total incorporation of domestic waste disposal standards.[198] Furthermore, the ongoing revision of American standards and the discretion granted to the EPA Administrator will permit American regulatory officials to actively and uniformly apply domestic standards beyond the United States borders.[199] WECA's international agreements mandate uniform domestic standards and therefore require extraterritorial jurisdiction.

B. Expanding The Reach Of WECA Extraterritorially Under The Effects Doctrine

As in the ESA,[200] WECA's statutory language and legislative history clearly indicate strong congressional intent to apply it extraterritorially.[201] Such strong evidence of congressional intent should survive the judicial hurdle of the *Foley* Doctrine.[202] The ultimate success of WECA in reaching beyond the United States borders then depends on the second hurdle presented by the Effects Doctrine.

1. Congressional Intent To Apply WECA Extraterritorially

WECA includes provisions for United States officials to gain access to treatment, storage, or disposal facilities in a receiving country[203] in order to make a thorough and independent determination that the facilities comply with American standards.[204] WECA's requirement that

198. *See* note 7 and accompanying text (stating that WECA's standards are "no less strict than that which would be required by the Solid Waste Disposal Act if the waste were managed in the United States").

199. *See Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 2-3 (statement of Rep. Yatron) (explaining that the extraterritorial reach will only apply to private companies abroad and not to foreign governments).

200. *See supra* notes 179-188 and accompanying text (concluding that Congress clearly intended the ESA to have an extraterritorial application).

201. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) (discussing explicit statutory language that demonstrated Congress' intent in calculating pay under the Jones Act); Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985) (stating that the ESA's express statutory language indicates when an act of conservation is authorized); *Defenders of Wildlife*, 707 F. Supp. at 1084-86 (explaining the statutory language's role in judicial interpretation of legislation).

202. *See Mitchell*, 553 F.2d at 1003 (concluding that the court would interpret the MMPA as restricted by the *Foley* Doctrine because the MMPA's statutory language and legislative history did not indicate congressional intent to extraterritorially apply the MMPA).

203. WECA at §§ 12002(b)(1)(C), 12003(k)(1)(B) (pursuant to a bilateral agreement).

204. WECA at § 12003(f).

EPA inspectors make the above determination in the receiving country encourages the EPA to exercise extraterritorial jurisdiction.[205]

Beyond WECA's plain meaning, the bill's legislative history offers additional evidence of congressional intent to apply it extraterritorially.[206] When congressional intent is clear, United States courts willingly defer to this intent.[207] WECA's drafters envisioned the need for EPA inspectors to travel to foreign facilities.[208] The drafters also recognized that by reserving the right for EPA inspectors to conduct on-site inspections within the receiving country, the issue of sovereign integrity would arise.[209]

2. *Application Of The Effects Doctrine*

The courts make an exception to the judicial deference to Congress when the prescribed conduct either has no effect, or has no intended effect within the United States, or alternatively, when the prescribed conduct does not involve United States nationals.[210] As a practical matter, the courts have eliminated these exceptions by freely implying intent.[211]

WECA addresses environmental effects of global proportions.[212] Under the Effects Doctrine, United States courts have held that the

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205. WECA at § 12002(b)(1)(C).

206. *See Subcomms. on Human Rights and International Policy, supra* note 49, at 1-5 (statement of Rep. Yatron) (discussing the background leading to WECA's introduction).

207. *NRDC*, 647 F.2d at 1357.

208. Telephone interview with Shiela Cash Canavan, Professional Staff, Subcommittee on Environment, Energy and Natural Resources, Committee on Government Operations, United States House of Representatives (Jan. 14, 1991). As a model for inspections abroad, the drafters used the Food and Drug Administration's staff of forty that inspects foreign drug manufacturing facilities importing to the United States. *Id.* WECA would not need nearly as many EPA inspectors to travel since eighty percent of American waste is exported to thirteen Canadian facilities. *Id.*

209. *See Subcomm. on Trans. and Hazmat, supra* note 3, at 218 (statement of Rep. Wolpe) (expressing concern about the sovereignty of receiving countries); *Subcomms. on Human Rights, and International Policy, supra* note 49, at 19-20 (statements of Reps. Gejdenson, Miller, and Wolpe) (same); *id.* at 22 (letter from D.H. Burney, Canadian Ambassador to the United States, to Rep. Gejdenson) (same).

210. *NRDC*, 647 F.2d at 1357.

211. *See supra* note 108 and accompanying text (illuminating the practice of imputing intent from conduct and other circumstantial evidence).

212. In comparison, ESA reaches many harmful effects through its extraterritorial reach. Brief of *Amici Curiae* Ecotropica Foundation of Brazil, Slovak Union of Nature and Landscape Protectors, Fundacion de Parques Nacionales of Costa Rica, and Greenpeace International in support of Respondents at 12-19, Lujan v. Defenders of Wildlife, Friends of Animals, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S.Ct. 2008 (1991) (No. 90-925). A few of the harmful domestic effects averted by an extraterritorial application include: the loss of the United States and

effects need only be substantial in order to justify extending jurisdiction extraterritorially.[213] An analysis of prior events involving waste exports illustrates the substantial effects that would justify WECA's extraterritorial application.

First, the absence of regulations over exported waste would result in repeated fiascos like the one involving the *Khian Sea*.[214] This incident immediately effected the city of Philadelphia, forcing the city to scramble for a new disposal site for its incinerator ash. Also, the *Khian Sea* incident indirectly affected the EPA and the Department of State, which expended significant resources to verify Coastal's attempts to secure written consent from eleven potential receiving countries.[215] Second, unregulated waste exports may detrimentally affect the United States relations with other countries.[216] The *S.S. Bark* incident demonstrated how easily an international incident can develop.[217] And third, the United States can claim environmental effect under an expanded "circle of poison" theory.[218] This theory acknowledges that we live in a global environment in which toxins can return to their point of origin through natural forces.[219] Acid rain, disease, or the importation of food products from a polluted country exemplify the tenets of this theory. Congress acknowledged that acid rain, tropical deforestation, ozone de-

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humankind's ability to sustain themselves; the loss of improved medical and agricultural technology that genetic diversity offers; the "crashing" of ecosystems that depend upon certain species; the damage to industry and markets dependent upon biological products; and the loss of the intrinsic value animals offer. *Id.* These effects are especially acute given the irreparable nature of the potential injuries. *Id.* at 17. Furthermore, requiring the federal government to protect a species domestically while destroying it overseas is inherently inconsistent with the scheme of ESA and would undermine its scope and usefulness in protecting domestic species. *Id.* at 19 n.36 (citing *Foley*, 336 U.S. at 286).

213. *Timberlane*, 549 F.2d at 612-13; *Consolidated Gold*, 871 F.2d at 261-62. *See also* RESTATEMENT 3D, *supra* note 100, at comment d (qualifying that the effect must be both substantial and foreseeable).

214. *Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 4 (statement of Rep. Wolpe).

215. *See supra* notes 18-26 and accompanying text (discussing events surrounding the *Khian Sea* incident).

216. *See Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 3-4 (statement of Rep. Wolpe) (warning that reckless dumping of American waste will undermine the credibility of the United States as a world environmental leader, and foster an image of being a toxic terrorist). *See also Exporting Hazardous Industries*, *supra* note 12, at 782-83 (defining any inaction by the United States as promoting an image of callous indifference).

217. *See supra* note 32 and accompanying text (describing the arrest of a Norwegian official in connection with the *S.S. Bark* incident).

218. *See* Lutz, *supra* note 1, at 641 (hypothesizing that this theory is implicitly behind most toxic waste export regulations); D. WEIR & M. SHAPIRO, CIRCLE OF POISON (1981) (explaining more fully the "circle of poison" theory).

219. *Id.* at 641 n.41.

pletion, and ocean dumping will eventually affect individuals in the United States regardless of the origin of the pollution.[220]

In addition to these environmental, political, and financial effects, another factor encourages the extension of jurisdiction abroad — responsibility for the waste America produces. The United States government's responsibility for American waste is similar to its responsibility for its nationals. The government clearly has authority to control its nationals' extraterritorial acts.[221] On a higher level, the United States may have a moral responsibility to control, regardless of national borders, the waste it generates.[222] As the greatest producer and exporter of waste, the United States bears the greatest burden in seeking ways to control the transboundary movement of waste.

As in antitrust law, the court must balance each sovereign's interests.[223] In weighing these interests, the courts must consider many factors, including: whether the receiving country has any conflicting environmental laws; the exporter's nationality; whether the illegal act resulted from an export or a re-export from a third country; the possible effects on foreign relations if the exporting company or receiving facilities are affiliated with the receiving country's government; to what extent the receiving country will enforce the complicated provisions of RCRA; whether the United States would grant reciprocity to the receiving country's environmental laws; and whether the bilateral agreements promulgated under the WECA include provisions covering the many contingencies that could arise.[224]

The *Timberlane* balancing test also examines the nature of the proposed extraterritorial intrusion.[225] The drafters designed WECA to protect not only the United States environment, but also the global environment.[226] Thus, a foreign sovereign may welcome this extension of

220. *Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 3 (statement of Rep. Yatron). While the transboundary movement of solid waste may not cause deforestation, it can increase the frequency and magnitude of acid rain, ozone depletion, and ocean dumping. *Id.*

221. Blackmer v. United States, 284 U.S. 421 (1932); RESTATEMENT 3D, *supra* note 100, at § 402(2).

222. *Subcomms. on Human Rights, and International Policy*, *supra* note 49 (statement of Rep. Wolpe).

223. *See Mannington Mills*, 595 F.2d at 1297-98 (adopting the *Timberlane* balancing test).

224. *See supra* note 142 and accompanying text (detailing the six factors of the *Timberlane* test).

225. *See Mannington Mills*, 595 F.2d at 1297-98 (expanding the *Timberlane* test to include this consideration).

226. *See supra* notes 218-20 and accompanying text (explaining that under the "circle of poison" theory the United States would be protecting its own environment and the health of its own citizens by protecting the environments of other countries).

United States regulatory power, especially in those developing countries that lack the resources or technology to implement their own environmental program.[227]

IV. RECOMMENDATIONS

Regardless of the motives of WECA's individual drafters, Congress has compiled in WECA a comprehensive and practical solution to the growing solid waste export problem.[228] The drafters closed many of the large regulatory gaps in the present American waste export laws.[229] Moreover, the bill grants the EPA Administrator significant discretionary powers to implement and enforce the new regulations.[230]

Although the EPA has demonstrated its competency to regulate environmental standards, WECA thrusts the agency into an unfamiliar

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227. *See Exporting Hazardous Industries*, *supra* note 12, at 781-82 (stating that many developing countries give preferential treatment in an effort to stimulate their economy but at the same time lack the resources to monitor, detect, and mitigate the detrimental side effects from the imports). *Compare Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 22-24 (letter from D.H. Burney, Canadian Ambassador to the United States, to Rep. Sam Gejdenson (D-Conn.)) (challenging the presumption that Canadian standards fail to "ensure that waste is dealt with safely and in an environmentally sound manner"); *with id.* at 25 (statement of Rep. Conyers) (asserting that the United States very likely possesses greater scientific knowledge on waste disposal than any other country).

228. *Compare Subcomms. on Human Rights, and International Policy*, *supra* note 49, at 25 (statement of Rep. Conyers) (advocating WECA's uniform global, *i.e.* American, standards as closing regulatory loop holes); *and id.* at 3-4 (statement of Rep. Yatron) (viewing WECA as a means to reestablish the United States as a world environmental leader, and prevent future international incidents from reaching crisis levels); *and id.* at 3 (statement of Rep. Yatron) (warning that the condition of the environment halfway around the world will affect individuals living in the United States); *and Subcomm. on Trans. and Hazmat*, *supra* note 3, at 217 (statement of Rep. Wolpe) (pointing out that WECA, by creating disincentives for hazardous waste manufacturers, will contribute to source reduction); *with id.* at 219 (statement of Rep. Luken) (stating that WECA would be "totally consistent" with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal which many other countries have ratified).

229. *See supra* notes 190-93 and accompanying text (discussing how WECA regulates almost all solid waste exports, tracks the export beyond United States borders, provides for verification, and guarantees that the waste was properly disposed).

Another alternative to WECA that would close all regulatory gaps in the export laws would be a total ban on exports. This is the approach advocated by Representative Ed Towns (D-NY) in his proposed Waste Export and Import Prohibition Act. H.R. 2580, 102d Cong., 1st Sess. (1991).

230. *See supra* notes 193-96 and accompanying text (listing WECA's provisions that grant discretion to the Administrator to issue exemptions as well as criminal, civil, or administrative penalties); Mounteer, *Codifying Basel Convention Obligations Into U.S. Law: The Waste Export Control Act*, 21 ENVTL. L. REP. 10085, 10098 (Envtl. L. Inst. Feb. 1991) [hereinafter Mounteer] (concluding that the export permit provisions of WECA would provide EPA with a powerful tool for guaranteeing proper disposal of American solid waste overseas).

foreign affairs role. Along with the State Department, the EPA must negotiate international agreements with potential receiving countries.[231] The EPA must also maintain the authority to send inspectors to facilities in receiving countries.[232] Consequently, diplomacy will become more important than the EPA's improved regulatory strength.[233]

WECA's flexible discretionary provisions will aid the Administrator to make the necessary case by case determinations. The EPA, however, lacks the necessary competence in foreign policy.[234] To successfully enforce WECA, the EPA must develop a close working relationship with

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231. *See supra* note 192 and accompanying text (discussing international agreements under WECA). By incorporating the American domestic standards into an international agreement, WECA has effectively ratified the substantive provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention). *Subcomm. on Trans. and Hazmat*, *supra* note 3, at 219 (statements of Reps. Luken and Wolpe). The Basel Convention adopted a notification and consent system similar to HSWA, and a manifest system similar to RCRA. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *adopted and opened for signature* Mar. 22, 1989, *reprinted in* UNITED NATIONS ENVIRONMENTAL PROGRAMME, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE AND THEIR DISPOSAL: FINAL ACT, *also reprinted in* 28 I.L.M. 649 (1989). *See also* Mounteer, *supra* note 226, at 10098 (describing WECA's standard of "no less strict" as similar but less nebulous than the Basel Convention's standard of "environmentally sound management"). The current version of WECA, H.R. 2358, would explicitly implement the Basel Convention pending ratification by the Senate. Interview with English, *supra* note 4.

After prodding by Congress, the Bush Administration submitted the Basel Convention to the Senate for its advice and consent to ratification on May 17, 1991. Leich, *Contemporary Practice of the United States Relating to International Law*, 85 AM. J. INT'L L. 668, 674-79 (1991). *See* H. Con. Res. 88, 101st Cong., 1st Sess. (1989) (introduced by Rep. Clinger (R-PA) on April 6, 1989) (urging the President to sign and submit the Basel Convention to the Senate).

WECA would actually go further since it adopts a stronger standard than the one finally adopted by the Basel Convention:

> There are indications that the United States was largely responsible for watering down the [Basel Convention] in a number of important areas. Under the final version, exporting nations must require that their wastes are managed in an environmentally sound manner, whereas in earlier drafts exporting nations had to ensure that their wastes were managed in a manner no less environmentally sound than the manner in which they would have been treated domestically.

Subcomms. on Human Rights, and International Policy, *supra* note 49, at 2 (statement of Rep. Gejdenson). *See also* Mounteer at 10,092-93 (relating how WECA incorporates a stricter standard than the one Bush Administration negotiators successfully removed from the Basel Convention); *Exports to Canada*, *supra* note 35, at 10,065 n.58 (describing an earlier version of WECA as a de facto ban on waste exports).

232. *See supra* notes 203-05 and accompanying text (discussing access to foreign facilities).

233. *See Third Restatement*, *supra* note 123, at 151 (suggesting that international conflicts would be better resolved through good-faith diplomatic efforts rather than unilateral balancing by one state).

234. *See* ROSENTHAL & KNIGHTON, *supra* note 9, at 32-33 (stating that there have been problems in the past where the State Department has been unable to "turn off

the Department of State.[235] This alliance may require either a liaison office within the EPA, or the appointment of an at-large United States Ambassador to the Environment. Either option could resolve the foreseeable conflicts that will arise between the EPA, whose goals are regulation of waste exports and protection of the environment, and the Department of State, whose goal is to facilitate the executive's broader foreign policy objectives. The interagency decision making process itself should be modeled after the balancing tests developed by the judiciary and articulated in *Timberlane Lumber*, *Mannington Mills*, and *Defenders of the Wildlife*.[236]

CONCLUSION

WECA grants the EPA broad powers, which classifies the EPA as *ad hoc* protector of the global environment. WECA equips the EPA with enforcement provisions and funding that often guarantee the success of federal programs.[237] As the case law reveals, the application of domestic laws and standards extraterritorially often implicates foreign policy considerations.[238] Therefore, as the EPA enters the realm of international relations, diplomacy will become more important than the strength of its enforcement powers. The program's ultimate success will depend on the EPA's moderate use of its new powers on a case by case basis, while remaining conscious of its potential for transforming the

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diplomatically damaging extraterritorial law enforcement, by semi-independent U.S. regulatory and prosecution agencies").

235. *Cf. Leak in the System*, *supra* note 6, at 10,174 (noting that Congress originally intended the EPA and the United States Customs Service to work together in implementing and enforcing HSWA, but in practice rarely have).

236. *See supra* notes 129-44 and accompanying text (applying antitrust laws extraterritorially); *supra* notes 179-88 and accompanying text (applying the Endangered Species Act extraterritorially). *But see Third Restatement*, *supra* note 123, at 149-52 (cautioning that the adversarial process that permits a somewhat impartial balancing by the judicial branch does not exist within the politically sensitive legislative and executive branches).

The assumption is that the Department of State would take an impartial role and introduce the concerns of foreign countries into the decision-making process. In the past, executive agencies have often neglected to balance the interests of other countries against their own. *See id.* at 143-44 (recalling the United States Department of Commerce and United States Export Administration's efforts to inhibit the construction of the Soviet trans-Siberian pipeline against the sharp criticism of a unified European Economic Community).

237. *See supra* notes 190-97 and accompanying text (detailing the strictness of WECA).

238. *See Mannington Mills*, 595 F.2d at 1297-98 (listing foreign policy as one of many considerations in whether to give a law extraterritorial application); *Timberlane*, 549 F.2d at 614 (same).

United States into an environmental imperialist.[239] As the vast majority of the solid waste exported to other nations originates in the United States, WECA represents the government's acknowledgement of its responsibility for environmental damage within another sovereign's borders.[240]

239. *See* Rublack, *Controlling Transboundary Movements of Hazardous Waste: The Evolution of a Global Convention*, 13 FLETCHER F. WORLD AFF. 113, 122 (1989) (observing that it is "difficult to delineate between paternalistic restrictions on hazardous exports and a state's legitimate power to control its exports for reasons such as its foreign relations").

240. *See* Nanda & Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*, 13 DEN. J. INT'L L. & POL'Y 155, 159-60 (1988) (suggesting that states be held responsible for conditions that could foreseeably cause harm to another state, like hazardous waste exports, under customary international law).