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A TRANSNATIONAL PERSPECTIVE ON EXTENDING NEPA: THE CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

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INTRODUCTION

In recent years, the potential adverse impacts of transboundary pollution have received heightened attention both domestically and abroad.[1] International pollution may detrimentally affect outer space, the atmosphere, the oceans, the weather, and possibly the climate, freshwater bodies, groundwater aquifers, farmland, cultural heritage, and life forms.[2] Specific pollution threats include acid deposition, nuclear contamination, debris in outer space, stratospheric ozone depletion, and toxic petroleum spills. The Chernobyl nuclear power plant accident, on April 26, 1986, raised the world's consciousness about the potentially devastating effects of transboundary nuclear pollution.[3]

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1. DANIEL BARSTOW MAGRAW, INTERNATIONAL LAW AND POLLUTION 4 (Daniel Barstow Magraw ed., 1991).

2. *Id.* at 5.

3. *See* Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 402 (1989) ("Chernobyl . . . confirmed the danger this pollution poses to people, to property, and to the environment . . . [the accident] demonstrated that traditional

Given this backdrop and the emerging interdependence of nations, particularly within the European Economic Community, it is not surprising that the United States, later joined by twenty-five other countries, signed the "Convention on Environmental Impact Assessment in a Transboundary Context" (hereinafter "the Convention") at Espoo, Finland on February 25, 1991.[4] Among its provisions, the Convention establishes legal procedures for bilateral and multilateral protests against future sources of transboundary pollution.[5] The Convention also establishes a transboundary environmental impact assessment process similar to the process implemented under the U.S. National Environmental Policy Act (NEPA), which is the first national environmental impact assessment law passed by the U.S. government.[6] However, three years have passed since the United States signed the Convention, and it still has not been formally adopted.[7] Consequently, questions about its legal basis remain.

This Article examines issues relating to the implementation and enforceability of the Convention in the United States and focuses on the legal basis for the Convention. Specifically, this Article addresses the issue of whether the Convention is a self-executing document, legally undergirded by the President's inherent authority to bind the federal government in foreign affairs;[8] or in the alternative, whether NEPA, as extended by Executive Order 12,114 "Environmental Effects Abroad of Major Federal Actions,"[9] serves as the underlying legislative authority for the Convention.[10] This Article argues that,

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international law provides only a rudimentary structure for compensating for the damage to persons and property that transboundary nuclear pollution causes, and that it provides neither rights nor relief in respect of damage to the environment.").

4. Convention on Environmental Impact Assessment in a Transboundary Context, Feb 25, 1991, 30 I.L.M. 800 [hereinafter "Convention"]. As of June 11, 1991, the following states had signed the Convention: Albania, Austria, Belgium, Bulgaria, the Byelorussian Soviet Socialist Republic, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, the Ukrainian Soviet Socialist Republics, the United Kingdom, and the United States.

5. *Id.* art. 2-9, 30 I.L.M. at 803-807.

6. *Id.* art. 4, 30 I.L.M. at 806. *See* National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1988)(requiring preparation of Environmental Impact Statement, public notice, and recognition of worldwide implications).

7. The Convention enters into force after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession. Convention, *supra* note 4, art. 18, 30 I.L.M. at 811.

8. U.S. CONST. art. II, § 2, cl. 2.

9. Exec. Order No. 12,114, 3 C.F.R. 356 (1979), *reprinted in* 42 U.S.C. § 4321 (1988).

10. *Id.*

for the Convention to have a proper legal foundation, either NEPA should be amended to apply extraterritorially, or the Convention should undergo the normal treaty ratification process to firmly establish it as "the law of the land."[11] To do anything less would provide a tenuous legal basis for meeting and enforcing Convention requirements.

Part I of this Article briefly discusses the factual background of the Convention as reported by persons who negotiated the Convention on behalf of the United States. Part I also examines substantive portions of the Convention's twenty articles and seven appendices, highlighting the obligations they impose. Part II explores implementation issues, particularly the proposal that the Convention be treated as an Executive Agreement and the current debate over whether NEPA, as extended by Executive Order 12,114, supports such an agreement. The issue of NEPA's application extraterritorially is an integral part of this discussion. This Article argues that there currently exists no tenable legal basis for ratification of the Convention. Part III discusses the present status of the Convention, including the U.S. Council on Environmental Quality (CEQ) draft guidelines for implementation, and enforcement under international environmental law. This Article concludes by asserting that, for the Convention to have a proper legal foundation, NEPA should be amended to specifically apply extraterritorially or the Convention should go through the normal treaty ratification process.

I. THE CONVENTION: AN OVERVIEW

The Convention, adopted by the Economic Commission for Europe (ECE) on February 26, 1991, is significant historically because it is one of the first transboundary pollution agreements between Eastern and Western European nations.[12] Commenting on the

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11. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

12. Treaty Signed by Twenty-Six Nations Sets Way to Protest Cross-Border Pollution, 14 Int'l Envtl. Rep. (BNA) 99 (Feb. 27, 1991) [hereinafter Treaty Signed by Twenty-Six Nations]. However, this is disputed in Comment, *Developments in the Law: International Environmental Law*, 104 HARV. L. REV. 1484, 1558 n. 45 (1991), which asserts that the Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10541, *reprinted in* 18 I.L.M. 1442 [hereinafter LRTAP] was the first such environmental agreement between Eastern European and Western European nations. The LRTAP was concluded by 34 countries in Europe and North America under the auspices of the Economic Commission for Europe (ECE) and addresses transboundary air pollution. The LRTAP "establish[ed] notice and consultation requirements for changes in the national policies of parties that might significantly affect levels of transboundary air pollution." *Id.* at 1559.

adoption of the Convention, ECE Executive Secretary Gerald Hinteregger stated:

> This is a major achievement in combating pollution and it will cause significant changes in environmental legislation within many of the signing nations . . . Not only will it force all signing nations to establish an environmental impact assessment procedure, but it will allow governments and the public from other nations to participate in that process from the start.[13]

This section of the article briefly describes the adoption of the Convention and provides a general overview of its requirements.

A. *Background to the Convention*

In 1978, the Senate Foreign Relations Committee passed a resolution directing the United States to work towards a transboundary convention;[14] the United Nations Environment Programme (UNEP) was viewed as the vehicle for accomplishing this task.[15] However, because of the difficulty obtaining consensus among the diverse countries aligned with UNEP, the effort faltered and the ECE became the proponent by adopting the Convention on February 26, 1991.[16] Previously the ECE had issued the European Community Environmental Impact Assessment General Directive (hereinafter "EIA Directive"), applicable to member states in the European Economic Community.[17] The EIA Directive is similar to

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13. Treaty Signed by Twenty-Six Nations, *supra* note 12, at 99.

14. Treaty Signed by Twenty-Six Nations, *supra* note 12, at 99. Transboundary pollution became a political concern in the United States as far back as 1941 with the *Trail Smelter Case*, which was one of the first cases to document the harmful effects of air pollution migration. The United States and Canada were parties to the case, which was heard by arbitrators who rendered damage awards on April 16, 1938 and March 11, 1941. The case involved damages caused to Washington state by migrating fumes discharged from the Consolidated Mining and Smelting Company in British Columbia. Canada had paid the United States $350,000 pursuant to findings by the international Joint Commission. Trail Smelter Case (U.S. v. Can.), 3 Rep. Int'l Arb. Awards 1905, 1945-46 (1938). The Trail Smelter Arbitral Tribunal ordered Canada to pay an indemnity of $78,000 plus interest for further environmental damage. *Id.* at 1940.

15. Interview with Anne Miller, Deputy Director, Office of Federal Activities, U.S. Environmental Protection Agency, in Washington, D.C. (Dec. 23, 1994). Ms. Miller represented the United States at several Convention negotiation sessions.

16. *Id.*

17. Council Directive No. 85/337, 1985 O.J. (L 175) 40 [hereinafter "EIA Directive"]. A similar agreement was recently signed by the three Belgian regions of Brussels, Flanders, and Wallonia which provides for sharing of information and environmental impact assessments when a project in one of the regions could have transboundary impact on another region. Three Governments Agree to Share Data on Activities with Transboundary Impacts, 10 Int'l Envtl. Rep. (BNA) 642 (July 27, 1994).

NEPA and evidences the ECE's recognition that unconsidered growth in a heavily populated region like Europe may produce significant adverse transboundary impacts.[18]

Because the Convention negotiators worked by consensus, the task of honing the Convention was arduous and revealed the different approaches of eastern and western hemisphere nations to environmental issues. For instance, many European states wanted to clearly spell out the terms of the Convention, describing the seventeen activities that trigger Convention requirements, while other countries, such as Canada and the United States, were more willing to have a broader narrative description of these activities.[19] The negotiators considered a broad range of provisions, including opening the Convention to non-ECE members, such as Mexico, but could not reach agreement on many of these issues. The final document generally represents hard-won consensus.[20]

B. *Obligations Under the Convention*

The Convention does not apply to existing transboundary pollution sources, nor does it enable one nation to prevent another from constructing a disputed project. It does, however, create an affirmative obligation for signatory nations to prepare an environmental impact assessment (EIA) on proposed projects that may have transboundary effects.[21] The Convention requires the proponent of a proposed action to provide the affected nation notice, comment, and public participation.[22]

The Convention delineates the responsibilities of each party planning an action with potential transboundary impacts. The main requirements of the Convention are similar to those imposed by

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18. *Cf.* EIA Directive, *supra* note 17, pmbl. The European Community (now known as the "European Union") directive has already been cited as authority to intervene in some noncomplying projects. The European Community Commission claimed the Italian government failed to comply with the EIA directive in planning a new $4.4 billion, 37-mile highway which would traverse the Appenine mountains. Highway Project Said To Comply with EC Assessment Directive, 15 Int'l Envtl. Rep. (BNA) 200 (Apr. 8, 1992). The European Commission asked Britain to suspend seven major construction projects, including a rail link to the new Channel Tunnel, because the government allegedly failed to follow the EIA directive. Commission Says Britain Ignored Environmental Rules on Seven Projects, 14 Int'l Envtl. Rep. (BNA) 566 (Oct. 23, 1991).

19. Interview with Anne Miller, *supra* note 15.

20. Interview with Anne Miller, *supra* note 15.

21. Convention, *supra* note 4, art. 2-11, 30 I.L.M. at 803-808.

22. Convention, *supra* note 4, art. 2-9, 30 I.L.M. at 803-807.

NEPA. The primary responsibility of each party is to prevent, reduce, or control significant adverse transboundary environmental impacts from proposed activities.[23] Parties must establish an EIA procedure, similar to that imposed by NEPA, that affords public notice and participation before a decision on the proposed action is made.[24]

The signatories of the Convention announce in the Preamble their awareness of the interrelationship between developmental activities and their environmental consequences.[25] The parties to the Convention affirm:

> the need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context.[26]

Under the Convention, the party initiating the proposed action, called the "Party of origin," must provide information to "affected Parties" and be available for consultation on the potential transboundary impact of the proposed action.[27] Furthermore, the party of origin must ensure that, in making its final decision on a proposed action, it takes into account the outcome of the EIA, including the documents and the comments received, as well as concerns aired in consultations between the parties.[28] When providing the affected party its final decision, the party of origin must state the reasons and considerations underlying its final decision.[29]

As with NEPA, the Convention does not require that the proponent of the proposed action select the least environmentally harmful alternative. However, the Convention does not preclude a

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23. Convention, *supra* note 4, art. 7-11, 30 I.L.M. at 807-808 (encouraging research programs aimed at improving methods for assessing transboundary pollution impacts, for achieving better understanding of cause-and-effect relationships and their role in integrated environmental management, and for analyzing and monitoring efficient implementation of decisions on proposed activities).

24. Convention, *supra* note 4, art. 4-5, 30 I.L.M. at 806.

25. Convention, *supra* note 4, pmbl., 30 I.L.M. at 802.

26. Convention, *supra* note 4, pmbl., 30 I.L.M. at 802.

27. Convention, *supra* note 4, art. 3-5, 30 I.L.M. at 804-806 (providing for post-project analysis which any party can request).

28. Convention, *supra* note 4, art. 6, 30 I.L.M. at 806.

29. Convention, *supra* note 4, art. 6, 30 I.L.M. at 806.

party from imposing more stringent requirements upon itself, nor does it abridge a party's right to enter new bilateral or multilateral agreements in order to implement its Convention responsibilities.[30]

Each party to the Convention has one vote.[31] When a dispute involving issues surrounding application of the Convention arises, it is to be handled by negotiation, and parties may either elect to submit their dispute to the International Court of Justice or request arbitration.[32] If a party is dissatisfied with the Convention, the party may voluntarily withdraw from the Convention any time after four years from the date on which the party joined the Convention.

C. *Applicability of the Convention*

The Convention applies only to specific activities, enumerated in Appendix I, that are likely to cause significant adverse transboundary impact.[33] For instance, activities such as the construction of motorways, railway lines, airports with a basic runway length of at least 2,100 meters, large diameter oil and gas pipelines, and hazardous waste management facilities trigger the Convention's EIA requirement.[34] When it is questionable whether an activity requires an EIA, the Convention establishes an analytic framework for making such a determination. Various criteria are considered, such as the size of the proposed activity, its location, and its potential effects on humans or valued species.[35]

When parties are unable to agree on the Convention's applicability to a proposed action or on the need for an EIA in a particular case, the Convention sets up an "inquiry procedure." In this procedure, the ECE Secretary selects an inquiry commission made up of three experts. The commission may investigate the activity and, by majority vote, render a decision on Convention applicability.[36] The Convention directs the inquiry commission to base its final opinion on

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30. Convention, *supra* note 4, art. 8, 30 I.L.M. at 809.

31. Convention, *supra* note 4, art. 12, 30 I.L.M. at 809.

32. Convention, *supra* note 4, art. 15, 30 I.L.M. at 810 (providing that Party may declare in writing in its acceptance or ratification document that it elects compulsory arbitration or submission of its disputes to International Court of Justice).

33. Convention, *supra* note 4, app. I, 30 I.L.M. at 812.

34. Convention, *supra* note 4, art. 2 & app. I, 30 I.L.M. at 802, 812-13.

35. These criteria are similar to those in the Council on Environmental Quality (CEQ) Guidelines implementing NEPA. *See* 40 C.F.R. §§ 1500-1508 (1994).

36. Convention, *supra* note 4, app. IV, 30 I.L.M. at 815-16.

scientific principles.[37] The parties must assist the inquiry commission by providing facts, documents, and testimony.[38] The commission is given broad discretion and autonomy to make its own rules of procedure and to take any "appropriate" measure to carry out its function.[39] Both the parties and the investigating commission are charged with protecting the confidentiality of any information received in confidence in the course of commission proceedings.[40]

Despite the Convention's well-articulated procedures for applying requirements and resolving implementation disputes, questions about applicability remain. There are three unresolved applicability issues that are particularly troublesome to the United States.[41] First, it is unclear whether the Convention applies to privately proposed or conducted activities and, if so, to what extent it applies. Second, the Convention does not specify whether it applies to U.S. military activities. Finally, it is unknown whether the Convention exempts sensitive national security information related to a proposed activity from disclosure and, if so, what authority will determine if such information is exempt.

II. LEGAL BASIS OF THE CONVENTION: AN EXECUTIVE AGREEMENT, OR A SELF-RATIFYING TREATY BASED ON NEPA AND EXECUTIVE ORDER 12,114?

Possibly, the United States is postponing ratification of the Convention because concerns about its legal basis persist. If the Convention is executed as an Executive Agreement, the President's authority to bind the United States in an agreement under the terms of this Convention is disputable. Alternatively, if the Convention's ratification is premised on NEPA, as expanded by Executive Order 12,114, the Convention's legal basis remains equally dubious. Because NEPA applies to activities within the United States, it is unclear whether the Convention would cover U.S. activities originating abroad. The following discussion examines both alternatives and illustrates why both are inadequate.

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37. Convention, *supra* note 4, app. IV, 30 I.L.M. at 815-16.

38. Convention, *supra* note 4, app. IV, 30 I.L.M. at 815-16.

39. Convention, *supra* note 4, app. IV, 30 I.L.M. at 815-16.

40. Convention, *supra* note 4, app. IV, 30 I.L.M. at 815-16.

41. These issues may be clarified if the United States attaches reservations to its ratification of the Convention.

A. *A Proposed Executive Agreement*

The Convention has been proposed for execution as an Executive Agreement rather than as a treaty.[42] Article II of the Constitution endows the President with broad authority, stating that "[t]he executive power shall be vested in a President of the United States of America."[43] However, the scope and exact content of presidential powers in foreign affairs is somewhat unspecific and has frequently been debated.[44] One scholar noted that:

> Without the consent of the Senate, the approval of Congress, or the support of a treaty, Presidents from Washington to Nixon have made many thousands of agreements, of different degrees of formality and importance, on matters running the gamut of American foreign relations . . . but the power to make them remains vast, and its constitutional foundations and limits as uncertain as ever.[45]

Executive Agreements concluded solely by the President have been upheld by the U.S. Supreme Court.[46] For instance, in United States v. Belmont, Justice Sutherland approved the executive's authority to make an agreement incidental to officially recognizing the Soviet Union, reasoning that "[G]overnmental power over external affairs is not distributed, but is vested exclusively in the national government."[47] Similarly, in United States v. Curtiss-Wright Export Corporation, the Court characterized the power "to make such international agreements as do not constitute treaties in the constitutional sense as one of those powers which, though not expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality."[48]

Although there is some persuasive evidence that the President has authority to execute binding Executive Agreements that may be

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42. Interview with Anne Miller, *supra* note 15.

43. U.S. CONST. art. II, §1, cl. 1.

44. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 44 (1972).

45. *Id.* at 177. Another writer commenting on presidential authority over foreign affairs has stated that "in foreign affairs [the Constitution] was often cryptic, ambiguous and incomplete." Elliot L. Richardson *Checks and Balances in Foreign Relations, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 25, 27 n.9 (LOUIS HENKIN et al. eds., 1990) Michael J. Glennon and William D. Rogers, eds. 1990) (*quoting* A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 2 (1973)).

46. United States v. Belmont, 301 U.S. 324 (1937).

47. *Id.* at 330-31.

48. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

construed as the law of the land, the limits of such agreements have not been extensively explored or defined, and unsettled questions persist.[49] For example, it is unclear whether, under international law, the United States could ever claim it was not bound by an agreement such as the Convention because it was made without the consent of the Senate.[50] A similar unanswered question is whether a state can lawfully be bound by Convention requirements if the executive was acting *ultra vires* when he incurred the obligation on the state's behalf and the Convention is not formally ratified as a treaty.[51] Despite these unsettled questions, it appears that the power of the President to make Executive Agreements in an international context is generally accepted, despite occasional senatorial accusations that the President has usurped the treaty power.[52]

B. *The National Environmental Policy Act*

NEPA, as expanded by Executive Order 12,114, may also be viewed as the enabling, underlying legal authority for Convention ratification.[53] NEPA and the Convention have similar requirements. NEPA requires federal agencies proposing major federal actions to assess the environmental impacts of those actions.[54] NEPA is commonly viewed as a procedural rather than a substantive statute because it does not mandate that the federal agency select the most environmentally beneficial action.[55] Rather, NEPA merely directs the federal government to examine the environmental impacts of a proposed federal action and alternatives to the action.[56] NEPA also provides other agencies an opportunity to comment on the govern-

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49. *See* Edmund S. Muskie, *The Reins of Liberty - Congress, the President, and American Security, in* FOREIGN POLICY AND THE CONSTITUTION 90, 91-92 (Robert A. Goldwin & Robert A. Licht eds., 1990).

50. HENKIN, *supra* note 44, at 427 n.21.

51. HENKIN, *supra* note 44, at 427 n.21. State compliance is not an immediate concern because the Convention applies only to federal actions. However, states may be encouraged to comply with the Convention if it is ratified. *See* Interview with Anne Miller, *supra* note 15.

52. HENKIN, *supra* note 44, at 420 n.1. According to Henkin, former Secretary of State John Foster Dulles estimated that about 10,000 informal Executive Agreements accompanied the North Atlantic Treaty.

53. NEPA, 42 U.S.C. § 4335 (1988).

54. NEPA, 42 U.S.C. § 4332 (1988).

55. NEPA requires the federal government to ensure that "environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." NEPA, 42 U.S.C. § 4332 (1988).

56. NEPA, 42 U.S.C. § 4332 (1988).

ment's proposal and analysis and makes those records public.[57] CEQ guidelines interpreting NEPA mandate a detailed, definitive assessment process that includes public involvement and interagency review.[58]

NEPA may be enforced judicially, and prior litigation has assisted in clarifying the statute's application within the United States.[59] Unfortunately, litigation has not resolved questions about the extent, if any, of NEPA's applicability abroad.[60] There is no clear statutory or regulatory guidance as to whether NEPA and the EIS requirement extend to federal actions involving overseas environmental impacts. The statute squarely addresses extraterritorial application in only one section, mandating that all agencies of the federal government shall:

> [R]ecognize the worldwide and long range character of environmental problems and, where consistent with foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.[61]

Although the NEPA assessment process has been used in negotiations of international agreements, such as the New Panama Canal Treaty,[62] it does not appear that NEPA has ever been cited as the legal basis for the United States' ratification of an international agreement. This leaves unanswered the issue of whether the Convention implicitly confers NEPA rights, such as judicial review, to other signatories when NEPA is the underlying legal authority for Convention ratification.

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57. NEPA, 42 U.S.C. § 4332 (1988).

58. 40 C.F.R. §§ 1500.1, 1500.2, 1506.6 (1994); *see also* Dinah Bear, "Nuts and Bolts of Procedural Compliance with the National Environmental Policy Act," C993 ALI-ABA 1 (1994).

59. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); NRDC v. Marsh, 568 F.Supp. 1387 (E.D.N.Y. 1983).

60. *Compare* Public Citizen v. Kantor, 864 F. Supp. 208 (D.D.C. 1994) (holding there was no "final agency action," therefore review of NEPA applicability was premature) *and* Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.D.C. 1993) (same); *with* Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (holding that executive agreement between United States and West Germany overrode any extraterritorial applicability that NEPA might have).

61. NEPA, 42 U.S.C. § 4332(f) (1988).

62. GENERAL ACCOUNTING OFFICE, INTERNATIONAL ENVIRONMENT: IMPROVED PROCEDURES FOR ENVIRONMENTAL ASSESSMENTS OF U.S. ACTIONS ABROAD, Report to the Chairman, Subcommittee on Toxic Substances, Research and Development, Committee on Environment and Public Works, U.S. Senate, February 1994, at 3 (hereinafter GAO REPORT).

C. *Executive Order 12,114*

Questions about NEPA's extraterritorial application are necessarily complicated by President Carter's Executive Order 12,114, which extends NEPA's application.[63] Executive Order 12,114 requires federal agencies taking major federal actions that have significant effects on the environment outside the United States to establish procedures, including NEPA analyses and documentation, that will "facilitate environmental cooperation with foreign nations."[64] Compared with NEPA, the Executive Order's requirements have been characterized as being more ambiguous and more limited in both the range of activities covered and in the analysis and participation required.[65] For example, the Order does not have any implementing regulations, does not require evaluation of alternatives, does not mandate public or interagency review, and confers no standing for judicial review. However, unlike NEPA, Executive Order 12,114 applies to federal actions that have a significant effect on any of the following: (1) a nation not participating with the United States in the action, (2) a nation to which the United States exports a product or a physical project that produces an emission or effluent that is prohibited or strictly regulated in the United States because it poses a toxic or radioactive threat, (3) a designated natural or ecological resource of global importance, or (4) the global commons.[66]

Actions in the global commons have recently sparked litigation seeking to define the bounds of NEPA's applicability and to determine whether the Executive Order provides a means for enforcing NEPA extraterritorially. In *Environmental Defense Fund, Inc. v. Massey*, the U.S. District Court for the District of Columbia held that NEPA did not apply to actions of U.S. citizens overseas and that the Executive Order did not provide a private cause of action.[67] However, on appeal, the District of Columbia Court of Appeals held that there is no presumption against extraterritorial application of the statute if the behavior occurs primarily in the United States or if the

63. Exec. Order No. 12,114, *supra* note 9, at 356-57.

64. Exec. Order No. 12,114, *supra* note 9, at 357.

65. GAO REPORT, *supra* note 62, at 2.

66. Exec. Order No. 12,114, *supra* note 9, at 357 (defining global commons to include the oceans and Antarctica).

67. Environmental Defense Fund, Inc. v. Massey, 772 F. Supp. 1296 (D.D.C. 1991).

extraterritorial effect of the statute will occur in Antarctica — a continent with no sovereign and over which the United States has some control.[68]

The Court of Appeals decision created a "headquarters theory," whereby decisions of the United States that direct projects outside the United States become actions subject to NEPA. Under this analysis, many activities of the Department of Defense as well as U.S. multinational corporations operating with some federal involvement could be subject to NEPA.[69] The Court's broad analysis seemed to ignore the well established *Foley* doctrine mandating that laws are meant to apply domestically only, absent specific Congressional intent to the contrary.[70]

In its decision not to appeal the case, the Department of Justice chose to construe the holding narrowly and, uncharacteristically, issued a statement explaining its decision:

> [I]n declining to seek a rehearing in this case today, the Administration has decided not to challenge the Court's precise holding — namely, that the National Environmental Policy Act applies to the National Science Foundation's activities in Antarctica described in the opinion. However, the administration does not embrace language in the opinion which may be interpreted to extend beyond this holding.[71]

Shortly after the *Massey* decision, the District Court of the District of Columbia held that NEPA did not require the Defense Department to prepare environmental impact studies for U.S. military installations in Japan because of the presumption against the extraterritorial application of statutes.[72] The Court emphasized that doubts concerning extraterritorial application of statutes must be

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

69. *See* David Young, *The Application of Environmental Impact Statements to United States Participation in Multinational Development Projects*, 8 AM. U. J. INT'L L. & POL'Y 309 (1992).

70. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1942).

71. Press release, DOJ, March 15, 1993.

72. NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D. D.C. 1993). To support its reliance on the presumption against extraterritorial application and restrictive interpretation of questions involving the presumption, the Court cites two cases decided after *Massey*, which clarify that choice of law considerations are not the only justification for the presumption. *See* Smith v. United States, 113 S.Ct. 1178, 1183 (1993) (holding that presumption against extraterritorial application of Federal Tort Claims Act prevents spouse of worker killed in Antarctica from filing a wrongful death claim against the United States); Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, 2560 (1993) (holding that statutes prohibiting deportation of aliens when their lives are threatened does not apply to Coast Guard interdiction of Haitian refugees on the high seas).

resolved restrictively and distinguished *Massey* because it involved the unique status of Antarctica, which is not a foreign country but a continent analogous to outer space.[73]

In conclusion, case law suggests that NEPA applies extraterritorially only to actions involving the global commons, where all nations have a common nonproprietary interest. Questions remain whether this would include actions such as U.S. military operations on the high seas and U.S. space exploration ventures. Because case law has circumscribed NEPA's application, it is doubtful that NEPA, as written, offers a tenable basis for ratification of the Convention.

D. *Legislative Proposals to Amend NEPA*

More than one bill proposing to amend NEPA to apply extraterritorially has floundered in committee. For example, H.R. 1271, which authorized appropriations for the Office of Environmental Quality for fiscal years 1992 through 1996, contained a provision that would ensure consideration of the impact of federal actions on the global environment.[74] Similarly, H.R. 1113 would have amended NEPA by specifically adding the words "including extraterritorial actions" to the first paragraph of section 102(2)(C) following the word "actions."[75] The U.S. Environmental Protection Agency (EPA) did not support H.R. 1113 and an EPA representative testified that the agency "is not convinced that applying NEPA, a domestic U.S. statute, would necessarily achieve the desired result overseas."[76] However, without such an amendment or formal ratification of the Convention as a treaty, the Convention will not legally bind the United States or its individual states.

III. CURRENT STATUS OF THE CONVENTION IN THE U.S. AND CANADA

In addition to the uncertain legal basis of the Convention, many issues regarding implementation of the agreement remain. These include the authority of the Council on Environmental Quality to

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73. *NEPA Coalition*, 837 F. Supp. at 467.

74. H.R. 1271, 102d Cong., 1st Sess. § 1(c) (1991).

75. H.R. 1113, 101st Cong., 1st Sess. § 1(a)(1) (1989).

76. *A Bill to Authorize Appropriations for the Office of Environmental Quality for Fiscal Years 1989-1993 and Oversight of the National Environmental Policy Act: Hearings on H.R. 1113 Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment*, 101st Cong., 1st Sess. 59 (1989) (statement of Jennifer J. Wilson, Assistant Administrator for External Affairs, EPA).

promulgate regulations, the legal status of provisions that extend beyond NEPA, the scope of the Convention's provisions, and mechanisms to enforce the agreement. This section reviews these issues.

A. *CEQ Guidelines*

The Council on Environmental Quality (CEQ) was created by Title II of NEPA and, among other things, is chartered to:

> [a]dvise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.[77]

CEQ is authorized to spend money in support of activities necessary to implement international agreements.[78] However, CEQ's legislatively-defined duties do not include implementing international agreements.[79] But, there is a "catchall" phrase in NEPA that may be interpreted to authorize CEQ to issue guidelines implementing international agreements. This provision provides that all federal agencies shall:

> where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.[80]

Presumably as an extension of its NEPA authority, CEQ has prepared draft guidelines for implementing the Convention in consultation with the Department of State and the EPA.[81] The proposed guidelines state that the Convention is not intended to alter an agency's substantive implementation of NEPA or Executive Order 12,114, but rather is intended to provide a procedure for including public members and other countries' agencies in the current U.S. practice.[82] The EPA anticipates that, once the Convention is ratified, the transboundary impact analysis prescribed by the Convention will mirror the NEPA process.[83]

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77. Exec. Order No. 11,514, 3 C.F.R. 904 (1966-1970), *reprinted in* 42 U.S.C. § 4321 (1988).

78. NEPA, 42 U.S.C. § 4346(b) (1988).

79. *See* NEPA, 42 U.S.C. § 4344 (1988).

80. NEPA, 42 U.S.C. § 4332(f) (1988).

81. Interview with Joe Montgomery, Office of Federal Activities, U.S. Environmental Protection Agency, in Washington, D.C. (Dec. 6, 1994).

82. *Id.*

83. *Id.*

Although CEQ was created by NEPA, it derives its authority to issue implementing guidelines on Environmental Impact Statement preparation not from NEPA, but from Executive Order 11,514, which President Nixon issued "in furtherance of the purpose and policy of" NEPA.[84] Supplementing this, President Carter issued Executive Order 11,991, with the intent of creating a single set of uniform, mandatory CEQ regulations binding upon federal agency heads.[85] The mandatory character of CEQ's regulations has been judicially upheld.[86]

Nevertheless, it is uncertain whether CEQ's guidelines implementing the Convention will bind federal agencies once they are finalized. Arguably, these guidelines are binding because they derive from the CEQ's authority to implement NEPA. However, this argument is premised upon NEPA being the legal basis for Convention ratification, which is an unsettled question.

B. *Further Unsettled Issues and Questions*

In addition, many questions remain as to the nature of the Convention's mandates. The following discussion illustrates several of these issues.

Certain provisions of the Convention appear to go beyond NEPA's requirements. For instance, the Convention requires a "Party of origin" to initiate consultation whenever there is a finding of potential significant adverse environmental impact.[87] In contradistinction to NEPA, the Convention does not provide for "Findings of No Significant Impact" or provide for "Categorical Exclusions." It is unclear how activities meeting these NEPA descriptions will be handled under the Convention.

In addition, the Convention does not address requirements of other statutes that are relevant to the NEPA analysis process. For example, it is uncertain whether the substantive and procedural requirements of the Endangered Species Act[88] apply if a proposed action threatens a protected species or habitat. Resources such as endangered species or buildings with historical significance might be

84. Exec. Order No. 11,514, *supra* note 77, at 904.
85. Exec. Order No. 11,991, 3 C.F.R. 123-24 (1977).
86. *See* Andrus v. Sierra Club, 442 U.S. 347 (1979).
87. Convention, *supra* note 4, art. 5, 30 I.L.M. at 806.
88. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (West Supp. 1992).

addressed under the Convention as part of an EIA, but no affirmative duty to consider such impacts exists.

Significant questions remain as to the applicability of the Convention, including its geographical scope, the types of activities covered, and the threshold of activity triggering the Convention's requirements. For example, it is unclear whether Convention obligations attach to the activity of a vessel or an aircraft since it is unclear whether either of these constitute an "area" within the meaning of "transboundary impact" as defined in Article I. Further, it remains to be seen whether the Convention affects the navigational freedoms shared by Department of Defense vessels and aircraft. Many of these vessels and aircraft have nuclear components, including nuclear-powered generators, potentially making them subject to Convention requirements since the Convention specifically covers nuclear power stations and nuclear reactors.[89]

Some of these questions and issues might be resolved if the United States appends reservations to its acceptance document. If and when the United States deposits its instrument of approval on the Convention, it may include three provisos: (1) that the Convention does not bind the individual states, (2) that the Convention does not create a cause of action against the Federal Government, and (3) that the United States does not accept compulsory arbitration of disputes (because this may be considered a compromise of national sovereignty).

C. *Enforcement of the Convention Under International Environmental Law*

The Convention, similar to Executive Order 12,114, does not by its terms create a legal cause of action. Therefore, since the Convention has no real "teeth," it is questionable whether its requirements will be enforced. Apparently, moral suasion and the integrity of signatories are the only insurance for compliance. Instead of sanctions, the Convention relies on the voluntary cooperation and adherence of the signatories. This alliance among signatories forms the basis for a novel kind of international environmental impact assessment procedure.[90]

89. Convention, *supra* note 4, app. I, ¶¶ 2-3, 30 I.L.M. at 812-13.

90. Treaty Signed by Twenty-Six Nations, *supra* note 12, at 99.

The Transnational School of International Law teaches that coercive sanctions are not necessary to form international legal order. Rather, the Transnational School proposes that:

> law can be viewed as deriving its binding force, not from the 'power' of its source and the threat of punishment, but from the 'acceptance of a norm as binding.'[91]

The Transnational School recognizes and encourages cooperative efforts such as the EIA Directive and the Convention as necessary for "the global good." Arguably, since the Convention is the product of transnational will, sanctions and standing to sue are not necessary for compliance. Instead, parties have a mechanism for dispute resolution and a provision for a hearing before the International Court of Justice.[92] The provision for an inquiry commission under the Convention is another neutral mechanism for resolving disputes.[93]

The Transnational School view of international environmental law envisions agreements like the Convention, which transcend national boundaries in order to address problems such as transboundary pollution.[94] Indeed, transnational law embraces all law that regulates actions or events that extend beyond national frontiers, and it includes both public and private international law as well as other rules that do not completely fit into such standard categories.[95] Theories of transnational law, as compared to other schools, supply a larger storehouse of rules on which to draw, because the transnational view is not founded on the concept of the nation-state as the supreme basis for law. Instead, the transnational view oversteps provincial notions of territoriality and embraces norms, customs, and conventions that are not bound by sovereignty.[96]

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91. ALLEN SPRINGER, THE INTERNATIONAL LAW OF POLLUTION 39 (1993) (*quoting* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 85 (1964)).

92. Convention, *supra* note 4, art. 15, 30 I.L.M. at 810.

93. Convention, *supra* note 4, art. 3 & app. IV, 30 I.L.M. at 804, 815.

94. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 37 (1964).

95. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

96. *Id.* Jessup states that the territorial emphasis in English common law can be traced to the insular position of England, having no international land boundaries and knowing only the boundaries between counties. He posits that this common law concept of territoriality was subsumed by U.S. law. *Id.* at 43-44.

CONCLUSION

Because our society is becoming increasingly transnational, there is growth in the volume and scope of international agreements such as the Convention. The principal agents of these transnational agreements are the nation-states, using instruments of multilateral or bilateral international conventions.

"The acceptance of bilateral, multilateral, regional, and other international conventions . . . as sources of modern international law is therefore no longer a matter of doubt."[97] However, without proper legal foundation, the reason for enforcing these conventions is often merely moral suasion. Thus, to ensure that the Convention is legally binding on the United States, a more tenable basis than the uncertain power of the Executive to make agreements is needed. Instead, the Convention either should be formally ratified as a treaty or should rely on NEPA as enabling legislation for ratification, which would require amendment of NEPA to apply extraterritorially. If either of these options were accomplished, the Convention's requirements would be unquestionably binding and consistent with U.S. law.

The Convention is an example of a revealing trend. "The changing structure of international law is a direct response to the social transformation taking place in international society."[98] As described by one writer:

> While the national state continues to be the overwhelmingly important form of political organization in international society, and the principal repository of legal power, the national state, and its symbol, national sovereignty, is becoming increasingly inadequate to meet the needs of our time.[99]

Were it not for the unified effort of the ECE, the Convention might not exist today. The kind of cooperative effort that produced the Convention is recognized by the Transnational School as essential in today's world of increasing interdependence. It is a significant move towards global awareness of environmental impacts and environmental accountability. Most importantly, the Convention represents the growing universalization of an environmental ethic that recognizes our mutual dependency.

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97. FRIEDMANN, *supra* note 94, at 69.

98. SPRINGER, *supra* note 91, at 39-40 (*quoting* FRIEDMANN, *supra* note 94, at 365-66).

99. FRIEDMANN, *supra* note 94, at 365-66.