ARTICLES

BIODIVERSITY AND A NEW "BEST CASE" FOR APPLYING THE ENVIRONMENTAL STATUTES EXTRATERRITORIALLY

BY
PAUL BOUDREAUX*

The federal courts have applied a presumption that most environmental statutes do not apply to conduct overseas. Efforts to overcome this presumption based on the supposed intent of Congress have largely failed. This Article argues for a new "best case" for applying environmental laws extraterritorially, focusing on the Endangered Species Act's powerful section 7. This best case would assert that 1) the overseas action affects interests within the United States, such as the interest in preserving biodiversity for future needs, and 2) the action would not create a clash with the expectations of foreign governments or culture.

* Associate Professor, Stetson University College of Law, Gulfport and Tampa, Fla.; J.D., University of Virginia School of Law LL.M, Georgetown University. The author argued environmental cases for the federal government in the 1990s.

I. INTRODUCTION

Do the U.S.' environmental statutes control the conduct of federal agencies and American companies when they act in other countries? For example, does an American aid agency have to consider the potentially adverse effects of a development project in Asia on an endangered elephant?[1] For the most part, the answer of the federal courts has been "no." The laws have been limited to the borders of the United States not because Congress has commanded so, but because the courts have applied a court-made presumption against extraterritoriality. It has been nearly a generation since two federal courts of appeals overcame the presumption and separately held that the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) *did* apply extraterritorially, at least in some circumstances.[2] And it has been nearly as long since these breakthroughs were frittered away by later decisions.[3]

Meanwhile, new science has made clearer the fact that the globe's environment is a single unit. Pollution from the United States and Japan

[1] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). In this case, wildlife advocates sued the Secretary of the Interior over a then-new regulation stating that a federal agency's duties under section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544 (2000 & Supp. 2004), do not apply to agency actions overseas. Lujan v. Defenders of Wildlife, 504 U.S. at 557–58. The plaintiffs won in the U.S. Court of Appeals for the Eighth Circuit, which concluded that Congress intended the duties to apply to agency conduct overseas. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990). The Supreme Court reversed, however, holding that the plaintiffs did not have standing to sue, in large part because they did not have definite plans to return to the foreign countries to observe the endangered species. Lujan v. Defenders of Wildlife, 504 U.S. at 564. The Court did not rule on the merits. *Id.* at 578. For a further discussion, see the text accompanying notes 89–121. The issue of extraterritorial application of the ESA, which has not been ruled on by a federal appellate court since 1992, is the chief focus of this Article.

[2] *See* Envtl. Def. Fund, Inc. v. Massey (*EDF v. Massey*), 986 F.2d 528, 529 (D.C. Cir. 1993) (holding NEPA applies extraterritorially); *see* Defenders of Wildlife v. Lujan, 911 F.2d at 125 (holding section 7 of the ESA applied extraterritorially).

[3] *See* Basel Action Network v. Mar. Admin., 370 F. Supp. 2d 57, 71–73 (D.D.C. 2005) (discussing judicial reaction to *EDF v. Massey* and concluding that NEPA does not require an environmental impact statement for federal actions taken overseas); Lujan v. Defenders of Wildlife, 504 U.S. at 578 (reversing *Defenders of Wildlife* and holding the plaintiffs lacked standing).

heats the world's climate and melts the icy habitat of the polar bear.[4] Fires generated by forest-cutting in southeast Asia blanket nearby nations with smoke.[5] And the anthropogenic extinction of species of animals and plants may change the world in ways that we do not yet understand.[6] Advocates for the environment have yet to press these scientific ideas into service for new arguments in favor of applying U.S. environmental statutes extraterritorially.

This Article explores the law of extraterritorially primarily as it applies to one of environmental law's most famous provisions—section 7 of the Endangered Species Act.[7] This powerful provision, which requires federal agencies not to "jeopardize" endangered species, was the subject of one of environmentalism's greatest victories in the Supreme Court;[8] later, it was the subject of one of its most deflating losses, 1992's *Lujan v. Defenders of Wildlife*,[9] in which the Supreme Court ordered the dismissal, for lack of standing, of claims asserting that the ESA applies to agency actions overseas.[10] It is time to revive claims for the extraterritorial application of section 7 of the ESA.

In this Article, I develop a "best case" for arguing that environmental laws, especially ESA's section 7, govern certain actions in other countries. *First*, the case should be one in which the conduct arguably affects interests *within* the United States. Preserving global genetic biodiversity is a strong example of such an effect because protecting endangered species may preserve valuable goods and services for the United States in the future. *Second*, the federal action should be one for which the affected foreign county has not developed an expectation that the planned action will go forward, thus allowing for a minimization of the foreign "clash" argument that supports the law of the presumption against extraterritoriality.

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4 The U.S. Fish and Wildlife Service has proposed to list the polar bear as endangered, in large part because of the decrease in arctic sea ice caused by unusually warm temperatures in the arctic region. *See* U.S. Fish and Wildlife Serv., Marine Mammals Mgmt., *Polar Bear, Conservation Issues*, http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm (last visited Sept. 7, 2007). *See also* Proposed Rule to List the Polar Bear as Threatened Throughout Its Range, 72 Fed. Reg. 7381, 7381 (Feb. 15, 2007) (to be codified at 50 C.F.R. pt. 17), *available at* http://www.gpoaccess.gov/fr/index.html (search volume 72 for page number 7381).

5 Over the past ten years, fires from the Indonesian island of Sumatra have sent smoke clouds over Malaysia. *Indonesian Forest Fires again Cause Haze in Malaysia*, ASSOCIATED PRESS, Aug. 4, 2005, http://news.mongabay.com/2005/0804-ap.html (last visited Nov. 18, 2007); Vijay Joshi, *Malaysia haze prompts state of emergency*, Aug. 11, 2005, MONGABAY.COM, http://news.mongabay.com/2005/0804-ap.html (last visited Nov. 18, 2007).

6 In Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997), the D.C. Circuit concluded that a chief reason for the ESA was to preserve a pool of genetic biodiversity for the future. The usefulness of this decision for the extraterritoriality issue is discussed in depth in Part V of this Article.

7 Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000).

8 *See* Tenn. Valley Auth. v. Hill (*TVA v. Hill*), 437 U.S. 153, 188 (1978) (holding that section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2000), allowed for no exceptions and worked to block the completion of a multi-million dollar dam because of its likely effects on the endangered snail darter fish). *See infra* text accompanying notes 111–19.

9 504 U.S. 555 (1992).

10 *Id.* at 578; *see supra* note 1.

This argument is made from a perspective that is admittedly that of an advocate for broad application of the environmental laws. Even the "best case" would undoubtedly face an uphill battle in the federal courts, which have not been kind to claims of extraterritoriality for the environmental laws. But the new "best case" deserves to be asserted.

II. THE PRESUMPTION AGAINST THE EXTRATERRITORIAL APPLICATION OF U.S. STATUTES

A. The Supreme Court's Uneasy History of a Presumption

It is settled federal law that there is a presumption against the extraterritorial application of U.S. statutes.[11] More complex, however, is the question of determining whether a particular application would indeed be "extraterritorial." While some authorities refer to this body of law as the "*Foley* doctrine" after a 1949 Supreme Court decision,[12] this term is by no means universal; this Article will refer to it simply as "the Presumption." In order to apply the Presumption, however, it is worthwhile to scrutinize the rationales posited by the Supreme Court for this common-law doctrine.

As the Supreme Court has asserted, it is likely that most members of Congress think most often about how legislation affects domestic parties and interests.[13] Occasionally, an explicit limitation to U.S. boundaries is placed in a statute. For example, the provisions prohibiting "take" of endangered species in the ESA's section 9 are divided into separate restrictions against take "within the United States or the territorial sea of the United States" and take "upon the high seas."[14] The federal Clean Water Act covers discharges into "navigable waters," which are defined as "waters of the United States, including the territorial seas."[15] The Marine Mammal Protection Act (MMPA) prohibits take "in waters or on lands under the jurisdiction of the United States" or "on the high seas."[16]

For most statutory commands, however, Congress makes no reference to the nation's boundaries. The ESA's section 7(a)(2) fails to clarify whether its requirement that federal agencies not "jeopardize" an endangered species applies to agency actions undertaken in other countries, such as the funding of foreign aid projects.[17] Part IV of this Article explores this issue and concludes that there is not a convincing case that the statutory text reveals an "intent" to apply section 7 overseas. In any event, any argument that

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[11] *See, e.g.*, Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991); Foley Bros. v. Filardo (*Foley*), 336 U.S. 281, 285 (1949); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

[12] *See Foley*, 336 U.S. at 281.

[13] *See, e.g.*, *Aramco*, 499 U.S. at 248 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.").

[14] 16 U.S.C. § 1538(a)(1)(B)–(C) (2000).

[15] Federal Water Pollution Control Act, 33 U.S.C. § 1362(7) (2000).

[16] Marine Mammal Protection Act of 1972, 16 U.S.C. § 1372(a)(1)–(2) (2000).

[17] *Id.* § 1536(a)(2) (2000).

section 7 applies extraterritorially must take account of the Presumption against extraterritoriality, which is worth reviewing briefly.

In *Foley Bros., Inc. v. Filardo*,[18] the Supreme Court in 1949 made its first clear explanation of the Presumption. The case concerned the federal Eight Hour Law,[19] which imposed eight-hour-work-day limits for laborers working for contractors and subcontractors with the federal government.[20] The statute contained no explicit reference to employment by a contractor or subcontractor outside the United States.[21] The plaintiff was an American who worked for an American company building public works projects in Iran and Iraq; the company's contract with the government stated that it would abide by all U.S. laws, but did not refer specifically to the Eight Hour Law.[22]

The Supreme Court first conceded that Congress holds the *authority* to impose restrictions on U.S. companies acting overseas.[23] But the Court then concluded that the Eight Hour Law did not apply to employment in other countries because the statutory text did not clarify that it applied overseas.[24] "[A] canon of construction . . . teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States," the Court wrote.[25] This Presumption arises, the Court explained, from an "assumption that Congress is primarily concerned with domestic conditions."[26]

This method of reasoning is circular, of course: the Presumption is based on an assumption with no support other than the Court's sense of how Congress works. If it were untrue, for example, that Congress typically thinks only about domestic conditions for a certain category of legislation, it would make little sense to apply the Presumption for this category. Nonetheless, now that *Foley* and its Presumption have been established law for more than half a century, it seems unlikely that the Court would reverse its "assumption" of how Congress thinks and behaves. Today, if members of Congress affirmatively intend for a law to apply to conduct outside the United States, they should know enough to clarify their intent through precise language in the statute, or at least through some other expression of intent in the legislative history. ESA's section 9, for example, clearly and explicitly extends its prohibition of "take" to "the high seas."[27]

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18 336 U.S. 281 (1949).

19 40 U.S.C. §§ 321–22 (1949) (repealed 1962), § 323, §§ 324–326 (repealed 1962).

20 *Id.* § 324 (1949).

21 *Foley*, 336 U.S. at 285.

22 *See id.* at 283.

23 *See id.* at 284 (citing Blackmer v. United States, 284 U.S. 421 (1938) (involving a subpoena served overseas)).

24 *See id.* at 286.

25 *Id.* at 285 (citing *Blackmer*, 284 U.S. at 437).

26 *Id.* at 285.

27 16 U.S.C. § 1538(a)(1)(C) (2000). Other examples of statutes clearly expressing intent to apply to actions in other countries include the Americans With Disabilities Act, 29 U.S.C. § 630(f) (2000) ("employee" includes a U.S. citizen "employed . . . in a foreign country"), and the Logan Act, 18 U.S.C. § 953 (2000) (applying to a citizen "wherever he may be" and referring to correspondence with foreign governments).

The *Foley* decision also obliquely referred to another policy-based reason for the Presumption—the potential cultural troubles that might be stirred up by imposing the values and requirements of U.S. law inside the borders of another nation.[28] *Foley* pointed out that if the eight-hour law was applicable to American companies working in Iran, the law would benefit "a citizen of Iran who chanced to be employed on a public work of the United States . . . although labor conditions in Iran were known to be wholly dissimilar to those in the United States."[29] This comment appears to raise the specter of a *cultural clash* between American values and those of other countries.

Although the firmness of *Foley*'s Presumption was sometimes questioned over the succeeding years, it was reaffirmed by an increasingly conservative Supreme Court in 1991, in *Equal Employment Opportunity Comm'n v. Arabian American Oil Co.* (*Aramco*).[30] This case concerned whether the U.S. law prohibiting discrimination in employment, Title VII of the Civil Rights Act of 1964,[31] applied to employment by an American company in a foreign country.[32] The plaintiff, who was a Lebanese-born naturalized American citizen, asserted that Aramco discriminated against him on account of his race and religion when he worked for the American owned company in Saudi Arabia in the 1980s.[33]

The Court's opinion, written by Chief Justice Rehnquist, reaffirmed *Foley*, which it quoted to restate the Presumption that federal statutes "apply only within the territorial jurisdiction of the United States."[34] The Presumption stands "unless there is 'the affirmative intention of the Congress clearly expressed.'"[35]

Significantly, the Court in *Aramco* also reaffirmed that a primary rationale for the Presumption was "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[36] Interestingly, however, the Court did not explain in *Aramco* or in other decisions what kind of "clash" it envisioned. In any event, the Court has applied the Presumption a number of times since *Aramco*.[37]

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[28] *Foley*, 336 U.S. at 293–94.

[29] *Id.* at 286.

[30] 499 U.S. 244 (1991).

[31] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000 & Supp. 2004).

[32] *Aramco*, 499 U.S. at 246.

[33] *Id.* at 247.

[34] *Id.* at 248 (quoting *Foley*, 336 U.S. at 285).

[35] *Id.* (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

[36] *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)).

[37] The most notable recent Supreme Court decisions have been Smith v. United States, 507 U.S. 197 (1993) (holding that the Federal Tort Claims Act did not apply to torts committed in Antarctica, in part because of a lack of "clear evidence" that Congress meant to apply the statute outside the United States), and Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (holding that certain protections against deportation of aliens to hostile nations do not apply to aliens apprehended on the high seas, using evidence such as legislative history to reach the conclusion).

The Presumption is not impenetrable, however. The Court has never held that the congressional intent must be expressed by an explicit jurisdictional statement in the text of the statute, such as "this statute applies to the conduct of United States citizens or corporations acting within another nation," or the "high seas" provision of the MMPA.[38] Although the Court in *Aramco* at one point referred to the fact of Congress's "awareness of the need to make a *clear statement*" of overseas application, this was not the holding of the case.[39] Proof of congressional *intent*, not necessarily through explicit statutory language, appears to be sufficient to overcome the Presumption. Intent can be inferred by the structure of the statute, legislative history, or—perhaps in some cases, as discussed in Part V—an interpretation that gives full effect to the purpose of the law.

B. The "Clash" Rationale

It is rather odd that the Supreme Court has never endeavored to explain what kind of "clash" it envisioned might occur if U.S. law applied to conduct in other countries. The Court has not explained whether it was concerned about what may be called a "true conflict" of colliding laws,[40] which occurs when American law commands action in one direction, while the other nation's law demands action in another direction.[41] In such a circumstance, some law must recede; to give precedence to the "home" nation's law would make sense, if only as a matter of international comity. By contrast, another sort of potential clash would be "indirect social friction," in that persons in the other country merely might disagree with or not understand the American law. This sort of clash does not require one nation's law to recede. Depending on the type of indirect social friction that might be generated, the Presumption makes greater sense in some instances than in others.

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[38] 16 U.S.C. § 1372(a)(1) (2000).

[39] *Aramco*, 499 U.S. at 258 (emphasis added). Some commentators have read this passage in *Aramco* to require Congress to state explicitly with statutory text its intent to override the Presumption. *See, e.g.*, Randall Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 96 (2006) (referring to a "clear statement" requirement (quoting *Aramco*, 499 U.S. at 258)). But, the "clear statement" language in *Aramco* was merely part of the Court's explanation of how Congress *could* override the Presumption. The holding of *Aramco* was that the "intent" of Congress was sufficient to overcome the Presumption. 499 U.S. at 248 (quoting *Foley*, 336 U.S. at 285). This "intent" test presumably would allow for an argument based on legislative history, such as congressional reports and statements, not just the text of the Act. This method of statutory interpretation would run counter, of course, to the skepticism of legislative history expressed by Justice Antonin Scalia. *See* Daniel A Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423, 437–44 (1988) (chronicling Justice Scalia's skepticism of legislative history throughout his opinion and speeches).

[40] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–99 (1993) (discussing the idea of a "true conflict" of laws pulling in opposite directions and rejecting the assertion that such a "true conflict" occurred in the case at hand, which applied United States law to actions in the United Kingdom).

[41] *Id.* at 799.

To require, for example, the use of the American minimum wage in another country might not be justified, in some sense, because the cost of living might be lower in the other country. To require that the workers of an American company be paid according to the American minimum wage might engender resentment among other workers in the country. In another example, the American limits on working hours might compare so favorably to those of other employers in the nation that large numbers of highly skilled workers would be "drained" to American employers, thus harming other, locally based companies. Or, perhaps even more controversially, American standards of fair conduct—such as those concerning non-discrimination and sexual harassment—might be so alien to another country's culture that to impose them would cause resentment and discord. Although it might make sense, as a matter of social justice, for American companies to abide by our values of non-discrimination while acting in Saudi Arabia, for example, there is no doubt that American values may sometimes clash with those of other nations. Some might go so far as to assert that imposition of American values in other countries, even in the context of only American companies, could amount to "cultural imperialism."[42]

In the context of protection of animal species, potential clashes are not hard to imagine. Across the world, different cultures have different views of the exploitation and take of animals. In some cultures, for example, the horse is considered an unacceptable source of food; in others, it is treated not much differently from a goat or a chicken.[43] In some cultures, cattle are revered; in other countries, pigs are not eaten because they are considered unclean. [44] With endangered species, to be sure, there is less likely to be a clash concerning the treatment of the animals, if only because the species, by virtue of their rarity, are less likely to be a significant part of the culture or economy. It is possible, however, to conjure up such a potential clash. Consider a hypothetical plan for an American aid project to build a highway in a poor nation that would facilitate medical care and other aid to remote rural regions. If the road would jeopardize an endangered reptile that tends to venture onto the road at night and into the path of oncoming vehicles, section 7 of the ESA would block the project, if it applied to the American agency.[45] If the culture of the foreign nation placed very little importance on protection of the reptile, the decision of the U.S. government to back out of the planned project might seem like an unacceptable slight to the host nation, with unpleasant foreign policy ramifications. For a lawmaker or jurist for whom foreign relations takes precedence over species protection,

[42] *Globalization and Cultural Identity*, *in* THE GLOBAL TRANSFORMATION READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 269, 273 (David Held & Anthony McGrew eds., 2d ed. 2003).

[43] *See* Joel Stein, *A Mane Course*, TIME, Feb. 19, 2007, at 76.

[44] *See* Britannica Online Encyclopedia, *India Agriculture*, http://www.britannica.com/eb/article-46416/India (last visited Nov. 18, 2007) (discussing the traditional Hindu and Muslim views of animals).

[45] If the project would jeopardize the species, a biological opinion of the Secretary of the U.S. Fish and Wildlife Service would suggest "reasonable and prudent alternatives" that would not jeopardize the species. 16 U.S.C. § 1536(b)(3) (2000).

the specter of such a potential clash would be a significant drawback in applying laws such as the ESA to U.S. agency actions in other countries.

III. PRECEDENT FOR AVOIDING THE PRESUMPTION

Although the Supreme Court has solidified its Presumption against extraterritoriality, the Court has never held that Congress is forbidden to apply its laws to conduct in other nations. In fact, the federal courts have a number of times imposed U.S. statutes to overseas conduct without explicit statutory language. An analysis of these opinions is essential for developing an argument that the environmental statutes should be applied extraterritorially.

A. The "Spillover" Rationale

The most significant case law exception to the Presumption was *Steele v. Bulova Watch Co., Inc.* (*Steele*).[46] This 1952 case involved a trademark violation claim brought under the Lanham Act[47] by an American corporation, the Bulova Watch Company. The defendant was an American citizen, living in Texas, who organized a business in Mexico to stamp the name "Bulova" on cheap watches and sell them in Mexico.[48] His conduct did not violate Mexican law.[49] Had this conduct taken place in the United States, however, it clearly would have violated the Lanham Act.[50]

The Supreme Court held that the Lanham Act outlawed the defendant's conduct, even though it took place in Mexico.[51] Noting the Presumption set forth in *Foley*, the Court held that the Presumption may be overcome if "legislative intent appears."[52] In the case of the Lanham Act, Congress did *not* make explicit that it applied to the use of American trademarks in foreign countries.[53] Nonetheless, the broad language of the Act's reach—it covers "all commerce which may be lawfully regulated by Congress"[54]—helped convince the Court that Congress intended the Act to apply in foreign countries.[55]

The Court did so despite the obvious potential for clashes between the United States and foreign countries under trademark law. Consider a hypothetical retailer that is a successful employer in a foreign country. The retailer, which is an American company, provides inexpensive goods to the local population, but uses a trade name that is registered in the United States to another American company. Under the decision in *Steele*, the retailer

46 344 U.S. 280 (1952).
47 Lanham Act, 15 U.S.C. §§ 1051–1141n (2000 & Supp. IV 2004).
48 *Steele*, 344 U.S. at 281.
49 *Id.* at 281–82.
50 *See* 15 U.S.C. §§ 1051–1141n (2000 & Supp. IV 2004).
51 *Steele*, 344 U.S. at 285.
52 *Id.* (citing *Foley*, 336 U.S. 281, 285 (1949)).
53 *Id.* at 283–84.
54 15 U.S.C. § 1127 (2000).
55 *Steele*, 344 U.S. at 286.

could be penalized and enjoined, even though an injunction might be resented in the foreign country, where employees might lose their jobs, tax revenue would be lost, and useful goods might be taken off the market. Needless to say, these effects might seriously annoy the government and society in the foreign country. The Court in *Steele* did not address the potential for such clashes, even though it was cited in *Foley* as a chief reason for the Presumption.[56]

A key factual reason for the *Steele* Court's quickness in avoiding the Presumption was that some of the "spurious 'Bulovas' filtered through the Mexican border" into the United States; some of these watches were brought to American repair shops, which discovered that they were not true American "Bulova" watches.[57] I call this a factual "spillover" of conduct in another country into harmful effects within the United States. Although the Court in *Steele* did not explicitly state that the spillover was a *sufficient* ground to apply a U. S. law extraterritorially, the Court certainly relied on the spillover to support its holding.[58] Indeed, when conduct "spills over" into the United States, there could be a solid argument that the Presumption should not apply at all, because the conduct in another country affects interests within the United States. The Supreme Court has never made such a holding, however.

More recently, in 1993, the Supreme Court again allowed for an extraterritorial application of U.S. business law.[59] In *Hartford Fire Insurance Co. v. California*,[60] the Court held that the Sherman Act,[61] which bans restraints of trade, applied to anti-competitive conduct engaged in by re-insurance companies acting inside the United Kingdom.[62] Oddly, the Supreme

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[56] *Foley*, 336 U.S. at 285–86.

[57] *Steele*, 344 U.S. at 285–86.

[58] *Id.* at 288.

[59] The most significant and well-reasoned lower court opinion that overcame the Presumption since *Steele* was *EDF v. Massey*, 986 F.2d 528 (D.C. Cir. 1993). *EDF v. Massey* held that the requirements for an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. § 4332(c) (2000), applied to activities of a federal agency in Antarctica. 986 F. 2d at 530–37. The case is discussed at length below.

[60] 509 U.S. 764 (1993).

[61] Sherman Act, 15 U.S.C. § 1 (2000).

[62] *Hartford Fire Ins.*, 509 U.S. at 795–96. The plaintiffs in *Hartford Fire Insurance* argued that the defendants, which included private re-insurance companies, had boycotted the plaintiffs for failure to use insurance terms that they preferred. *Id.* at 764. Much of the allegedly anti-competitive behavior occurred in Britain. *Id.* The defendants argued that British law did not make the conduct unlawful, thus creating a conflict. *Id.* at 799. The Supreme Court rejected this argument, concluding that merely because a certain course of action is legal under the law of another nation does not create a "true conflict" with U.S. law. *Id.* If a company is able to comply both with U.S. law and not run afoul of the law of the foreign nation in which it is acting, there is no "true conflict." *Id.* Through this conclusion, the Court found that companies acting in Britain could be and were bound by U.S. antitrust law. *Id.* at 795–99. Accordingly, *Hartford Fire Insurance* stands for the principle that a U.S. interest may have to abide by both U.S. and foreign law when it acts in another country, as long as the two sets of laws do not pull in opposite directions. *See id.* This principle may be of great use in arguing for application of ESA's section 7 to conduct of federal agencies in other countries. Because federal agencies, unlike corporations, are subject less often to the laws of the other nation (federal agencies do not set up shop in other countries, for example, and are not incorporated in the other country), federal agencies are less likely than corporations to be in situations of "true conflict."

Court did not even mention the Presumption or the then-recent *Aramco* decision; rather, the Court relied on lower court precedent holding that the Sherman Act applied to anti-competitive activity in other countries when it affected commerce inside the United States.[63]

It may be tempting to conclude from the precedent of *Steele* and *Hartford Fire Insurance* that a corporate-minded Supreme Court accepts extraterritoriality when it threatens *business* interests in the United States, but not when it concerns other values, such as anti-discrimination principles and environmental concerns, that may be addressed by federal law. This may indeed be a partial explanation. But a more optimistic and practical interpretation of these exceptions to the Presumption is this: the Court is sometimes willing to allow application of U.S. law to conduct taken in a foreign country when the conduct spills over and harms interests within the United States.

It is not difficult to imagine an ESA case in which there might be significant spillover effects in the United States. Consider the hypothetical example of a plan to construct apartments on an island in a Caribbean nation. The apartments would be built by a U.S. construction company, supported by a grant from a U.S. aid agency. In fact, the housing project would cause the "take" of endangered sea turtles, through disorientation of hatchlings born on the beach, by the artificial lights of the new development.[64] Indeed, the extent of the harm might rise to the level of "jeopardy" under the ESA.[65] Moreover, assume that these sea turtles often migrate to U.S. waters, interbreed with other sea turtles, and support sea turtle populations in U.S. territorial waters. Thus the harm to the turtles in the Caribbean nation would indirectly decrease turtle populations in the United States. But the Caribbean nation holds no law to protect sea turtles.

Such a case would hold nearly perfect factual parallels to the facts of *Steele*.[66] In both cases the conduct is undertaken by an American company acting inside a foreign country. In both cases the conduct causes harm that the law of the foreign country does not address. But in both cases the conduct spills over and harms interests within the United States. The injuries are precisely the type the American laws were designed to avoid—consumer confusion over product origin in *Steele,* and endangered species jeopardy in the sea turtle hypothetical. Accordingly, an ESA case resembling the sea turtle hypothetical could rely on *Steele* to support an argument of applying the ESA to the conduct undertaken in a foreign country. In Part V, I develop this argument more thoroughly.

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63 *Id.* at 796.

64 When baby sea turtles hatch from nests on the beach, they walk toward low-level light at night, which before the modern age emanated only from the moon being reflected off the sea. In this way, the poor-vision babies would find the sea. With the introduction of artificial lighting, however, young turtles are often led in the wrong direction, to their peril. *See* Fla. Fish and Wildlife Conservation Comm'n, *Artificial Lighting and Sea Turtle Hatchling Behavior*, http://research.myfwc.com/features/view_article.asp?id=2156 (last visited Nov. 18, 2007).

65 16 U.S.C. § 1536 (b)(3)(A) (2000).

66 344 U.S. 280, 286 (1952).

B. Decisions Made in the United States

In some circumstances, the most straightforward way to avoid the Presumption might be to argue that the Presumption is not in fact triggered. This might occur because the potentially regulated conduct, although related to substantive action within another country, occurs, at least in part, *within* the United States.

The most significant and well-reasoned federal court opinion to avoid the Presumption in such a situation was the 1993 decision of *Environmental Defense Fund v. Massey* (*EDF v. Massey*),[67] which is still good law in the D.C. Circuit. The environmental plaintiffs claimed that the National Science Foundation (NSF) was required to prepare an environmental impact statement (EIS) pursuant to the National Environmental Protection Act (NEPA)[68] to study the environmental consequences of its practice of burning food wastes at scientific sites in Antarctica.[69] The Presumption did not apply, the D.C. Circuit held, because "the conduct regulated by the statute occurs primarily, if not exclusively, in the United States."[70]

Because NEPA imposes a duty only to create the EIS document *within* the United States, the Court reasoned, the case did not even trigger the Presumption against extraterritoriality.[71] This reasoning is more sophisticated than the typical "headquarters" argument that is sometimes asserted by a plaintiff to obtain, for example, venue in the D.C. Circuit concerning actions taken by an agency elsewhere, but nominally under the authority of the agency chief.[72] Rather, the court's reasoning in *EDF v. Massey* went as follows. NEPA does not require that the federal agency follow any specific course of substantive conduct in regard to the environment.[73] The legal obligation for the NSF simply was to prepare and *consider* an EIS in connection with the waste-burning in Antarctica; this would have been the end of its legal duty.[74] This consideration presumably would have been done by the NSF in Washington or elsewhere in the United States. Although it is possible that the agency could have decided, as the result of the information revealed in the EIS, to change its waste-burning practices, this decision would have been within the complete discretion of the agency; it would have been outside the control of NEPA. Accordingly, the D.C. Circuit reasoned, NEPA's EIS requirement did not even implicate the Presumption.[75]

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67 *EDF v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

68 42 U.S.C. § 4332(c) (2000).

69 *EDF v. Massey*, 986 F.2d at 529.

70 *Id.*

71 *Id.* (imposing the requirement for an EIS set forth in 42 U.S.C. § 4332(2)(c) (2000)).

72 *See, e.g.*, Natural Res. Def. Council, Inc. v. Envtl. Prot. Agency, 465 F.2d 492, 495 (1972).

73 *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (holding that NEPA does not require an agency to take a particular substantive course of action to protect the environment).

74 *EDF v. Massey*, 986 F.2d at 533.

75 *Id.*

If the Presumption is not triggered because the regulated conduct occurs within the United States, there is no ground to inquire whether application might cause a clash with the policies of other nations. It is easy to imagine, however, a case in which such a clash might arise. Consider a hypothetical case in which a valued foreign ally has placed an order for a new military weapons system designed in the United States. The military contractor plans to build the weapons at a new state-of-the-art facility in the United States. Such a facility would require at least one, if not more, federal permits. If the facility might adversely affect an endangered species in the area—thus triggering both NEPA and the ESA's section 7 duty to consult with the U.S. Fish and Wildlife Service—the permits would have to wait while the environmental statutes were complied with.[76] The foreign ally might become impatient at the NEPA and ESA-caused delay of the weapons system, potentially leading to foreign policy repercussions. Nonetheless, there is no doctrine for excusing federal law compliance simply because it might disturb foreign relations.

The strength of the conclusion in *EDF v. Massey* was dulled, however, by the fact that the court added an additional and alternative ground for its holding. Another reason that the Presumption would not apply, the court added, was because the *substantive* agency conduct would take place in Antarctica—an area of the global commons in which there was unlikely to be any potential clash with foreign law.[77] In effect, the United States held complete sovereign control over the U.S. bases in Antarctica.[78] At the end of its opinion, the Court seemed to back off from its earlier blanket conclusion—that the EIS requirement simply does not implicate the Presumption because it applies only within the United States—by stating that "we do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign . . . ."[79]

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[76] *See, e.g.*, *TVA v. Hill*, 437 U.S. 153, 174 (1978) (concluding that Congress intended to give species protection the "highest of priorities" and that even compelling needs of a government agency do not trump the straightforward commands of ESA's section 7).

[77] *EDF v. Massey*, 986 F.2d at 533.

[78] *See id.* at 535 (concluding that "[s]ince NEPA imposes no substantive requirements, U.S. Foreign policy interests in Antarctica will rarely be threatened, except perhaps where the time required to prepare an EIS would itself threaten international cooperation . . . or where the foreign policy interests at stake are particularly unique and delicate."). Soon after *EDF v. Massey*, the U.S. Supreme Court held that the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2000), did not apply to torts committed in Antarctica. United States v. Smith (*Smith*), 507 U.S. 197, 201 (1993). The FTCA is plainly distinguishable from NEPA and the ESA in a number of ways, however. First, the tort in *Smith* allegedly occurred as the result of negligent conduct in Antarctica. Second, the FTCA requires application of the "law of the place where the [negligent] act or omission occurred"—a statement of congressional intent that would be incompatible with extraterritorial application. 28 U.S.C. § 1346(b)(1) (2000). A goal for any claim seeking to overcome the Presumption is to convince a court that the claim is more like the NEPA analysis, as set forth in *EDF v. Massey*, and less like the analysis under the FTCA, as set forth in *Smith*. Part V sets forth how it could be asserted that ESA claims are more like NEPA claims than they are like FTCA claims.

[79] *EDF v. Massey*, 986 F.2d at 537.

Because the D.C. Circuit discussed at length the alternative ground, subsequent court opinions chose to limit *EDF v. Massey* to facts involving substantive agency action in the global commons. In *NEPA Coalition of Japan v. Aspin*,[80] the first district court opinion to interpret *EDF v. Massey*, the court held that the Presumption *did* apply to a NEPA claim directed at various activities on U.S. military bases in Japan.[81] Because the military's obligations to Japan were governed by long-standing treaties, the court noted, there might be a clash if an EIS requirement were imposed.[82] Preparation of an EIS "would necessarily require the [Department of Defense] to collect environmental data from the surrounding residential and industrial complexes, thereby intruding on Japanese sovereignty," the court reasoned.[83] Instead of following *EDF v. Massey*, the court cited an older D.C. Circuit NEPA precedent holding that a site-specific EIS was not required for an agency project to export nuclear technology to the Philippines[84] (the agency considered an EIS at the international project level).[85]

These cases reveal complications that the opinion in *EDF v. Massey* did not consider. First, it may be too facile to conclude that the EIS requirement addresses conduct that occurs solely within the United States. As mentioned in the Japanese case, creation of an EIS may sometimes necessitate data collection in the foreign country.[86] In such a case, it is conceivable that the collection might conflict with the laws or culture of the other country (although information about other nations is routinely collected in cases in which environmental consequences straddle the United States and other nations, in connection with the creation of both EISs and ESA biological opinions).

Second, even if the EIS can be created without meddling inside a foreign country, EISs always take time, and the foreign country may be

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80 837 F. Supp. 466 (D.D.C. 1993).

81 *Id.* at 468. For a more recent decision that sums up the current skepticism of the continuing validity of *EDF v. Massey*, see Basel Action Network v. Mari. Admin., 370 F. Supp. 2d 57, 71 (D.D.C. 2005) (holding that NEPA does not require an EIS for federal actions taken overseas). In a currently pending lawsuit, however, a plaintiff argues that the federal Overseas Private Investment Corporation is obliged to do an environmental impact statement for the effects of its overseas actions on global climate change, the effects of which will harm interests *within* the United States. *See* Friends of the Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889, 892 (N.D. Cal. 2007) (order denying in part and granting in part motion for summary judgment).

82 *Aspin*, 837 F. Supp. at 467 ("By requiring the [Department of Defense] to prepare EISs, the Court would risk intruding upon a long-standing treaty relationship.").

83 *Id.* at 467 n.5.

84 Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1366 (D.C. Cir. 1981). That decision was muddied, however, by practical considerations, such as the fact that the Nuclear Regulatory Commission was bound by other statutes to act upon the export application within very short time frames that would have made complying with NEPA very difficult. *See id.* at 1385–86 (Robinson, J., concurring).

85 A similar decision was reached in Greenpeace USA v. Stone, 748 F. Supp. 749, 757 (D. Haw. 1990) (holding that an EIS was not required for the transoceanic shipment of munitions from Germany to the Pacific). There, the Army had prepared a Global Commons Environmental Assessment, which met the requirement of Executive Order 12114, but did not complete an EIS. *See id.* at 762 n.15, 763.

86 *Aspin*, 837 F. Supp. at 467 n.5.

annoyed simply by the timing of the environmental law requirement. Reconsider the hypothetical of the plan to build a facility for a weapons system to be sold to an eager foreign ally. Requiring an EIS, and possibly a supplemental document if information changes,[87] might slow down significantly the construction of the facility and the eventual sale to the foreign ally. Thus, the EIS requirement may, in some cases, have fairly direct effects on American relations with other nations.

Finally, *EDF v. Massey* may be gainsaid by the observation that if U.S. law does not apply to *substantive* conduct in other countries, it would be a waste of time to create a document that addresses conduct that is of no concern of American law. This observation brings us back to the underpinnings of the Presumption. In "assum[ing] that Congress legislates against the backdrop of the presumption against exraterritoriality," as the Supreme Court explained in *Aramco*,[88] does this mean that the law presumes Congress has no interest at all in conditions in other countries? If Congress is completely uninterested in the world outside the United States, then it makes little practical sense to require an EIS to consider conduct about which Congress does not care.

But the Supreme Court has never held, of course, that it presumes Congress holds no interest whatsoever in actions outside the United States. Indeed, *Aramco* stated, quoting *Foley*, that "we must presume [Congress] 'is *primarily* concerned with domestic conditions.'"[89] The plain words of many statutes make clear that Congress is concerned, to some extent, with environmental conditions outside the United States. In NEPA, Congress stated that it was concerned with the relationship between "man and his environment."[90] Under an Executive Order issued by President Carter in 1979, agencies are supposed to create procedures for considering environmental issues overseas in some instances (although a full EIS is required only in actions affecting the "global commons").[91]

Accordingly, the strongest argument for the environment is that Congress and the Executive have expressed *some* interest in environmental conditions outside the United States. Once this proposition is accepted, then it is plain that there is some usefulness for an EIS that addresses the environmental effects of substantive federal agency actions in other countries. Because agencies should hold at least some minimal interest in the environmental consequences of their actions in other countries, it makes sense, as *EDF v. Massey* reasoned, to require them to consider these effects through the creation and consideration of an EIS.

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87 *See, e.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 385 (1989) (imposing a standard of review concerning a decision whether to create a supplemental EIS).

88 *Aramco*, 499 U.S. 244, 248 (1991).

89 *Id.* at 248 (quoting *Foley*, 336 U.S. 281, 285 (1949)) (emphasis added).

90 National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000).

91 The Order instructed federal agencies to engage in NEPA obligations for, among other instances, major federal actions affecting the global commons and major federal actions that involve the creation or use of toxic products or pollution. *See* Exec. Order No. 12,114, 3 C.F.R. 356–60 (1980). The Order did not create a private cause of action, however; accordingly, there is no court enforcement of violations of the order. *See id.* at 359.

This is true even though subsequent cases have limited the holding of *EDF v. Massey* to cases involving Antarctica and other global commons.[92]

It has been worth considering in detail the law of NEPA and extraterritoriality because of the parallels to the ESA's section 7, which was patterned in large part after NEPA. In the ESA, Congress once again clearly expressed *some* interest in species outside the United States. The ESA was spurred in large part by the then-new Convention on International Trade in Endangered Species (CITES).[93] Moreover, the United States holds a number of treaty obligations with other counties concerning the protection of migratory species.[94] As discussed below, the ESA also countenances the listing of species outside the United States. Accordingly, it cannot be said that, in enacting the ESA, Congress was completely indifferent to the fate of species living solely in foreign countries.

C. Limited Foreign Control

If the Presumption is primarily predicated on a concern over avoiding clashes with foreign law, another category of cases for which the Presumption makes little sense is cases in which there is limited foreign control of the land or species habitat. In places such as the high seas, Antarctica, U.S. embassies, and other locations in which it is unlikely that a foreign nation would impose its law or policy, there is far less reason to fear a clash, and little reason to impose the Presumption.

Professor Randall Abate has suggested that the law of the Presumption follows a geographically based continuum.[95] The closer the United States is to completely controlling the place of conduct, the more likely the federal courts are to apply U.S. law. The stronger the foreign control, the more likely it is that courts will apply the Presumption against extraterritorial application. Accordingly, the Presumption would apply with full force inside the boundaries of foreign sovereign nations, in locations where the U.S. government holds no control of the land. Places of mixed control, such as U.S. embassies or U.S. military bases in other countries, pose more difficult questions. By contrast, in the global commons, including the 200-mile-deep Exclusive Economic Zone in the seas adjacent to the United States, the Presumption is often avoided.[96]

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92 A number of academic writers have argued in favor of applying NEPA's EIS requirement extraterritorially. *See, e.g.*, Browne C. Lewis, *It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act*, 25 CARDOZO L. REV. 2143, 2145 (2004); Sara E. Baynard, Note, *The Extraterritorial Reach of NEPA and the Creation of a Foreign Policy Exception*, 28 VT. L. REV. 173, 181 (2003).

93 *See* 16 U.S.C. § 1531(a)(4) (2000) (referring to CITES, Sept. 13, 1973, 27 U.S.T. 1087, and other international obligations as a reason for the ESA).

94 *See id.* (referring to treaties). Perhaps the most significant are the migratory bird treaties, which spurred the enactment of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2004).

95 *See* Abate, *supra* note 39, at 87.

96 The Clean Water Act is an example of a federal statute that explicitly imposes regulation on conduct within "the territorial seas." Federal Water Pollution Control Act, 33 U.S.C. § 1362

D. Social Context?

A variant of this argument does not focus on the geography of where the conduct occurs, but rather on the *social* context in which the conduct occurs. If applying law extraterritorially would insinuate American social standards into a foreign society, the more likely it is that there would be a direct clash of cultures, and the more sensible it is to apply the Presumption. If, however, applying the law would *not* insinuate American social standards into another country, the stronger the argument for avoiding the Presumption. Although no court has explicated this argument of social context, it is supported by both precedent and logic.

Reconsider the facts of *Aramco.* Although both the plaintiff employee and the defendant company were American, the place of employment was Saudi Arabia, where presumably many of the fellow employees were Arabs, and where the insinuation of American standards of ethnic and religious tolerance might generate antipathy.[97] A potential clash might ensue. Likewise in *Foley*, in which an American citizen argued for application of U.S. law in Iran,[98] it would have created a difference in employment standards among workers had U.S. courts held that an American citizen was entitled to shorter working hours. This difference would likely have caused resentment in the other country.

By contrast, in *Steele*, the watch trademark case, the U.S. Lanham Act did not regulate employment of workers, but rather only restrained the American businessman who sold "Bulova" watches in Mexico.[99] Restraining the watch seller did not result in some persons in Mexico being treated more or less favorably than others. It is arguable that applying U.S. law in *Steele* did not implicate the insinuation of American social standards into Mexican society.

Extrapolating to the ESA, it is apparent that different types of extraterritorial applications could have radically different results, as a matter of social context. As an example, assume that an American-based company builds an industrial facility in another country, even though toxic water pollution from the facility might "take" some individual members of a fish species that is listed under the ESA. The facility is permitted in accordance with the law of the country. Indeed, the other nation's law sets forth a method of balancing the supposed costs and benefits of industrial projects with their effects on the environment; in this specific case, the foreign government concludes that the economic benefits of the facility exceed the quantified harm to the imperiled species.[100] If the ESA (or at least

nn.6–7 (2000) (defining, in part, the term "navigable waters").

97 *See Aramco*, 499 U.S. 244, 247 (1991).

98 *See Foley*, 336 U.S. 281, 281–83 (1949).

99 *See Steele*, 344 U.S. 280, 280 (1952).

100 An infamous dissent by Justice Powell in the snail darter decision, *TVA v. Hill*, 437 U.S. 153, 195 (1978) (Powell, J., dissenting), argued for just such a balancing of supposed economic benefit against species protection. Justice Powell's argument was rejected by the majority of the Court, and by subsequent commentators, largely because he wanted courts to conduct an ad hoc balancing. The flaw in this argument is that courts are not equipped to make such policy

section 9's no-take provision) applied to the project, however, the American company might be enjoined from building the facility, even though it would have been in compliance with the law of the nation in which it would be built. This is a fairly straightforward clash of social cultures, as reflected in law. American law gives precedence to protection of endangered species, regardless of economic impact. The other nation's law gives precedence to economic development over the protection of imperiled species. Although the U.S. Congress holds the *authority* to regulate the American company in this instance, imposition of the Presumption against extraterritoriality might be justified because of the clash of social cultures. Indeed, it is arguable that a respect for comity with the other nation argues against extraterritorial application of U.S. law in this instance.[101]

Contrast this scenario with another hypothetical in which a U.S. federal agency considers a grant of assistance to a foreign country for a new highway to serve rural areas, and the highway would adversely affect an endangered reptile. If the ESA's section 7 applied extraterritorially, the agency would have to consult with the U.S. Fish and Wildlife Service and ensure that the highway project would not jeopardize the reptile. This consultation would not take place within the social context of the foreign nation; it would take place within the context of U.S. government decision making. The federal agency might refrain from funding the road project for any of a number of reasons—the agency's budget and fiscal constraints, the agency's reprioritization of its foreign aid programs, the agency's displeasure with the other country's lack of help in the war on terrorism, or the effect on the endangered reptile. The decision not to fund the project, although it might annoy some interests in the foreign nation, occurs largely as matter of American decision making, and outside of the social culture of the foreign country.

This analysis might suggest that if the party affected by the statute is the U.S. government, then the Presumption does not apply. Such a suggestion would be too strong, however, as shown by the cases that have applied the Presumption to bar the application of NEPA to federal actions in other countries.[102] Nonetheless, it is conceivable and sensible that the law of the Presumption could evolve to distinguish cases in which the regulated decision making is done solely by the U.S. government. In such cases, application of U.S. law is less likely to cause clashes with either the law or

and economic judgments; in fact, a panel (the Endangered Species Committee, *see* 16 U.S.C. § 1536(e) (2000)), known as the "God Squad," later found that the Tellico dam at issue was not economically worthwhile. *See* Zygmunt J.B. Plater, *Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, A Small Fish in a Pork Barrel*, 34 ENVTL. L. 289, 299 (2004).

101 This comment is not meant to imply that the dam project would be justified or that there is a *compelling* argument for the Presumption in such a case. Rather, I argue that such a case would form a *relatively* strong argument for the Presumption, as compared to the contrasting example that follows in the text.

102 *See* Basel Action Network v. Mar. Admin., 370 F. Supp. 2d 57, 71 (D.D.C. 2005) (holding that NEPA does not require an EIS for federal actions taken overseas); NEPA Coal. of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993).

the culture of other countries. This category of cases could form an exception to the Presumption. Alternatively, law could develop a variant of the current law of the Presumption, in which a reverse presumption *in favor of* extraterritoriality is created, unless the specific facts of a particular case showed that a social clash could be likely to occur. A strong candidate for such a variant of the current law would be the ESA's section 7, which is a statutory requirement that is imposed solely on U.S. federal agencies and their operation, and not on private parties.[103] Under a more nuanced law of extraterritoriality, section 7 would apply to federal actions in foreign countries unless the agency showed convincing evidence that there were special reasons of foreign policy not to apply the law in the instance at hand.

IV. APPLYING THE PRESUMPTION TO THE ESA'S SECTION 7 AND CONGRESSIONAL INTENT

Does the ESA's section 7 apply to U.S. agency actions in other countries? In this part, I approach this question through the current law of the Presumption and its threshold inquiry of whether Congress expressed an intent to apply a statute extraterritorially. In Part V, I address a new "best case" argument for overcoming the Presumption.

A. The Bite of the ESA's Section 7

The ESA's section 7 is the one of the most powerful provisions in environmental law, and the source of the ESA's reputation as the small but tough "pit bull" of environmentalism.[104] Innocuously entitled "Interagency Cooperation," section 7 requires that a federal agency "shall, in consultation with and with the assistance of the Secretary [of Interior or Commerce, depending on the species], insure that any [agency] action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species," and not harm its critical habitat.[105]

Before taking action that might harm an endangered species,[106] therefore, a federal agency must consult with an expert wildlife agency (the U.S. Fish and Wildlife Service for most non-maritime species, through delegation from the Secretary of the Interior). The expert agency then

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103 16 U.S.C. § 1536 (2000).

104 *E.g.*, George Cameron Coggins, *An Ivory Tower Perspective on Endangered Species Law*, 8 NATURAL RES. & ENV'T 3, 3 (1993) (mentioning the common reference of the ESA as a "pit bull"); Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. TIMES, May 26, 1992, at A11 (quoting the World Wildlife Fund's Donald Barry that the ESA is "short, compact and has a hell of a set of teeth. Because of its teeth, the act can force people to make the kind of tough political decisions they wouldn't normally make.").

105 16 U.S.C. § 1536(a)(2) (2000). Section 1536(a)(1) requires, less significantly, that agencies "[carry] out [unspecified] programs for the conservation of endangered species." *Id.* § 1536(a)(1) (2000).

106 For purposes of this discussion, I use the term "endangered" species to refer to both endangered and threatened species—a grouping that is often referred to as "listed species."

creates a Biological Opinion as to whether the proposed action would unlawfully "jeopard[ize]" the species.[107] As part of the consultation, the expert agency often convinces the "action agency" to modify its plans so as to minimize potential effects on the species. If the Opinion states that the agency action would not jeopardize the species, the agency may proceed, sometimes with a statement of the "reasonable and prudent measures" that the agency must follow to minimize its "take" of the species, if any.[108] If the Opinion finds the agency action *would* jeopardize the species, there is no way for the agency lawfully to go forward with its action, except through the cumbersome and difficult process of requesting that an exemption be granted by a specially convened Endangered Species Committee.[109] As of 2006, the Committee, often jocularly called the "God Squad," had granted only two exemptions in its history, only one of which was actually used.[110]

The Committee was created in response to one of the towering landmarks of environmental law, the U.S. Supreme Court's decision in *Tennessee Valley Authority v. Hill* (*TVA v. Hill*),[111] which was handed down to great national attention in 1978. The Court held that the multi-million dollar Tellico Dam project in Tennessee, which was near completion, had to be stopped because it was expected to cause the extinction of an endangered little fish, the snail darter, which had been recently discovered in the Little Tennessee River.[112] The low oxygen content at the bottom of a still reservoir would cause the death of the snail darter, which needs highly oxygenated, shallow, flowing waters.[113] Rejecting government arguments to read the statute in a way that would avoid wasting the millions of dollars already spent on the dam (Attorney General Griffin Bell personally argued the case for the agency),[114] the Court held that the command, "do not jeopardize the continued existence" of the snail darter allowed for no exception.[115] Chief Justice Burger's sweeping opinion became famous for a number of astonishing phrases, such as "Congress intended endangered species to be afforded the highest of priorities,"[116] and "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward

107 *Id.* § 1536(b) (2000).

108 *Id.* § 1536(b)(4)(C) (2000).

109 *Id.* § 1536(e)–(p) (2000).

110 *See* CONG. RESEARCH SERV., THE ENDANGERED SPECIES ACT: A PRIMER 24–25 (2006), *available at* http://www.ncseonline.org/NLE/CRSreports/06Oct/RL31654.pdf. The only successful application of the exemption was that granted in 1979, for the Graylocks Dam and Reservoir in Wyoming, which had been found to jeopardize habitat of the endangered whooping crane. The Committee granted the exemption as Congress was about to grant a statutory exemption.

111 437 U.S. 153 (1978).

112 *Id.* at 172–73 (concluding that "the explicit provisions" of the ESA "require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million").

113 *Id.* at 165–66 n.16.

114 *Id.* at 187.

115 *Id.* at 173.

116 *Id.* at 174.

species extinction, whatever the cost."[117] In some sense, this decision was a high water mark for environmentalism in the United States.[118] Following *TVA v. Hill*, the ESA's section 7 quickly became a preferred legal tool for environmental advocates across the nation—from the Pacific, where it stopped logging of certain old growth forests in Washington because of harm to the northern spotted owl, to the Atlantic, where it restricted off-road vehicles on habitat of the endangered piping plover on Cape Hatteras, North Carolina.[119] But one large question remained: Did it apply to agency actions *overseas*?

B. Lujan v. Defenders of Wildlife and the Evidence of Intent in the ESA

In 1990, environmental advocates made a significant breakthrough in applying the ESA's section 7 extraterritorially. In *Defenders of Wildlife v. Lujan*,[120] the U.S. Court of Appeals for the Eighth Circuit held that section 7 applies to agency actions overseas, contrary to the regulations of the U.S. Fish and Wildlife Service.[121] The Eighth Circuit was reversed, however, by the U.S. Supreme Court for lack of standing in 1992's *Lujan v. Defenders of Wildlife*.[122]

The Supreme Court's opinion is among the decisions most reviled by environmental advocates. One plaintiff, Amy Skilbred, complained about the lack of a section 7 consultation concerning the potential adverse effects of a development project funded by the U.S. Agency for International Development on the endangered Sri Lankan elephant.[123] She had visited Sri Lanka, observed the elephant, and wanted to return to Sri Lanka in the future; however, she had no firm plans to do so, in part because of a civil war in the country.[124] Writing for the Court, Justice Antonin Scalia reasoned

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117 *Id.* at 184.

118 Like many great stories, the judicial victory was followed by some odd repercussions. First, additional populations of the snail darter were later found outside the area of the Tellico Dam. Second, after the Endangered Species Committee voted unanimously *not* to grant an exemption for the dam (it wasn't worth the expenditures), the dam was eventually built by a special statutory rider, introduced by a Tennessee senator, to an appropriations bill. *See generally* Plater, *supra* note 100, at 293–99, for a story of the litigation and of Section 7 of the ESA from the perspective of the litigator for the plaintiffs.

119 *See, e.g.*, N. Spotted Owl v. Lujan, 758 F. Supp. 621, 629 (W.D. Wash. 1991) (holding that the government had failed in its obligations under Section 7(a)(2) of the ESA); Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior**,** 344 F. Supp. 2d 108 (D.D.C. 2004) (challenging the designation under Section 7(a)(2) of critical beach habitat for the piping plover by an off-road vehicle group).

120 911 F.2d 117 (8th Cir. 1990), *rev'd sub nom.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that the plaintiffs lacked standing).

121 Defenders of Wildlife v. Lujan, 911 F.2d at 125; Interagency Cooperation-Endangered Species Act of 1973, as amended, Final Rule, 51 Fed. Reg. 19926, 19930 (June 3, 1986) (codified in part at 50 C.F.R. pt. 402(2006)) ("The scope of regulations has been enlarged to cover Federal actions on the high seas but has not been expanded to include foreign countries.").

122 504 U.S. at 578.

123 *Id.* at 563–64.

124 As of 2007, the civil war was flaring up again between the Hindu Tamil rebels in the north and the Buddhist majority. *See* BBC News, *Country profile: Sri Lanka*, http://news.bbc.co.uk/

that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed any specification of *when* the some day will be—do not support a finding of the 'actual or imminent injury' that our cases require."[125] The Court did not rule on the merits, although a concurring Justice Stevens, often a friend of environmentalism, concluded that section 7 does not apply extraterritorially.[126] The issue has not been ruled on by an appellate court since the Supreme Court decision.

Faced with the presumption set forth in *Foley* and *Aramco*,[127] the plaintiffs had argued in front of both the Eighth Circuit and the Supreme Court that the ESA shows a congressional intent to apply section 7 to agency actions in other countries.[128] They relied on the text of section 7, which imposes the duties to consult and to avoid jeopardy on "any action."[129] The plaintiffs highlighted a conclusion of a lower court, reminiscent of *TVA v. Hill*, that "[t]he language and mandate is all inclusive; it could not be more broad."[130]

This was, however, an overstatement. Congress could have been much clearer, of course. It could have stated that section 7's duties apply "throughout the world." It could have specified "on the high seas," as it did for the no-take prohibitions of section 9.[131] Alternatively, Congress could have expressed its intent that section 7 apply to "all actions which may lawfully be regulated by Congress"—similar to what it did in the Lanham Act,[132] for which the statutory language led the Supreme Court to hold that it applies extraterritorially.[133] In fact, the ESA's section 7 is maddeningly silent as to whether it applies to actions taken abroad.[134]

The plaintiffs also relied on the fact that other provisions of the ESA clearly do consider the international protection of wildlife. Indeed, Congress specified in its "findings" that impetuses to passage of the ESA in

1/hi/world/south_asia/country_profiles/1168427.stm (last visited Nov. 18, 2007). Does the fact that war has continued for nearly two decades support the Court's conclusion—the plaintiff may never return—or, by contrast, show that the application of the "imminent" requirement in the doctrine of standing is cockeyed?

125 Lujan v. Defenders of Wildlife, 504 U.S. at 564. This may be called the "plane ticket test" for standing. Had Ms. Skilbred possessed a plane ticket to Sri Lanka she would have had standing; because she did not have such a ticket, her case was dismissed. Among the many distressing points was Justice Scalia's reference to Ms. Skilbred and another plaintiff, Joyce Kelly, as "the women." *Id.* at 564. Had the plaintiffs been male, would the Court have referred to the plaintiffs as "the men"?

126 *Id.* at 581 (Stevens, J., concurring).

127 *Aramco*, 499 U.S. 244, 248 (1991) (quoting *Foley*, 336 U.S. 281, 285 (1949)) (recognizing "the long standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'").

128 Brief for Respondents at 6, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1991) (No. 90-1424).

129 16 U.S.C. § 1536(a)(2) (2000).

130 Defenders of the Wildlife v. Hodel, 707 F. Supp. 1082, 1084 (D. Minn. 1989).

131 16 U.S.C. § 1538(a)(1)(C) (2000).

132 15 U.S.C. § 1127 (2000).

133 *See Steele*, 344 U.S. 280, 285–86 (1952).

134 16 U.S.C. § 1536 (2000).

1973 were the U.S.' obligations under the then-new CITES[135] and other international conventions in which the United States has pledged to protect migratory species.[136] An obvious flaw in this argument, however, is that the restriction of trade and the protection of migratory species can be distinguished from protecting a species that does not exist in, and is not traded to, the United States. The ESA can and does protect species that exist solely within the United States; indeed, private property owners repeatedly have attempted and failed to have courts limit the ESA, on constitutional grounds, to species that are not migratory across state lines.[137]

The ESA's section 4,[138] which governs the listing of endangered and threatened species, does refer to other countries. In determining whether to list a species, the government must consider "efforts" to protect the species taken in a "foreign nation."[139] The ESA also makes it unlawful to "import" such species into the United States.[140] Moreover, the U.S. Fish and Wildlife Service[141] has listed species that are imperiled outside of the United States, even though its regulations state that the section 7 duties do not apply to agency actions taken abroad. It lists foreign species largely because of the U.S.' obligations under CITES and other treaties governing trade in and migration of imperiled species.[142]

The plaintiffs in *Lujan* v. *Defenders of Wildlife* did not, of course, dwell on language in the ESA that appeared to point against extraterritorial application of the ESA's section 7. Perhaps the most damaging appears in the first clause of the ESA as it appears in the U.S. Code. Congress found that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."[143] Two clauses later, Congress referred to the value of such species "*to the Nation* and its people."[144] Had the drafters had in the front of their minds the

135 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

136 *See* 16 U.S.C. § 1531(a)(4) (2000) (listing international treaties concerning species protection).

137 *See, e.g.*, Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1057 (1997) (holding that it is constitutional for Congress to regulate harm to single-state species, such as the Delhi Sands flower-loving fly); Gibbs v. Babbitt, 214 F.3d 483, 505–06 (4th Cir. 2000) (upholding the reintroduction of the red wolf to North Carolina).

138 16 U.S.C. § 1533 (2000).

139 *Id.* § 1533(b)(1)(A) (2000).

140 16 U.S.C. § 1538 (a)(1)(A) (2000).

141 The ESA grants the decision-making authority to the Secretaries of the Interior and of Commerce. 16 U.S.C. § 1532(15) (2000). For most terrestrial species, the Secretary of the Interior has delegated authority to the U.S. Fish and Wildlife Service.

142 Indeed, the U.S. Fish and Wildlife Service has recently proposed listing the polar bear, much of whose habitat is outside the United States, because of threats from global climate change, among other threats. *See* 12-Month Petition Finding and Proposed Rule To List the Polar Bear (*Ursus maritimus*) as Threatened Throughout its Range, 72 Fed. Reg. 7381 (proposed Feb. 15, 2007) (to be codified at 40 C.F.R. pt. 17).

143 16 U.S.C. § 1531(a)(1) (2000) (emphasis added).

144 *Id.* § 1531(a)(3) (2000) (emphasis added).

protection of species wholly outside of the United States, this was a very odd way to start the statute.

It is true that the next clause refers to the U.S.' conventions with other countries "in the international community."[145] As noted above, these conventions protect species that migrate to and from the United States or the high seas, or that may be subject to international trade. In sum, therefore, a fair and sober conclusion is that the text of the ESA does not clearly show an intent of Congress to apply the duties and obligations of ESA's section 7 to protect species that exist only in other countries.

The environmental plaintiffs succeeded, of course, in convincing the U.S. Court of Appeals for the Eighth Circuit in 1990 that the ESA's section 7 does apply extraterritorially. But the reasoning of the Eighth Circuit in *Defenders of Wildlife v. Lujan* was misplaced and is not likely to be repeated.[146] While giving lip service both to the Presumption against extraterritoriality and the *Chevron* doctrine of deference to agency interpretations of vague statutes,[147] the Eighth Circuit, in effect, ignored both of these principles of statutory interpretation. Noting the "expansive language" of the ESA's section 7 that "admits to no exceptions"[148] and the ESA's definition of "endangered species" that includes "no geographic limitation,"[149] the Eighth Circuit concluded, "[w]e are convinced that congressional intent can be gleaned from the plain language of the Act."[150] Accordingly, the court stopped at step one of the *Chevron* test, which asks whether Congress has addressed the issue at hand in the statute.[151]

The Eighth Circuit's approach was misguided. The panel viewed congressional silence and broad language to be evidence of an intent to apply section 7 overseas. But the entire point of a *presumption* is that silence does not overcome it; the purpose of a presumption is that it points in one direction unless there is convincing evidence—not silence—pointing in the opposite direction. Many statutes, such as the civil rights law at issue in *Aramco*,[152] used broad language, but this was not, of course, enough to overcome the Presumption against extraterritoriality. With the Presumption in place, the silence of Congress—and even its use of broad language without exceptions—cannot by itself overcome the Presumption, absent some affirmative evidence of intent to override the Presumption. To construe silence to overcome a presumption is to obliterate it. Accordingly, it is unlikely that another appellate court would repeat this reasoning.[153]

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145 *Id.* § 1531(a)(4) (2000).

146 Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd*, 504 U.S. 555, 578 (1992) (holding that the plaintiffs lacked standing).

147 Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

148 Defenders of Wildlife v. Lujan, 911 F.2d at 122.

149 *Id.* at 123 (citing the definition of "endangered species" from 16 U.S.C. § 1532(6) (1988)).

150 *Id.*

151 *Chevron*, 467 U.S at 842–44.

152 *Aramco*, 499 U.S. 244 (construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000)).

153 *But see* Mary A. McDougall, Comment, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 437 (1991) (arguing the Eighth Circuit's opinion was correct but

Moreover, the Eighth Circuit misapplied the *Chevron* doctrine. The first step of the *Chevron* test is not whether some intent can be gleaned from the interstices of the statute, but "whether Congress has spoken *directly* to the precise question at issue."[154] Although application of the *Chevron* doctrine is notoriously slippery and subject to abuse,[155] it is certainly not the case that congressional silence or broad language, with the backdrop of a presumption, constitutes speaking "directly" to overriding the presumption. In sum, the Eighth Circuit's reasoning as to extraterritoriality and the ESA's section 7 is not likely to be repeated.

C. The Interior Department's Reversal of Interpretation

Another point of potential vulnerability for the Presumption against extraterritoriality is that the expert federal wildlife agencies charged with administering the ESA changed their interpretation as to whether section 7 applies overseas.

In 1978, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued regulations clarifying that section 7's consultation and no-jeopardy requirements *did* apply to federal agency actions in other countries.[156] The agencies relied on the fact that 1) species that live in foreign countries are listed as endangered or threatened through section 4 and 2) the consultation and no-jeopardy requirements in section 7(a)(2) hold no geographic limitation.[157] This interpretive conclusion was complicated, however, by the fact that the expert agencies had already concluded that the additional requirements of section 7(a)(2)—the designation of "critical habitat" and the duty of action agencies not to engage in "destruction or adverse modification" of such critical habitat—do *not* apply to habitat in foreign countries, in large part because section 7(a)(2) states that critical habitat is to be determined "after consultation as appropriate with affected States."[158]

After President Carter was succeeded by President Reagan, the agencies reconsidered the extraterritorial application of section 7's consultation and no-jeopardy requirements, in part because of objections by some federal agencies that the duty to consult over projects in other countries complicated foreign relations.[159] The federal government

poorly reasoned).

154 *Chevron*, 467 U.S. at 842 (emphasis added). The second step is for the court to defer to any reasonable agency interpretation. *See id.* at 844–45.

155 For example, in *Rapanos v. United States*, 126 U.S. 2208 (2006), a plurality of the Court concluded that Congress's reference in the Clean Water Act to the linchpin term "waters," 33 U.S.C. § 1362(7) (2000), satisfied the first step of the *Chevron* test. The plurality relied on a definition of "waters" in a dictionary, and concluded that the agency's interpretation did not meet the plurality's reading of this definition. *Id.* at 2220–25 (Scalia, J., plurality).

156 Interagency Cooperation-Endangered Species Act of 1973, Final Rule, 43 Fed. Reg. 870, 874 (Jan. 4, 1978) (codified in part at 50 C.F.R. pt. 402 (2000)).

157 *Id.* at 874.

158 16 U.S.C. § 1536(a)(2) (2007).

159 *See* Brief of Petitioner-Appellant at 31–33, 47, Lujan v. Defenders of Wildlife, 504 U.S. 155

highlighted this putative complicating factor before the Supreme Court in *Lujan v. Defenders of Wildlife*.[160] It should be kept in mind, however, that parties potentially subject to regulation often object to environmental requirements and warn that, in effect, the sky will fall if they are required to undertake new duties to protect the environment. For example, the federal agency in the famous landmark ESA "snail darter" case predicted disaster for federal agency planning if section 7's consultation and no-jeopardy requirements were read broadly to cover domestic actions; the Supreme Court rejected these complaints, and the Republic has survived.[161]

Nonetheless, the FWS and NMFS issued new regulations in 1986 that reversed their previous interpretation.[162] The 1986 rule stated the new view that section 7 had a "domestic orientation," and relied on the lack of clarification by Congress in its 1978 amendment of the ESA about applying section 7 extraterritorially.[163] It also cited the "potential for interference with the sovereignty of foreign nations" as a reason for the change.[164] The 1986 rule spurred the litigation that led to the Supreme Court's *Lujan v. Defenders of Wildlife* decision in 1992, reversing the Eighth Circuit on the ground of a lack of standing.[165] The issue of the ESA's extraterritoriality has not been significantly re-litigated in a federal appellate court since.

It is tempting to assume that the flip-flop in agency interpretation between the Carter and Reagan Administrations was made for purely ideological reasons. Nonetheless, the change in interpretation is unlikely to form a successful basis for challenging the newer rule. Although there is surprisingly sparse law on the point, the U.S. Supreme Court has written that agencies are free to change their interpretation of a statute if there is a "good reason" to do so.[166] This is an extension of the *Chevron* doctrine, which requires federal courts to defer to a federal agency's interpretation of vague statutes, as long as the interpretation is a reasonable one.[167] The doctrine is supported by the idea that agencies, not courts, are likely to hold special expertise in the fields they regulate, and by the fact that agencies are part of the "political" branches of government, and thus better suited to make policy in interpreting vague statutes. Indeed, *Chevron* suggested that agencies are justified in changing their rules simply because their view of wise policy has changed.[168]

(1991) (No. 90-1424) (describing the State Department's concern that extraterritorial application of section 7 would interfere with the conduct of foreign affairs).

160 *Id.*

161 *TVA v. Hill*, 437 U.S. 153, 193–94 (1978).

162 Interagency Cooperation-Endangered Species Act of 1973, Final Rule, 51 Fed. Reg. 19926 (June 3, 1986) (codified in part at 50 C.F.R. pt. 402 (2000)).

163 *Id.* at 19,929.

164 *Id.*

165 Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).

166 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989).

167 *Chevron*, 467 U.S. 837, 843–44 (1984).

168 *Id.* at 844. Although in the 1980s *Chevron* was often considered beneficial toward conservative policy—the Republicans controlled the agencies in the 1980s, while the federal judiciary consisted mostly of judges appointed by Democrats—the doctrine has become far more politically neutral over time. It may be used to defend both liberal and conservative

It is unlikely, therefore, that a well-reasoned federal court decision would overturn the wildlife agencies' 1986 rule simply because it reflected a change in agency policy—especially more than twenty years after the fact. Indeed, environmentalists may wish to avoid arguing that agencies are bound to original interpretations, considering that future administrations may be friendlier to the environment than Republican-led agencies have been for eighteen of the past twenty-six years.[169] An environmentally oriented future administration might wish to return to the 1978 interpretation of the extraterritorial application of the ESA's section 7.[170]

In sum, neither the language, the legislative background, nor the regulatory interpretation of ESA's section 7 is likely to overcome the Presumption against extraterritoriality. Advocates should look to new arguments.

V. BIODIVERSITY, AMERICAN INTERESTS, AND OVERCOMING THE PRESUMPTION

Any legal argument that attempts to overcome the Presumption faces an uphill battle. First, as noted above, Congress was maddeningly silent as to whether it intended the ESA's duties under section 7 to apply to government actions in foreign countries. It is a reasonable speculation to suggest that members of Congress held no common understanding as to whether section 7 should apply to federal agency actions overseas. It is unlikely, therefore, that the current Supreme Court would hold that the ESA shows the requisite intent of Congress to overcome the Presumption.

The slim chance of defeating the Presumption head-on does not mean, however, that there is no chance of overcoming the Presumption in certain

agency policies. Indeed, many judges (maybe all judges) are inconsistent in their application of *Chevron* deference. A notable example is U.S. Supreme Court Justice Antonin Scalia, who has written often about the importance of deferring to agency interpretations. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 (1989). Yet Justice Scalia has been radically inconsistent in his application of the doctrine. Consider Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers (*SWANCC*), 531 U.S. 159 (2001), involving a challenge to a federal agency's broad interpretation of the linchpin term "navigable waters" under the Clean Water Act, 33 U.S.C. § 1362(7) (2000). There, the agency originally had given the term a somewhat narrow interpretation but then broadened it, in part because of court orders. In criticizing the change, Justice Scalia, writing for a majority of the Court, stated that the government had "put forward no persuasive evidence that [it] mistook Congress' intent" in its original interpretation. *SWANCC*, 531 U.S. at 168. This odd phrase seemed to reject both *Chevron* deference and the *Robertson* conclusion that agencies are free to change their policy positions. *See Robertson*, 490 U.S. at 355. The statement seemed to indicate a presumption that an initial agency interpretation is binding unless proven otherwise. There is nothing in the law of the *Chevron* doctrine to support such a presumption, and it is unlikely that any justice would explicitly rely on such a presumption in ruling on the question of the ESA's extraterritoriality. It is unlikely that Justice Scalia would employ such a presumption in favor of the Interior Department's 1978 interpretation of the extraterritoriality of the ESA's section 7!

169 Republicans have occupied the White House for more than 18 of the past 26 years since Ronald Reagan was inaugurated in 1981.

170 If it were to do so, a skeptical federal court would be unlikely to stop such a change, because the agency already flip-flopped in favor of a narrow interpretation in 1986.

categories of cases. In this section, I explore the factors that are most likely to convince a court to overcome the Presumption for the ESA's section 7. The categories of cases in which the Presumption might be overcome are: 1) cases in which harm to a protected species overseas affects interests within the United States, with particular attention to the interest in biodiversity, and 2) cases in which a clash with foreign law or interests appears to be unlikely.

A. Cases Affecting Interests Inside the United States

The Presumption applies, of course, to conduct of U.S. parties acting in foreign countries. In certain instances of applying the ESA to species in other countries, however, it is fair to categorize the conduct as affecting interests *within* the United States. When this occurs, the case resembles *Steele*,[171] in which the Supreme Court overcame the Presumption in part because the conduct of selling fake "Bulova" watches in Mexico spilled over into the United States, by virtue of the movement of some of the watches across the border.[172]

For endangered species, the most obvious parallel is to species that migrate to the United States. To use an example, a U.S. agency action in Canada that adversely affected the summer Canadian population of the endangered whooping cranes that migrate to the U.S. Great Plains[173] clearly would affect U.S. interests. There would be a solid argument for applying the ESA's section 7 to this agency project, following the logic of *Steele*. More subtly, a project that adversely affected endangered jaguar habitat in Mexico, with some evidence that some individual jaguars might sometimes migrate to Texas or New Mexico, forms another case for applying section 7 extraterritorially.

This avoidance of the Presumption could extend to even more subtle cases of spillover effects within the United States. Consider the hypothetical case of a migratory bird that summers in the United States and winters in Latin America. If a U.S. agency action significantly and adversely affected the bird's chief food source (say, a fish) in Latin American rivers, it would be true that the agency's action would adversely affect the migratory bird, albeit indirectly. Habitat destruction is recognized as one of the most common ways of "harming" a protected species.[174] One could develop similar arguments about the indirect effects of altering a foreign ecosystem that supports a protected species that migrates to the United States.[175] An

171 344 U.S. 280 (1952).

172 *Id.* at 289.

173 *See* Operation Migration, http://www.operationmigration.org (last visited Nov. 18, 2007).

174 *See* 50 C.F.R. § 17.3 (2006) (including habitat modification as means of "harm"); Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995) (upholding 50 C.F.R. § 17.3 (2000)).

175 A pending lawsuit argues that the federal Overseas Private Investment Corporation is obliged to do an environmental impact statement for the effects of its overseas actions on global climate change, the effects of which will harm interests within the United States. *See* Friends of the Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889 (N.D. Cal. 2007).

argument of *indirect* effects on species in the United States might be limited only by the restrictions of proximate causation.[176]

B. The Special U.S. Interest in Preserving Future Biodiversity

An especially intriguing and potentially powerful means of arguing that foreign conduct spills over into the United States arises from the "biodiversity" rationale for the ESA. In *National Association of Home Builders v. Babbitt*,[177] the plaintiffs challenged the constitutionality of the ESA's "take" prohibition[178] for species that live within only one state. The U.S. Court of Appeals for the D.C. Circuit in 1997 upheld the statute, concluding that one of the rationales for the ESA is to protect a pool of genetic "biodiversity" for future generations.[179] Judge Patricia Wald concluded that the ESA "prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it."[180] Some years from now, the argument plays out, scientists may find a medical or other practical use for unique biological material that exists only in the imperiled species.[181] The D.C. Circuit case concerned the Delhi Sands flower-loving fly, an otherwise obscure species that lives only in certain desert areas of southern California.[182] Judge Wald quoted the House Report on the bill that led to the ESA:

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176 In *Sweet Home*, the Supreme Court declined to rule on whether the tort doctrine of proximate causation stands as a barrier, or even a guide, to determining the limits of indirect harm under Section 9 of the ESA. *See* 515 U.S. at 696–97 n.9.

177 130 F.3d 1041 (D.C. Cir. 1997).

178 16 U.S.C. § 1538(a) (2000).

179 *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052–53 (citing Bryan Nolan, *Commodity, Amenity, and Morality: The Limits of Quantification in Valuing Biodiversity*, *in* BIODIVERSITY 200, 202 (Edward O. Wilson ed., 1988) (setting forth various studies that explain the value to humankind, including for medicine and other useful products, of a diverse world of species)).

180 *Id.* at 1052.

181 The idea of the potential future usefulness of unique animal species has been in the plot of at least two popular motion pictures. In 1992's *Medicine Man*, Sean Connery played a pharmaceutical researcher who finds, and then loses, a cure for cancer, which he developed from a rare Amazonian epiphytic flower, whose habitat is about to be demolished. *See* Hal Hinson, *Medicine Man*, WASH. POST, Feb. 7, 1992, *available at* http://www.washingtonpost.com/wp-srv/style/longterm/movies/videos/medicinemanpg13hinson_a0a73c.htm.

In *Star Trek IV*, the earth is imperiled in the 23rd century by an alien spacecraft that needs to communicate with humpback whales, which, unfortunately, had gone extinct nearly 300 years before. In order to save the planet, Admiral Kirk (he'd been promoted) and others travel back in time to the Pacific Ocean in 1986 to retrieve the critically needed humpback whales. *See* StarTrek.Com, *Star Trek IV: The Voyage Home*, http://www.startrek.com/startrek/view/series/MOV/004/synopsis/84.html (last visited Nov. 18, 2007). There was no suggestion that Kirk instead use his wiles to change the language in the 1986 Interior Department regulation that interpreted the Endangered Species Act as not applying extraterritorially.

182 This fly, which is about an inch long, spends most of its life underground as a larva or pupa, emerging to the sunlight in effect long enough only to eat, mate, lay eggs, and die. Thus it is difficult to ascertain whether an area truly is the habitat of the fly. *See* U.S. Fish and Wildlife Serv., *Delhi Sands flower-loving fly*, http://www.fws.gov/endangered/i/i0v.html (last visited Nov. 18, 2007).

> … As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable . . . .
>
> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask. . . .
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.[183]

The Senate Report put the biodiversity argument a little less philosophically, but a little more practically:

> … From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.[184]

Judge Wald then cited some of the scientific evidence that many species of plants and animals provide valuable goods or services for the economy. Her comments about the usefulness of endangered species within the United States apply with equal force to species that may live outside the United States:

> The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use to produce marketable products. In the most narrow view of economic value, endangered plants and animals are valuable as sources of medicine and genes. Fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species. Such medicines were estimated in 1983 to be worth over $15 billion a year. In

183 H.R. REP. NO. 93-412, at 4–5 (1973), *quoted in Nat'l Ass'n of Home Builders*, 130 F.3d at 1050–51.

184 S. REP. NO. 91-526, at 3 (1969), *quoted in Nat'l Ass'n of Home Builders*, 130 F.3d at 1051.

> addition, the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity.[185]

Judge Wald noted that the venom of a South American pit viper helped scientists discover the system that regulates human blood pressure, leading to the development of a popular drug for regulating human hypertension, and significant economic returns.[186] This drug, Captopril, was the first clinically tested angiotensin-converting enzyme (ACE) inhibitor and reaped a pharmaceutical company more then $1.3 billion in sales per year.[187] One of the most famous examples of a valuable plant is the rosy periwinkle from Madagascar, which contains an alkaloid used in a variety of medicines, including those effective against leukemia and Hodgkin's disease.[188]

The national interest in biodiversity forms the basis for a bold but sound argument that harm to *any* imperiled species in the world adversely affects interests *within* the United States. As Judge Wald wrote:

> A species whose worth is still unmeasured has what economists call an "option value"—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless. To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species. Because our current knowledge of each species and its possible uses is limited, it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce.[189]

It is a simple and logical extension to conclude that the extinction of a species in a foreign country harms interests within United States, by virtue of the loss of this biological resource to the United States in the future.[190]

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185 *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052.

186 *Id.* at 1052–53 n.12 (citing BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 9 (Marjorie L. Reaka-Kudla et al. eds., 1997)).

187 *See id.*; Michel Komajda, Marie-Catherine Wimart, *Angiotensin converting enzyme inhibition: from viper to patient*, 84 HEART, at i11–i14 (2000), *available at* http://heart.bmj.com/cgi/content/extract/84/suppl_1/i11 (providing additional information about the development of ACE inhibitors since the first Captopril clinical evaluation in 1977). Judge Wald also cited the popular EDWARD O. WILSON, THE DIVERSITY OF LIFE 308 (1992).

188 *See* Nationall Tropical Botanical Garden, Meet the Plants—Catharanthus roseus, http://ntbg.org/plants/plant_details.php?rid=413&plantid=2497 (last visited Nov. 18, 2007) (discussing the scientific uses of the rosy periwinkle); Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1136 (1999) (discussing rosy periwinkle as a species with tremendous economic value).

189 *Nat'l Ass'n of Home Builders*, 130 F.3d at 1053 (citing Bryan Nolan, *supra* note 179, at 202); Alan Randall, *What Mainstream Economists Have to Say about the Value of Biodiversity*, *in* BIODIVERSITY, *supra* note 179, at 217).

190 The literature on the economic value of biodiversity is extensive, even in the legal literature. *See generally*, *e.g.*, Jim Chen, *Biodiversity and Biotechnology: A Misunderstood Relation*, 2005 MICH. ST. L. REV 51 (2005); Lyle Glowka, *Bioprospecting, Alien Invasion, and Hydrothermal Vents: Three Emerging Legal Issues in the Conservation and Sustainable Use of Biodiversity*, 13 TUL. ENVTL. L.J. 329 (2000); Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127 (1999).

Just as an insect in California might someday be used by an American pharmaceutical company to create a cure for Alzheimer's disease, the DNA in a small African beetle might someday be useful in curing AIDS, which could be exploited by another American company for the benefit of the nation (and the world).

In this sense, the biodiversity argument parallels the successful argument in *Steele*, in which the spillover of bogus Bulova watches from Mexico to the United States was sufficient to apply the Lanham Act to conduct in Mexico. Although it may seem astounding or simplistic to assert that jeopardy to any species in the world affects the interests within the United States, this appears to be the logical conclusion of the biodiversity rationale.

The biodiversity reasoning, which was not expressed by an appellate court until 1997—five years after *Lujan v. Defenders of Wildlife*—forms the most promising argument for overcoming the Presumption against extraterritoriality. It is precedent of the D.C. Circuit that biodiversity forms a basis for justifying the ESA.[191] It is not such a large leap to use this rationale to argue that agency actions in other countries that jeopardize endangered species injure the interest, within the United States, of having future sources of biodiversity.

The biodiversity argument is not a guaranteed "silver bullet" through the Presumption, of course. If it were raised before judges who are skeptical of the broad reach of the ESA, it is likely that these judges would find some way to impose the Presumption, perhaps by limiting the decision in *National Association of Home Builders* or by asserting that it is unacceptably "speculative" as to whether a particular species found in another country might someday help the United States. At a minimum, however, asserting the biodiversity argument in the D.C. Circuit might, in practical effect, shift the burden of persuasion to the government to explain why the interest in protecting biodiversity for the future is not a recognizable interest within the United States.

In any event, the biodiversity argument against the Presumption would be bolstered by the precedent of *EDF v. Massey*,[192] which is also still good law in the D.C. Circuit. There, the D.C. Circuit reasoned that NEPA's EIS requirement did not trigger the Presumption because the creation of an EIS occurs solely within the United States, for the purpose of internal government decision making, even if the environmental effects would occur on another continent that is not subject to the sovereign rule of any nation.[193] Does the ESA's section 7 mirror the EIS process? Yes and no. The

191 *Nat'l Ass'n of Home Builders*, 130 F.3d at 1046, 1046 n.3, 1052–53, 1054.

192 986 F.2d 528 (D.C. Cir. 1993).

193 *EDF v. Massey*, 986 F.2d at 529, 531–32, 535. The biodiversity rationale distinguishes ESA cases from the NEPA precedent holding that an EIS need not be prepared for federal agency actions in a foreign country. *See, e.g.*, *Aspin*, 837 F. Supp. 466, 468 (D.D.C. 1993) (holding NEPA did not apply to U.S. military bases in Japan because foreign policy interests outweighed the benefits of preparing an EIS, and noting this holding was limited to the facts of the case). As a category, environmental impacts in another nation do not necessarily affect interests within the United States; by contrast, jeopardizing endangered species in another nation *does* affect the

ESA's consultation procedure was patterned after the existing EIS system, of course. Indeed, in its brief to the Supreme Court in *Lujan v. Defenders of Wildlife*, the government argued that the consultation procedures "are wholly internal to the United States government" and focus on whether a project would comply with a "standard derived solely from the United States law" (as part of a strained argument that this feature thus makes consultation inappropriate for projects in foreign countries).[194] Thus, the arguments that supported *EDF v. Massey* apply with similar force to the ESA's consultation process.

But the ESA's section 7 goes beyond the EIS procedure; ESA's section 7 also imposes substantive obligations. In addition to consulting, an agency must also "insure" that its actions are not likely to jeopardize the continued existence of the species (among other substantive obligations).[195] The substantive no-jeopardy requirement is *not* "wholly internal" to agency deliberations, despite the assertion of the government in *Lujan v. Defenders of Wildlife*.[196] If section 7 applied extraterritorially, it would impose an obligation on a federal agency to avoid any action that would jeopardize a species anywhere in the world.

C. Cases in Which a Clash with a Foreign Nation Is Unlikely

Another category of cases that might justify the extraterritorial application of ESA's section 7 are instances in which the potential for a clash with foreign sovereignty is low. A challenger might argue successfully that this category should overcome the Presumption.

Would the "clash" rationale justify imposing the Presumption, regardless of impacts within the United States? In *Lujan v. Defenders of Wildlife,* the federal government argued that the procedures under the ESA's section 7 "would likely cause affront to the foreign government concerned."[197] But precedent does not support such a finding. Rather, there is ample precedent implying that if the effects of conduct in foreign countries straddle or spill over into the United States, the Presumption does not apply, regardless of the potential for a clash.[198] In *Steele*, for example, the fact that applying the Lanham Act would enjoin a business in Mexico that presumably employed a number of workers did not even factor into the Supreme Court's reasoning.[199]

It was an exaggeration for the government to have emphasized the clash rationale in connection with the ESA's section 7. It is true that the consultation and no-jeopardy requirements might, in some cases, cause

interests within the United States by harming potential future sources of biodiversity.

194 Brief for the Petitioner at 32, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1991) (No. 90-1424).

195 16 U.S.C. § 1536(a)(2) (2000).

196 Brief for the Petitioners, *supra* note 194, at 32.

197 *Id.* at 15, 32.

198 *See, e.g.*, *Steele*, 344 U.S. 280 (1952).

199 *See id.*

consternation in the foreign country. A foreign country might look forward to a planned U.S. foreign aid project; disruption of this plan because of the ESA might cause dismay in the foreign country. But application of U.S. laws *domestically* could have similar effects. Consider a private American company that enters into a contract to supply foodstuffs to a foreign country. After the contract is signed, the company might run afoul of a myriad of domestic laws, including a class action lawsuit under the civil rights acts, orders for environmental compliance from the EPA, or a multi-million dollar judgment against the company under tort law. Any of these might cripple the company's ability to meet its contractual obligations with the foreign country. The other country might indeed become perturbed, considering that its reasonable expectations have been upset. But there is no principle of American law that other nations' expectations must be considered before U.S. law is applied domestically.

Indeed, application of the ESA's section 7 to foreign projects is *less* likely, as a category, to cause upset expectations than are certain applications of laws to domestic conduct. The ESA plainly requires that the consultation be undertaken during the *planning* stage.[200] Section 7(c)(1) requires an agency to seek information as to whether any endangered species are present in the geographic area of the proposed action and, if so, to create a biological assessment "before any contract for construction is entered into and before construction is begun with respect to such action."[201] Similarly, the regulations require agencies to consider their consultation obligations "at the earlier possible time."[202] Once consultation is started, federal agencies are required[203] "not [to] make any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative[s]."[204]

Like the EIS process, the consultation process is designed to provide information as to whether a project should be undertaken. Accordingly, the effect upon endangered species should be considered before, not after, the agency has made a "go" decision on a project. ESA consultation should not be conducted after the agency has already made a commitment to the foreign country. The requirements of ESA's section 7 should be considered as one of a number of factors that guide an agency's decision, including the availability of funding, human resources, cost-benefit analysis, and effects on U.S. foreign policy. Any of these might derail a project before the agency makes a commitment to the affected country. If an agency engages in its ESA section 7 consultation at the appropriately early stage, the

200 16 U.S.C. § 1536(c)(1) (2000).

201 *Id.*

202 50 C.F.R. § 402.14(a) (2006). To be precise, the regulations state that "[e]ach agency shall review its actions at the earliest possible time to determine whether any action may affect endangered species or critical habitat." *Id.*

203 These rules are patterned after the rules for creating EISs under NEPA. *See* 40 C.F.R. § 1501.2 (2006) (requiring the preparation of an EIS early in the process).

204 16 U.S.C. § 1536(d) (2000); *see also* 50 C.F.R. § 402.09 (2000) (regulations of the U.S. Fish and Wildlife Service).

consultation should rarely have the effect of upsetting a foreign nation's reasonable expectations.

The government also argued in *Lujan v. Defenders of Wildlife* that a foreign government would likely deem it an "affront" to submit to the sort of factual inquiry necessary for consultation.[205] Again, this supposition is not borne out by the law or evidence. Under the federal regulations, an agency's biological assessment may include results of on-site inspection, views of biological experts, and the analysis of the likely effects of the planned project on endangered species.[206] If an agency's information-gathering were early in the process of considering a proposed action, a foreign government would not be surprised at the potential complication of endangered species. Moreover, although the action agency must provide the expert wildlife agency with "the best scientific and commercial data available,"[207] the action agency is not obliged to engage in any specific kind of intrusive factual inquiry in creating its biological assessment.

The expert wildlife agency is more likely to visit and study the area of the planned project, of course, even though it is not required. The regulations impose an obligation to create the biological opinion after "review[ing] all relevant information . . . available. Such review may include an on-site inspection of the action area with representatives of the [action] agency . . . ."[208] In certain instances, therefore, and by anecdotal evidence, some biological opinions are created without an on-site inspection. Moreover, even when an on-site inspection is deemed necessary, the agency can ameliorate any potential annoyance to the foreign government by notifying the government ahead of time of the requirements of the ESA, the possibility that an inspection may be necessary, and that final approval of the project may depend on whether it would jeopardize an endangered species.

In practice, the expert wildlife agencies only rarely issue "jeopardy" biological opinions; when they do, they almost always offer "reasonable and prudent alternatives," which are ways of achieving the agency's goals without jeopardizing the species at issue.[209] More often, when a planned action poses significant threats to an endangered species, the expert agency suggests, during consultation, small changes to the action that lessen the impact on the species and avoids jeopardy while allowing the action to go forward. Once again, an agency can avoid the likelihood of causing an affront by incorporating the consultation early in its planning process. This way, the ESA consultation and the no-jeopardy requirement would become just another of a number of factors, including funding and politics, that go into agency decision making.

The argument for applying the ESA's section 7 overseas would be strengthened if extraterritoriality were limited to a category of cases in which

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205 *See* Brief of Petitioner at 32–33, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1991) (No. 90-1424).

206 50 C.F.R. § 401.12(f) (2006).

207 *Id.* § 402.14(d) (2006).

208 *Id.* § 402.14(g)(1) (2006).

209 16 U.S.C. § 1536(b)(3)(A) (2000); 50 C.F.R. § 402.14(h)(3) (2006).

the possibility of a clash is minimal. Identifying such a category might help convince a court that the case either does not implicate the Presumption or justifies overcoming the Presumption. I suggest the following category: the Presumption should not apply to a proposed agency action that is *not* part of an established, on-going agency project in a foreign nation. When a planned agency action is new or stands alone, it is less likely that a foreign government would hold an expectation that the action will go forward and is less likely to be surprised or "affronted" by the role that the ESA may play in delaying, changing, or preventing the planned action.

Consider two contrasting hypothetical examples. The first is a proposal of the U.S. Agency for International Development (USAID) that is part of a long-term project in a developing nation. Years ago, USAID made an informal agreement to provide financial and technical assistance in building small agricultural dams if certain conditions were met.[210] These conditions were that the stored water be used for experimental drip-irrigation systems, and that the water be used by cooperatives of small independent farmers as the nation makes a transition from a socialist agricultural system to a privately owned system. When such conditions have been met in the past, USAID has usually provided funding for the dams.[211] With such a long-term relationship and the creation of expectations, the introduction of the ESA's section 7 might annoy the foreign government. If a dam project were delayed or prevented because of the ESA, the foreign nation might complain that the United States seemingly has "changed the rules."

Far more common, however, are proposals that are *not* part of a larger on-going project. Consider, for example, an USAID idea to fund in-person instruction about new best practices for successfully planting cotton in regions previously considered unsuitable for cotton.[212] Consider further the possibility that the region is the habitat of an endangered animal. The agency could avoid a potential "affront" to the foreign nation by conducting its ESA consultation early on in the decision-making process. Before making any commitment to the foreign government, USAID could consult with the U.S. Fish and Wildlife Service and determine whether the proposed action would jeopardize the endangered species and what steps could to be taken to minimize any potential impact. If the ESA consultation was completed at the same time that the agency considered other threshold questions—such as whether it had sufficient funding for the action and whether it would further the foreign policy and other goals of the U.S. government[213]—then the foreign

210 *See* USAID, CREATING CANAL-IRRIGATED LAND IN AFGHANISTAN (2003), *available at* http://www.usaid.gov/stories/afghanistan/cs_afghan_canals.pdf (discussing a USAID dam-building project in Afghanistan).

211 *E.g.*, USAID, MOVING FROM SUBSISTENCE TO CASH CROPS, *available at* http://www.microlinks.org/file_download.php/India.pdf?URL_ID=7857&filename=112071699901India.pdf&filetype=application%2Fpf&filesize=74169&name=India.pdf&location=user-S/.

212 *See* USAID, *Training Film Helps Girl Finish School*, http://www.usaid.gov/stories/malawi/fp_mw_cotton.html (last visited Nov. 18, 2007) (discussing USAID funding of a film about best practices in growing cotton).

213 *See* USAID, *Policy*, http://www.usaid.gov/policy (last visited Nov. 18, 2007) (discussing factors that are used in making USAID aid decisions).

nation would hold no expectation that the proposal would be undertaken. Just as the proposal might be not be carried out because of financial constraints or because of foreign policy concerns, the proposal might not be undertaken because of impacts on endangered species. In such a situation, the foreign government would have little ground to take offense.

Accordingly, the clash rationale for the Presumption might be minimized by arguing for extraterritorial application of the ESA only in the category of cases in which the planned action is not part of an on-going project relationship with the foreign nation.

VI. CONCLUSION: THE BEST CASE FOR OVERCOMING THE PRESUMPTION

These arguments give shape to a "best case" for overcoming the Presumption and applying the ESA's section 7 extraterritorially. This best case might be used as a model for similar arguments for extraterritorial application of other laws. *First*, the case should be one in which the conduct overseas would have effects that spill over from the other country and harm some interests within the United States. A powerful argument would be presented by facts showing that injuring a species in another country would have cascading effects on an ecosystem that would harm species or other natural systems within the United States. The most sweeping argument of this type is that the American interest in protecting global sources of future biodiversity makes any jeopardy to a species anywhere in the world an injury to interests within the United States.[214]

Second, the agency's planned action should *not* be part of an on-going project in another country, through which the country may have developed an expectation that the planned action would go forward without the complications of the ESA. If the planned action were new, the federal government would find it more difficult to argue that application of the ESA's section 7 would cause an affront to the foreign country.[215]

Although overcoming the Presumption might prove to be arduous, environmental advocates would have their greatest chance of success to date by making this best case for extraterritoriality. The best case is waiting to be asserted.

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214 As a practical matter for litigation, the strongest case would be one involving a species for which there is some evidence that it might be useful in the near future, either through goods or market services, or through its contribution to the pool of genetic biodiversity. An animal or plant related to other species known to hold useful qualities, such as the Brazilian pit viper or the Madagascar rosy periwinkle, might fit the bill. The strongest case for litigation also would be one for which there is some evidence that the agency's action truly would cause a significant adverse impact to the species. Although it is true that the entire point of an ESA section 7 consultation is to determine *whether* an agency action would harm or jeopardize a species, strong facts at the beginning of litigation would bolster the claim.

215 The best venue for litigation would be the courts of the D.C. Circuit, in which it is the law of the circuit that preserving imperiled species for future biodiversity is a recognizable reason for the ESA. *See Nat'l Assn of Home Builders*, 130 F.3d 1041 (1997).