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THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 TO THE DARIEN GAP HIGHWAY PROJECT

A. DAN TARLOCK*

When the Darien Gap highway is completed, adventurous travelers will be able to drive from Alaska to Tierra Del Fuego. Construction of the Inter-American Highway linking North, Central and South America has long been a goal of United States foreign policy, but only recently has the choice of the route through the Darien Gap been questioned on environmental grounds. If the Darien Gap were within the territorial boundaries of the United States, the selection and design of the route would be classified as a major federal action, and an impact statement would be required under Section 102 of the National Environmental Policy Act of 1969 [hereinafter "NEPA" or the "Act"]. The adequacy of such an impact statement would undoubtedly be litigated, inasmuch as the irreversible alteration of a primitive area raises difficult and unresolved issues concerning the role of impact statements in structuring decisions made on the basis of less than complete data as to their ultimate environmental impact. Because the highway lies outside our territorial boundaries, the Department of Transportation [hereinafter "DOT" or the "Department"], which administers the funds appropriated by Congress for the Inter-American Highway, and the Council on Environmental Quality have been embroiled in a dispute as to whether DOT must file an impact statement. The Department has filed an environmental impact "assessment" but has refused to file a full NEPA statement on the ground that "[its] Darien Gap environmental impact assessment meets the requirements of NEPA for an

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2. An environmental "assessment," unlike an environmental impact statement, does not entail a point-by-point discussion of each § 102 requirement.
environmental impact statement." Should DOT's position be litigated, the following legal issues would have to be resolved:

(1) Has the Department made a negative determination that NEPA does not apply and if so, is its refusal to file an impact statement supported by adequate reasons?

(2) Assuming that DOT's "assessment" fails to satisfy NEPA requirements, does the Act apply to federal agency activities outside the territorial limits of the 50 states and territories?

(3) If NEPA does have extraterritorial application, does the existence of a partnership between the Department of Transportation and another government, which will make the final decision on whether to undertake the activity, exempt DOT from Section 102 (c) duties?

This article will explore possible answers to these questions.

I. BACKGROUND OF THE DARIEN GAP CONTROVERSY

United States participation in the construction of the Inter-American Highway was authorized in 1958. The legislation empowers the Secretary of DOT to administer a grant program in consultation with officials of the Department of State "with respect to matters involving the foreign relations of this Government..." It also permits the Secretary of Transportation to expend up to one-third of the funds allocated without requiring a matching contribution from the country through which the highway is passing, subject to a determination by the Secretary of State that the cost to the Central American country "will be beyond [its] reasonable capacity to bear." Expenditures in excess of one-third of the U.S. commitment must be matched by the participating country. The specific authorization for the Darien Gap project, a short amendment to the Federal Aid Highway Act of 1970, directs the DOT Secretary to cooperate with Panama and Colombia in the construction of a...
250-mile highway "in the location known as the 'Darien Gap.'" This $100 million construction grant is subject to the same terms as the general Inter-American Highway program. The text of Section 216, the authorizing legislation, makes no mention of NEPA, which became effective one year prior to the enactment of that section. During consideration of the 1970 Act, both the Senate and House agreed on the merits of Section 216 and did not consider the possible adverse environmental impact of the project. At that time, it was apparently assumed that the primary impact would be economic and beneficial.8

More recently, however, the environmental impact of the Darien Gap project has been questioned by the Center for Law and Social Policy. The Center has made, inter alia, the following objections to DOT's environmental assessment: (1) the development that would be triggered by the highway, i.e., "an indiscriminate development of land in the vicinity of the highway, with consequent deforestation of very large areas";9 (2) the adverse impact on a native tribe of Indians;10 and (3) the risk of disruption of a fragile ecosystem.11 The Center has also suggested that an

8. House Comm. on Public Works, Federal Aid Highway Act of 1970, H.R. Rep. No. 1554, 91st Cong., 2d Sess. 16 (1970) stressed that "[s]tudies have shown the tremendous favorable impact the Inter-American Highway has and will continue to have on the economy of the Central American Countries."
9. Letter from Leonard C. Meeker, Center for Law and Social Policy, to H. A. Lindberg, Assoc. Adm'r for Engineering and Traffic Operations, Dep't of Transp., Aug. 1, 1974 [hereinafter "Meeker letter"]. DOT's assessment referred to this possibility in § 4.1.3.1. at 123 and in § 5 at 145. The Meeker letter further noted that construction of the Darien Gap highway will open up the area "to immigration and colonization, leading to rapid destruction of forests and turning the area into an open wasteland in a relatively few years." Id. In addition, the assessment disclosed (at 103, 137) "a shallow upper layer of fertile forest top soil which is rapidly exhausted by agriculture"; and further, that experts

have pointed out that a very high percentage of all inorganic nutrients in such a situation—unlike the conditions prevailing in temperate zones—are found not in the soil but in the standing biomass—vegetation whose removal would have an immediate and profound effect on soil structure. Id., citing Sioli, Tropical Forest Ecosystems in Africa and South Africa, at 321-24.
10. The Meeker letter referred to the assessment's disclosure (at 86, 137) of the "severe and soon devastating effects" that construction of the highway and subsequent deforestation of the area will have on the Cuna and Choco Indian groups who maintain a precarious existence in upper valleys of rivers in the Darien area. Meeker letter, supra note 9, at 3.
11. With respect to the impact on wildlife in the area, the Meeker letter quoted the International Council for Bird Preservation: Darien is an area with an exceptional faunal richness and a surprising amount of endemism (especially in the mountainous areas near Colom-
environmental impact statement should consider two mitigation measures, a flora and fauna survey of the area prior to completion of the highway and negotiations between the U.S. and Panama for the creation of national parks and wildlife preserves before highway construction is begun.\textsuperscript{12}

Aside from the question of NEPA's extraterritorial application, the substantive environmental issues raised by these objections are, with one possible exception, similar to those litigated in connection with environmental challenges to dams and highways. The possible exception is the application of NEPA to the disruption of human settlement. NEPA has been applied to projects in urban areas partly on grounds that the social disruption of a neighborhood is a relevant environmental concern, but the inclusion of social disruption in the range of relevant NEPA inquiries remains unclear.\textsuperscript{13}

As to the threshold question of whether an impact statement must be prepared, the agency itself has discretion to make that determination: Section 102 (c) requires an impact statement only for a "major Federal [Action] significantly affecting the quality of the human environment. . . ."\textsuperscript{14} A negative determination is subject to judicial review, although the standards vary among the circuits.\textsuperscript{15} Whatever the standard adopted, a heavy burden has been imposed upon the agency to demonstrate that a proj-

\textit{b}ia, which are not very high . . . . Vertebrates new to science are being discovered in Darien, and almost every study reveals unexpected and interesting range extensions.

In comparison, the discussion of this subject in DOT's assessment (at 57-58) says simply:

the fauna and flora of this region are not yet well enough known to determine for sure whether or not some of its species are indeed endangered.

Id. at 4.

\textsuperscript{12} Id. at 5-6. It was also suggested that additional lumbering and clearing not be permitted during the period of construction in order "to ensure preservation of the habitat" during this period. Id.


\textsuperscript{14} 42 U.S.C. § 4332 (c) (1970).

ect is not major or will not have a significant environmental impact. Agencies have been compelled, as DOT's environmental assessment illustrates, to provide extensive documentation to support negative determinations; at a minimum, they are required affirmatively to develop reviewable environmental records which have been aptly characterized as "mini" environmental analyses. For example, when the seventh circuit in First National Bank of Chicago v. Richardson upheld a decision that a federal parking garage and detention center in Chicago's Loop would cause no significant environmental impact, it did so only after carefully reviewing the agency's 142-page environmental assessment. Many of the cases upholding negative agency determinations have involved the construction of single buildings in large urban centers and do not necessarily support DOT's position that its assessment—which undoubtedly discloses potential adverse environmental impacts—constitutes compliance with NEPA. Therefore, a court would first have to decide whether DOT's assessment is sufficient. A negative declaration must include a discussion of the factors set out in Section 102, "although obviously not in the same detail as a regular environmental impact statement." A determination would also have to be made as to whether the assessment has undertaken some balancing of costs and benefits or has simply collected data and adverse comments without the required balancing. Finally, a court would have to resolve whether, as many environmentalists have argued, an impact statement or assessment which discloses substantial adverse impacts must propose mitigation measures.

II. CASE LAW FOR AND AGAINST THE EXTRATERRITORIAL APPLICATION OF NEPA

The issue of NEPA's extraterritorial application has been raised in four cases, none of which dealt directly with the questions presented by the Darien Gap controversy or the broader problem of

16. See notes 9-12 supra for references to DOT's environmental assessment of the Darien Gap project.
17. 484 F.2d 1369 (7th Cir. 1973).
the applicability of NEPA to foreign assistance programs. *The People of Enewetak v. Laird*\(^{20}\) involved a challenge to the Defense Department's draft environmental impact statement for the Pacific Cratering Project on Enewetak (PACE), a project conducted on the trust territory for the purpose of providing data on the vulnerability of elements of our strategic defenses to nuclear attack. In that case, when the Council on Environmental Quality objected to the initial NEPA statement, the Department of Defense agreed to prepare a new one; so the issue of NEPA's extraterritorial applicability was not faced directly. The court did, however, have to determine if it had jurisdiction to enjoin continued core drilling while the new impact statement was being prepared. Ordinarily, federal legislation does not apply to the trust territories unless Congress manifests such an intent, usually by the inclusion of a definition of state or United States which refers to the trust territories.\(^{21}\) In the absence of a definition of the term "United States" within the text of NEPA, the court turned to "the history, character and general aim of the legislation" to determine congressional intent and held that trust territories were included within that definition.\(^ {22}\) Stressing the broad language of NEPA and Senator Henry M. Jackson's supporting remarks in its legislative history, the court concluded that NEPA

> clearly evidences a concern for all persons subject to federal action which has a major impact on their environment—not merely United States' citizens located in the fifty states.\(^ {23}\)

Section 102 (2) (E), which mandates international cooperation "where consistent with the foreign policy of the United States," was also cited.

Broadly read, *The People of Enewetak* stands for the principle that the beneficiaries of NEPA are all those whose enjoyment of their environment is threatened by an activity of the United States. But the case is an easy one for the application of NEPA because, as the court observed, the residents of the trust territory are subject to U.S. authority and have no independent government which could


\(^{21}\) See People of Saipan v. United States Dept of Interior, 645, 649-650 (D. Hawaii 1973). The court, holding that NEPA evidences a congressional purpose that it be applied to trust territories, concluded that the canon of construction laid down in Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949), was not applicable to NEPA.

\(^{22}\) 353 F. Supp. at 817.

\(^{23}\) Id. at 816.
protect them against the actions of the United States. The fact that the United States is a trustee rather than sovereign is immaterial. Although not cited by the court, the application of NEPA to leases of Indian lands provides a firm precedent for its decision. 24 Shortly thereafter, in People of Saipan v. Department of the Interior, 25 the same district court again had occasion to consider the extraterritorial application of NEPA in a suit against the High Commissioner of the Trust Territory of the Pacific Islands. Although the court cited The People of Enewetak for the proposition that NEPA does apply extraterritorially, it held that the Trust Territory Government was not a federal agency and thus was immune from the provisions of NEPA.

The third case, Wilderness Society v. Morton, 26 inferentially recognized the rights of foreign nationals under NEPA by allowing a Canadian environmental group to intervene in the Alaska pipeline litigation. The opinion of the court simply noted that "it [was] quite clear that the interests of the United States and Canadian groups [were] sufficiently antagonistic in this litigation to require granting [an] application for intervention." 27 However, the case may be of little relevance to the broader problems raised by the Darien Gap controversy. Under general principles of international law, the United States has a duty to manage activities within its territorial boundaries so as not to cause damage to the environment of adjoining countries. Allowing intervention might be regarded as merely a means of recognizing and enforcing that duty. Even if the Wilderness Society holding is construed as recognizing that "NEPA provides foreign nationals with certain rights when their environment is endangered by federal actions," 28 such a principal would seem to be limited to cases in which the environment of a foreign country is threatened with damage by activities solely under the control of a U.S. government agency.

Finally, the issue of NEPA's application to foreign assistance programs was directly raised but not decided in Sierra Club v. AEC. 29 That litigation was instituted to compel the Atomic

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24. Davis v. Morton, 335 F. Supp. 1258 (D. N.M. 1971), rev'd, 469 F.2d 593, 597 (10th Cir. 1972) (NEPA clearly applied to lands held in trust by the United States; environmental impact statement was a precondition to Bureau of Indian Affairs' approval of a 99-year lease on Indian Reservation).
25. 356 F. Supp. 645 (D. Hawaii 1973), aff'd as modified, 502 F.2d 90 (9th Cir. 1974) (trusteeship agreement held to create individual rights enforceable in the High Court of the Trust Territory).
27. Id. at 1262-63.
Energy Commission (AEC), the Export-Import Bank, and the State Department to file an impact statement in connection with the sale of nuclear generating systems and enriched fuels to foreign countries. The issue ultimately became moot in the course of the litigation by AEC's voluntary decision to prepare an impact statement. Accordingly, the court held that since the lead agency responsible for the program had agreed to file a statement, NEPA was satisfied as to the other agencies. Although Sierra Club v. AEC is a potentially important precedent for the extraterritorial application of NEPA, the traditional United States interest in controlling the diffusion of nuclear technology makes the effective final decision-maker a federal agency. This factor might distinguish Sierra Club from other foreign assistance programs.

These cases provide some support for the proposition that NEPA should be applied extraterritorially, but they provide no support for the principle that the existence of a sovereign entity—which has the discretion to accept or reject the conclusions of an environmental impact statement—is irrelevant to the duty of a U.S. government agency to file an impact statement. This is the precedent-setting principle that must be established if NEPA is to be applied to the Darien Gap highway project.

Lacking direct support in the case law, one might argue that NEPA impact statement duties apply to foreign assistance agencies by analogy to a case involving federal energy programs. In Natural Resources Defense Council v. Morton the Court of Appeals for the District of Columbia Circuit held that an impact statement must be filed for a Department of Interior offshore oil leasing program and, more importantly, that the statement must "analyze ab initio the feasibility of developing other major alternative energy sources, even those beyond Interior's authority to develop." The duty to study alternatives was qualified only by a vague rule of reason, although the court did limit its holding to cases in which a comprehensive program as opposed to a single project in an established program was under review. Among the alternatives suggested by the Natural Resources Defense Council was the increased importation of foreign oil by the elimination of a then existing import quota program, a remedy which had just been rejected by President Nixon. The Department of Interior's counter-argument—that it need not study alternatives which it had no power to implement, es-

especially when the Executive had directed it to pursue other objectives—was rejected with the rather optimistic reasoning that the action was within

the purview of both Congress and the President, to whom the impact statement goes. The impact statement is not only for the exposition of the thinking of the agency, but also for guidance of those ultimate decision-makers, and must provide them with the environmental effects of both the proposal and alternatives. . . .

But the Morton principle, broad as it is, still does not apply to the situation where ultimate action is to be taken by a foreign sovereign.

Before turning to an examination of the policies for and against the application of NEPA to foreign assistance programs and hence to the Darien Gap highway project, a brief analysis of the major cases in which NEPA has been held not applicable might be useful. Several carefully considered district court decisions have refused to apply Section 102(c) because of countervailing considerations. In Cohen v. Price Commission, for example, Judge Weinfeld of the District Court for the Southern District of New York refused to apply Section 102(c) to an authorization by the Price Commission under the Economic Stabilization Act of 1970 for a fare increase on New York City subways and buses. Although the precise issue before the court was whether plaintiffs had to make a showing that they were entitled to temporary relief, Judge Weinfeld suggested that they would ultimately lose on the merits because the Price Commission's duty to act with dispatch was inconsistent with the systematic and interdisciplinary study required by NEPA. The Cohen rationale was recently employed in Gulf Oil Corp. v. Simon to dismiss a suit brought by a large oil company in which it was contended that the mandatory crude oil quotas of the Energy Office were a major federal action requiring an impact statement. While agencies administering foreign grant programs may not be able to claim that the imposition of NEPA duties would interfere with their ability to act with all deliberate speed, Cohen and Gulf Oil do stand for the proposition that an agency can exempt itself by demon-

32. 458 F.2d at 835.
strating that the blanket application of NEPA would seriously interfere with its ability to carry out its primary mission. It might be further argued that there is no duty to file an impact statement in situations where an agency's primary mission requires that environmental considerations be accorded little ultimate weight. Support for this argument can be found in Kings County Economic Community Development Association v. Hardin, which held that the Department of Agriculture need not impose pesticide and fertilizer use conditions on pesticide and fertilizer loans because the conditions would be unrelated to the program's primary purposes of securing a fair income to farmers and providing an adequate food supply.

III. POLICY CONSIDERATIONS FOR AND AGAINST NEPA'S EXTRATERRITORIAL APPLICATION

Perhaps the strongest policy argument for the application of NEPA to foreign assistance activities is that environmental values should be integrated into development planning. The environmental impact of large public works programs such as dams and highways, agricultural projects, and industrial development programs are potentially substantial. However, it is highly improbable that host countries will ever consider environmental factors to the same extent as this country does presently. To date, the less developed countries have exhibited a general lack of enthusiasm for environmental quality considerations. The arguments in support of their position, now familiar, focus first on the inequity of requiring the less developed countries to divert scarce resources to environmental quality in order to rectify the past environmental depredations of developed nations; and second, on the financial burden that the developed nations themselves should bear in order to achieve environmental quality. Because of this, United States insistence on the integration of environmental considerations into development planning might interfere with the achievement of our foreign assistance objectives, confused as they are. Guidelines of assistance agencies such as AID reflect this dilemma by at once denying the extra-

35 478 F.2d 478 (9th Cir. 1973).

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territorial application of NEPA while developing agency assessment procedures for NEPA compliance.\textsuperscript{38}

An author of a recent article in this \textit{Journal} has argued that the absence of final U.S. authority over foreign aid programs in other countries is irrelevant to the question of NEPA's extraterritoriality because the issue is whether the United States should “maintain a firm foreign policy of suggesting alternative project designs which would protect foreign territorial environments. . . .”\textsuperscript{39} The author further argues that

the issue of how foreign affairs agencies comply with NEPA does not involve interference in the affairs of other nations. Rather the aim is to assure that the United States itself is never responsible for unanticipated environmental injury anywhere. . . . How to assess environmental impact abroad may itself raise legitimate questions of methodology, but not of purpose.\textsuperscript{40}

Support for this argument can be found in Morton. What is the difference between an impact statement which contains “evaluation of the environmental effects of all alternatives in the area of the energy crisis,”\textsuperscript{41} including those which the President had just reject-


\textsuperscript{39}. Id. at 261.

The argument that NEPA should apply in order that foreign countries will have the benefit of the full impact statement before exercising their authority to undertake a project is based on three premises: (1) that NEPA applies to all agencies except those specifically excluded from the Act; (2) that there are no specific exceptions for those agencies with extraterritorial activities; and (3) that the Act’s scattered references to the global environment manifest a congressional intent “that NEPA enjoy worldwide application by all federal agencies.” Id. at 263. Mr. Robinson also claims that this construction is supported by NEPA’s legislative history but, in my judgment, it is not. He relies, for example, on a statement made by Senator Jackson in the context of a general defense of the bill to the effect that “the provisions of Section 102 directs [sic] any Federal agency which takes action . . .” to file an impact statement. 115 Cong. Rec. 40416 (1969) quoted in Robinson, supra note 38, at 264. This statement is simply too broad a reference to support Mr. Robinson’s thesis, especially in light of the Senator’s refusal to undertake a case-by-case review of each federal agency’s mission prior to enactment of the legislation. The full consequences of NEPA’s application to all federal agencies were never considered during the congressional debates; the Act was directed primarily against AEC’s refusal to consider the environmental impact of nuclear power plants and the public works agencies. However, the issue is open and nothing in the text of NEPA precludes its extraterritorial application.

\textsuperscript{40}. Robinson, supra note 38, at 270.

\textsuperscript{41}. 458 F.2d at 835.
ed, and an impact statement prepared in part for a government which may regard development as more important than environmental quality? Morton, however, appears to be premised on the assumption that the impact statement requirement may be justified by the fact that federal decision-makers will indeed react to the information. Morton strains this assumption to such a fiction that its extension to the Darien Gap highway project and foreign assistance programs generally might be unwarranted.

The argument for the application of NEPA to the Darien Gap controversy and to foreign assistance programs generally rests on two assumptions: that the policy of strict statutory construction applies equally to the extraterritorial activities of federal agencies, since the primary mandate of NEPA is fulfilled once impact information is displayed; and that the processing and approval of a foreign assistance grant is a federal action sufficiently discrete to require the preparation of an impact statement. At the outset, it should be observed that congressional authorization of a project subsequent to the enactment of NEPA does not negate the inference that the Act was intended to apply. Thus congressional silence is not a bar to the application of NEPA to the Darien Gap highway project.43 The policy of strict construction announced by Judge Wright in Calvert Cliffs' Coordinating Comm. v. AEC44 was designed to prod agencies not only into collecting and analyzing information but also into making fundamental changes in their decision-making processes to take environmental considerations into account. That policy was derived from Section 102 (1), which provides that

[t]he Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter. . . .45

Most circuits, following the lead of Calvert Cliffs' have required more than information display; they have required a showing of a good faith effort on the part of the agency to weigh environmental and developmental values in striking a final balance between the activity and its alternatives. With respect to domestic activities, once the

42. According to the fifth circuit, the "principal thrust" of Section 102 (c) "is to require documentation." Environmental Defense Fund, Inc. v. Corps of Engineers, -F.2d-, 6 ERC 1513, 1518 (5th Cir. 1974).
44. 449 F.2d 1109 (D.C. Cir. 1971).
courts decided to enforce NEPA judicially, it was reasonable for them to assume that Section 101's statement of environmental objectives was a sufficient indication that Congress wished to institute new procedures throughout the federal government and that any inconsistencies with an agency's primary mission were to be resolved against the agency in order to raise environmental considerations to a level equal to developmental ones.

A court might refrain from implying a similar mandate to restructure the extraterritorial activities of federal agencies. Traditionally, the federal judiciary has been reluctant to intervene in the conduct of foreign affairs. Assuming that anyone has standing to challenge the failure to file an impact statement, a court might well conclude that requiring the preparation of an impact statement for extraterritorial activities would be relatively pointless if the nature of those activities necessitated that only a minimal standard of adequacy be applied. Such a conclusion can be supported by a close reading of the Act. The primary reference to the extraterritorial impact of NEPA appears in Section 102 (2) (E), which directs federal agencies to support

where consistent with the United States . . . initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment. . . .

However, the thrust of the Act read as a whole is that the primary beneficiaries of NEPA are those persons under the jurisdiction of the United States. Section 101 refers to the duty of the federal government to balance environmental and economic considerations for "present and future generations of Americans," and to "assure all Americans, safe, healthful, productive, and esthetically and culturally pleasing surroundings." These sections suggest that Section 101 (c), which recognizes that each person shall enjoy a healthful environment, refers to those under the jurisdiction of the United States. Although People of Enewetak construed Section 102 (2) (E) as requiring agencies which undertake activities in all areas under the

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47. 42 U.S.C. § 4331 (b) (2) (1970).

In the congressional debates Senator Jackson stressed in support of NEPA that international cooperation was possible "because the problems of the environment do not, for the most part, raise question related to ideology, national security and the balance of world power." 115 Cong. Rec. 40417 (1969).
exclusive control of the United States to file impact statements, the section would not seem to impose the impact statement requirement on activities undertaken with the cooperation of other sovereigns in areas not within our jurisdiction. The federal government is encouraged to enter multilateral environmental agreements, but because of considerations of foreign policy, no single procedure is imposed on agencies concerned with extraterritorial activities as it is with agencies involved in domestic activities.

Similar considerations might lead a court to define federal action more narrowly than has been the case in the past. The cases imposing a duty to prepare an impact statement have stressed the procedural, i.e., informational, rather than substantive aspects of NEPA, but they seem to have assumed that final control of the project rests with a federal agency. Ultimately, the duty to assemble and assess environmental information makes sense only if some decision-maker can react to it by approving, disapproving, or modifying a project. Final federal control does not exist with respect to most foreign assistance grants generally or the Darien Gap highway project in particular. It would be possible, as has been suggested, to say that the major federal action is the approval of a request for assistance funds and that the purpose of NEPA is furthered if the federal decision-maker is simply alerted to the issues which should be raised with the host country.48 But this may be too restrictive a definition, for the environmental impact of federal action must be evaluated in terms of what the host country will do with the grant. The United States cannot and, at least in theory, has no desire to dictate a country’s use of resources in development assistance programs. A court might therefore rationally conclude that the federal activity under the control of the United States would not be an appropriate occasion to assess the environmental impact of an assistance project, since so much would depend on measures taken by a sovereign independent of United States control.49

48. The State Department has recently prepared impact statements prior to the conclusion of international agreements affecting the human environment as well as for activities occurring within the United States which have extraterritorial impact. Council on Environmental Quality, Fifth Annual Report 399-400 (1974).

49: Cf. Citizens Organized to Defend Environment, Inc. v. Volpe, 353 F. Supp. 520 (S.D. Ohio 1972). The plaintiffs argued that a highway crossing permit for Little Egypt, a huge strip mining shovel, thus triggered a duty to consider the environmental impact of strip mining generally. The highway crossing agreement was negotiated in 1964 and the court held additional approval was not a major federal action but suggested the secondary and tertiary impacts (the overall environmental impact of strip mining on public lands) would be required of a crossing permit negotiated for the first time.
IV. Conclusion

No one would quarrel with the proposition that environmental considerations ought to be integrated into development planning, but the issue raised by the Darien Gap controversy is whether the impact statement procedure is the appropriate one when two or more sovereigns share the responsibility for a project. This article has suggested that there are precedents which support the application of NEPA to the Darien Gap project and foreign assistance programs generally, but that there are legitimate countervailing considerations not present in domestic activities. Because of the magnitude of the Darien Gap highway project and the extent of United States involvement in it, a court might well strike the balance in favor of application of NEPA. If it does, however, the court should carefully consider the implications of its holding for other foreign assistance programs to determine if the principles developed in the domestic context apply across the board to the activities of the foreign affairs and assistance agencies.