
U.S. Environmental Law: Non-Applicability Abroad

By

Louis K. Rothberg

INTRODUCTION

As a member of the U.S. country team in Bandaria, you might be asked by the Minister of Defense the following question:

Must FMS arms transfers, international cooperative agreements, and co-production agreements for arms production in Bandaria, comply with U.S. environmental laws and regulations?

The analysis provided in this note below, will explain why such FMS and international agreements need not comply, for purposes of regulating environmental activities in a foreign country with general U.S. environmental laws and regulations, such as the National Environmental Policy Act (NEPA) and the Resource Conservation and Recovery Act (RCRA). The reason is that generally, U.S. laws and rules do not apply outside the United States. However, the U.S. must comply with its treaty and other international agreements creating obligations under international law, e.g., the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer, and 1990 adjustments and amendments that restrict global production and consumption of ozone-depleting chemicals.

ANALYSIS

I. There is nothing in the texts of the Foreign Assistance Act¹, the Arms Export Control Act,² Chapter 138 of Title 10—Cooperative Agreements with NATO Allies and Other Countries,³ the NEPA or RCRA, which would suggest that Congress intended that arms transfer exports and international cooperative programs or agreements would be subject generally to United States environmental laws and rules extraterritorially. “Extraterritoriality” is an application of a U.S. statute that “involves the regulation of conduct beyond U.S. borders.”⁴

A. Executive Order 12114 *exempts* U.S. arms transfer matters from any requirement to perform an analysis of their environmental effects.

1. President Carter issued Executive Order 12114, “Environmental Effects Abroad of Major Federal Actions,” on Jan 4, 1979.⁵ E.O. 12114 “represents the United States government’s exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.”⁶

¹22 U.S.C § 2151 et seq.

²22 U.S.C § 2751 et seq.

³10 U.S.C § § 2341 - 2350i, on acquisition, cross-servicing and other cooperative agreements.

⁴*Environmental Defense Fund v. Massey*, 986 F 2d 528, 531 (D.C. Cir. 1993).

⁵44 *Fed Reg.* 1957.

⁶E.O. 12114, Sec. 1-1.

2. It is not necessary to discuss what E.O. 12114 requires of federal agencies in certain of their actions having effects *abroad*, because:

The following actions are exempt from this order: (iv) intelligence activities and *arms transfers....*⁷ [Emphasis added]

3. DoD Directive 6050.7 (March 31, 1979), *Environmental Effects Abroad of Major Department of Defense Actions (P&L)*, and Army Regulation (AR) 200-2, respectively, implement E.O. 12114 for the DoD and Army, and they each set forth in detail the applicability of E.O. 12114 exemptions. DoD Directive 6050.7 ¶3.a.(6) and AR 200-2, appendix H, Section C.3.a.4.6. both provide:

The following actions are *exempt from* the procedural and other requirements under general exemptions established for all agencies by *Executive Order 12114* . . . The *decisions and actions* of the Office of the Assistant Secretary of Defense (International Security Affairs), the Defense Security Assistance Agency, and the other responsible offices within DoD components *with respect to arms transfers to foreign nations*. The term "arms transfers" includes the grant, loan, lease, exchange, or sale of defense articles or defense services to foreign governments or international organizations, and the extension of guarantees of credit in connection with these transactions. [Emphasis added]

4. FMS sales, international cooperative agreements and co-production agreements are "decisions and actions of . . . the Defense Security Assistance Agency, and the other responsible offices within DoD components with respect to arms transfers to foreign nations." Accordingly, they are expressly exempt under the terms of E.O. 12114, DoD Directive 6050.7, and AR 200-2 from the Executive Order.

II. While U.S. general environmental laws, as explained below in Section III, do not apply extraterritorially, care should be given in particular cases.

A. It should be noted that the *RCRA* does *contain an export control provision*⁸ which prohibits the export of hazardous waste from the United States, generally, unless the receiving country is notified and agrees to accept it.⁹

B. However, U.S. Federal law provides that, where an *international agreement* between the U.S. and the government of the receiving country *exists*, the *export need only conform* to the terms of that international agreement.¹⁰ Therefore, when any FMS sales or international cooperative agreement involves or may involve, the *export of hazardous waste* from the United States the action *should be implemented* in accordance with the terms of the *applicable international agreement* between the U.S. and the receiving country. If there is no applicable international agreement, then the export of the waste should conform to the requirements of 42 U.S.C §6938. Where hazardous waste is imported into the United States, the requirements of 40 C. F. R. Part 262, subpart F must be complied with.

III. As stated in the introduction above, generally, United States Government law and policy is without extraterritorial effect.

⁷E.O. 12114, Sec. 2-5(a).

⁸42 U.S.C § 6938.

⁹See also 40 C.F.R Part 262, Subpart E.

¹⁰42 U.S.C § 6938 (a)(2) and (f).

A. In 1991, the United States Supreme Court decided that, absent clear evidence of the congressional intent to apply a statute extraterritorially, United States laws do not apply outside the United States.¹¹ The court held that Title VII of the 1964 Civil Rights Act simply did not apply extraterritorially to alleged discriminatory conduct against United States citizens employed in Saudi Arabia by a U.S. firm doing business there. As stated by the Supreme Court in *Aramco*, the *primary purpose* of the *presumption against extraterritoriality* is “to protect against the unintended clashes between our laws and those of other nations which could result in international discord.”¹²

B. Again, in 1993, the Supreme Court re-affirmed the general rule against extraterritorial application of U.S. laws in *Smith v. United States*.¹³ In citing *Aramco* with approval, the Court ruled that “it is a 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 [citations omitted] . . . We assume that Congress legislates against the backdrop of the presumption against extra territoriality [citations omitted].”¹⁴

The *Smith* case involved interpretation of the Federal Tort Claims Act (FTCA), which states that the FTCA will not apply to any tort claim “arising in a foreign country.” The Court held that Antarctica, a sovereignless place, is a “foreign country” within the meaning of the FTCA. Therefore, the personal representative of a man who was accidentally killed in Antarctica could not bring a negligence action under the FTCA against the U.S. Government.

IV. There are three exceptions to the stated general rule.

A. In 1993, the District of Columbia Circuit Court of Appeals found that there are three general categories for which the controlling presumption against the extraterritorial application of U.S. law does *not apply*. According to *Environmental Defense Fund v. Massey*, cited above in Section I, the exceptions to the rule are:

First, as made explicit in *Aramco*, the presumption will not apply where there is an “affirmative intention of the Congress clearly expressed” to extend the scope of the statute to conduct occurring within other sovereign nations . . . [citation omitted]. **Second**, the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States. Two prime examples of this exception are the Sherman Anti-Trust Act and the Lanham Act and the securities laws . . . [citation omitted]. **Finally**, the presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States. By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders.¹⁵

V. With respect to Antarctica, an environmental law was found to fall under exception three.

¹¹*Equal Employment Opportunity Commission v. Arabian American Oil Co. (“Aramco”)*, 111 S.Ct. 1227, 113 L.Ed. 2d 274 (1991).

¹²113 L.Ed.2d at 282.

¹³507 U.S. ___, 113 S.Ct. ___, 122 L.Ed. 2d 548 (1993).

¹⁴122 L.Ed. 2d at 556.

¹⁵*Id.*, 986 F.2d at 531-532.

A. Having enunciated the three basic exceptions to the general rule, the *Massey* court then inquired whether the National Environmental Policy Act (NEPA)¹⁶ applied to a *federal agency's* (National Science Foundation) *proposed burning of waste in Antarctica*. Specifically, the court was asked to address whether the National Science Foundation was required by the NEPA to prepare an environmental impact statement (EIS) before burning the waste in Antarctica. The court found:

that the presumption against the extraterritorial application of statutes described in *Aramco* does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica—a continent without a sovereign, and an area over which the United States has a great measure of legislative control.¹⁷

B. Therefore, the *Massey* court decided that an EIS was required. The court held that the “conduct regulated by the statute” occurred in the U.S.—*because the agency's decision-making occurred within the U.S.* However, the *court* also was careful to *expressly limit its decision to activities in Antarctica*. It did not rule on the applicability of the NEPA or other environmental statutes to government action in other sovereign countries. It should be noted that the Clinton Administration decided not to appeal the *Massey* decision. Whatever else the court's decision in *Massey* may imply, its narrow decision arguably is limited to the application of NEPA to the unique circumstances of Antarctica.

C. Indeed, on November 30, 1993, in *NEPA Coalition of Japan v. Aspin*, the U.S. District Court for the District of Columbia (Civ. Action 91-1522, Memorandum Opinion by Judge John H. Pratt) held that NEPA did not require the Department of Defense to prepare an EIS on the environmental effects of U.S. Navy naval and air operations in Japan. The court found that the presumption against the extraterritorial application of U.S. law prevented it from applying the NEPA without clear Congressional intent. The Plaintiffs were unable to show, and the Court found, that there was no such Congressional intent. Further, citing *Massey* as the controlling precedent in the D.C. Circuit, the Plaintiffs argued the court should apply NEPA overseas, as it applied to Antarctica. The District Court declined to extend *Massey*. It held that *Massey* did not apply because “The *Massey* court expressly limited its ruling by refusing to decide whether NEPA might apply to actions involving an internationally recognized sovereign power.” The District Court went on to add: “For completeness, the Court notes that even if NEPA did apply to this case, as an initial proposition, no EISs would be required because U.S. foreign policy interests outweigh the benefits from preparing an EIS.”

VI. The extraterritorial reach of other environmental statutes has also been the subject of recent litigation.

A. In *Amlon Metals Inc. v. FMS Corp.*,¹⁸ the court held that the Resource Conservation and Recovery Act (RCRA)¹⁹ *did not apply* extraterritorially to *hazardous waste disposal in the United Kingdom of U.S.-origin hazardous waste*. The court found no evidence of *Congressional intent to apply RCRA* extraterritorially in either the statute or its legislative history. The court also noted that Congress had failed to provide a venue provision for citizen

¹⁶42 U.S.C. § 4332.

¹⁷*Id.* 986 F.2d at 529.

¹⁸775 F.Supp. 668 (S.D.N.Y. 1991).

¹⁹42 U.S.C. § 6901 et seq.

suits based on hazards arising from wastes located in another country, suggesting that Congress sought to limit RCRA to hazards in the United States.

B. The extraterritorial reach of the Endangered Species Act (ESA)²⁰ was litigated in *Lujan v. Defenders of Wildlife*.²¹ The Supreme Court reversed, on standing grounds,²² an opinion of the Court of Appeals for the Eighth Circuit²³ which decided that *Congress intended* the consultation requirements of the *ESA* to *apply* to all agency actions affecting endangered species whether the actions are inside or outside the United States. The Lujan plaintiffs have refiled their case with an amended standing position, and the matter is now pending.

C. Given the general rule and exceptions stated, even in light of Massey applying NEPA to Antarctica, the question of whether a particular environmental statute applies extraterritorially remains a statute-specific inquiry.

VII. International Treaties and Agreements

Although U.S. general environmental laws are not applicable abroad, where the U.S. is a party to an international treaty or other international agreement concerning these issues, the specific text of that treaty or agreement should be carefully reviewed. An examination of all U.S. environmental treaty obligations is beyond the scope of this article which does not undertake to review all such agreements for their implication in this area.²⁴ Some treaties, such as the GATT, contain exemptions for national security matters.

CONCLUSION

Based on the foregoing analysis, three conclusions can be drawn:

1. Nothing in the Foreign Assistance Act, the Arms Export Control Act, Chapter 138—Cooperative Agreements with NATO Allies and Other Allies, the NEPA or RCRA, establish or suggest that Congress intended that FMS transactions and/or other defense international cooperative agreements would apply United States environmental laws and rules outside the United States.

2. Executive Order 12114 and its implementing DoD and Army regulations exempt arms transfer decisions and actions of the DSAA and other responsible DoD offices, such as FMS and international cooperative or coproduction agreements from any requirement to perform an analysis of the environmental effects outside the United States.

3. There is a general legal presumption against applying U.S. law outside the U.S.

As a final comment, the Clinton Administration has expressed interest in the issue of the overseas application of U.S. environmental laws. Therefore, the area bears watching for new policy initiatives or legislation.

²⁰16 U.S.C §1531 et seq.

²¹504 U.S. ___, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992).

²²"Standing" means that "a party has sufficient stake" in the controversy to obtain judicial resolution of the controversy. It "is a jurisdictional issue which concerns power of federal courts to hear and decide cases and does not concern ultimate merits of substantive claims in the action." *Black's Law Dictionary*, Sixth Ed, 1990, p. 1405.

²³*Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir., 1990).

²⁴For a general discussion on international environmental treaties and laws, see M. Quinn, "International Environmental Law," in *International Trade for the Non-Specialist*, 1993 Supplement, pp. 19-50.

Author's note. Although the preceding article focuses on the non-extraterritoriality of U.S. environmental laws concerning the FMS program, the same general principles of law would appear to apply as well to commercial arms exports licensed or approved under the Arms Export Control Act.

ABOUT THE AUTHOR

Louis K. Rothberg is one of the legal advisors to USASAC, in the Office of the Command Counsel, Headquarters, U.S. Army Materiel Command. He holds a Master of Laws (LL.M) in International Law from the Georgetown University Law Center, Washington DC, and J.D. from the Marshall-Wythe School of Law of the College of William and Mary, Williamsburg, VA.