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EXTRATERRITORIAL APPLICATION OF
FEDERAL WILDLIFE STATUTES: A NEW
RULE OF STATUTORY INTERPRETATION

The number of legal measures designed to protect wildlife\(^1\) and other living resources\(^2\) has multiplied sharply in recent years.\(^3\) More than one hundred federal statutes, regulations, executive orders, treaties, and international agreements now comprise this area of the law.\(^4\) Yet despite this array of legal provisions, the actual protection afforded wildlife and other living resources is less than complete. Treaty prohibitions against the taking\(^5\) of protected wildlife usually cannot be enforced directly against American citizens in U.S. courts.\(^6\) And although federal wildlife legislation is enforcea-

\(^1\) Federal wildlife conservation statutes are compiled in Congressional Research Service, A Compilation of Federal Laws Relating to Conservation and Development of Our Nation's Fish and Wildlife Resources, Environmental Quality, and Oceanography (1977). Wildlife law includes a wide range of statutes and regulations designed to create wildlife habitats and to prohibit the taking, export and import of protected wildlife species. "Quite simply, if all the federal laws which have or might have some direct or indirect impact on the tangled bank of life are included under the umbrella of 'wildlife law,' then one can hardly exclude any law." Environmental Law Institute, The Evolution of National Wildlife Law 3 (1977). This Note considers only those federal wildlife statutes that provide penalties for the taking of wildlife and its import and export.


\(^3\) For a description of the growth of federal and international wildlife law, see The Evolution of National Wildlife Law, supra note 1, at 4-5. See also Coggins & Smith, The Emerging Law of Wildlife: A Narrative Bibliography, 6 Env't L. 583, 583-84, 618 (1975).

\(^4\) The Evolution of National Wildlife Law, supra note 1, at Preface.

\(^5\) "Taking" is a term of art used in federal wildlife conservation law to mean anything from harassing to killing wildlife. See, e.g., Marine Mammal Protection Act of 1972, 16 U.S.C. § 1362(13) (1976) [hereinafter cited as MMPA] (defining "take" as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal").

ble against American citizens within the United States, federal courts have not applied these statutes extraterritorially. Specifically, in United States v. Mitchell, the United States Court of Appeals for the Fifth Circuit refused to apply the Marine Mammal Protection Act of 1972 to an American national who had taken dolphins in Bahamian territorial waters. The court based its decision on the traditional presumption that federal laws apply only within U.S. territory, absent a clear expression of congressional intent to the contrary.

Two familiar means exist by which enforcement officials could surmount these barriers to effective control of the taking of protected wildlife by American nationals outside U.S. territorial limits. Congress could amend existing federal wildlife conservation laws so as clearly to express an intent that the statutes apply extraterritorially. Alternatively, the United States could, as a matter of foreign policy, encourage foreign nations to enact legislation prohibiting the taking of certain wildlife. This Note will propose yet a third method of control: the use by the federal courts of an expanded rule of statutory interpretation that would increase the extraterritorial applications of federal wildlife conservation law in specific cases. Explication of this modified rule requires an examination of existing methods for regulating the activities of U.S. citizens abroad that are harmful to wildlife. This will include a review of international trends in wildlife conservation and current views on extraterritoriality, as well as a brief description of U.S. wildlife law. The Note will then describe the modified rule and discuss how it would operate, particularly as applied to the situation presented in United States v. Mitchell.

I

MECHANISMS FOR WILDLIFE PROTECTION

A. INTERNATIONAL CONSERVATION LAW

In the past decade, several major developments in public international law have contributed to an evolving customary international law of wildlife protection. For example, the international community has increasingly rec-
ognized that wildlife is a "public trust"\(^{14}\) and "the common heritage of mankind,"\(^{15}\) and many nations have signed regional wildlife conventions.\(^{16}\)

Probably the most significant developments in the field are the Principles of the Stockholm Declaration on the Human Environment\(^ {17}\) and the Third United Nations Conference on the Law of the Sea,\(^ {18}\) both of which attempt to state basic international wildlife conservation principles and to codify those principles in treaty form.

Some of the draftsmen of the Stockholm Declaration saw it as a "first step toward the development of international environmental law."\(^ {19}\) The Declaration gives sovereign states responsibility for preserving the world's wildlife\(^ {20}\) and may even impose an obligation on states to prevent their nationals from acting in ways that harm wildlife, no matter where the actions occur.\(^ {21}\) Similarly, the Informal Composite Negotiating Text of the Sixth Session of the Law of the Sea Conference appears to envision the eventual extraterritorial application of domestic wildlife law.\(^ {22}\) Yet both of these developments are only preliminary steps that cannot either alone or in tandem fulfill the task of protecting wildlife on an international scale.

B. United States Conservation Law and Its Extraterritorial Application

1. Statutory Protection of Wildlife

The federal courts have long recognized the power of Congress to give
a statute extraterritorial effect, based on any one of four theories of jurisdiction: territorial,\textsuperscript{23} protective,\textsuperscript{24} universality,\textsuperscript{25} and nationality.\textsuperscript{26} The territorial, protective, and universality principles do not appear to justify the extraterritorial application of federal wildlife conservation law. They require that the regulated conduct produce or be intended to produce adverse effects within American territory, \textsuperscript{27} on U.S. governmental functions or security, \textsuperscript{28} or on some other universally accepted state interest such as the

\textsuperscript{23} The territorial principle can be broken down into “subjective” and “objective” territoriality. The Restatement defines subjective territoriality as follows:

A state has jurisdiction to prescribe a rule of law
(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
(b) relating to a thing located, or a status or other interest localized, in its territory.

\textbf{RestateMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965)} [hereinafter cited as Restatement]. Objective territoriality, by contrast, means that:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

\textit{Id.} § 18.

\textsuperscript{24} A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

\textit{Id.} § 33(1).

\textsuperscript{25} “A state has jurisdiction to prescribe a rule of law with respect to piracy . . . .” \textit{Id.} § 34.

\textsuperscript{26} “A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct of a national . . . wherever the conduct occurs . . . .” \textit{Id.} § 30(1)(a).


The Rodriguez court also distinguished between the protective principle and the objective territorial principle:

Acts committed outside the territorial limits of the State but intended to produce, or producing, effects within the boundaries of the State are subject to penal sanctions . . . . Where the effect is felt by private persons within the State, penal sanctions rest on the “objective,” or “subjective,” territorial principle . . . . Where the effect of the acts committed outside the United States is felt by the government, the protective theory affords the basis by which the state is empowered to punish all those offenses which impinge upon its sovereignty, wherever these actions take place and by whomsoever they may be committed.
prevention of piracy. It is difficult to establish that the taking of wildlife produces any of these effects.

The nationality basis of jurisdiction, by contrast, may permit the extraterritorial application of federal wildlife conservation law, because it establishes the right of Congress to attach legal consequences to the conduct of U.S. nationals wherever the conduct occurs. For example, Congress can prohibit the taking of blue whales by American nationals, even in the waters of another nation. Yet even under the nationality principle, there are limits on extraterritorial enforcement, as opposed to extraterritorial prescription, of federal wildlife conservation laws.

182 F. Supp. at 488 (citations and footnote omitted).

29. For a discussion of other possible universal crimes, including slavery, see RESTATEMENT, supra note 23, Reporter's Note 2.

30. But see Trail Smelter Arbitration (United States v. Canada), U.S. DEP'T OF STATE, ARBITRATION SERIES No. 8, [1949] 3 R. Int'l Arb. Awards 1905 (1941). In that case, the tribunal held Canada responsible to the United States under international law for the production in Canada of fumes that polluted the air in the United States. The Trail Smelter decision could provide precedent for the use of the objective territoriality principle in federal wildlife conservation law, if plaintiff could show that pollution created outside the United States has a deleterious effect on wildlife habitats. International law may evolve to the point where the taking of certain endangered species anywhere is considered a universal crime against humanity. A short analysis of the present extraterritorial application of environmental law appears in Note, Extraterritorial Application of United States Laws: A Conflict of Laws Approach, 28 STAN. L. REV. 1005, 1022-24 (1976).

31. See note 26 supra. The nationality principle is universally accepted, although there are striking differences in the extent to which it is used in the different national systems. The United States rarely applies its laws extraterritorially solely on the basis of the nationality principle.

Indeed, it is hard for an Anglo-American lawyer to conceive of situations requiring application of our law to a national who, entirely apart from commerce between the United States and the foreign country in which he for the moment is transacting business and entirely apart from any effect upon or activity within the United States, acts in a way which, if he acted in the United States, would violate our law.

Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 OHIO ST. L.J. 586, 604 (1961). In some instances, however, the United States does exercise jurisdiction based solely on nationality. See Kawakita v. United States, 343 U.S. 717 (1952); 18 U.S.C. § 2381 (1976) (treason "within the United States or elsewhere" is a criminal offense). But see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). Civil law countries have been more willing to exercise prescriptive jurisdiction solely on the basis of nationality, particularly with regard to their penal codes. See Research in International Law, Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 435, 522-23 (Supp. 1935). The analogy to both U.S. and foreign law thus justifies American exercise of nationality jurisdiction, either through legislative enactment or through judicial interpretation, with regard to the penal provisions of a limited group of statutes.

32. The distinction between enforcement jurisdiction and prescriptive jurisdiction is important. Under international law, enforcement jurisdiction depends, first, on prescriptive jurisdiction and, second, on the presence of either the defendant or his property within the territory of the forum. See N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM, 139-51 (1973). After the Supreme Court's decision in Shaffer v. Heitner, 433 U.S. 186 (1977), quasi in rem jurisdiction may be a less effective enforcement mechanism.

For a discussion of some of the problems inherent in the enforcement of a law permitting extraterritorial application, including service of the defendant, investigation of the circum-
In deciding whether to apply a particular statute extraterritorially, federal courts have generally looked to congressional intent, which they have ascertained by using the traditional tools of statutory interpretation. The starting point for such interpretation is the rebuttable presumption that statutes only apply to conduct that occurs within or has an effect within U.S. territory, unless Congress clearly indicates a contrary intent either in the statute's language or in its legislative history.

In some instances, courts have extraterritorially applied a statute that contains no explicit provision in favor of or in opposition to such application, in order effectively to carry out the congressional purpose in enacting the statute. But no court has adopted this “nature of the law” analysis for a federal wildlife conservation statute. In general, under present case law, only those federal wildlife conservation statutes that clearly call for extraterritorial application comprehend the conduct of American nationals acting in foreign territories.

33. See, e.g., Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949) (court must look to congressional intent to determine if federal labor laws regulating maximum work hours apply to contract between the United States and a private contractor); Blackmer v. United States, 284 U.S. 421, 437 (1932).

34. The wide range of sources available, including statutory language, legislative history, and administrative interpretations is amply demonstrated by the decision in Foley Bros. v. Filardo, 336 U.S. 281, 285-88 (1949). See Moore v. Robinson, 206 Ga. 27, 40, 55 S.E.2d 711, 720 (1949) (“interpretation is a matter addressed solely to the intelligence, information, and learning of the judge, and he is not restricted as to the means by which he may enlarge these faculties”).


36. “Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.” Restatement, supra note 23, § 38. See, for example, Fed. R. Civ. P. 45(e)(2) and Fed. R. Crim. P. 17(e)(2), which permit U.S. courts to subpoena a U.S. citizen or resident alien to appear as a witness, even though he or she is abroad at the time of the summons; Blackmer v. United States, 284 U.S. 421 (1932). See also I.R.C. § 894 (revenue laws apply to U.S. citizens regardless of residence, except as otherwise provided in the I.R.C. or by treaty); accord, Cook v. Tait, 265 U.S. 47, 53-56 (1924).


39. Nevertheless, in the case of a wildlife species such as the whale, which migrates between the territorial seas of nations and depends upon ecological systems that extend beyond U.S. boundaries, a court could conclude that to restrict the jurisdictional reach of a whale protection statute to U.S. territorial limits would undermine the effectiveness of the statute. From this, the court could infer congressional intent to include foreign territorial seas in the locus of the statute. See United States v. Bowman, 260 U.S. 94 (1922).
2. **U.S. Enforcement of Treaty Protection of Wildlife**

The United States is a party to many of the bilateral and multilateral treaties\(^{40}\) that protect a wide range of species.\(^{41}\) Like all U.S. treaties, wildlife treaties may be either self-executing or non-self-executing. If a treaty is self-executing, it "shall become effective as domestic law of the United States at the time it becomes binding."\(^{42}\) A non-self-executing treaty requires that Congress pass implementing legislation before the treaty's provisions become binding. Without such implementing legislation, only a self-executing treaty will supersede inconsistent provisions of earlier acts of Congress or of the laws of the states. Determining whether a treaty is self-executing is often difficult,\(^{43}\) and the courts have not made this determination for most wildlife conservation treaties. It appears that most of these treaties are non-self-executing.

Regardless of whether a treaty is self-executing, it may be argued that the courts should utilize statutes as aids in construing international agreements. Certainly Congress may enact a statute that supersedes inconsistent portions of an effective international agreement, provided Congress clearly expresses an intent to supersede the agreement.\(^{44}\) Nevertheless, whenever a treaty and an act of Congress deal with the same subject, the courts will try to construe them so as to give effect to both.\(^{45}\) Nor is it unusual for a domestic court to rely on a treaty or other international agreement to which the United States is a party as a tool for interpreting domestic laws, including wildlife conservation statutes.\(^{46}\) For example, in a federal-state conflict

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\(^{42}\) Restatement, *supra* note 23, § 141.


\(^{44}\) Restatement, *supra* note 23, § 143.

\(^{45}\) "An international agreement is binding in accordance with its terms and each party has a duty to give them effect, except to the extent that they may be unlawful under the rule stated in § 116." *Id.* § 138. Cook v. United States, 288 U.S. 102 (1933). See also MMPA, *supra* note 5, § 1378(6)(B) (commits the Secretary of State to study what modifications, if any, could harmonize the provisions of the MMPA with those of the Interim Convention on the Conservation of North Pacific Fur Seals, *done* Feb. 9, 1957, 8 U.S.T. 2283, T.I.A.S. No. 3948, 314 U.N.T.S. 105).

concerning jurisdiction over the seabed underlying U.S. territorial waters, the United States Supreme Court defined "inland waters" by reference to the Convention on the Territorial Sea and the Contiguous Zone. The Court relied on the Convention, although it went into effect after the enactment of the statute in question, because the statute failed to define the term. Likewise, the Eighth Circuit looked to the Migratory Bird Treaty for aid in defining "wild duck" as used in the Migratory Bird Treaty Act, which Congress had passed to implement the Treaty. Courts have also emphasized the range of materials and policies on which a judge may rely when interpreting a statute. Thus it seems logical that courts should at least consider a related treaty provision when attempting to determine whether a wildlife protection statute should apply extraterritorially.

3. United States v. Mitchell

The only court squarely to address this issue, the Fifth Circuit in United States v. Mitchell, refused to apply the Marine Mammal Protection Act of 1972 (MMPA) to a U.S. national who had taken dolphins in Bahamian territorial waters. The court rested its decision on the traditional rule for determining the extraterritorial effect of statutes: courts will apply federal laws only within U.S. territory, absent a clear expression of contrary congressional intent. After examining both the "nature" of the MMPA and to Canada's interpretation of the treaty for support of regulations providing staggered hunting seasons across the United States; Bailey v. Holland, 126 F.2d 317, 322 (4th Cir. 1942) (upholding reasonableness of regulations issued pursuant in part to legislation not implementing the Migratory Bird Treaty, because the regulations tended to effectuate the conservation program envisioned by the Treaty); United States v. Lumpkin, 276 F. 580 (N.D. Ga. 1921) (including mourning dove as protected bird under Migratory Bird Treaty Act according to list set forth in Migratory Bird Treaty).


53. See note 34 supra; United States v. Stewart, 311 U.S. 60 (1940).
54. 553 F.2d 996 (5th Cir. 1977).
56. Id. at 1002.
57. See notes 38-39 supra and accompanying text.
and the statute's language and legislative history, the court held that there was no indication that Congress had intended the MMPA to apply extraterritorially.\textsuperscript{58}

This analysis appears to be correct under traditional rules of interpretation and in light of the content of the statute. Although the Act provides for a moratorium on the taking of marine mammals that is couched in universal language, it does not specifically apply the ban to U.S. nationals fishing outside the territorial limits of American waters.\textsuperscript{59} In addition, the more specific prohibitions contained in the statute apply to actions on the high seas, but they apparently do not extend to foreign territorial waters.\textsuperscript{60} Thus, neither the moratorium nor the specific prohibitions overcome the traditional rule's presumption against extraterritoriality.\textsuperscript{61} The legislative history makes no definite statements favoring or opposing extraterritorial application of the Act.\textsuperscript{62}

\begin{footnotesize}
\begin{enumerate}
\item 58. 553 F.2d at 1003-05.
\item 59. MMPA, supra note 5, §§ 1371-1372.
\item 60. 553 F.2d at 1004.
\item 61. See notes 35-37 supra.
\item 62. Representative Burke, a supporter of the bill, favored extraterritorial application:
\begin{quote}
At the national level we have a similar problem, we can control what the States do, but not other countries. By enacting this bill today we will have taken a giant step toward management of marine mammals by controlling our citizens' actions that are detrimental to them, but we will still need international cooperation before effective management can be instituted. . . . [I]nternational cooperation is necessary to establish effective management, and until this is achieved we must try to save these whales from extinction by total protection from our citizens, and from those hunting in our waters. 118 CONG. REc. 7694-95 (1972). The House Report, however, contains a statement suggesting that the Committee on Merchant Marine and Fisheries did not intend that the MMPA be applied extraterritorially.
\end{quote}
\end{enumerate}
\end{footnotesize}
II

A MODIFIED RULE OF STATUTORY INTERPRETATION

Because of the nascent state of international conservation law and the apparent unwillingness of federal courts to use existing rules of statutory interpretation to apply U.S. wildlife conservation laws extraterritorially, a new rule of statutory interpretation is needed to reach acts harmful to wildlife that are committed by American nationals outside U.S. territorial limits. Hereafter referred to as the modified rule, such an approach would use international treaties to which the United States is a signatory as aids in interpreting federal wildlife conservation statutes. Adoption of this modified rule would facilitate extraterritorial application of federal wildlife laws by expanding the range of factors a court would consider when seeking to establish the extraterritorial effect of such statutes.

The close relationship between wildlife conservation statutes and treaties and international agreements for the protection of wildlife justifies the use of such treaties in statutory interpretation. In general, the parties to conservation treaties intend to protect wildlife from the harmful activities of the nationals of the signatories and, by signing the treaties, manifest their adherence to international norms for the protection of wildlife. Because courts should, as much as possible, harmonize congressional enactments with the letter and spirit of treaties, they should favor the extraterritorial application of wildlife protection statutes. The modified rule would encourage courts to resolve ambiguities in favor of extraterritoriality, thereby harmonizing judicial interpretation with the goals of wildlife statutes and treaties and international customary law on conservation.

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63. See notes 14-22 supra and accompanying text.
64. See notes 40-62 supra and accompanying text.
65. See generally treaties cited in note 84 infra.
67. The United States Supreme Court has developed a similar liberal policy for construing the complex of treaties, statutes, and contracts that define the status of Indian tribes, which the Court has termed wards of the nation that depend on its protection and good faith. Under the policy, courts are to resolve legal ambiguities in favor of Indian interests, without disregarding clear expressions of tribal and congressional intent. DeCoteau v. District County Court, 420 U.S. 425 (1975). See also United States v. White, 508 F.2d 453 (8th Cir. 1974); United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941) (both cases holding that treaty preserved Indians' right to hunt all kinds of birds at any time and in any manner, and United States could not restrict Indians' hunting of birds upon the reservation).
68. See text accompanying notes 14-22 supra. It appears that courts may consider international customary law to be part of domestic law. See The Paquete Habana, 175 U.S. 677 (1900); Sprout, Theories as to the Applicability of International Law in the Federal Courts of the United States, 26 AM. J. INT'L L. 280 (1932). Courts will attempt whenever possible to read domestic law in harmony with international customary law. RESTATEMENT, supra note 23, § 3(3).
A. EXPLANATION OF THE MODIFIED RULE

At present, federal courts usually examine only the language and legislative history of a statute to determine whether Congress intended it to apply extraterritorially. Courts would use the modified rule only when these factors revealed no clear intent regarding extraterritorial application of a wildlife conservation statute. In such a situation, the extraterritoriality inquiry would focus on treaties and statutes dealing with the same wildlife species, as well as international customary law on conservation. In using these sources as interpretational guides, courts would have to determine how much evidentiary weight to give them, just as courts do when they interpret a statute by using statements from its legislative history.

A weighing of the effect to be given to each interpretational source should be based on the level of congressional consideration of and influence on the approval of the treaty or statute, the wildlife species covered by the treaty or statute, and the binding effect of the treaty or statute on U.S. nationals. Thus, a statute would be highly influential because both houses of Congress considered and passed it, whereas a treaty would be less persuasive because only the Senate had approved it, albeit by a two-thirds rather than a simple majority. Similarly, a self-executing treaty would have considerable impact because it, unlike a non-self-executing treaty, is binding on U.S. nationals. Finally, a court should give more weight to a treaty or statute that deals with the same or a similar wildlife species as that covered by the legislation in question. These factors can be ordered according to the relative weight they should be given by a court as it considers treaties, statutes, and international customary law to determine whether a particular wildlife protection statute should be enforced extraterritorially.

(1) Language, legislative intent, and “nature of the law” of the statute in question. At present, courts consider only these factors.

(2) The treaty implemented by the legislation that the court must interpret. The court should give the treaty great weight because of its close links to the implementing legislation, particularly because it deals with the same species.

69. See text accompanying notes 33-39 supra.
70. See, e.g., note 62 supra and accompanying text.
71. See notes 33-39 supra and accompanying text.
(3) Statutes protecting similar species.\textsuperscript{73} Such statutes, which may include legislation implementing other treaties, should be influential because they express the will of both houses of Congress and are binding on American nationals.

(4) Self-executing treaties protecting similar species.\textsuperscript{74} These treaties, ratified by the Senate, would bind U.S. nationals without further action by Congress.

(5) Non-self-executing treaties protecting some of the species covered by the statute before the court.\textsuperscript{75} Although such treaties do not automatically bind U.S. nationals, they evidence congressional intention through Senate ratification.

(6) International customary law on conservation. Although international customary law may have some effect in domestic courts,\textsuperscript{76} it should receive less weight than the other factors. The reasons are that it usually applies to wildlife generally, rather than to specific species,\textsuperscript{77} and that Congress often has little influence on its content.

A court using the modified rule could examine one or more of these interpretational guides to find an expression of congressional intent that would resolve the question of a statute's extraterritorial applicability. There is, of course, no guarantee that any clear expression of congressional intent would be found.\textsuperscript{78} But the overall import of these documents would proba-
B. LIMITATIONS ON THE MODIFIED RULE

Since application of the modified rule would expand U.S. jurisdiction over conduct that occurs outside American territory and is harmful to wildlife, courts should restrict their use of the rule in several respects. They should apply the rule only to defendants who are U.S. nationals and who have violated an American wildlife statute in a foreign territory. This would prevent aliens acting abroad from being held liable under U.S. laws for conduct that is detrimental to protected species. This limitation is consistent with the use of the nationality principle of jurisdiction as the basis for the extraterritorial application of federal wildlife conservation statutes. 79

Courts should also refrain from applying the modified rule unless there is little or no chance that the foreign nation in which the actions occurred will prosecute the alleged perpetrator. The proliferation of multilateral conventions protecting wildlife has increased the likelihood that foreign states will have prescribed criminal penalties for actions that also violate U.S. law. When this is the case, as a matter of international comity, the foreign state should have the first opportunity to prosecute, since it would be applying its own law to actions occurring within its territory. In addition, if the United States were to prosecute first, the defendant might face later prosecution in the foreign state, creating a risk of double jeopardy. 80

A final circumstance in which courts should not apply the modified rule is when it would interfere significantly with a foreign state's development of its natural resources. 81 Thus, for example, the court should not

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79. See notes 31 & 39 supra and accompanying text.
80. See American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (international comity); AD HOC COMMITTEE, supra note 32 (double jeopardy).
81. Each sovereign has the exclusive right to regulate the exploitation of natural resources
apply the rule to hold the defendant liable under an American wildlife statute when the defendant's foreign operations provide substantial benefits to the foreign state in which the alleged violation occurred. Yet this restriction on the rule's applicability is not as absolute as the earlier limitations, since Congress has shown a willingness in other areas of environmental law to place conservation and ecological values above resource development in foreign countries, thereby interfering with sovereign control over resource development in those countries.82

III

IMPLICATIONS OF THE MODIFIED RULE

A. AN ALTERNATE APPROACH TO UNITED STATES v. MITCHELL

By reversing the district court's decision, the Fifth Circuit in United States v. Mitchell83 refused to hold an American national liable for violations of the MMPA that occurred in foreign territorial waters. Although both the trial and appellate courts used the traditional rules of interpretation for extraterritoriality, they came to opposite conclusions. This indicates that the MMPA is indeed ambiguous on the issue of its extraterritorial applicability and that the courts might have profitably applied the modified rule. Had the Fifth Circuit done so, it would have upheld the conviction by the lower court. As before, the court would first have considered the language, legislative history, and nature of the MMPA to determine the Act's extraterritorial applicability. But since this analysis would not have resolved the ambiguity, the court, by applying the modified rule, would have proceeded to consider treaties, statutes, and international customary law.

Seven treaties protect the same wildlife species as the MMPA.84 Five

82. Examples can be found in applications of the National Environmental Protection Act, 42 U.S.C. §§ 4321-4347 (1974) [NEPA], the General Agreement on Tariffs and Trade [GATT], opened for signature Oct. 30, 1947, 67 Stat. A11 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 186, and provisions of the MMPA itself. The Legal Advisory Committee of the Council on Environmental Quality "has concluded that the NEPA requirements concerning impact statements should apply to Department of State and AID actions carried out within the territorial jurisdiction of another nation, both as a matter of law, and as a matter of policy . . . ." Boxer, The American Environmental Law System: A Model for Transnational Action, 1 BROOKLYN J. INT'L L. 18, 36 (1975) (footnote omitted). Under GATT, the President may use economic sanctions against a nation violating the provisions of an international fishery conservation program. 22 U.S.C. § 1978(a) (1976). If read literally, certain provisions of the MMPA would prohibit importation of any product from a nation that failed to secure U.S. certification that its program for the protection of marine mammals was consistent with the MMPA. Coggins, supra note 62, at 55. "To some extent, Congress has opted in the MMPA for imposing American standards of ethics and conservation practices on all other countries." Id. at 51.
83. 553 F.2d 996 (5th Cir. 1977).
of these would restrict the actions of U.S. nationals in foreign territories by prohibiting the taking, import, or export of marine mammals. Further, the implementing legislation for two of the treaties specifically calls for limited extraterritorial application. Thus, in a majority of the treaties that would be considered under the modified rule, the Senate and the executive branch—and in two cases, the House of Representatives—have shown a desire to subject U.S. citizens acting abroad to restrictions similar to those of the MMPA. The Mitchell court’s refusal to give extraterritorial application to the MMPA’s protection of all marine mammals appears to be inconsistent with an implied congressional intent to protect many types of marine mammals from Americans acting abroad. To further this intent and to promote the goals of international conservation law, a court using the modified rule should resolve the MMPA’s ambiguity in favor of extraterritorial application.

The court, having concluded that it could apply the MMPA extraterritorially, should next consider the policy question of whether such application and enforcement would seriously interfere with the foreign state’s sovereignty over its natural resources. Although it may be difficult for the court to determine the interest of the foreign nation in resource development, in this instance it could look to the MMPA’s permit mechanism. This mechanism allows the Executive branch to waive the prohibitions of the


87. Nafziger & Armstrong, supra note 73.

88. See notes 20-21 supra and accompanying text.

89. The court in United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977), placed some emphasis on this point, but used the argument only to refute the contention that the nature of the MMPA necessitated its extraterritorial application. 553 F.2d at 1002; see note 81 supra.
Act under certain circumstances. If the Executive branch refused the court's invitation to issue such a permit after the fact, the court could conclude that the conviction of the defendant would not impair resource development in the foreign state, at least from the U.S. foreign policy viewpoint. In any event, a case such as *Mitchell* appears to present little risk of interference with such development.

**B. Policy Effects of the Modified Rule**

Use of the modified rule would, first, lead to a better integration of domestic laws, treaties, and international conservation efforts, thereby furthering their purpose of protecting wildlife on an international scale. It would help fill the gap between the limited protective effect of foreign nations' wildlife conservation efforts and the measure of protection that Congress has indicated is desirable. American citizens would no longer be able to destroy endangered species abroad with impunity. Until treaties and especially their enforcement mechanisms prove equal to the task of providing adequate protection for wildlife on a worldwide scale, extraterritorial application could protect wildlife from exploitation by U.S. nationals.

Because the jurisdictional basis for the modified rule is the nationality principle, this use of extraterritorial jurisdiction avoids questionable reliance on "effects within the United States" as the foundation for jurisdiction. Such reliance would probably be fatal to the extraterritorial application of wildlife statutes because taking wildlife in a foreign territory has only minimal adverse effects within the United States. Finally, one of the most important benefits of the modified rule is that it would provide courts with a mode of analysis for determining the extraterritorial applica-

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90. The Secretary of the Interior will issue a permit only after considering factors such as the number and kind of animals involved, the location and manner of taking, and regulations governing the granting of permits, and will promulgate regulations only after considering existing treaties, the marine ecosystem, and fishery resources. MMPA § 1374. *See* Nafziger & Armstrong, *supra* note 73. *See also* Diggs v. Richardson, 555 F.2d 848, 849-50 (D.C. Cir. 1976) (plaintiffs argument based partly on waiver of MMPA for American company harvesting and importing seal furs from Namibia).

91. International law has proved a dismal failure in dealing with questions of such common resources as marine mammals or fish. . . . International law has failed because it provides no remedy short of war or economic sanction to bind intransigent nations; that is, should any one nation refuse to go along with agreements or regulations intended to benefit all nations by conserving the remaining marine mammal resources, and 'world opinion' proves fruitless, and the non-conforming state refuses to accept the jurisdiction or abide by the orders of the World Court, the only remaining remedies are coercive and unilateral warfare either by force or by economic sanction.

Coggins, *supra* note 62, at 52.


93. Note 30 *supra* and accompanying text.
bility of other legislation developed in a framework of international concern, such as statutes dealing with pollution.

CONCLUSION

The protection of the world's wildlife is an important goal of U.S. policy and will continue to be the focus of considerable litigation. To increase protection of wildlife species, U.S. courts should apply a modified rule of statutory interpretation when the question of extraterritorial application of federal wildlife statutes arises. This would discourage American nationals from violating these statutes in foreign territory. By considering the treaty implemented by the legislation in question, statutes and treaties protecting similar species, and international customary law on conservation, courts can systematically promote policies favored by Congress and the world community.

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