

# Sustainable Development Law & Policy

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Volume 10

Issue 1 Fall 2009: *Sustainable Development in the Courts*

Article 1

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## Volume 10 Issue 1

Sustainable Development Law & Policy

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# SUSTAINABLE DEVELOPMENT LAW & POLICY



EXPLORING HOW TODAY'S DEVELOPMENT AFFECTS FUTURE GENERATIONS AROUND THE GLOBE

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<http://www.wcl.american.edu/org/sustainabledevelopment>

# EDITORS' NOTE

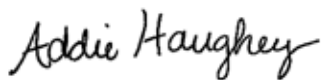
As the ongoing battle in the United States Congress over climate change legislation demonstrates, a legislature or parliament is not always the key to progressing sustainable development strategies. It is often in the courts where progress can be made, and it is this exact idea that our staff endeavored to explore in our fall issue.

SDLP's work on this topic has brought to light a number of unexpected realities. For example, South Asia and Africa are doing more than we previously believed to proliferate sustainable development, with constitutional guarantees of the right to life and a clean environment common within legal systems in those regions. Canada, on the other hand, is not as green as we once thought, with its provincial system building barriers to sustainable development unique to that nation.

On the home front, many environmental lawyers were thrilled to see so many cases dealing with sustainability issues go up to the US Supreme Court in the last few terms, but Professor May paints a much bleaker picture, laying out the true impacts those new precedents may have dealt. One of our student writers points to another domestic strategy—take the victories we do have in the US courts and spread them far and wide. This shows that even in the face of little Congressional progress and negative precedent, the courts can be used by creative and innovative litigators to push the envelope.

An additional article covers the September proceedings of a conference titled Transformation: The Road to a 21st Century Energy Infrastructure Impediments and Opportunities for Renewable Energy Deployment sponsored by the ABA Section on Environment and Energy and by SDLP and the WCL Environmental Law Society, held at the Washington College of Law.

Our hope is for this issue to broaden the discussion going on among litigators at every level and to encourage them to look outside their own system and their own paradigm to see how sustainable development driven litigation is happening—and succeeding—everywhere.



Addie Haughey  
EDITOR-IN-CHIEF



Blake M. Mensing  
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# INTRODUCTION

by Marcos Orellana\*

While its exact legal nature and status remains the object of controversy, sustainable development, at a minimum, requires the integration of environmental concerns in development decision-making. The *Iron Rhine Railway* arbitral tribunal recently affirmed this notion. While the process of integration required by sustainable development occurs mainly in the planning and implementation stage of projects and policies, the resolution of disputes concerning those economic activities also calls for an attempt to integrate the various relevant legal fields. In this regard, sustainable development invites a normative dialogue between competing norms and interests, and courts have a central role in providing a forum for such dialogue, both at the international and national levels.

Sustainable development finds its roots in the Stockholm Declaration on the Human Environment, endorsed by the UN General Assembly in 1972, which deals with the integration of economic, environmental, and social justice issues. In 1975, a decision of the UN Environment Programme's Governing Council employed the term sustainable development as a concept "aimed at meeting basic human needs without transgressing the outer limits set to man's endeavours by the biosphere." In 1980, the International Union for the Conservation of Nature and Natural Resources prepared its World Conservation Strategy which emphasized integration in its definition of sustainable development: "integration of conservation and development to ensure that modifications to the planet do indeed secure the survival and well-being of all people." The concept of sustainable development acquired international recognition as a result of the report of the World Commission on Environment and Development, "Our Common Future:"

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- The concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

Sustainable development carries profound implications for economic activities. The transition towards sustainability in response to the alarming deterioration of the earth's environment requires both immediate and gradual changes in production and consumption patterns. The required regulatory changes will affect not only new activities, but also those economic activities already under way, as clarified by the International Court of Justice in the *Gabcikovo/Nagymaros* case. It is thus foreseen that the necessary changes in the legal structures governing the local and global economies will impose costs on existing activities as

well as foster new opportunities in the marketplace. At the same time, investments in activities that reduce humanity's "ecological footprint" are indispensable to fuel the transition towards sustainability.

It is also foreseen that sustainable development requires adaptive management and evolving norms in order to incorporate new scientific insights and lessons learned regarding the operation and effectiveness of legal tools. In a long-term perspective, the international community has come to realize that while the challenges involved in sustainable development are formidable, they are also indispensable to maintain the viability of the planet and to safeguard the rights of unborn generations.

With the emergence of sustainable development as the overarching policy framework, the international community faces the challenge of finding channels for normative and institutional dialogue between economic, social, and environmental regimes. An important tool for dialogue is sustainable development's call for science-based decision-making, including with regard to the precautionary principle. Indeed the 2002 Plan of Implementation concluded at the World Summit for Sustainable Development expressly recognizes the need to "[p]romote and improve science-based decision-making and reaffirm the precautionary approach as set out in principle 15 of the Rio Declaration on Environment and Development."

In the 1992 UN Conference on Environment and Development, governments officially adopted sustainable development as the development paradigm. Since that adoption, the concept of sustainable development has influenced not only the legal structures governing policy-making, but also those concerning dispute settlement. Accordingly, international and national courts have a critical role in clarifying the contents of sustainable development in concrete historical circumstances.

The role of domestic courts is particularly important in regard to sustainable development, given that courts address particular disputes that reflect concrete tensions and interests and not abstract controversies. In addition, the societal balance between competing economic, environmental, and social considerations are often mediated by domestic laws, both substantively and procedurally. It is thus incumbent upon domestic courts to interpret and give effect to internal laws embodying societal preferences, with the aid of the principle of sustainable development. In this light, this volume explores how national and international courts are using the principle of sustainable development to reconcile tensions that surface between environmental, social, and economic issues.



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# ABOUT SDLP

*Sustainable Development Law & Policy* (ISSN 1552-3721) is a student-run initiative at American University Washington College of Law published three times each academic year, with occasional special editions and two annual foreign language translations. The journal publishes articles and essays that focus on reconciling the tensions between environmental sustainability, economic development, and human welfare. It embraces an interdisciplinary focus to provide a broad view of current legal, political, and social developments. Our mission is to serve as a valuable resource for practitioners, policy makers, and concerned citizens promoting sustainable development throughout the world.

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Printed by HBP, Inc., Hagerstown, MD.

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\* We welcome William Snape, a new addition to our Advisory Board this year.



# THE ROLE OF INTERNATIONAL FORUMS IN THE ADVANCEMENT OF SUSTAINABLE DEVELOPMENT

by Marie-Claire Cordonier Segger\*

## INTRODUCTION

This article briefly discusses emerging trends in international policy and law on sustainable development, focusing on how international forums can advance sustainable development. Drawing on recent experience in global policy making processes, international treaty regimes, and decisions of international courts and tribunals, this article argues that international forums can contribute constructively to global efforts to balance and integrate competing economic, human rights, and environmental priorities for development that can last over the long term. It notes that diverse international regimes quite appropriately contribute differently to sustainable development, depending on the specific challenge being addressed or the particular resource being jointly-managed. The devil, this article suggests, is in the details.

## GLOBAL COMMITMENTS TO MORE SUSTAINABLE DEVELOPMENT

Finding one accepted, universal definition of sustainable development that is appropriate for all cultures and regions of the world is not straightforward. International understanding of both sustainability and development has evolved a great deal in recent decades. Like other important global objectives (peace, democracy, human rights, freedom), sustainable development can take on new meanings in different contexts.

In the Preamble to the 1986 Declaration on the Right to Development, States focus on development as iterative processes to improve human well-being.<sup>1</sup> While debates persist in certain contexts, major international institutions active in development, as well as international development agencies, adopt variations of this approach.<sup>2</sup> This article takes both a principled and a practical approach. First, as a matter of principle, development can be understood as the processes of expanding people's choices, enabling improvements in collective and individual quality of life and the exercise of full freedoms and rights. Indian Nobel Laureate Amartya Sen, in *Development as Freedom*, provides theoretical underpinnings for this approach. As he describes it, development is a process of expanding the real personal freedoms that people might enjoy.<sup>3</sup> The expansion of freedoms, as Sen notes, can be analyzed through recognition of the "instrumental" and "constitutive" roles of development (the means and the ends). Second, on a practical level, it can be noted that in 2000, the Millennium Development Goals provided an important global set of targets, and that among 194 countries in the world, only 38 countries are characterized as developed according to the Human Development Index; with the vast majority

of the world's population in 156 developing countries.<sup>4</sup> Just in terms of development, a great deal remains to be done.

One important critique of development holds that if all human beings adopt the extraction, production, consumption, and pollution patterns that are currently common among some countries, humanity will quickly exceed the carrying capacity of the world's resources, leading to collapse.<sup>5</sup> In short, this view argues, current models of economic development are unsustainable. However, States hold sovereignty over their own natural resources, and, if developed countries achieved their present standard of living due to exploitation of resources, it is scarcely just to seek to prevent developing countries from adopting the same patterns, in spite of impacts on the environment or long-term global survival. The global objective of sustainable development emerged in the 1980s as a way to bridge these deadlocked views of developed and developing countries and to address concerns about the long-term sustainability of development. In certain sectors of natural resource development, where the common resource has a clear transboundary nature and can be studied scientifically (such as fish stocks or perhaps shared watercourses), common problems are clearer and create very practical imperatives for States to negotiate rational common management regimes. In other areas, however, particularly where impacts are diffuse, global, and cumulative over time (such as depletion of the common atmosphere, loss of global biological diversity, depletion of soil or seed resources), it is much more difficult to find common starting points to develop agreements. The concept of sustainable development emerged to help countries find solutions to these dilemmas and has become a key objective of many important international economic, environmental, and social agreements and regimes today.

International forums play important roles in advancing sustainable development. This article focuses on three. First, it argues that, through international "soft law" policy-making processes on sustainable development, States have worked to refine

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a common concept of sustainable development, identified priorities for sustainable development, and found certain elements of consensus on how these priorities can and should be addressed at different levels through policy and even law. Second, it argues that through the negotiation and implementation of international treaties on sustainable development, States seek to address specific sustainability challenges related to economic, environmental, and also social aspects of development, partly through the adoption of certain operational principles in the context of treaty regimes. Finally, it argues that through the peaceful settlement of disputes related to sustainable development, States are starting to gain valuable guidance from international courts and tribunals on how it is possible to resolve particular transboundary problems that invoke a need to balance environmental, economic, and social development priorities.

### THE ROLE OF INTERNATIONAL FORUMS IN THE ADVANCEMENT OF SUSTAINABLE DEVELOPMENT

The following sections analyze the role of international forums in the advancement of sustainable development by discussing the progress of soft law in the policy-making context, progress in the treaty making context, and progress in the realm of treaty regimes as shown by tribunal decisions.

#### PROGRESS IN “SOFT LAW” POLICY-MAKING PROCESSES: FRAMING THE DEBATES

The term sustainable development, which may have been first coined in European forestry laws of the 18th century,<sup>6</sup> gained recognition at the global level in the 1970s and 1980s. In 1972, the United Nations called an international Conference on the Human Environment, which led to the Stockholm Declaration on the Human Environment,<sup>7</sup> the creation of the UN Environment Programme, and increased impetus to agree on certain multilateral environmental agreements such as the 1973 Convention on International Trade in Endangered Species.<sup>8</sup>

In the 1980 World Conservation Strategy of the International Union for the Conservation of Nature (“IUCN”), sustainable development is defined as “the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life.”<sup>9</sup> In 1982, the World Charter for Nature was adopted by the UN General Assembly, calling for “optimum sustainable productivity,” and affirming that in “formulating long-term plans for economic development, population growth and the improvement of standards of living, due account shall be taken of the long-term capacity of natural systems to ensure the subsistence and settlement of the populations concerned, recognizing that this capacity may be enhanced through science and technology.”<sup>10</sup>

In 1983, after a decade of increasingly heated debates between developed and developing countries on environmental limits to development, the UN General Assembly established the World Commission on the Environment and Development (“WCED”).<sup>11</sup> The WCED, chaired by Prime Minister Gro Harlem Brundtland of Norway, embarked on a global series of consultations. In 1987, it delivered its Report to the General Assembly, *Our Common Future*.<sup>12</sup> The most generally accepted definition of sustainable development is found in this “Brundtland Report” where it is defined as “...development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>13</sup> The Report was accepted by the General Assembly in Resolution 42/187. The Resolution differentiates between the objective of sustainable development and the objective of environmental protection, though it considers them linked. The Resolution tasks the UN Economic and Social Council, other development institutions of the UN, and economic ministries with *reorientation toward* sustainable development, focusing on “needs,” especially the essential needs of the world’s poor, to which overriding priority should be given.

In 1992, in response to the Brundtland Report, the United Nations convened a global conference in Rio de Janeiro—the UN Conference on Environment and Development (“UNCED,” or the “Rio Earth Summit”).<sup>14</sup> The UNCED focused on development needs and on how to integrate environmental considerations into development planning and economic decision-making. At

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## *International understanding of both sustainability and development has evolved a great deal in recent decades*

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the time, developed country leaders were anxious to show their political concern, and developing country leaders were increasingly frustrated with what was perceived as attempts to limit their sovereign decisions concerning the use of natural resources for development. Ultimately, the UNCED was broadly viewed as a global success, with specific outcomes including the 1992 Rio Declaration on Environment and Development, which lays out certain principles, and the 1992 Agenda 21, which serves as a “blueprint” to halt and reverse the effects of environmental degradation and to promote sustainable development in all countries.<sup>15</sup> The text of Agenda 21 comprises a preamble and four sections entitled: Social and Economic Dimensions,<sup>16</sup> Conservation and Management of Resources for Development,<sup>17</sup> Strengthening the Role of Major Groups,<sup>18</sup> and Means of Implementation.<sup>19</sup> Agenda 21 also noted in several places, as a means of implementation of sustainable development, the need for international action to codify and develop “international law on sustainable development.”<sup>20</sup> Indeed, the UNCED process led to three international treaties: the 1992 UN Framework Convention on Climate Change (“UNFCCC”),<sup>21</sup> the 1992 UN Convention on Biological Diversity (“UNCBD”),<sup>22</sup> and the 1994 UN

Convention to Combat Desertification (“UNCCD”).<sup>23</sup> After the UNCED, a UN Commission on Sustainable Development (“UNCSD”) was established under the UN’s Economic and Social authority, to annually review progress in implementation of Agenda 21.

In 1997, a special session of the UN General Assembly, the “Earth Summit+5,” was held in New York to review progress toward the objectives set in Rio. The resulting Declaration, the Programme of Further Action to Implement Agenda 21, focused on assessing progress since Rio and calling attention to areas where implementation of Agenda 21 recommendations was faltering, highlighting the need to further strengthen and codify international law on sustainable development.<sup>24</sup> The UNCSD continued to meet annually from 1997 to 2002. States also held further global summits, adopting non-binding policy outcomes identifying points of global consensus on sustainable development issues and undertaking a series of legally binding negotiations on specific sustainable development challenges.

The 2002 World Summit on Sustainable Development (“WSSD”) in Johannesburg sought to reinvigorate global commitment to sustainable development,<sup>25</sup> focusing on how best to *implement* sustainable development in a context of globalization. The WSSD resulted in a 2002 Johannesburg Declaration on Sustainable Development and a Johannesburg Plan of Implementation. The Johannesburg Declaration, rather than laying out principles like the Declarations from Stockholm and Rio, provides a political commitment to sustainable development from heads of State.<sup>26</sup> The 2002 Johannesburg Plan of Implementation (“JPOI”) provides a framework for action to implement the commitments originally agreed at UNCED and to address a few additional challenges.<sup>27</sup> New resources were committed to the Global Environment Facility, and States agreed that efforts to address desertification would be henceforth funded by the GEF as a new focal area. A commitment was also made to negotiate a new binding regime on access and benefit sharing for biodiversity, under the UNCBD. Specific attention was focused on certain important priorities identified by the UN Secretary General, in the areas of water and sanitation, energy, health, agriculture and biodiversity (the so-called “WEHAB” issues). By the end of the WSSD, a number of the WEHAB commitments set out in the JPOI had been linked to new “voluntary” partnerships and financial commitments. Johannesburg witnessed the launch of 180 “Type II Outcomes.” These were specific sustainable development partnerships between governments, civil society, and industry, agreed to under the auspices of the WSSD process and supported by the UNCSD, to achieve a set of measurable objectives and results focused on the implementation of sustainable development in specific areas. The WSSD process set in place a broadened institutional architecture for sustainable development to further implement Agenda 21 and the WSSD outcomes and to meet emerging sustainable development challenges.<sup>28</sup> JPOI Chapter XI lays out a multi-tiered international architecture for sustainable development governance.

In sum, therefore, over the past thirty years, there has been an extensive policy-making process related to sustainable

development, including the debates and outcomes of the 1992 Rio UNCED, the 1997 New York UN General Assembly Special Session known as the Earth Summit +5, and the 2002 Johannesburg WSSD.<sup>29</sup> The debates helped to refine a common concept of sustainable development among States. For instance, in the Johannesburg Declaration, States “assume[d] a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels.”<sup>30</sup> Championed by the South African hosts and others, the social agenda in sustainable development was deeply emphasized. By the end of 2002, sustainable development was accepted as an important objective not only for bringing economic and environmental authorities together, but also for those addressing health, indigenous peoples’ rights, gender, and other social issues.<sup>31</sup> In addition, the process identified certain priority areas of consensus in State policy-making and cooperation. For instance, specific targets were agreed in the JPOI that built on the Millennium Development Goals themselves, and new partnerships were launched to work towards achieving the targets. The global debates also identified areas where existing economic, environmental, and social development treaties could be refined to better address sustainable development objectives, or new agreements negotiated. For instance, as noted above, in the Rio process three important international accords addressing both environmental and sustainable development objectives were signed, with several others negotiated soon afterwards. Furthermore, as discussed below, in the Johannesburg process, certain emerging principles of international law on sustainable development were openly debated, such as common but differentiated responsibility, precaution, sustainable use of natural resources, equity, integration, and openness, transparency, and public participation.<sup>32</sup> Unlike international treaties, or clearly recognized international customary law, the 1992 Rio Declaration and the Agenda 21, along with the 2002 Johannesburg Declaration and Johannesburg Plan of Implementation are not binding. Rather, such consensus declarations by States are usually described as “soft law.”<sup>33</sup> UN General Assembly resolutions, while they can be considered evidence of an emerging customary principle and while they can reflect treaty law, are similarly not considered legally binding as such. However, this does not mean that such consensus declarations of States are without legal relevance. Indeed, “soft law” declarations may give rise to legitimate expectations, in that States, assumed to be acting in good faith when they agree to such statements, might be precluded from deliberately violating agreements or commitments assumed in soft law without notice or a least assumed to be acting in accordance with such commitments.<sup>34</sup> In a related manner, “soft law” can provide evidence of emerging customary norms.<sup>35</sup> Though they may not provide a solid basis for robust legal analysis, the global “soft law” debates on sustainable development do appear to play a key role in building consensus around certain priorities and principles, and in identifying and building alliances for new areas of treaty-making on sustainable development.



## PROGRESS IN TREATY NEGOTIATION: SETTING SUSTAINABLE DEVELOPMENT OBJECTIVES

Unlike in the 1992 Rio Earth Summit, the Johannesburg Summit process did not produce new treaties. Instead, in the JPOI, States specifically highlighted over 60 existing international economic, environmental, and social instruments that play a role achieving sustainable development, and mentioned more than 200 others.<sup>36</sup> Essentially, sustainable development, once almost marginalized as a second or third objective of a few international environmental accords, came to be recognized as a key purpose of many important treaties and instruments, including specialized regimes for sustainable management of resources such as seeds, fisheries, and forests. One of these treaties even provides an agreed

definition of sustainable development.<sup>37</sup> While the concept of sustainable development, like development (or world peace, or human rights), may have no single simple accepted universal definition, this does not require that the meaning of sustainable development must also remain unclear in international treaty law. Different treaties, established to address distinct problems, usually specify what States mean by sustainable development in the accord itself, either in the preamble or in the operational principles, and this informs the specific mechanisms adopted, the manner of implementation, the resolution of related disputes, and often the further evolution of the regime.

One of the most significant of these treaties is the UN Framework Convention on Climate Change (“UNFCCC”). This treaty recognizes that the climate system is a shared resource whose stability can be affected by industrial and other emissions of carbon dioxide and other greenhouse gases, and sets an overall framework for inter-governmental efforts to tackle the challenges posed by climate change. In the UNFCCC, the promotion of sustainable development is framed as one of the “Principles” of the treaty, where it is described as a “right.” The provision is also, however, framed as a hortatory (“should” rather than “shall”) commitment to “promote.”<sup>38</sup> In this context, it can be noted that Principle 4 of the UNFCCC is provided as a distinct norm from Principle 1, which states in part “[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity . . .” It is also distinct from Principle 5, which states that “. . . Parties should cooperate to promote a

supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. . . .” As such, it would appear that, while UNFCCC Principle 4 recognizes a right and (hortatory) duty of States to promote sustainable development, this does not imply either intergenerational equity or a “new kind of economic growth,” as both of these are recognized as separate principles. Rather, the right to promote sustainable development appears to refer more directly to the work of the Parties to integrate environmental protection with development processes. Further, in spite of the Principles discussed above, an operational reference to sustainable develop-

ment is also found in Article 2. As such, while it could be argued that the “right to promote sustainable development” is recognized as a Principle by States in the context of the UNFCCC, it also seems that stabilization of greenhouse gas reduction levels “should” be achieved within a time-frame sufficient to “enable economic development to proceed in a sustainable manner”—essentially, an objective. At the first Conference of the Parties (1995), in the Berlin Mandate, Parties launched intense negotiations that resulted in the Kyoto Protocol<sup>39</sup> on December 11, 1997. The 1997 Kyoto Protocol shares UNFCCC objectives, principles, and institutions, but commits Annex I Parties to individual, legally binding targets to limit or reduce their greenhouse gas emissions. In contrast to the UNFCCC, the Kyoto Protocol mentions sustainable development as an objective in an extremely clear way. Indeed, it

provides quite a solid definition of the types of measures that States can take “in order to promote sustainable development” in the area of climate change.<sup>40</sup>

A second relevant treaty is the 1994 UN Convention to Combat Desertification (“UNCCD”), especially in Africa, which built on the Plan of Action to Combat Desertification from the 1977 UN Conference on Desertification to address land degradation in arid, semi-arid, and dry sub-humid areas. In Article 3 on Principles, the Parties commit to cooperate to work towards the sustainable use of land and water resources. But in the UNCCD States make over forty references to “sustainable” development, use, management, exploitation, production, and practices and/or unsustainable development and exploitation practices. As such,

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*It is possible that international courts and tribunals . . . are becoming more willing to go beyond a simple “balance” of environmental and economic concerns, towards actual integration of environmental, economic and social considerations in development*

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while “sustainable use” is set as a Principle in Article 3, States also clearly incorporated sustainable development as an “Objective” of the UNCCD, speaking both to their intention that an integrated approach will “contribute to the achievement of sustainable development” in particular areas, and that the adoption of integrated strategies will focus on “sustainable management of land and water resources” leading to “improved living conditions.”<sup>41</sup> In the UNCCD States essentially seek to specify how this objective will be realized, through action plans and regional annexes, each of which refers to sustainable development in slightly different (regionally appropriate) lights.

In a third example, 190 countries have ratified the 1992 UN Convention on Biological Diversity (“UNCBD”), which covers all ecosystems, species, and genetic resources, and recognizes that the conservation of biological diversity is “a common concern of humankind” while also noting that sustainable use of biodiversity is an integral part of the development process. In essence, in the treaty States

link traditional conservation efforts to the economic goal of using biological resources sustainably. The UNCBD contains principles for the fair and equitable sharing of the benefits arising from the sustainable use of genetic resources, including genetic resources destined for commercial use. The treaty also covers the rapidly expanding field of biotechnology, addressing technology development and transfer, benefit-sharing, and biosafety. The UNCBD regime agrees on measures and incentives for the conservation and

sustainable use of biological diversity; regulated access to genetic resources; access to and transfer of technology (including biotechnology); technical and scientific cooperation; impact assessment; education and public awareness; provision of financial resources; and national reporting on efforts to implement treaty commitments. In the UNCBD, States recognize “that ecosystems, species and genes must be used for the benefit of humans. However, this should be done in a way and at a rate that does not lead to the long-term decline of biological diversity.” Indeed, in Article 2, States define sustainable use as “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”<sup>42</sup> As such, in the UNCBD, States appear not only to clearly adopt sustainable use of biological diversity as a treaty objective, but also to define fairly precisely what is meant by sustainable use, and what types of measures and activities are needed to ensure that use is, indeed, sustainable in the context of biological resources. On January 29, 2000, the Conference of the Parties of the UNCBD adopted a supplementary instrument, the

2000 Cartagena Protocol on Biosafety. In the Protocol, States seek to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology. They establish an advance informed agreement (“AIA”) procedure for ensuring that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory. They also establish a Biosafety Clearing-House to facilitate the exchange of information on living modified organisms and to assist countries in the implementation of the Protocol. Overall, there are more than twenty references to “sustainability” in this Protocol, each specific to the actual resource being managed. “Sustainable use” is seen as an objective of the Protocol, and is considered relevant to social and economic (not just environmental) priorities such as the needs of indigenous and local communities. This highlights the point raised earlier, that there are important social and economic dimensions to sustainable development.

Sustainable development, as an objective of international treaty law, cannot simply be conflated with environmental protection in developing countries.

The commitment “to promote sustainable development” has not just been made in multilateral environmental agreements. In the preparations for the 2002 Johannesburg Summit, after seven years of negotiations, the Food and Agriculture Organization (“FAO”) Conference (through Resolution 3/2001) adopted the International Treaty on Plant Genetic Resources for Food and Agriculture<sup>43</sup> (“Seed Treaty”) in November 2001. The Seed Treaty covers all plant genetic resources relevant for food and agriculture and is vital in ensuring the continued availability of the plant genetic resources that countries will need to feed their people. In the Seed Treaty, States seek to conserve for future generations the genetic diversity that is essential for food and agriculture. Plant genetic resources for food and agriculture are defined as “any genetic material of plant origin of actual or potential value for food and agriculture.” The treaty objectives are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with the UNCBD, for sustainable agriculture and food security. In the Seed Treaty, States establish a Multilateral System for Access and Benefit-Sharing that is meant to provide an efficient, effective and transparent framework to facilitate access to plant genetic resources for food and agriculture, and to share the benefits in a fair and equitable way. This Multilateral System applies to over 64 major crops and forages. The Governing Body of the treaty sets out the conditions for access and benefit-sharing in a “Material Transfer

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*The process of identifying principles of international law and policy related to sustainable development has been reasonably complex*

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Agreement.” Resources may be obtained from the Multilateral System for utilization and conservation in research, breeding and training. When a commercial product is developed using these resources, the Treaty provides for payment of an equitable share of the resulting monetary benefits, with the condition that the use of the product may not be restricted and the seed may be used for further research and breeding. If others may use it, payment is voluntary. The Seed Treaty provides for sharing the benefits of using plant genetic resources for food and agriculture through information exchange, access to and the transfer of technology, and capacity-building. Under the Seed Treaty, a funding strategy was also established to mobilize funds for activities, plans, and programs to help small farmers in developing countries. This funding strategy also includes the share of the monetary benefits paid under the Multilateral System. There are twenty-four references to “sustainable” agricultural development, use, and systems in the FAO Seed Treaty. Sustainable use of genetic resources is clearly recognized as an “Objective” of the treaty. But in Article 6.1, the Contracting Parties also accept a duty. States “shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.” In Article 6.2, the Parties identify seven specific such measures, including “(a) pursuing fair agricultural policies that . . . enhance the sustainable use of agricultural biological diversity and other natural resources; (b) strengthening research which enhances and conserves biological diversity by maximizing intra- and inter-specific variation for the benefit of farmers . . . (d) broadening the genetic base of crops . . . (e) promoting, as appropriate, the expanded use of local and locally adapted crops, varieties and underutilized species; (f) supporting . . . sustainable use of crops and creating strong links to plant breeding and agricultural development in order to . . . promote increased world food production compatible with sustainable development . . .” This is important for two reasons. First, the Seed Treaty is a recent instrument, and therefore offers an insight into States’ most current conceptions of sustainability as an economic, social and environmental objective that can be operationalized. Second, in the treaty, States focus on “sustainable use” in one particular context, that of plant genetic resources for food and agriculture. In this specific sector, it appears possible to pinpoint fairly precisely the meaning of sustainable use of the resource, and the type of measures that are required to ensure that it takes place.

Furthermore, in several important trade and investment treaties States have also underlined a commitment to sustainable development, one that has been interpreted by decisions of the Appellate Body of the World Trade Organization (“WTO”) and other economic tribunals.<sup>44</sup> The negotiation of the Preamble of the 1994 WTO Agreement was influenced by the outcomes of the 1992 UNCED, as was made explicit in the Uruguay Round Decision on Trade and Environment which noted the Rio Declaration, Agenda 21, and the General Agreement on Tariffs and Trade (“GATT”) follow-up process.<sup>45</sup> The Preamble of the WTO Agreement states that:

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources *in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development . . .

*Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.<sup>46</sup>

While Preambular statements are not formally legally binding in the same way that operational provisions can be, they can play a role in interpretation of a treaty, particularly in identification of the treaty’s object and purpose.<sup>47</sup> Nearly eight years after the WTO Agreement was adopted in Punta del Este in 1994, the importance of a sustainable development objective to the WTO was underscored, after debates, in the 2001 Doha WTO Ministerial Declaration at paragraph 6 which states:

*We strongly reaffirm our commitment to the objective of sustainable development*, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive . . . . We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.<sup>48</sup>

It can be argued that in Doha, Ministers recognized sustainable development as an objective of the WTO, and placed it into a strengthened context, referring to practical measures such as the need for cooperation in other international environment *and development* organizations. References to this objective in the Doha Ministerial Declaration clearly recognize environmental protection and social development as elements that need to be integrated into the mandate of a mainly economic organization, the WTO. The Ministerial Declaration also contains, in particular, several substantive provisions showing that a commitment to sustainable development provided real guidance for the Ministers’ decisions. Indeed, after 2001, the WTO, as an institution, moved more quickly to recognize sustainable development and its normative nature. As noted by WTO Director General Pascal Lamy, the objective of sustainable development mandates WTO members “to no longer compartmentalize [their] work; discussing environmental and developmental issues in isolation of the

rest of what [they] do. These are issues that permeate all areas of the WTO.”<sup>49</sup> Similarly, the 1994 North American Free Trade Agreement (“NAFTA”), and most international trade agreements signed by Canada, the United States, or the European Union since the 1992 Rio Earth Summit, contain assurances that States, in signing these regional trade and investment accords, seek to promote sustainable development (North American bilateral trade and investment treaties), or plan to carry out their treaty commitments in accordance with a principle of sustainable development (European economic association agreements and trade accords).<sup>50</sup>

#### PROGRESS IN TREATY REGIMES: OPERATIONALIZING SUSTAINABLE DEVELOPMENT PRINCIPLES

These last three decades of policy-making and treaty negotiations have reinforced international recognition of certain key principles related to sustainable development, including the principles of integration, sustainable use of natural resources, and equity, as well as principles of common but differentiated responsibility, precaution, good governance, and openness, transparency, and public participation.<sup>51</sup> They also highlighted the emergence and refinement of international instruments and techniques to put these principles into practice. As was predicted in the Annex on Legal Principles to the Brundtland Report,<sup>52</sup> a body of rules of international law related to sustainable development is emerging, mainly through the adoption of “hard law” treaty regimes. When States set sustainable development as a policy objective of an international treaty, they also adopt certain norms to realize their joint purpose. For example, the principle of common but differentiated responsibilities governs the way that burdens to reduce greenhouse gases are apportioned among States, serving the sustainable economic development objective of the 1992 UNFCCC.<sup>53</sup> Such principles which aim to contribute to and achieve sustainable development may even come to be used so often, and to be accepted so generally, that they do, indeed, gain recognition as customary international rules themselves, binding on all States that have not persistently objected. Existing universal adoption of these principles to address specific international issues, moreover, might support a contention that in these contexts (climate change, biodiversity, desertification, law of the sea), certain principles have already reached such a status. The practical implications of such a contention, in some nearly universal membership treaties, which explicitly commit to these principles, might be minimal, but it does not discount the value of examining the principles themselves.

The process of identifying principles of international law and policy related to sustainable development has been reasonably complex. The most important undertakings ran parallel to the global policy-making events outlined above, and included the process of elaborating the 1972 Stockholm Declaration, the 1987 Brundtland Commission’s Legal Experts Group on Principles of International Law for the Protection of the Environment and Sustainable Development, the 1992 Rio Declaration, the 2002 New Delhi Declaration of the International Law Association, and other efforts. The 1992 Rio Declaration echoes many

of the Principles recommended by the Brundtland Report, and was clearly directly influenced by its findings. Widely accepted as “soft law,”<sup>54</sup> the central concept of the 1992 Rio Declaration is sustainable development, as defined by the Brundtland Report. The Rio Declaration was followed by the Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, which was commissioned by the UN Division for Sustainable Development in accordance with a request by States at the second session of the UN Commission on Sustainable Development in 1994, and released in September 1995.<sup>55</sup> This early Report identifies nineteen principles and concepts of international law for sustainable development but did not resolve international debates on these questions.

In 1997, States noted in the Programme of Action for Further Implementation of Agenda 21 that “[p]rogress has been made in incorporating the principles contained in the Rio Declaration on Environment and Development . . . including the principle of common but differentiated responsibilities . . . [and] the precautionary principle . . . in a variety of international and national legal instruments . . . much remains to be done to embody the Rio principles more firmly in law and practice.”<sup>56</sup> As a Resolution of the 70th Conference of the International Law Association (“ILA”) in New Delhi India, April 2-6, 2002, the Committee on the Legal Aspects of Sustainable Development released its New Delhi ILA Declaration on Principles of International Law relating to Sustainable Development.<sup>57</sup> It outlines seven principles of international law on sustainable development. These principles are central principles of most international treaties related to sustainable development, and are recognized and reaffirmed throughout the 2002 Johannesburg Plan of Implementation. Detailed analysis is beyond the scope of this article and can be found elsewhere.<sup>58</sup> However, given the decade of study and analysis conducted by the Committee and the relative normative clarity of their findings, the 2002 New Delhi Declaration provides a current benchmark of the important principles of international law on sustainable development.<sup>59</sup> As such, a short survey is provided below.

The New Delhi Declaration starts by recognizing the need to further develop international law in the field of sustainable development, with a view to according due weight to both the developmental and environmental concerns, in order to achieve a balanced and comprehensive international law on sustainable development, as called for in Principle 27 of the Rio Declaration and Chapter 39 of Agenda 21 of the UNCED. Then, seven “principles” are highlighted.

The first evokes a duty of states to ensure sustainable use of natural resources. States have sovereign rights over their natural resources, and a duty not to cause (or allow) undue damage to the environment of other States in the use of these resources. As discussed above, this principle was recognized in Stockholm Declaration Principle 21 and the Rio Declaration Principle 2.<sup>60</sup> Though a comprehensive review is beyond the scope of this article, it should be noted that this principle has been reflected and strongly reaffirmed in several international treaties on

sustainable development with extremely broad membership in the past two decades. In the UNFCCC, at the Preamble, Parties recognize the rights of sovereignty over natural resources and related responsibilities to protect the world's climate system. Similar recognition is found in the Preamble of the UNCBD, and is highlighted as a principle of sustainable use of biological resources in Article 3 and Article 10.<sup>61</sup> Similarly, in the UNCCD, at Article 3(c), Parties agree on a principle to work toward sustainable use of scarce water and land resources, and, in Article 10.4 on national action plans, Article 11 on regional and sub-regional actions, Article 17.1(a) on research and development, and Art 19.1(c) and (e) on capacity-building, the principle is reaffirmed.<sup>62</sup> The WTO Agreement also recognizes, in its Preamble, the need to ensure optimal use of the world's resources in accordance with the objective of sustainable development.<sup>63</sup> The FAO Seed Treaty, at Article 1.1, sets the conservation and sustainable use of plant genetic resources for food and agriculture, making the commitment operational in Article 6 which lays out a series of specific law and policy measures that States should adopt to ensure sustainable use of plant genetic resources.<sup>64</sup>

The second principle of equity and poverty eradication refers to both *inter-generational equity* (a right of future generations to enjoy a fair level of the common patrimony) and *intra-generational equity* (a right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources).<sup>65</sup>

According to the New Delhi Declaration, the principle of equity includes a duty to cooperate to secure development opportunities of developed and developing countries, and a duty to cooperate for the eradication of poverty, as noted in Chapter IX on International Economic and Social Co-operation of the Charter of the United Nations.<sup>66</sup> This principle is also reflected in international treaty law on sustainable development. In the UNCBD, the principle is reflected in Article 15.7 on access to the benefits of biological resources and related obligations to ensure that the benefits are equitably shared.<sup>67</sup> In the Preamble of the 1992 UNFCCC, Parties commit to take into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty, while also noting their determination to protect the climate system for present and future generations. Indeed, one of the treaty principles in Article 3 states an intention to "protect the climate system

for the benefit of present and future generations of humankind, on the basis of equity" and commits that accordingly, "developed country Parties should take the lead in combating climate change."<sup>68</sup> In the UNCCD, Parties included provisions on poverty eradication and intra-generational equity at Article 16(g) on the sharing of traditional knowledge sharing, at Article 17.1(c) on research and development related to traditional knowledge, and in Article 18.2(b) on technology transfer.<sup>69</sup> Further, a responsibility for inter-generational and intra-generational equity in sharing the benefits of plant genetic resources is recognized in the Preamble of the FAO Seed Treaty, as well as at Article 1.1 as an objective of access and benefit-sharing provisions, and Articles 10, 11, 12, and 13 which operationalize the principle by establishing a multilateral system of access and benefit sharing for plant genetic resources.<sup>70</sup>

The third principle concerned the common but differentiated obligations of States in securing sustainable development. According to the New Delhi Declaration, this principle holds that the common responsibility of states for the protection of the environment at the national, regional, and global levels shall be balanced by the need to take account of different circumstances, particularly in relation to each state's historical contribution to the creation of a particular problem, as well as its ability to prevent, reduce, and control the threat.<sup>71</sup> This principle is reflected in the UNFCCC at its Preamble, as well as in Article

3 on Principles and Article 4 on commitments, which establishes the differentiated obligations of Annex 1 and non-Annex 1 Parties.<sup>72</sup> Parties also affirm and operationalize the principle in the Kyoto Protocol at Article 10, which recognizes common but differentiated responsibilities to establish inventories and programmes to abate greenhouse gas emissions, and Article 12, which operationalizes the principle by establishing a Clean Development Mechanism to help cover the costs of low emission technologies and energy systems.<sup>73</sup> The principle is also prominent in the UNCCD, where Parties reaffirm, in Article 3 on principles, the need to respect the common but differentiated responsibilities of States, in Articles 4 through 6, which lay out the obligations for affected and developed country Parties, and in Article 7, which includes specific provisions for Africa.<sup>74</sup> The principle is reaffirmed and made operational in the FAO Seed Treaty at Article 7.2(a), which provides for developing country's

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*As a general principle, international forums have contributed to the growth and expansion of sustainable development by providing a space within which State and non-state actors may come together for a collective discussion of their sustainability-related challenges*

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different capabilities, at Article 8 which commits to technical assistance, at Article 15.1(b)(iii) which grants special benefits to least developed countries and to centers of diversity, and in Article 18.4(d) on financing implementation of the treaty.<sup>75</sup>

The fourth was the principle of the precautionary approach to human health, natural resources, and ecosystems, in that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent degradation.<sup>76</sup> This principle is reflected in UNCBD in its Preamble, and made operational through Article 14.1(b), which addresses likely adverse impacts and Article 8(g) on transboundary movement of living modified organisms (“LMOs”).<sup>77</sup> It is also central to the Cartagena Protocol on Biosafety, both through explicit reaffirmation of the principle in its Preamble, at Article 1 that lays out the precautionary objective of the Protocol, and in the way that it is operationalized at Article 7 on advanced informed agreement requirements that must be fulfilled prior to the first transboundary movement of an LMO, at Article 10.6 with regards the decision-making procedures that will be followed in implementation of the Protocol, at Article 11.8 which establishes simplified procedures for LMOs destined for food, feed, and processing uses, at Article 15 on risk assessment which references Annex III.4, in which precautionary decision-making is explicitly permitted.<sup>78</sup> Precaution also appears in the UNFCCC at Article 3 as a Principle of the treaty.<sup>79</sup> The precautionary principle is reflected in the design of 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, which requires exporters of certain hazardous substances to obtain the prior informed consent of importers before proceeding, and accepts precautionary measures by Parties in Article 14(3) and the Annex V on information exchange.<sup>80</sup> The 2001 Stockholm Convention on Persistent Organic Pollutants also acknowledges, at its Preamble, that “precaution underlies the concerns of all the Parties and is embedded within this Convention.” At Article 1, Parties note that they are mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration in setting their objective to protect human health and the environment from persistent organic pollutants. Article 8 makes precaution an operative priority; Parties agree to use “a precautionary manner” when deciding which chemicals to list in the Annexes of the Convention, where lack of full scientific certainty shall not prevent a proposal to list from proceeding. Further, Part V(B) of Annex C specifies that “precaution and prevention” should be considered when determining the best available techniques. In the 1995 Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of December 10, 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks at Article 6, Parties agree that “[s]tates shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks... States shall be more cautious when information is uncertain, unreliable, or inadequate. The absence of adequate scientific information shall not be used

as a reason for postponing or failing to take conservation and management measures.” And according to the WTO Appellate Body, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, enshrines the precautionary principle in Article 5.7 which permits provisional measures to be taken to restrict trade where scientific data is uncertain, though this does not exhaust its relevance in WTO law.<sup>81</sup>

The fifth is a principle of public participation and access to information and justice. According to this principle, States have a duty to ensure that individuals have appropriate access to “appropriate, comprehensible and timely” information concerning sustainable development that is held by public authorities, and the opportunity to participate in decision-making processes, as well as effective access to judicial and administrative proceedings, including redress and remedy.<sup>82</sup> The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>83</sup> is an example of an international legal instrument based on this principle. Many international human rights instruments also provide specifically for public participation, access to information, and access to justice, including through the UN Human Rights Council itself, which has public participation procedures similar to those of the UNCSD.<sup>84</sup> Provisions to ensure public participation in the international treaty-making processes are also reflected in UNCBD at Article 13 on public education and awareness, and Article 14.1(a) on participation in impact assessment.<sup>85</sup> The Cartagena Protocol on Biosafety contains similar provisions at Article 23 on public awareness and participation;<sup>86</sup> and the UNCCD reaffirms the principle in Article 3(a), and in Article 10.2(f), which recommends public participation in the development of national action plans.<sup>87</sup> The North American Agreement on Environmental Cooperation, which runs parallel to NAFTA, allows citizens to make claims under Article 14 and 15 processes to prompt the investigation of non-enforcement of environmental laws.<sup>88</sup> Furthermore, the FAO Seed Treaty, at Article 9.2(c), has specific provisions to recognize farmers’ rights to participate in decision-making concerning the sustainable use of plant genetic resources.<sup>89</sup>

The sixth is a principle of good governance. According to the New Delhi Declaration, this principle commits States and international organizations *inter alia* to adopt democratic and transparent decision-making procedures and financial accountability; to take effective measures to combat official or other corruption; to respect the principle of due process in their procedures; and to observe the rule of law and human rights. The Declaration also notes that non-state actors should be subject to internal democratic governance and to effective accountability, and encourages corporate social responsibility and socially responsible investment among private actors. Good governance is specifically noted as a priority in the Johannesburg Plan of Implementation, and the Commission on Human Rights Resolution 2001/72 on the Role of Good Governance in the Promotion of Human Rights has also underlined the importance of this principle.<sup>90</sup> While an international organization or government that did not meet any of the ‘good governance’ criteria described

above would certainly be subject to critique, international treaties are only just beginning to incorporate such obligations. The main treaty in this area is the UN Convention against Corruption,<sup>91</sup> which is founded on international support for good governance. This Convention notes in its Preamble that corruption threatens the political stability and sustainable development of States, and at Article 5.1 obliges all State Parties to, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency, and accountability.<sup>92</sup> Further, Article 62.1 commits that in regard to economic development and technical assistance, States will take measures to implement the Convention in their international cooperation, taking into account “the negative effects of corruption on society in general, in particular on sustainable development.”<sup>93</sup> A commitment to good governance is also prominent in UNCCD at Article 3(c) which lays out the principles of the treaty, and Article 10.2(e) on establishing institutional frameworks for national action plans, as well as in Article 11 on sub-regional and regional action plans, and Article 12 on international cooperation.<sup>94</sup>

The seventh is a principle of integration and interrelationship, in particular in relation to human rights and social, economic, and environmental objectives. Principle 4 of the Rio Declaration states that, “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>95</sup> If a customary international rule *named* “sustainable development” were to emerge, this principle is the most likely candidate. However, as the New Delhi Declaration itself recommends, such a norm could just as easily be characterized as the “integration principle.”<sup>96</sup> One corollary of this principle that is recognized in the Preambles of both the UNFCCC and the UNCBD, involves the recognition that “[s]tates should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.” This

recognition, like the right to promote sustainable economic development that is enshrined as a principle of the UNFCCC is important to understand the implications of integrating environmental protection with social and economic development—while there is a commitment to take priorities into account in decision-making, and seek mutually supportive, balanced solutions, this principle is not a trump card for the environment. It is a commitment to compromise in good faith. The principle is core to international treaties on sustainable development. It is reflected in the Preamble of the UNCBD and at Article 6

on integrating conservation and use objectives in policies and plans;<sup>97</sup> and in the Cartagena Protocol on Biosafety at the Preamble where trade and environment regimes are referred to as mutually supportive, and set in practice by Articles 2.4 and 2.5 on the relationship of the Protocol to other international instruments. The principle also governs the FAO Seed Treaty, in the Preamble of which Parties note the need for synergies between environment and development objectives, and in Article 5.1 they commit to promote an integrated approach to the use of plant genetic resources for food and agriculture.<sup>98</sup> Arguably, the GATT at Article XX provides exceptions for health, environment, and the conservation of natural resources in order to take social and environmental objectives into account,<sup>99</sup> as does the NAFTA through Articles 103, 104 and

104.1, which govern the relationships with other accords, as well as Article 1114 on not lowering environmental standards to attract investment, and Article 2101 on general exceptions also seeks to take environmental protection into account in the development process related to trade.<sup>100</sup>

In sum, through the negotiation and implementation of international treaties on sustainable development, States seek to address specific sustainability challenges related to economic, environmental, and also social aspects of development. Sustainable development objectives are recognized by states not just in multilateral environmental agreements, but also in treaties governing sustainable management of certain resources, such as food and agriculture, and in trade and investment agreements. The collections of principles identified by the Legal Annex to the WCED Report, the UNCSD, and the ILA, among others, are not exhaustive. In the most part these principles are not yet recognized as binding rules of customary international law. And in

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*It seems probable that the future of sustainable development law will be advanced and enhanced over the coming decades through the interaction of international treaty regimes with domestic regulatory regimes, as well as through a dialogue of international courts and tribunals.*

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some cases, they may never be. Though States can and do refer to broad objectives and principles of sustainable development in these treaties, such general commitments are increasingly being operationalized in the more detailed provisions of certain accords, including through the recommendation of specific legal and policy measures to ensure that a particular globally important resource can last over the long term. Further, States are starting to apply functional principles, which, in the context of each specific treaty regime, take on particular meanings to guide the cooperation of the Parties in the advancement of sustainable development.

### PROGRESS IN INTERNATIONAL TRIBUNALS

Since the 1992 Rio Earth Summit, as noted above, international tribunals and courts have also begun to pronounce on sustainable development, mainly in order to resolve disputes that require a balance between environmental and development concerns in a transboundary context. In decisions of the International Court of Justice (“ICJ”), important references to the need to manage resources in a sustainable manner, and to balance between environment and development interests, are found in the *Gabcikovo-Nagymaros* Case,<sup>101</sup> the *Nuclear Tests* Advisory Opinion (especially Judge Weeramantry’s Dissent),<sup>102</sup> the *Kasikili / Sedudu* Case (especially Judge Weeramantry’s Dissent),<sup>103</sup> and the Order of Provisional Measures in the *Pulp Mills on the River Uruguay* Case,<sup>104</sup> as well as in the recent findings of the Permanent Court of Arbitration in the Tribunal Award of the *Iron Rhine Arbitration*.<sup>105</sup> Such decisions appear to be slowly taking into account some of the principles mentioned above, as an aid to judicial reasoning. Certain selected examples below focus mainly on recent international courts and tribunals’ consideration of the “integration principle” mentioned above, which may occasionally be characterized, in less than elucidatory legal shorthand, as a “sustainable development principle.”

It is possible that international courts and tribunals, in the years since the 1992 Rio Earth Summit, are becoming more willing to go beyond a simple “balance” of environmental and economic concerns, towards actual integration of environmental, economic, and social considerations in development. A key example of the way the dilemma of balancing environment and development is found in the often-quoted early *Gabcikovo-Nagymaros* Case,<sup>106</sup> where pursuant to a treaty, one Party sought to build a dam on a transboundary river over the objections of the other. The majority stated that:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—for pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards

given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. *This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.* For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.<sup>107</sup>

Due to the specific facts of this case, it appears at first glance that only procedural requirements were imposed on the Parties in connection with a “concept” of sustainable development. However the Court did, essentially, order the Parties to balance environmental protection with their development interests by ordering them to “look afresh at the effects on the environment . . .” and “find a satisfactory solution.” The majority described this as a ‘need’ to reconcile economic development with the protection of the environment. H.E. Judge C.G. Weeramantry, as Vice-President of the ICJ, further argued that sustainable development is a principle of international law in his Separate Opinion in the *Gabcikovo-Nagymaros* Case. In particular, he stated that he considers sustainable development to be “more than a mere concept, but as a principle with normative value which is crucial to the determination of this case.”<sup>108</sup>

If there were, indeed, a normative function for such a principle, it might involve the requirement to integrate environment and development considerations. More recently, the 2005 *Iron Rhine* (Belgium v. Netherlands) Award<sup>109</sup> of the Arbitral Tribunal struck under the auspices of the Permanent Court of Arbitration addressed the issue of balance between environment and development considerations. The case concerned a Party seeking to reactivate a railway across the territory of another pursuant to a venerable treaty, where it was unclear which State should bear the burden of environmental impact assessment and mitigation measures. In its decision, the Tribunal first recognized that:

There is considerable debate as to what, within the field of environmental law, constitutes ‘rules’ or ‘principles’; what is ‘soft law’; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories ‘environment’ is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.

The Tribunal then explained:



Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require *the integration of appropriate environmental measures in the design and implementation of economic development activities*. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 which reflects this trend, provides that ‘environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’ Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which *require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm . . .* This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties.<sup>110</sup>

The Tribunal recalled the observation of the ICJ in the *Gabcikovo-Nagymaros* Case that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”<sup>111</sup> and cited with approval the ICJ’s recognition that “new norms have to be taken into consideration, and . . . new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past . . .”<sup>112</sup> It held that “this dictum applies equally to the Iron Rhine railway.”<sup>113</sup>

This determination was directly relevant for the decision in this case:

As the Tribunal has already observed above . . . economic development is to be reconciled with the protection of the environment, and, in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded.

. . . Applying the principles of international environmental law, the Tribunal . . . is of the view that, by analogy, where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply. The exercise of Belgium’s right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request. *The reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use*

*of the railway line. These measures are to be fully integrated into the project and its costs.*<sup>114</sup>

In the *Iron Rhine* award, the Tribunal found that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm, and stated that this is now an accepted principle of international law. But the Tribunal also mentions various other potential principles of law such as “sustainable development,” and makes a further finding that environmental measures must be “fully integrated into the project and its costs,” linking this to the exhortation found in Principle 4 of the Rio Declaration on Environment and Development which provides that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” One interpretation is that the Arbitral Panel was applying an “integration principle” in conjunction with the directly recognized “no environmental harm” principle, in order to find that the costs of impact assessments and mitigation measures should be borne by the Party carrying out the development (as an integral part of the reactivation of the Iron Rhine Railway), rather than by the Party through whose territory the railway would pass. In the future, this recognition might be extended by States to include situations where the “development process” consists of undertaking new trade and investment disciplines, or initiating development projects that will significantly affect the global commons. Were such a principle eventually recognized, it would likely still have real limits—“constituting an integral part” is not the same as “becoming a trump card.” Indeed, such a principle might also press States to, *a l’envers*,<sup>115</sup> ensure that environmental protection activities (such as the development of new environmental laws) not be undertaken “in isolation” without ensuring that social and economic development priorities and norms are taken into account.

A recent decision in the ICJ does suggest such an outer boundary to such a norm. Positive claims based on a States’ “sovereign right to implement sustainable economic development projects” were used by States in the 2006 *Pulp Mills on the River Uruguay* Case. In its findings of Provisional Measures of July 2006, the ICJ notes that Uruguay “maintained that the provisional measures sought by Argentina would therefore irreparably prejudice Uruguay’s sovereign right to implement sustainable economic development projects in its own territory.” As Alan Boyle, Counsel for Uruguay before the ICJ in the public sitting for provisional measures in the aforementioned *Pulp Mills on the River Uruguay* Case, argued:

This is not a dispute in which the Court has to choose between one party seeking to preserve an unspoiled environment and another party recklessly pursuing unsustainable development, without regard to the environment, or to the rights and interests of neighboring States. It is a case about balancing the legitimate interests of both parties. It is a case in which Uruguay has sought—without much co-operation from its neighbor—to pursue sustainable economic development while doing everything possible to protect

the environment of the river for the benefit of present and future generations of Uruguayans and Argentines alike.<sup>116</sup>

It is possible that a concern for such a right of a State was a principal element in the ICJ's reasoning in its first Order with regards to Provisional Measures in the *Pulp Mills on the River Uruguay* case,<sup>117</sup> where it found:

. . . the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development; . . . it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; . . . from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States; . . .<sup>118</sup>

Should an "integration" or "sustainable development" principle be recognized in international law, it seems that the norm would not forbid sustainable economic development as such. Rather, it would require States *not to prevent or frustrate each other from promoting sustainable development*, and further, "where development may cause significant harm to the environment" or to social development, it would require States to take steps to address "a duty to prevent, or at least mitigate" such harm by ensuring that environmental (and social) measures are "fully integrated into the project and its costs." Bounded on one side by the *Iron Rhine Railway* award, and on the other by the *Pulp Mills on the River Uruguay* order, such an "integration" principle might become recognised as an emerging principle of customary law, and could be useful to guide States in resolving differences that require a balance between environmental, economic, and social development priorities.

Another international tribunal has also had occasion to examine, between the Rio and Johannesburg Summits, the need to balance between environmental protection and international economic development priorities, taking a different approach.<sup>119</sup> The *Retrospective Analysis of the 1994 Canadian Environmental Review of the WTO*, carried out by Canada's Department of Foreign Affairs and International Trade ("DFAIT") after five years of GATT implementation, focused on GATT Article XX as an important safeguard for a State's ability to secure sustainable development.<sup>120</sup> In 1998, in the *United States—Shrimp Case*, the WTO dispute settlement mechanism considered the meaning of these exceptions, in light of the WTO Agreement's Preamble commitment to sustainable development. By the time the dispute was resolved, four Panel and Appellate Body Reports had evaluated the same measures, providing the clearest expression, to date, of the meaning of State commitments to sustainable development in the WTO Agreements. The *United States – Shrimp Dispute* concerned a regulation under the 1973 U.S. Endangered Species Act to protect five different species of endangered sea turtles. A U.S. law requires that U.S. shrimp trawlers use "turtle excluder devices" in their nets. A

different law then prohibits shrimp imports from States that harvest shrimp in areas where these endangered turtles are found, unless the States in question are certified users of the technologies that protect the sea turtles. India, Malaysia, Pakistan, and Thailand, as shrimp exporters, complained that the prohibition was inconsistent with U.S. GATT obligations. The complainants argued that the embargo on shrimp violated the most-favoured nation rule of Article I:1 of the GATT 1994 because products from different countries were treated differently based solely on the method of harvest (i.e. whether a turtle excluder device had been used).<sup>121</sup> The complainants also argued a violation of Article XI:1 of the GATT 1994 because contrary to their obligations to generally eliminate quantitative restrictions on imports and exports, the United States had implemented an embargo which restricted trade. The complainants also alleged a violation of Article XIII:1 of GATT 1994 because the United States restricted the importation of shrimp and shrimp products from countries which had not been certified, while "like products" from other countries which in turn meant a differential treatment of "like products." (This would imply that the United States was discriminating between like products on the basis of how they are made, their production processes, and methods ("PPMs"), rather than due to distinct physical characteristics and other permissible grounds). The Panel found that the United States had violated Article XI:1 of the GATT 1994.<sup>122</sup> It then exercised judicial restraint, and did not express itself on the possible violation of Article I or XIII:1 of the GATT 1994 because one violation had been found. From that point onward, most of the Panel's analysis centered on interpretations of the scope and nature of Article XX of the GATT 1994, on general exceptions. Article XX (g) GATT 1994, which provides for a general exception to GATT obligations:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .<sup>123</sup>

In the case, the US proposed that Art. XX GATT should be interpreted in the light of the Preamble of the WTO Agreement; "[a]n environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the WTO Agreement acknowledges that the rules of trade should be in accordance with the objective of sustainable development, and should seek to protect and preserve the environment."<sup>124</sup> (In its arguments, the United States omitted the reference to the world's resources and the statement concerning the "respective needs and concerns at different levels of economic development"). The United States, at the Panel stage of the dispute, specifically argued that sustainable

development is a principle of international law, in particular of WTO law:

The United States noted that the World Trade Organization Agreement, which was the first multilateral trade agreement concluded after the UN Conference on Environment and Development, provided that the rules of trade must not only promote expansion of trade and production, but must do so in a manner that respects the *principle of sustainable development* and protects and preserves the environment. Yet, the complainants claimed that in becoming a Member of the World Trade Organization, the United States had agreed to accept imports of shrimp whose harvest and sale in the US market might mean the extinction from the world of sea turtles for all time.<sup>125</sup>

The interpretation that the Panel and Appellate Body adopted was a change from the findings of a much earlier GATT Panel in the *Tuna – Dolphin Case I*.<sup>126</sup> In that earlier un-adopted GATT report,<sup>127</sup> the Panel had found that references to domestic production and consumption meant that a GATT Contracting Party could only adopt restrictions within their own jurisdiction, rather than for the protection of resources in other countries and suggested that furthermore, such a measure could only be adopted for the resource in question (in that case tuna), not for other species (such as dolphins). In the *United States—Shrimp Case*, the Panel found that the new preambular language of the WTO Agreement could have an influence on the interpretation of Article XX GATT. The Panel further clarified that, thus “the Preamble endorses the fact that environmental policies must be designed taking into account the situation of each Member, both in terms of its actual needs and in terms of its economic means.”<sup>128</sup> In its reasoning, the Panel highlighted a quote from the 1992 Rio Declaration, recognizing that all countries could design their own environmental policy and that international cooperation rather than unilateral measures are needed for sustainable development.<sup>129</sup>

The WTO Appellate Body further clarified the findings of the Panel. It found in favor (contrary to the *Tuna – Dolphin* cases) of the United States that Article XX (g) could be applied to protect turtles. However it did not completely follow the US argument regarding a principle of international law:

The words of Article XX(g), ‘exhaustible natural resources,’ were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agree-

ments—explicitly acknowledges ‘the objective of sustainable development.’<sup>130</sup>

The enclosed legal note,<sup>131</sup> as part of the Appellate Body’s decision, deserves particular attention. The Appellate Body refers to the *objective* of sustainable development and then provides in the footnote a simple definition for the concept. In particular, the Appellate Body explained that “[t]his *concept* has been generally accepted as integrating economic *and* social development *and* environmental protection.”<sup>132</sup> This is remarkable for two reasons. First, the WTO Appellate Body expresses itself about the nature of sustainable development, agreeing that it is considered to be an objective of the WTO. Second, the WTO recognises (in line with the findings of the 1997 UN General Assembly Special Session, the Earth Summit +5) the need to integrate all three elements or “pillars” of sustainable development—social development, economic development and environmental protection. This highlights the important social dimension of the concept, as was later also recognised in the 2002 WSSD.

In cases before the European Court of Human Rights, States have similarly been allowed a wide margin of appreciation to pursue economic objectives provided they regulate environmental nuisances and enforce their own law,<sup>133</sup> and otherwise maintain a fair balance between the benefits for the community as a whole and the protection of the individual’s right to private and family life or protection of possessions and property.<sup>134</sup> In the latter context economic development may be seen as unsustainable if it fails adequately to respect human rights, but the case will have to be a fairly extreme one. Similar considerations have been made by the Inter-American Commission and Court of Human Rights,<sup>135</sup> the African Commission on Human and Peoples Rights,<sup>136</sup> and the UN Human Rights Committee.<sup>137</sup>

## CONCLUSIONS

This article highlights how the objective of sustainable development, and its principles, have been enhanced and furthered by international forums. As a general principle, international forums have contributed to the growth and expansion of sustainable development by providing a space within which State and non-state actors may come together for a collective discussion of their sustainability-related challenges. Both in terms of “soft law” (in this area, a process of global summits and declarations), and “hard law” (in this field, mainly treaties), the global objective of sustainable development is advanced by international forums. This article has focused on three ways that this advancement takes place. First, it has shown that through international “soft law” policy making processes on sustainable development, States are defining and refining a deeper understanding of what sustainable development means in specific instances, identifying the most important priorities for sustainable development, and seeking certain elements of consensus on how these priorities can and should be addressed at different levels through policy and even law. The Agenda 21 and the JPOI, in particular, demonstrate this process of evolving definitions, priority setting, and action plans, supported by informal

partnerships. Second, it argues that through the negotiation and implementation of international treaties on sustainable development, States and others are using international venues to find cooperative solutions for specific sustainability challenges related to economic, environmental, and also social aspects of development. This includes, where appropriate, the adoption in treaty regimes of certain operational principles such as a duty to ensure sustainable use of natural resources, precaution, equity, openness and public participation, common but differentiated responsibility, or integration. And third, it has suggested that through the peaceful settlement of disputes related to sustainable development, States are gaining valuable guidance from international courts and tribunals on how it is possible to resolve certain particular transboundary problems that invoke a need to balance environmental, economic, and social development priorities. There even appears to be certain willingness on the part of international courts and tribunals to refer to principles such as 'integration' in their attempts to resolve such disputes.

International forums are not just useful to sustainable development as a matter of history, however. International treaty law in the field of sustainable development is a vital, and indeed

vibrant, area of study that has seen a dramatic growth throughout its relatively short history. Given the inevitable differences involved in coordinating social, environmental economic development policy between 194 countries with distinct cultures, priorities, and challenges, and given the short timelines of the last three decades, a great deal of progress is actually being made for sustainable development in many areas. However, this space is very much "still developing," with many of the most interesting and difficult details still to be worked out.

It seems probable that the future of sustainable development law will be advanced and enhanced over the coming decades through the interaction of international treaty regimes with domestic regulatory regimes, as well as through a dialogue of international courts and tribunals. Indeed, the scope of international forums, which have and will affect sustainable development and its legal underpinnings, has expanded to include international arbitral bodies, including those associated primarily with trade such as the WTO. This article only paints a brief, broad-brush picture of certain emerging trends. Further legal scholarship and practice is needed to realize the promise of sustainable development in international law.



## Endnotes: The Role of International Forums in the Advancement of Sustainable Development

<sup>1</sup> G.A. Res. 4/128, U.N. Doc. A/Res/41/128/ (Dec. 4, 1986), available at <http://www.un.org/documents/ga/res/41/a41r128.htm>.

<sup>2</sup> See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, <http://www.undp.org> (last visited Nov. 08, 2009); Organisation Economic Co-operation and Development, available at <http://www.oecd.org>.

<sup>3</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 35 (Anchor 1999).

<sup>4</sup> See generally United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/Res/55/2 (Sept. 18, 2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf>; UN DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2009, 171, 204, available at [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf).

<sup>5</sup> See, e.g., MATHIS WACKERNAGEL ET AL., OUR ECOLOGICAL FOOTPRINT: REDUCING HUMAN IMPACT ON THE EARTH (Island Society 1995); THE WORKS OF THOMAS ROBERT MALTHUS VOL. 1: AN ESSAY ON THE PRINCIPLE OF POPULATION 9 (E.A. Wrigley & D. Souden, eds. 1986); D.W. PEARCE & R.K. TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 6-7 (The John Hopkins University Press 1990).

<sup>6</sup> See *Lexikon der Nachhaltigkeit*, <http://www.nachhaltigkeit.aachener-stiftung.de> (last visited Nov. 9, 2009).

<sup>7</sup> See, e.g., G. D. Meyers & S. C. Muller, *The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy*, 4 BUFF. ENVTL L.J. 1 (1996); see also A. Geisinger, *Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature*, 27 B.C. ENVTL. AFF. L. REV. 43 (1999). See generally Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf 48/14/Rev.1, 11 I.L.M. 1416 (June 16, 1972), available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503> [hereinafter STOCKHOLM DECLARATION].

<sup>8</sup> CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, Mar. 3, 1973, 993 U.N.T.S. 243, 12 I.L.M. 1085 [hereinafter CITES].

<sup>9</sup> In "Towards Sustainable Development," the Strategy linked ecological destruction with poverty, population pressure, social inequity, and trade relationships, laying out the need for a new international development strategy which could establish a more dynamic and stable world economy, stimulate accelerating economic growth, counter the worst impacts of poverty, and promote greater equity.

<sup>10</sup> World Charter for Nature, G.A. Res 37/7, ¶ 8, U.N. Doc. A/Res/37/7 (Oct. 28, 1982), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/424/85/IMG/NR042485.pdf?OpenElement>.

<sup>11</sup> Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond, G.A. Res. 38/161, ¶ 2, U.N. Doc. A/RES/38/161 (Dec. 19, 1983), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/445/53/IMG/NR044553.pdf?OpenElement>.

<sup>12</sup> U.N. World Comm'n on Env't & Dev., *Report of the World Commission on Environment and Development: Our Common Future; Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law*, U.N. Doc. A/42/427 (Aug. 4, 1987), available at <http://www.un-documents.net/ocf-a1.htm> [hereinafter *Our Common Future*].

<sup>13</sup> *Id.* at 54.

<sup>14</sup> ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 67 (1994).

<sup>15</sup> INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES COMMISSION ON ENVIRONMENTAL LAW, AGENDA 21: EARTH'S ACTION PLAN §38.1 (Nicholas A. Robinson, ed. 1993) [hereinafter AGENDA 21], available at [http://www.un.org/esa/dsd/agenda21/res\\_agenda21\\_00.shtml](http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml).

<sup>16</sup> *Id.* §§1.1-8.54 (addressing international co-operation to accelerate sustainable development in developing countries, poverty, consumption patterns, demographic dynamics, human health, human settlements, and integrating environment and development in decision-making).

**Endnotes:** The Role of International Forums in the Advancement of Sustainable Development *continued on page 78*

# THE IMPORTANCE OF REGULATING TRANSBOUNDARY GROUNDWATER AQUIFERS

by Emily Brophy\*

If the United States Supreme Court grants *certiorari* in a case between Mississippi and Tennessee,<sup>1</sup> the Court will have its first opportunity to determine if and how transboundary aquifers should be regulated. The applications of this case are far from surface level. Regulated groundwater allocation would protect environmental and economic sustainability by restricting over-pumping, thereby tempering the harmful effects of groundwater depletion, and protecting all parties to a transboundary aquifer from losing a freshwater source due to another's careless usage.<sup>2</sup> Over-pumping of aquifers results in significant harm, including increased water pollution, changes in stream flow, and increased costs.<sup>3</sup> If groundwater continues to be managed at the state level,<sup>4</sup> then the lack of standardized data and regulation across multi-state aquifers may prolong the problem of over-pumping, turning our nation's groundwater sources into a tragedy of the commons.<sup>5</sup>

In *Hood v. City of Memphis*, Mississippi seeks damages from the City of Memphis for the theft of billions of gallons of water that the city sold to the public through the city's water utility.<sup>6</sup> By pumping water from a transboundary aquifer over the course of several decades, the utility has effectively changed the aquifer's flow.<sup>7</sup> As a result, water that would naturally be located below Mississippi now flows towards Memphis where it accounts for about one-third of all water supplied through the public utility.<sup>8</sup>

This case illustrates the detrimental effects that a lack of regulation can have on groundwater sources. In the United States, fresh groundwater use is rising steadily, increasing five-percent between 1990 and 2000, compared to no change in total freshwater use and only a one-percent increase in fresh surface-water use.<sup>9</sup> In a city such as Memphis that pumps water from a transboundary aquifer, the absence of regulatory groundwater allocation magnifies the detrimental effects of the increased pumping on all users of the aquifer. Water experts already expect groundwater shortages in at least forty-one states in the next twenty years due to social and environmental pressures.<sup>10</sup>

Furthermore, climate change threatens to increase the pressure on fresh groundwater supplied by possibly affecting drought cycles, aquifer recharge and discharge, and human reliance on groundwater resources.<sup>11</sup>

The transboundary implications of unregulated groundwater pumping extend beyond changes in aquifer flows as experienced between Mississippi and Tennessee. Declining water levels may lead to the diminished water quality of the aquifer, affecting the water supply of all who draw from the system.<sup>12</sup> Because of the interconnectedness of the hydrologic system, a decrease in groundwater levels due to over-pumping may result in a drop in surface water levels, affecting rivers, lakes, wetlands, and similar features.<sup>13</sup> These and additional consequences of over-pumping illuminate the importance of implementing regulation over

transboundary aquifers.



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*Over-pumping of aquifers results in significant harm, including increased water pollution, changes in stream flow, and increased costs*

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## Endnotes:

<sup>1</sup> See *Hood v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625, *petition for cert. filed*, (U.S. Sept. 2, 2009) (No. 09-289).

<sup>2</sup> See A. Dan Tarlock, *Water Law Reform in West Virginia*, 106 W. VA. L. REV., 495, 530 (2004) ("The best guarantee that water will be used in an environmentally sustainable manner to serve the full range of uses from basic human consumption to aquatic ecosystem conservation is an effective state water law regime.").

<sup>3</sup> See J.R. BARTOLINO & W.L. CUNNINGHAM, US GEOLOGICAL SURVEY, GROUND-WATER DEPLETION ACROSS THE NATION[hereinafter DEPLETION], *available at* [http://pubs.usgs.gov/fs/fs-103-03/JBartolinoFS\(2.13.04\).pdf](http://pubs.usgs.gov/fs/fs-103-03/JBartolinoFS(2.13.04).pdf).

<sup>4</sup> See generally FOOD AND WATER WATCH, UNMEASURED DANGER: AMERICA'S HIDDEN GROUNDWATER CRISIS 5 (2009), *available at* <http://www.foodandwaterwatch.org/water/pubs/reports/unmeasured-danger-america2019s-hidden-groundwater-crisis> (pointing out that groundwater is managed at the state level, not at the federal level, which creates discrepancies over data collection across the states, giving an incomplete view of the state of a transboundary aquifer as a whole).

**Endnotes:** The Importance of Regulating Transboundary Groundwater Aquifers continued on page 81

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# NOT AT ALL:

## ENVIRONMENTAL SUSTAINABILITY IN THE SUPREME COURT

by James R. May\*

### INTRODUCTION

The principle of “sustainability” is soon to mark its 40<sup>th</sup> anniversary. It is a concept that has experienced both evolution and stasis. It has shaken the legal foundation, often engaged, recited, and even revered by policymakers, lawmakers, and academics worldwide. This essay assesses the extent to which sustainability registers on the scales of the United States Supreme Court, particularly during the tenure of Chief Justice John Roberts.

Sustainability entered the general public conscience in 1972 with the Stockholm Declaration on the Human Environment.<sup>1</sup> In 1987 it secured center stage when the World Commission on Environment and Development released its pioneering study, *Our Common Future*,<sup>2</sup> which defines “sustainable development” as “development . . . that . . . meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>3</sup> In 1992 the Earth Summit’s *Rio Declaration* declared that sustainable development must “respect the interests of all and protect the integrity of the global environmental and developmental system.”<sup>4</sup> The Rio Declaration’s blueprint document, Agenda 21, provides that sustainable development must coincidentally raise living standards while preserving the environment: “[I]ntegration of environment and development concerns . . . will lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.”<sup>5</sup> The unmistakable thread that runs through threshold definitions of sustainability is the interconnectedness of living things, opportunity, and hope.

Recognition of the importance of sustainability has grown exponentially since the Earth Summit.<sup>6</sup> Since then, the concept of sustainability has been regularly recognized in international accords,<sup>7</sup> by nations in constitutional, legislative and regulatory reform,<sup>8</sup> by States, municipalities and localities in everything from policy statements to building codes,<sup>9</sup> and in corporate mission statements and practices worldwide.<sup>10</sup> Sustainability principles are shape-shifters, adaptive to most environmental decision making, including water and air quality, species conservation, and national environmental policy in the U.S. and around the globe.<sup>11</sup> Furthermore, it has entered the bloodstream of courts around the globe as a guiding principle of judicial discretion in environmental cases.<sup>12</sup>

There remains one notable bastion still indifferent about if not immune to sustainability. A situs where the word “sustainability” is never uttered, nor written, nor argued, nor acknowledged: the United States Supreme Court. Forty years on, it seems reasonable to expect that at least one member of the most

influential juridical body on the planet would have found a case or a cause or a controversy befitting a mention of what many behold as the common denominator in environmental law and policy, a field well represented before the Court.<sup>13</sup> Yet, this hasn’t happened. In the roughly 4,000 or so cases the court has decided during the era of modern environmental law, it has seen fit to decide about 300 “environmental” cases (those involving pollution control, natural resources and property management, and energy).<sup>14</sup> More than one-half of these cases involve either State’s or individual property rights, or disposition of the West’s mineral, land, and water resources, or both. This is a testament to the southwest-tinged and Barry Goldwater influenced ideals of Chief Justice William Rehnquist and Justice Sandra Day O’Connor, both of whom were raised in Arizona, and who together served the court for nearly sixty years. When Rehnquist and O’Connor left the court in 2005 to their successor urban brethren from the Northeast, Chief Justice John G. Roberts and Justice Samuel Alito, fair money was that the court’s interest in environmental cases would wane, diminishing opportunity to have the Supreme Court engage sustainability.<sup>15</sup>

Yet the Roberts’ Court has shown more than a passing interest in environmental cases. Chief Justice Roberts’ Court-issued opinions had something to rejoice or revile for nearly every sustainability enthusiast. The Court decided cases across the environmental spectrum: endangered species, cost recovery, climate change, air and water pollution, the intersection between two of environmental law’s most venerated statutes, and the overlap between local solid waste control efforts and the U.S. Constitution. The Court ruled on the profound, such as whether the Clean Air Act gives the Environmental Protection Agency (“EPA”) authority to regulate new vehicle emissions of greenhouse gases that alter the Earth’s climate (yes), and the practical, including whether it is appropriate to issue a preliminary injunction under the National Environmental Policy Act to ameliorate the impact of the Navy’s use of submarine detecting sonar (no), whether EPA may use cost-benefit analyses when deciding how to protect aquatic life from intake structures (yes), whether an Army Corps of Engineers’ permit obviates the need to comply with EPA’s technology based standards under the Clean Water Act (it

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does), whether intent is a qualifying condition for liability as an “arranger” under the Comprehensive Environmental Response, Compensation, and Liability Act (it is), and whether plaintiffs have standing to challenge a national regulation that authorizes salvage timber sales (they don’t). Each environmental case saw a different justice write the majority (and in one case, plurality) opinion, with opinions by Justice John Paul Stevens, Chief Justice Roberts, and Justice Anthony Kennedy ascendant. Yet, at no time does anyone mention sustainability.

None of the environmental cases decided thus far during the tenure of Chief Justice Roberts engage sustainability. The word “sustainability” does not appear to exist before the Court. It does not appear in any majority, concurring, or dissenting opinion. While the Court seems to be agnostic about the idea of sustainability as a governing norm, strong astringent reveals that with some counterexamples the extent to which decisions before the Roberts’ Court regarding biodiversity, land use, air pollutant emissions, and cleanup standards implicate sustainability, they do so negatively, as discussed below. I conclude that factors having little or nothing to do with sustainability per se are at the heart of these results. Yet unless and until parties amass the courage of their conviction and infuse “sustainability” into litigative lexicon and strategy, sustainability will continue to matter to the U.S. Supreme Court not at all.

## PROMOTING BIODIVERSITY

If at all, sustainability most likely should influence jurisprudence involving biodiversity, which often engenders related notions of sustainable and optimum yields, minimizing adverse environmental effects, species conservation, and even cost-benefit analysis. Yet the Supreme Court has yet to consider sustainability per se in reaching decision in a dispute involving biodiversity. To be sure, decisions during the tenure of Chief Justice Roberts involving biodiversity seem contrary to sustainability principles. By way of example, the Court has been unconcerned about sustainability in evaluating impacts on marine mammals, fish stocks, aquatic habitat, and forest management, discussed below.

### MARINE MAMMALS

In *Winter v. Natural Resources Defense Council* (“NRDC”),<sup>16</sup> the Court reversed the U.S. Court of Appeals for the Ninth Circuit and ruled 5-4 that the U.S. Navy’s interests in security and military preparedness outweighs the respondent’s interest in protecting whales and other marine mammals from acoustic harm caused by submarine seeking sonar devices.

In *Winter*, the Court voted to lift a “narrowly tailored” preliminary injunction to enjoin the U.S. Navy’s use of mid-frequency active sonar off of the southern California coast, known as the “SOCAL exercise.”<sup>17</sup> The Navy regards mid-frequency active sonar as the sole effective means for detecting and tracking enemy diesel-electric submarines. The Navy’s sonar, however, also disrupts marine mammals that rely upon their own sonar.

The NRDC challenged the Navy’s failure to perform an environmental impact statement under the National

Environmental Policy Act (“NEPA”) and attached other claims under the Coastal Zone Management Act (“CZMA”) and the Endangered Species Act.

Finding the “possibility” of causing irreparable environmental harm, the district court issued a preliminary injunction requiring, *inter alia*, the Navy to “power down” (1) completely if marine mammals were spotted within 2,200 yards of Navy vessels or (2) by seventy-five percent in the presence of other significant “surface ducting” conditions.

Following the initial grant of preliminary injunction, the Bush administration then identified the SOCAL exercise to be of “paramount interest to the United States” and granted the Navy a waiver from the CZMA. Correspondingly, the White House Council on Environmental Quality granted the Navy’s request for “alternative arrangements for compliance with” NEPA due to a national “emergency.”

Thereafter, the Navy appealed the lower court’s injunction to the Ninth Circuit. Rather than lift the injunction, the Ninth Circuit remanded to have the district court weigh the exemption’s impacts on the injunction.

On remand the lower court threw out the “emergency” premise behind the Council on Environmental Quality’s “alternative arrangements” decision. While finding it “constitutionally suspicious,” the lower court did not rule on the legality of the waiver of CZMA requirements. The Ninth Circuit affirmed, finding the lower court had not abused its discretion in issuing the limited preliminary injunction.<sup>18</sup> The Ninth Circuit stayed the injunction’s “power down” provisions, however, allowing the Navy to appeal the case to the Supreme Court. The Navy still would be subject to the injunction’s four less restrictive conditions that the Navy did not appeal, including a twelve nautical-mile no-sonar zone along the California coast and enhanced monitoring requirements.

Writing for the majority, Roberts reversed the Ninth Circuit 5-4 and vacated the injunction and its “power down” requirements on two grounds. First, the majority held that the lower courts’ preliminary injunction analysis applied an incorrect standard that did not require a sufficient showing of harm. It held that the lower court should have asked whether the SOCAL exercise would result in the “likelihood” rather than the “possibility” of irreparable harm, because the “possibility” standard is “too lenient.”<sup>19</sup> Second, it determined the lower courts had given short shrift to the Navy’s interests in security and preparedness.

Turning to the merits, the Court held first that respondents had not met their burden of showing irreparable harm. The Court reached this conclusion notwithstanding the Navy’s own countervailing data, which while both lower courts found to be “cursory, unsupported by evidence [and] unconvincing,” still revealed that sonar training had resulted in 564 physical injuries and 170,000 behavioral disturbances of marine mammals.<sup>20</sup> The environmental respondents also argued that countless other reported and undetected mass strandings of marine animals had been “associated” with sonar training.<sup>21</sup> Instead, the Court concluded that the Navy had been conducting sonar training for forty years without documented cases of irreparable harm.<sup>22</sup>

Next, the majority concluded that, properly balanced, the Navy's military interests far outweighed respondents' interest in protecting and observing marine mammals. It reasoned that balancing the public interest supporting the Navy's national security and military preparedness against NRDC's public interest in protecting marine mammals for observation and education "does not strike us as a close question."<sup>23</sup> Disagreeing with the lower courts, the majority found the equities tipped strongly in the Navy's favor: "To be prepared for war is one of the most effectual means of preserving peace."<sup>24</sup> The majority noted that the president deemed active sonar as "essential to national security" because adversaries possess 300 submarines. Mid-frequency active sonar, the Navy argued, is "the most effective technology" for "antisubmarine warfare, a top war-fighting priority for the Pacific Fleet."<sup>25</sup> Citing senior naval officers, the majority observed the importance of training ship crews with all possible war stressors occurring simultaneously, thus making mid-frequency active sonar "mission critical" for training.<sup>26</sup> The imposition of the mitigating regulations would require the Navy "to deploy an inadequately trained submarine force," which would in turn jeopardize the safety of the fleet.<sup>27</sup> Imposition of other mitigating factors, the majority held, could decrease the overall effectiveness of sonar training generally.<sup>28</sup> On the other hand, "[f]or the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe..." in contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet.<sup>29</sup> The majority concluded that the "public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs."<sup>30</sup>

Thus the majority found the district court had applied the incorrect standard and abused its discretion on the merits. Finding in favor of the Navy, the Court reversed the decisions below and did not impose the lower court's "power down" requirements.<sup>31</sup>

While the majority did not engage sustainability principles at all, the dissent concerned itself with just how the SOCAL exercise affected marine mammals. Justice Ruth Bader Ginsburg, joined by Justice David Souter, dissented: "In light of the likely, substantial harm to the environment, NRDC's almost inevitable success on the merits of its claim that NEPA required the Navy to prepare an EIS, the history of this litigation, and the public interest, I cannot agree that the mitigation measures the district court imposed signal an abuse of discretion."<sup>32</sup>

In particular, Ginsburg had no trouble finding irreparable harm, and thus, diminution of sustainability. She was dismayed

about how the Court could overlook "170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121." She also observed that, "sonar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs."<sup>33</sup> On balancing the competing interests of the parties, Ginsburg concluded that these injuries "cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the [Navy's training exercises]."<sup>34</sup>

Charting a more solicitous course, Justice John Paul Stevens, joining Justice Stephen G. Breyer, concurred in part and dissented in part. They would have found that neither court below adequately explained why the balance of equities favored

the two specific mitigation measures being challenged over the Navy's assertions that it could not effectively conduct its exercises subject to the conditions. They would have remanded for a more narrowly tailored injunction, but continued the Ninth Circuit's stay conditions as the status quo until the completion of the SOCAL exercise, thus promoting sustainability to some extent.<sup>35</sup>

The postscript is that the Navy concluded its SOCAL exercise and completed its

NEPA environmental impact statement for the SOCAL exercise in January 2009.

## FISH STOCKS

In *Entergy v. Riverkeeper*,<sup>36</sup> the Supreme Court reversed the U.S. Court of Appeals for the Second Circuit and ruled 5-1-3 that the EPA may conduct a cost-benefit analysis in regulating the substantial adverse impacts of "cooling water intake structures" under Section 316(b) of the Clean Water Act.<sup>37</sup> Section 316(b) of the act requires that any standards established for existing discharge sources ensure that the "design, location, construction and capacity" of any such intake structures "reflect the best technology available for minimizing adverse environmental impact."<sup>38</sup>

Some thirty years after the enactment of the Clean Water Act, EPA issued rules applying Section 316(b) to existing dischargers. The rules allow, but do not require, the use of a cost-benefit analysis before setting performance-based best technology available standards and in deciding whether to grant site-specific variances. Cost-benefit analysis is invariably at odds with sustainability, as it is skewed heavily in favor of industrial and power producing interests over those in providing access to sustainable fisheries for future generations.

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*None of the environmental cases decided thus far during the tenure of Chief Justice Roberts engage sustainability.*

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The Second Circuit, in an opinion by then judge and now Justice Sonia Sotomayor, ruled that the language, structure, and history of Section 316(b) do not permit cost-benefit analysis. It then remanded the case to EPA to explain the role, if any, cost-benefit analysis played in EPA's regulations for existing intake structures.

Writing for the Court, Justice Antonin Scalia reversed, reasoning that Section 316(b), when read together with other performance-based provisions of the act, gives EPA discretion to base BTA on a cost-benefit analysis. Scalia relied upon a traditional *Chevron* two-part analysis. First, he held that Section 316(b) does not contain a plain meaning with regard to cost-benefit analysis. To be sure, he held that the word "best" invites many meanings, including that which "most efficiently produces some good," even if the "good" is of a lower quality than other options.<sup>39</sup> He also wrote that "minimize" has many meanings, and "is a term that necessarily admits of degree [but] is not necessarily used to refer exclusively to the greatest possible reduction."<sup>40</sup> Scalia then found that EPA's interpretation of Section 316(b) was reasonable because while the provision "does not expressly authorize cost-benefit analysis," it does not show "an intent to forbid its use."<sup>41</sup> Thus, he wrote, it is "eminently reasonable" to conclude that Congress' silence on the use of cost-benefit analysis in cooling tower regulatory cases "is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."<sup>42</sup>

Justice Stevens dissented, joined by Souter and Ginsburg, advocating a result more consistent with principles of sustainability. Stevens asserted that the court had "misinterpreted" Section 316(b)'s plain language, and that the majority "unsettles the scheme Congress established."<sup>43</sup> According to this view, either the absence of plain language authorizing cost-benefit analysis, or congressional silence on the matter, is conclusive, especially in light of the fact that Congress expressly authorized the use of cost-benefit analysis with powerplant regulations in other contexts.<sup>44</sup> This, Stevens argued, is "powerful evidence" of Congress' decision not to authorize cost-benefit analysis in Section 316(b).<sup>45</sup> In Stevens' view, the Court "should not treat a provision's silence as an implicit source of cost-benefit authority."<sup>46</sup> Indeed, quoting Justice Scalia verbatim from another case, he noted that Congress does not draft fundamental regulatory plans in "vague terms or ancillary provisions," and "hide elephants in mouseholes."<sup>47</sup>

Stevens viewed EPA's interpretation as unreasonable and outcome determinative: "[I]n the environmental context, in

which a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits . . . cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection."<sup>48</sup>

Breyer concurred and presented a middle ground for sustainability, observing that "those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons."<sup>49</sup> He would have found that the Clean Water Act's extensive history demonstrates Congress' intent to limit cost-benefit analysis. Quoting the act's principal sponsor, Senator Edmund Muskie, Breyer wrote that, "while cost should be a factor in the Administrator's judgment, no balancing test will be required."<sup>50</sup> Formal cost-benefit analysis, he feared, would induce extensive delays and a distorted emphasis on easily quantifiable factors, running in contrast to the goal of promoting cheaper, more effective cleanup technology.<sup>51</sup>

#### THREATENED AND ENDANGERED SPECIES

In a case that both pits two of the nation's more venerated environmental statutes crosswise, and runs counter to sustainability, the Court decided by a 5-4 majority that EPA's

delegation to a State of an environmental permitting program under the Clean Water Act does not trigger "consultation" under the Endangered Species Act ("ESA"). In *National Ass'n of Home Builders v. Defenders of Wildlife*,<sup>52</sup> an environmental organization challenged EPA's decision that it is not authorized to conduct "consultation" with federal wildlife agencies to "insure" conservation of threatened and endangered species before delegating Clean Water Act permit authority to a State. Section 402(b) of the Clean Water Act lists criteria that if satisfied dictate that EPA "shall approve" the State's authority

to issue permits under the Act.<sup>53</sup> These criteria do not include effects on threatened and endangered species. On the other hand the ESA impels that federal agencies "shall" "consult" with federal wildlife agencies prior to conducting any "agency action" "authorized, funded or carried out" by the agency.

Writing for the majority, Justice Samuel Alito upheld EPA's "expert interpretation" (and one it changed from an earlier interpretation) that the ESA must yield to the CWA's permitting authority: "the transfer of permitting authority to state authorities—who will exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Species Act and other federal environmental protection statutes—was proper."<sup>54</sup> Curiously, the Court held that Section 7 of the Endangered Species Act only applies to

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*Two cases decided by the Roberts' Court look to future and past application of the Clean Air Act and reach results that promote sustainability to some degree.*

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agency actions that are “discretionary.” Because Section 402(b) is nondiscretionary, Section 7 does not apply, thus diminishing sustainability.

In so doing, the Court rejected the U.S. Court of Appeals for the Ninth Circuit’s conclusions (1) that the ESA, as an independent source of legal authority, trumps the CWA, (2) applying *Department of Transportation v. Public Citizen*,<sup>55</sup> in concluding that EPA’s approval of Arizona’s National Pollutant Discharge Elimination System (“NPDES”) permitting program was the legally relevant cause of impacts to threatened and endangered species resulting from future private land-use activities, and (3) EPA’s application of the act is arbitrary and capricious.

Stevens, writing for himself and Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer dissented, advocating a position consistent with sustainability. For that conclusion, the dissenters relied principally on ESA Section 7’s express application to “all federal agencies” for all “actions authorized, funded or carried out by them,” and the broad reading of the statute dating back to *Tennessee Valley Authority v. Hill*.<sup>56</sup>

#### HABITAT

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,<sup>57</sup> the Supreme Court reversed the Ninth Circuit and held 5-1-3 that when the U.S. Army Corps of Engineers issues a Section 404 permit under the Clean Water Act it displaces otherwise applicable new source performance standards that EPA applies to pollutant discharges subject to a Section 402 permit.<sup>58</sup> This has the effect of eliminating freshwater lake habitat, and diminishing sustainability.

Coeur Alaska, Inc. sought to open a new gold mine about forty-five miles north of Juneau, dubbed the “Kensington Gold Mine,” adjacent to Lower Slate Lake, a “water of the U.S.” in the Tongass National Forest. The Kensington Mine would use the froth flotation process, producing over the life of the project about one million ounces of gold and 4.5 million tons of waste tailings in the form of waste mill slurry. Coeur Alaska hoped to discharge the slurry into Lower Slate Lake, the most economically advantageous option. The slurry would consist of about 45 percent water and 55 percent froth flotation mill tailings. Eventually the mine would produce enough slurry to fill the more than 50-foot depth of Lower Slate Lake, thus converting the 23 acre lake into a 60 acre impoundment. It was undisputed that this would “destroy the lake’s small population of common fish ...” and other plant and animal life.<sup>59</sup>

Upholding the Corps’ and petitioner’s less environmentally protective interpretation, the Court ruled that pollutants that have the effect of changing the bottom elevation of a body of water may be regulated as “fill material” instead of “pollutant discharges” subject to new source performance standards. Consequently, the Court held that EPA has jurisdiction to issue Section 402 permits for discharges into waters except to the extent that the Corps regulates the permits to constitute a disposal of “dredge or fill material” under Section 404.

*Coeur Alaska* pits the Clean Water Act’s two principal permitting provisions against one another. On the one hand, the act

prohibits the “discharge of any pollutant” except in compliance with a permit issued under Section 402, including new source performance standards for categories and classes of pollutant discharges such as “froth flotation mills” here. Froth flotation is a process in which raw ore material is ground into fine gravel and mixed in slurry with chemicals whereby pebbles of desired metal float to the surface for capture and processing. The polluted “waste mill tailings,” laden with mercury, lead, and other hazardous heavy metals, however, sink to the bottom, destined for disposal on land, or as in this case, in a nearby body of water. EPA’s new source performance standards prohibit discharges from froth flotation mills.

On the other hand, the Clean Water Act also prohibits the “discharge of dredge or fill material” except in compliance with a permit issued under Section 404. The Corps administers and issues permits under Section 404 in most States, including Alaska. In 2002, EPA and the Corps issued joint regulations defining “fill material” as that which “has the effect of changing the bottom elevation” of a water of the U.S., including mining slurry.<sup>60</sup> “Fill material” includes “slurry, or tailings, or similar mining-related materials.”<sup>61</sup> Thus, the requirements of the act’s two permitting schemes potentially converge if discharge of a pollutant, such as waste slurry mill tailings, also has the effect of raising the bottom elevation of an affected water body.

Because the slurry would have the “effect of raising the bottom elevation” of Lower Slate Lake, Coeur Alaska sought a Section 404 permit from the Corps. The Corps accepted jurisdiction, finding that the slurry would be “fill material” instead of a prohibited “pollutant discharge” from froth flotation mills under EPA’s New Source Performance Standards (“NSPS”) rules. It then issued the Section 404 permit, determining that discharging the tailings into Lower Slate Lake and eventually converting it into an impoundment, was the least environmentally damaging disposal option and was a preferable environmental alternative to filling adjacent wetlands. Contending that all this constituted an end run around Section 402 and the applicable zero discharge NSPS, Southeast Alaska Conservation Council sued to enjoin the Corps from issuing the Section 404 permit.

The Federal District Court in Alaska rejected the Southeast Alaska Conservation Council’s position. It held that unlike with Section 402 permits, new source performance standards do not explicitly apply to Section 404 permits. Therefore, EPA’s rule barring froth flotation discharges did not apply once the Corps assumed jurisdiction.

The Ninth Circuit reversed, holding that “§ 404’s silence regarding the explicit and detailed requirements [that apply to § 402] cannot create an exception to those sections’ strongly worded blanket prohibitions.”<sup>62</sup>

Notwithstanding the United States’ opposition, the Supreme Court granted Coeur Alaska’s writ of *certiorari*. The United States then joined as a petitioner.

The Supreme Court reversed the Ninth Circuit 5-1-3. Kennedy, writing for the Court, upheld the Corps’ interpretation of the Clean Water Act. First, instead of reviewing the Corps’ interpretation under *Chevron*,<sup>63</sup> Kennedy applied the more searching

*Mead*<sup>64</sup> standard of review because, he found, the Corps' interpretation was not intended to be formal. Nonetheless, Kennedy upheld the Corps' interpretation of the Clean Water Act, finding persuasive the argument that it does not unambiguously apply NSPS to permits issued under Section 404.

Second, Justice Kennedy held that the Corps properly issued the Section 404 permit. He observed that "if the tailings did not go into the lake, they would be placed on nearby wetlands [and] . . . would destroy dozens of acres of wetlands."<sup>65</sup> Moreover, the Section 404 permit required Coeur Alaska to cover what used to be Lower Slate Lake with about four inches of "native material," thereby in his view improving the local environment for wildlife habitat and repopulation.<sup>66</sup>

Justice Ginsburg dissented, joined by Stevens and Souter, reasoning that the majority's reading of the statute "strained credulity" and creates a "loophole" to NSPS: "A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards."<sup>67</sup>

Justice Ginsburg's dissent conjured principles of sustainability, observing that it was undisputed that the Section 404 permit, if granted, would "kill all the fish and wildlife" of the lake, possibly permanently as repopulation was "uncertain."<sup>68</sup>

Justice Breyer concurred in the judgment, believing that too literal an application of NSPS or too narrow an interpretation of "fill" or "dredge material" would undermine the purpose of the statute, and with it, some degree of sustainability.<sup>69</sup>

## NATIONAL FORESTS

In *Summers v. Earth Island Institute*,<sup>70</sup> the Supreme Court reversed the Ninth Circuit and held 5-4 that plaintiffs must establish, with affidavits, knowledge of future injuries to use of specific tracks of soon to be harvested national forest land to demonstrate sufficient "concrete and particularized" injury so as to satisfy constitutional standing under Article III,<sup>71</sup> thus having the effect of diminishing sustainability.

The Decision Making and Appeals Reform Act requires the U.S. Forest Service to provide advance notice and an opportunity for comment and appeals processes regarding land and timber management decisions for national forests under the Forest and Rangeland Renewable Resource Planning Act.<sup>72</sup> The Forest Service issued rules that provide a "categorical exclusion" for activities that in the aggregate do not significantly affect the quality of the human environment and do not trigger the need for either an environmental assessment or an environmental impact statement under NEPA.<sup>73</sup>

The Forest Service subsequently determined that "fire rehabilitation" timber efforts involving less than 4,200 acres, or "timber salvage" involving less than 250 acres, fall within this categorical exclusion, including a timber salvage sale of 238 acres in the Burnt River Project, an area affected by large fires that swept through the Sequoia National Forest in California in 2002.<sup>74</sup>

Earth Island challenged both the timber salvage sale for the Burnt Ridge Project in particular and the Forest Service's categorical exemption rule in general. The parties subsequently settled the action challenging the Burnt Ridge Project, but pressed ahead on the legality of the underlying rule as applied nationwide to "many thousands of small parcels."<sup>75</sup> Siding with Earth Island, the district court blocked the application of the rule.<sup>76</sup>

The Ninth Circuit affirmed, ruling that the Forest Service must allow the public to contest internal administrative decisions on small timber-clearing projects such as the Burnt Ridge timber sale.<sup>77</sup>

Without reaching the merits, the Supreme Court held by another bare majority that Earth Island lacked standing to challenge the application of the rule nationwide, and dismissed the case.

Writing for the majority, Justice Scalia held that Earth Island did not possess any injury in fact because it had voluntarily settled the portion of the lawsuit pertaining to its only member who suffered any injury that was "concrete and particularized."<sup>78</sup> The settlement agreement already fully addressed the procedural injury alleged by one member who had visited the project site with plans to return: "[W]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action."<sup>79</sup> The majority explained that Earth Island "identified no other application of the invalidated regulations that threatens imminent and concrete harm" to any of its members who planned to visit sites where the rules were to be applied.<sup>80</sup>

Justice Scalia also rejected standing for another affiant who stated that he had been a long time visitor of Forest Service sites and would continue to visit sites, some of which would be subject to the rule. He wrote that the "vague desire to return is insufficient to satisfy the requirement of imminent injury: Such someday intentions—without any description of concrete plans, or indeed any specification of when the someday will be—do not support a finding of the actual or imminent injury that our cases require."<sup>81</sup>

Justice Breyer dissented, joined by Stevens, Souter, and Ginsburg, arguing in favor of a position more consistent with sustainability. He noted that the majority's conclusion is "counterintuitive" because a programmatic failure to provide notice, opportunity for comment, and appeal would eventually and inevitably cause members to suffer concrete injury.<sup>82</sup> "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive," Justice Breyer wrote.<sup>83</sup> "The law of standing does not require the latter kind of specificity. How could it?"<sup>84</sup> In particular, he noted that a "threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates and GPS coordinates."<sup>85</sup>

Justice Breyer also questioned whether the result is consistent with precedent respecting standing for future harm in the global warming context: "[W]e recently held that Massachusetts has *standing* to complain of a procedural failing, namely, EPA's

failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades.”<sup>86</sup>

### CLEANING UP TOXIC SITES

In *Burlington Northern v. United States*,<sup>87</sup> the Court reversed the Ninth Circuit and held 8-1 that liability as an “arranger” under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) requires more than knowledge of chemical spillage; one must intend or plan to arrange for the disposal at issue. In addition, it held that CERCLA does not impose joint and several liability when there is a “reasonable basis” to apportion liability.<sup>88</sup> Neither result promotes sustainability.

In *Burlington Northern*, a now defunct company called Brown & Bryant (“B&B”) once owned and operated a plant that stored and distributed agricultural chemicals on land owned in part by predecessors to petitioners Burlington Northern and Union Pacific Railroad (“railroads”). B&B obtained some of its chemicals, including D-D pesticide, from the Shell Oil Company (“Shell”). Shell would deliver the chemicals by truck for transfer into large storage tanks onsite. Spills sometimes occurred during delivery, and the tanks leaked, leading to substantial soil and groundwater contamination.

Eventually EPA and the State of California investigated, responded, and then filed suit under CERCLA Section 107(a) against B&B, Shell, and the railroads as “potentially responsible parties” for the costs of feasibility studies and response action.

The district court found the railroads liable as owners “at the time of disposal,” and Shell liable as a “person who . . . arranged for disposal.” The Court, however, declined to hold the parties subject to joint and several liability. Instead, it found liability to be subject to equitable apportionment and set the railroads’ and Shell’s liability at nine and six percent, respectively, which had the effect of limiting the government’s recovery by about eighty-five percent.

The Ninth Circuit affirmed on liability but reversed on apportionment. First, it held that although Shell did not qualify as a “traditional arranger,” it could still be held liable under a “broader category” if the disposal was a known or foreseeable by-product of the transaction.<sup>89</sup> Second, it reversed the lower court’s apportionment of liability. The Ninth Circuit instead held that CERCLA intends for the government to recover full response costs against targeted parties, envisioning subsequent civil actions by them against additional potentially responsible parties for contribution.<sup>90</sup>

The Supreme Court reversed the Ninth Circuit 8-1 at both turns, finding Shell had not “arranged for disposal,” and that

joint and several liability is not required when it is practicable to apportion liability. Writing for the Court, Justice Stevens maintained that “it is . . . clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.”<sup>91</sup> In other words, “arrange” implies action directed to a specific purpose. Thus, under the statute, “an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance.”<sup>92</sup> Arranging for disposal must involve the purpose of discarding a “used and no longer useful hazardous substance.”<sup>93</sup> Stevens acknowledged that determining the

arranger’s purpose could involve a “fact-intensive inquiry.”<sup>94</sup> Rejecting the Ninth Circuit’s analysis, the Court found Shell had not arranged for disposal: “. . . Shell must have entered into the sale of D-D with the intention that at least a portion of the product to be disposed of during the transfer process by one or more of the methods described.”<sup>95</sup> Thus, Justice Stevens concluded, Shell was

not liable as an arranger under CERCLA because it did not “intend” for its chemicals to be released into the environment, even though it knew it was delivering its product to a sloppy operator.<sup>96</sup>

The Court also held that joint and several liability does not apply when reasonable apportionment is practicable and upheld the district court’s initial allocation of liability.<sup>97</sup>

Justice Ginsburg again urged a position more consistent with sustainability. She argued in dissent that Shell had arranged for disposal because it exercised “the control rein” over delivery of the D-D pesticide, specifying transportation and storage features that resulted in “inevitable” spills and leaks.<sup>98</sup> Indeed, Justice Ginsburg observed, “[t]he deliveries, Shell was well aware, directly and routinely resulted in disposals of hazardous substances through spills and leaks for more than [twenty years].”<sup>99</sup> Shell arranged to have its chemicals shipped by bulk tank truckload stored in bulk storage facilities instead of shipping drums.<sup>100</sup> Shell knew that spills occurred during every delivery.<sup>101</sup> It also knew about “numerous tank failures and spills as the chemical rusted tanks and eroded valves.”<sup>102</sup>

Justice Ginsburg was troubled by the blind eye arrangers may now turn to chemical transport and storage, emboldened by the court’s decision: “The sales of useful substances [does not] exonerate Shell from liability, for the sales necessarily and immediately resulted in the leakage of hazardous substances.”<sup>103</sup> She questioned the Court’s dismissal of joint and several liability, noting that the lower court “undertook an heroic labor” by apportioning costs without the benefit of briefing—indeed, without even a request to apportion—by the parties.<sup>104</sup>

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*In some ways,  
sustainability seems  
consigned to the elected  
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On the other hand, the Court has issued recent opinions in this context that seem more consistent with sustainability. In *United States v. Atlantic Research Corp.*,<sup>105</sup> the Court unanimously ruled that under CERCLA Section 107(a) private parties not subject to an enforcement action who incurred “other necessary response costs” may seek cost recovery claims against “any other person,” including the Federal Government. At issue in *Atlantic Research* was whether such a Potentially Responsible Party (“PRP”) may recover costs from other PRPs under CERCLA Section 107(a) instead of 113(f).<sup>106</sup> Likewise, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court held CERCLA does not allow private parties who have voluntarily cleaned up contaminated property but who have not been the subject of an EPA enforcement action to recover “contribution” costs from other responsible parties under CERCLA Section 113(f).<sup>107</sup>

### WASTE FLOW CONTROL

The Court recently revisited its dormant commerce clause jurisprudence in a way that is more consistent with sustainability. It upheld a county flow control ordinance that requires all solid waste generated within the county to be delivered to a publicly owned county waste processing facility. In *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,<sup>108</sup> the Court decided that a county’s flow control ordinance does not violate the dormant commerce clause. Chief Justice Roberts, for a plurality, applied the *Pike* balancing test and determined that the ordinance does not violate the dormant commerce clause because it creates at least “minimal” local benefits that outweigh whatever “insubstantial” differential burden it may place on interstate commerce: “[W]e uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer counties.”<sup>109</sup> The Court rejected the interstate waste hauling companies’ argument that the ordinance is per se invalid as economically protectionist under *Philadelphia v. New Jersey*.<sup>110</sup> The companies argued that under *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>111</sup> government instrumentalities may not “hoard wastes” regardless of whether the “preferred processing facility” is owned by a public entity arguably within the “market participant exception” to the dormant commerce clause. The plurality disagreed, finding the public/private distinction is “constitutionally significant.” Breathing judicial restraint the Court observed: “there is no reason to step in and hand local businesses a victory they could not obtain through the political process.”<sup>112</sup>

### POLLUTION EMISSIONS

Two cases decided by the Roberts’ Court look to future and past application of the Clean Air Act and reach results that promote sustainability to some degree.

#### CLIMATE CHANGE

In the Court’s initial foray into the global climate change imbroglio, the Court decided in *Massachusetts v. EPA*,<sup>113</sup> that Title II of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles that “endanger” public health or welfare, thereby promoting sustainable air emissions and energy policy. In this case, the Commonwealth of Massachusetts and a litany of mostly downwind “blue” States and environmental organizations contended that EPA improperly exercised its discretion in denying petition by several States calling for rulemaking to regulate carbon dioxide and three other

greenhouse gas emissions—methane, nitrous oxide, and hydrofluorocarbons—from new motor vehicles under Title II of the Clean Air Act. Section 202(a)(1) of the Act directs EPA to regulate tailpipe emissions that (1) “in his judgment” (2) “may reasonably be anticipated to endanger public health or welfare.” Massachusetts et al. maintained both prongs had been met. EPA argued that the Clean Air Act does not authorize it to regulate emissions to address global climate change and that it has discretion not to regulate based on policy considerations, including foreign policy.<sup>114</sup>

The Court decided three issues. First, that petitioners (namely, Massachusetts) demonstrated standing under Article III of the U.S. Constitution to challenge EPA’s inaction. The Court held that States enjoy “special solicitude” in demonstrating standing. Second, the Court held that greenhouse gas emissions constituted an “air pollutant” under the Clean Air Act’s “capacious definition of air pollutant.” Last, it held that EPA “offered no reasoned explanation” and that it was arbitrary and capricious for the agency to refuse to decide whether these emissions “endanger public health and welfare” due to policy considerations not listed in the Clean Air Act, mainly foreign policy.<sup>115</sup>

In dissent, Roberts questioned Stevens’ “state solicitude” standard as an “implicit concession that petitioners cannot establish standing on traditional terms.” Scalia thought the Court should have deferred to EPA in what he says is a “straightforward administrative-law case,” and that it had “. . . no business substituting its own desired outcome for the reasoned judgment of the [EPA].”<sup>116</sup>

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*So perhaps the reason sustainability doesn't exist in the U.S. Supreme Court is the simplest: it has yet to be presented to the Court.*

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## NEW SOURCE REVIEW

In the other Clean Air Act case decided the same day, *Environmental Defense v. Duke Energy Corp.*,<sup>117</sup> the Court unanimously held that EPA by regulation could define the word “modification” differently for different parts of the Clean Air Act, thereby potentially reducing pollutant emissions and promoting sustainability. The case asks whether the term as applied to an existing Major Emitting Facility under the Prevention of Significant Deterioration (“PSD”) aspect of the Clean Air Act refers to “increases” in emission *annual quantity* or *hourly rates*. For the Court, Souter wrote that EPA does not need to harmonize the two regulatory interpretations of the same term. He said it was reasonable for EPA to interpret the term “modification” differently in different parts of the statute.<sup>118</sup>

EPA initially had interpreted the term “modification” to require New Source Review for any operational or facility changes that result in “increases” in net annual emissions. Duke Energy contended instead that “modification” under the PSD program requires an “increase” in hourly emission rates—as EPA interprets the term under the New Source Performance Standards aspect of the Act—but does not reach increased hours of operation and increased annual emissions, and the U.S. Court of Appeals for the Fourth Circuit agreed. Along the way, EPA aligned with Duke Energy’s interpretation.

Interestingly, only intervenor Environmental Defense sought review. Ironically, EPA initially opposed review, only to rejoin Environmental Defense after the Court granted *certiorari*, then joining Duke Energy’s interpretation of the Clean Air Act as applied to future rulemaking. Environmental Defense agreed with EPA’s initial interpretation of the Clean Air Act. *Duke Energy* is notable insofar as it marks the first time since *Sierra Club v. Morton*<sup>119</sup> that the Court granted review over the Federal Government’s opposition, at the exclusive request of an environmental organization who does not enjoy support from a State, as in *Massachusetts v. EPA*. In the vast majority of environmental cases the Court grants review at the behest of State or industrial petitioners who argue for more constrained application or interpretation of an environmental law. Moreover, past experience demonstrates that when the Court grants *certiorari* in a case with an environmental group, it nearly always rules against the group. *Duke Energy* also is perhaps the only case where EPA opposed a parties’ petition for review only to rejoin it after the Court granted *certiorari*, but then only to stake a legal position opposing its original legal position (“increase” in amount, not rate) and that of co-plaintiff (Environmental Defense), the petitioner.

## DISCUSSION

The Court’s environmental cases do not engage sustainability. If anything, they reveal more about its jurisprudential ideologies than any environmental jurisprudence and invite five observations. First, the surfeit of sustainability tinged cases does not necessarily reveal anything about judicial receptiveness to the concept of sustainability. Rather, these cases are a surrogate for the jurisprudential ideologies of the Court’s conservative wing to curtail federal power, promote State’s rights, and protect

private property rights. If anything, Chief Justice Roberts, and Justices Alito, Scalia, and Thomas seem to reject principles of sustainability, except when it becomes a matter of State’s rights. Yet curiously when the State’s interest is to protect rather than develop land and environment, such as shoreline loss due to global climate change, these same justices wonder aloud how it can be that the State has a sufficient interest to protect. All this seems counterintuitive because sustainability is a quintessentially “conservative” position insofar as it counsels conservation and careful consideration of externalized social costs.

Justices Ginsburg and Stevens seem to be much more receptive to notions of sustainability. They argue in favor of greater consideration of the environmental consequences. Justice Sotomayor may be cut from the same cloth, having written the opinion while sitting on the Second Circuit that the Supreme Court later reversed in *Entergy*.

Nonetheless, as Justice Kennedy’s decisions go in cases implicating sustainability, so goes the Court. Justice Kennedy voted with the majority—or perhaps more accurately the majority voted with him—in each case that implicates sustainability. Justice Kennedy almost always votes in a manner that does not promote sustainability.

Second, the Court may just consider the concept of sustainability to be unworkable. The United States lacks “sustainability law” *per se*, so it is not surprising that the Court has failed to engage sustainability law *per se*. “Sustainability” does not invite facile definition or judicially cognizable guidelines. In some ways, sustainability seems consigned to the elected branches. Indeed, most of the environmental cases that arguably invoke sustainability place a premium on arguments cloaked in statutory “plain meaning.” In *Atlantic Research*, the Court unanimously found that CERCLA Section 107’s reference to “any other person,” allows cost recovery, indeed, by other PRPs. This is likely to allow courts to turn to the merits in myriad CERCLA private cost recovery actions working their way through the federal system. The same plain meaning thread weaves its way through *Duke Energy*, in which the Court gave EPA wide latitude to interpret “modification.” *Duke Energy*’s ripple effect looms large, as it potentially subjects more than 100 of the nation’s largest and eldest coal-fired power plants, and hundreds of other existing major emitting facilities, including cement kiln plants, coke ovens, minerals and metals processors, and petrochemical processors, located in Prevention of Significant Deterioration areas, to New Source Review.

Likewise, plain meaning ruled, although only by the slimmest of margin, in both *Massachusetts v. EPA* and *National Ass’n of Home Builders*. In *Massachusetts v. EPA*, the Court promoted the plain meaning of “air pollutant” to include climate changing gases and that EPA does not have discretion to refuse to regulate pollutants that “*may reasonably be anticipated to endanger public health or welfare.*”

In *National Ass’n of Home Builders*, the Court used plain meaning in support of elevating the Clean Water Act’s meaning over that of the Endangered Species Act. Section 402(b) of the Clean Water Act provides “[EPA] *shall approve* a [state’s

NPDES program] *unless he determines that adequate authority does not exist.*” The Court was divided 5-4, however, about whether the language at issue in these cases is in fact “plain.” Indeed, Justice Alito’s opinion in *National Ass’n of Home Builders* arguably ignores the “plain meaning” of a provision of a more specific and subsequently enacted statutory provision. Section 7(b) of the ESA provides that: “[e]ach Federal agency shall, in consultation with [federal wildlife agencies] insure that any [agency action] authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species [or their habitat].”

Fourth, the Court’s judicial capacity does not invite consideration of sustainability. Article III of the U.S. Constitution grants federal courts authority to resolve “cases” and “controversies” involving the Constitution, laws of the United States, or treaties. Sustainability falls into none of these categories. Sustainability is a guiding principle, not a constitutionally enshrined doctrine. No U.S. law requires or even recognizes sustainability. And, the United States has not ratified an international treaty that does so either. Moreover, no member of the Court studied environmental law. None of them have much if any practical experience with environmental law in general, and sustainability in particular. And while some members have regulatory experience, none of the current members have held elected political office, often the crucible for implementing sustainability. So to the members of the Court, sustainability is unnoticed.

Finally, and surprisingly, sustainability—even as a governing principle—isn’t the subject of advocacy before the Court. Supreme Court litigants of every persuasion—government, private, public interest, whomever—ignore sustainability too. As far as I can tell, no party in any environmental (or any other case for that matter) has bothered to invoke “sustainability” in a pleading, brief, or argument.<sup>120</sup> Even *amici*, with much wider latitude to advocate policy positions not at issue in any claim, defense or “Question Presented,” have yet to argue that the Court consider sustainability.<sup>121</sup> So perhaps the reason sustainability doesn’t exist in the U.S. Supreme Court is the simplest: it has yet to be presented to the Court.

Thus, sustainability remains a concept in search of law subject to review by the U.S. Supreme Court. Without a plain


meaning foothold, therefore, sustainability does not seem to exist.

## CONCLUSION

Early returns suggest that environmental cases hold interest for the Roberts Court. It already has decided about a dozen core environmental cases in three years, almost three times the rate during the Burger and Rehnquist Courts. Yet, sustainability seems to matter not at all. The Court accepted the business/industry position in *Entergy*, *Coeur Alaska*, and *Burlington Northern*, and the government’s less environmentally protective position in *Summers* and *Winter*. In *Home Builders*, it held that EPA’s delegation to a State of an environmental permitting program under the Clean Water Act does not trigger “consultation” under the Endangered Species Act.

The Court seems to be especially interested in reversing sustainability reinforcing decisions out of the Ninth Circuit. Indeed, it reversed each of the four cases from that circuit for which it granted review, cases where the Ninth Circuit arguably agreed with the pro-sustainable result. It also reversed a Second Circuit opinion that arguably produced an outcome more consistent with sustainability.

There are some counterexamples. In *Massachusetts v. EPA*, the Court held that Title II of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles that “endanger” public health or welfare. In *Duke Energy*, it held that EPA by regulation could define the word “modification” differently, and more stringently, in different parts of the Clean Air Act. In *Oneida*, a plurality concluded that a county’s flow control ordinance—requiring that all solid waste generated within the county to be delivered to the county’s publicly owned solid waste processing facility—does not violate the dormant commerce clause. In *Atlantic*, it found that under CERCLA Section 107(a) private parties not subject to an enforcement action who incur “other necessary response costs” may seek cost recovery claims against “any other person,” including the Federal Government. Each result arguably promotes sustainability.

In sum, the Court seems at worst hostile to, at best agnostic about, and most likely ignorant of sustainability as a governing principle. 

## Endnotes: Not at All: Environmental Sustainability in the Supreme Court

<sup>1</sup> United Nations Conference on the Human Environment, *Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14 Corr. 1 (June 16, 1972).

<sup>2</sup> World Commission on Environment and Development, *Our Common Future*, U.N. Doc. A/42/427 (1987).

<sup>3</sup> *Id.* at 8.

<sup>4</sup> United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (June 5-16, 1992), [hereinafter *Rio Declaration*].

<sup>5</sup> United Nations Conference on Environment and Development, *Agenda 21*, U.N. Doc. A/CONF.151/PC/100/Add. 1 (June 14, 1992) [hereinafter *Agenda 21*].

<sup>6</sup> See AGENDA FOR A SUSTAINABLE AMERICA 2-3 (John C. Dernbach ed., *Env’tl. L. Inst.* 2009).

<sup>7</sup> See, e.g., RANEE K.L. PANJABI, *THE EARTH SUMMIT AT RIO: POLITICS, ECONOMICS, AND THE ENVIRONMENT* 17 (Northeastern Univ. Press 1997) (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty making).

**Endnotes: Not at All: Environmental Sustainability in the Supreme Court** *continued on page 81*

# ENVIRONMENTAL LITIGATION STANDING AFTER MASSACHUSETTS V. EPA: CENTER FOR BIOLOGICAL DIVERSITY V. EPA

by Andy Hosaido\*

As a consequence of the U.S. Supreme Court's landmark 2007 decision in *Massachusetts v. Environmental Protection Agency*, reduced standing requirements have enabled litigators to pursue environmental claims and compel U.S. Federal agencies to enforce existing statutes. *Center for Biological Diversity v. Environmental Protection Agency* is predicated upon these reduced standing requirements. On May 14, 2009, the Center for Biological Diversity ("CBD") filed a complaint in the Western District of Washington against the Environmental Protection Agency ("EPA") based on EPA's failure to list and regulate damage caused to Washington's coastal waters by ocean acidification.<sup>1</sup> In the suit, the CBD alleged that the EPA's approval of Washington's list of impaired waters, which only included inland waters and did not include the adversely affected coastal ocean areas, harmed the right of its members to enjoy the marine animals in the area.<sup>2</sup> As a result of the EPA's action, CBD also claimed that its members suffered procedural and informational injury.<sup>3</sup> Pursuant to the holding in *Massachusetts*, where the Court found that the EPA violated its statutory obligation when it declined to regulate CO<sub>2</sub> and greenhouse gasses ("GHG"), the CBD is seeking to compel similar EPA action by requesting declaratory relief against the EPA for its procedurally improper approval of Washington's list of impaired waters.<sup>4</sup>


Prior to *Massachusetts*, environmental litigants had difficulty meeting requirements for substantive and procedural standing, because comprehensive regulations such as the Clean Air Act ("CAA") preempted claims that fell under its mandate.<sup>5</sup> *Massachusetts* was significant because the Court found substantive standing despite the difficulty of proving injury, traceability, and redressability, and it also vested environmental litigants with the right to enforce procedural violations by federal agencies such as the EPA.<sup>6</sup> *Massachusetts* held that a plaintiff can claim procedural standing when the alleged harm can be redressed by the government agency reconsidering the administrative decision that caused the harm.<sup>7</sup> This procedural standing forms the basis of much of the current litigation against government agencies for not enforcing statutory regulations according to provisions of the Clean Air Act, Clean Water Act, National Environmental Policy Act, Endangered Species Act, and other federal and state environmental protection laws.

As a result of the decision in *Massachusetts*, courts have found standing in several recent cases of environmental litigation.<sup>8</sup> *Center for Biological Diversity v. Environmental Protection Agency* follows in the footsteps of these prior cases.

At issue in *Center for Biological Diversity v. Environmental Protection Agency* is the listing provision of the Clean Water Act

("CWA"), which requires states to establish water quality standards and prepare lists of water bodies where pollution controls are insufficient (known as the "impaired waters list").<sup>9</sup> After the list is prepared, it is submitted to the EPA and approved, disapproved, or partially disapproved.<sup>10</sup> On August 15, 2007 the CBD submitted data to Washington Department of Ecology ("WDE") to notify them that Washington's coastal ocean waters should be included on the impaired waters list because the pH level was outside the range proscribed by state law, and was causing damage to ocean fauna.<sup>11</sup> Subsequently, CBD petitioned the WDE to include the ocean waters on the CWA impaired waters list.<sup>12</sup> However on June 23, 2008 when WDE submitted the list to the EPA for approval, the acidified ocean waters were not included.<sup>13</sup> As a result, the CBD submitted letters to the EPA with scientific documentation contending that Washington's coastal ocean waters were impaired due to substantial changes in pH level that were beyond statutory limits, and requested that the EPA include the acidified waters on the list.<sup>14</sup> Despite the evidence submitted by CBD that demonstrated that the waters were impaired due to ocean acidification, the EPA approved Washington's list on January 29, 2009.<sup>15</sup>

CBD brought suit against the EPA because of its approval of Washington's list of impaired waters without the acidified ocean waters allegedly violated CWA section 303(d).<sup>16</sup> CBD also contends that the EPA's approval of the list violated the Administrative Procedure Act, which allows judicial review of agency action that is arbitrary, capricious, and not in accordance with the law.<sup>17</sup> CBD seeks declaratory relief from the court that the EPA violated its duties under the CWA and an order to require that the EPA add the impaired ocean waters to the list.<sup>18</sup> If CBD's complaint is successful, the EPA would be compelled to address the effect of CO<sub>2</sub> emissions on ocean acidification.

The decisions in *Massachusetts* and its successors have had a significant impact on environmental litigation in the United States. Although some provisions of the various environmental laws discussed above may be rendered obsolete for the purpose of climate-related litigation because of their absorption into a new climate and energy regulatory regime under consideration in Congress, *Center for Biological Diversity v. Environmental Protection Agency* demonstrates that the reduced requirement for substantive and procedural standing established in *Massachusetts* will continue to stimulate environmental litigation against agencies' lack of regulatory enforcement.<sup>19</sup> 

**Endnotes:** Environmental Litigation Standing After *Massachusetts v. EPA: Center for Biological Diversity v. EPA* continued on page 82

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# COURTS AS CHAMPIONS OF SUSTAINABLE DEVELOPMENT: LESSONS FROM EAST AFRICA

by Patricia Kameri-Mbote and Collins Odote\*

## INTRODUCTION

Courts function as an arm of government that is critical in the separation of powers doctrine, and they play a crucial role in giving effect to legislative and executive intentions and pronouncements. Judicial power enables sovereign states to decide controversies between itself and its subjects and between the subjects *inter se* (between themselves).<sup>1</sup> Judiciaries the world over balance the interests of society with economic development, environmental sustainability, and the competing interests of persons and entities. Sustainable development is defined as development “that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>2</sup> Sustainable development requires mediation between the interests of current generations and those of future generations as well as between competing interests of current generations. Not surprisingly, the judiciary has been called upon in the quest for enforcing sustainable development policies owing to its traditional role in dispute resolution and interpretation of laws. As D. Kaniaru, L. Kurukulasuriya, and C. Okidi state:

The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have, and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institutional regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development will be a major force in strengthening national efforts to realise the goals of environmentally friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process.<sup>3</sup>

The role of the judiciary is particularly important in developing countries, such as those in Africa, where the bulk of the population is poor and relies on natural resources for livelihood and sustenance, and where the countries’ economies have those same resources as the bedrock of the gross domestic product. At the World Summit on Sustainable Development<sup>4</sup> in Johannesburg in 2002, chief justices and senior judges from around the world presented the Johannesburg Principles on the Role of Law and Sustainable Development.<sup>5</sup> The Principles had been adopted at the Global Judges Symposium on the Role of Law and Sustainable Development.<sup>6</sup> The Principles underscored the critical role that judiciaries around the world can and should

play in efforts to promote sustainable development.<sup>7</sup> The judges underscored the fact that:

an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law . . . .<sup>8</sup>

The assembled judges then made a commitment to “contribut[e] towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process.”<sup>9</sup>

It is against this background that this paper assesses the role that judiciaries in East Africa have played in the quest for sustainable development. It focuses on Kenya, Uganda, and Tanzania, the original members of the East African Community. These three countries also have legal systems drawing on the common law tradition. The paper first summarizes the key environmental issues in the region as a prelude to the discussion on the legal framework for environmental management and the court structure in the three countries in the following section. It then analyzes several trends in judgments and the emerging jurisprudence on environmental law matters from the courts in East Africa.<sup>10</sup> Finally, it proposes ways of improving the role of the judiciaries in fostering sustainable development in East Africa.

## MAJOR ENVIRONMENTAL ISSUES AND CHALLENGES FOR SUSTAINABLE DEVELOPMENT IN EAST AFRICA

As a region, East Africa is largely poor: two of the three countries reviewed in this paper are classified as Least Developed<sup>11</sup> and only Kenya as Developing. The region is, however, endowed with numerous natural resources including forests, wildlife, fisheries, minerals, land, rivers, and Lake Victoria, the second largest freshwater lake in the world. The major environmental resources in East Africa may be categorized broadly into either transboundary or national ecosystems.<sup>12</sup>

The key challenges to the environment in the region are driven and controlled by three factors: (i) high populations and the attendant pressure from the interaction between the population and their surroundings; (ii) the ineffectiveness of the legal

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framework put in place to regulate these pressures; and (iii) the weak institutional arrangements in place for monitoring compliance leading to widespread non-compliance with the law by all concerned.<sup>13</sup> The resulting environmental challenges include land degradation, poor land use and land management, over-exploitation of fisheries, water pollution, poor waste disposal management, water scarcity, biodiversity loss, wetlands destruction, deforestation, and climate change.<sup>14</sup>

A synoptic review of the regional environment shows that natural resources are not being managed in a sustainable and rational manner.<sup>15</sup> The rate of degradation and exploitation of resources threatens the region's quest for sustainable development and thus brings great challenges for the judiciaries in East Africa. With the region's high levels of poverty, food insecurity, underdevelopment, low levels of awareness, barriers to access to information, and institutional challenges, the judiciaries have an increasingly critical role to play.

## THE LEGAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT

### REGIONAL

Within East Africa, the totality of law is derived from both regional legal instruments and national legislation.<sup>16</sup> In addition, however, recourse must be had to continental environmental laws<sup>17</sup> and international environmental laws, since East African countries are members of the international community. The principal legal instrument at the regional level is the Treaty for the Establishment of the East African Community ("Treaty").<sup>18</sup> The Treaty was signed on November 30, 1999 and entered into force on July 7, 2000, heralding the rebirth of the East Africa Community ("Community") as a regional integration bloc.<sup>19</sup> The broad objective of the Community is stipulated in the Treaty to be "the development of policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs."<sup>20</sup> Broadly speaking, therefore, the Treaty envisages development of programs and policies in a diverse range of areas, including the environmental field. Article 5(3) stipulates that:

For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the community shall ensure:

(a) The attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner states.

...

(c) The promotion of sustainable utilization of natural resources of the partner states and the taking of measures that would in turn, raise the standard of living and improve the quality of life of their populations.<sup>21</sup>

Further, Chapters 19 and 20 of the Treaty<sup>22</sup> contain substantive provisions addressing environment and natural resource management and tourism and wildlife management. In addition

to these expansive provisions, the East African Community has also developed two protocols relevant to environmental management: the Protocol for the Sustainable Development of Lake Victoria<sup>23</sup> and the Protocol on Environment and Natural Resources.<sup>24</sup> Taken together with international instruments to which the East Africa Partner States are parties, these provide the legal framework for environmental management at the regional level.

### NATIONAL

Environmental management in the three East African countries derives from the states' constitutions, parliamentary laws, and regulations made pursuant to such laws. Additionally, the customs and traditional practices of local communities continue to provide important rules and provisions for the management of the environment in all three countries. The framework environmental laws recognize the importance of such customary laws, providing that in determining environmental matters and upholding sustainable development, courts should be guided by, amongst other things, the cultural and social principles traditionally applied by communities for the management of the environment. The only caveat to this provision is that such principles and practices should not be repugnant to justice and morality.<sup>25</sup>

The principal source of all laws in each of the three countries is each country's respective constitution. The constitutions of Uganda,<sup>26</sup> Tanzania,<sup>27</sup> and Kenya<sup>28</sup> treat the issue of environment differently.<sup>29</sup> Of the three, Uganda has the most comprehensive provisions on the environment.

In Uganda, the National Objectives and Directive Principles of State Policy of the Constitution contains a directive on protection of natural resources, which provides that "The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."<sup>30</sup> There is also a directive on environmental management, requiring the State to promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner for present and future generations;<sup>31</sup> promote and implement energy policies that will ensure that people's basic needs and those of the environment are met;<sup>32</sup> create and develop parks, reserves, and recreation areas; ensure conservation of natural resources; and promote rational use of natural resources so as to safeguard and protect biodiversity of Uganda.<sup>33</sup> Although these provisions are only hortatory, they demonstrate the premium that the Constitution places on environment and natural resource management. Additionally, the substantive part of the Constitution on fundamental rights and freedoms guarantees every Ugandan the right to a clean and healthy environment,<sup>34</sup> and gives every Ugandan the right to apply to a court for redress if that right is violated.<sup>35</sup>

The Tanzanian and Kenyan constitutions, on the other hand, do not contain an enumerated right to a clean and healthy environment. Instead, both guarantee the right to life, which, following the expansive jurisprudence and interpretation of other courts such as those in Asia,<sup>36</sup> has been held by courts in both countries to include the right to a clean and healthy

environment.<sup>37</sup> Additionally, the Tanzanian Constitution, in the part on Fundamental Objectives and Directive Principles of State Policy,<sup>38</sup> urges the Tanzanian Government and all its agencies to direct their policies and programs towards ensuring “that public affairs are conducted in such a way as to ensure that the national resources and heritage are harnessed, preserved and applied toward the common good and the prevention of the exploitation of one man by another.”<sup>39</sup>

The Kenyan Constitution<sup>40</sup> has no part dealing with directive policies. Since 2001, with the establishment of the Constitution of Kenya Review Commission, the country has been going through a structured process to review and rewrite its constitution.<sup>41</sup> As part of that process and following the National Constitutional Conference in 2004, it produced a draft constitution, which included provisions guaranteeing the right to a clean and healthy environment as a constitutional right.<sup>42</sup> The review process has not ended and has been dogged with controversy, the result of which is that the environmental provisions remain aspirations awaiting the adoption of a new constitutional order in Kenya.<sup>43</sup>

In addition to constitutional provisions, the East African countries also have statutes dealing with the environment. The principal laws are those referred to as framework environmental statutes, a concept that emerged in the 1990s to describe a statute dedicated to environmental management and “encompassing regimes of planning, management, fiscal incentives and penal sanctions.”<sup>44</sup> Uganda was the first country to adopt its National Environmental Act<sup>45</sup> in 1995, followed by Kenya, with its Environmental Management and Coordination Act in 1999.<sup>46</sup> Tanzania closed the circuit when it adopted the Environmental Management Act in 2004.<sup>47</sup> The Acts provide the framework for sustainable environmental management and create the institutional mechanisms for environmental management.<sup>48</sup> They contain legal provisions reiterating the right to a clean and healthy environment,<sup>49</sup> establish a central environmental authority,<sup>50</sup> and have detailed provisions requiring environmental impact assessments.<sup>51</sup> To complement the framework laws, each of the countries has additional legislation governing specific sectors of the environment including fisheries, forestry, wildlife, and water.<sup>52</sup>

## DISPUTE RESOLUTION MECHANISMS FOR ENVIRONMENTAL MATTERS

Within the traditional structure of government, the arm of government responsible for dispute resolution is the judiciary. In all the three countries under study, the judiciary serves this dispute resolution function. The constitutions of Uganda,<sup>53</sup> Kenya,<sup>54</sup> and Tanzania<sup>55</sup> describe the structure of the judiciary. In Uganda, in addition to the Constitution, the Judicature Act<sup>56</sup> and the Magistrates’ Courts Act<sup>57</sup> provide for the structure and functions of the Ugandan judiciary. At the apex of the court structure in Uganda is the Supreme Court,<sup>58</sup> which is the court of last resort with appellate powers for decisions emanating from the Court of Appeal.<sup>59</sup> Below the Supreme Court are the Court of Appeal,<sup>60</sup> which also serves as the first instance constitutional court in Uganda,<sup>61</sup> then the High Court,<sup>62</sup> which has unlimited

original jurisdiction in all matters and such appellate jurisdiction as conferred on it by the Constitution.<sup>63</sup> The Constitution stipulates that the country, through parliament, shall establish such subordinate courts as it shall desire.<sup>64</sup> Pursuant to this constitutional stipulation, Parliament has provided for magistrates’ courts to hear limited criminal and civil cases as “reasonably practicable.”<sup>65</sup> It has also established local county courts to hear simple civil cases falling within their jurisdiction,<sup>66</sup> as well as a military court system.<sup>67</sup>

Tanzania’s court system comprises of a Court of Appeal as the final court with appellate jurisdiction over decisions from the High Court.<sup>68</sup> The High Court has jurisdiction as specified by the Constitution or any other law.<sup>69</sup> Below these courts are the Resident’s Magistrate’s Courts, District Courts, and Primary Courts.<sup>70</sup>

The Kenyan Constitution provides for the court structure at Chapter IV.<sup>71</sup> This is augmented by the provisions of the Judicature Act,<sup>72</sup> the Magistrates’ Courts Act,<sup>73</sup> and the Appellate Jurisdiction Act.<sup>74</sup> The Constitution stipulates that the highest court shall be the Court of Appeal,<sup>75</sup> with powers to hear appeals from the High Court. The High Court has original unlimited jurisdiction to hear and determine all civil and criminal cases.<sup>76</sup> It also has powers to hear appeals from subordinate courts.<sup>77</sup> In 2007, the Chief Justice of the Republic of Kenya administratively created a Division of the High Court charged with handling land and environmental cases.<sup>78</sup> The Constitution also empowers Parliament to establish subordinate courts.<sup>79</sup> Under this provision, Parliament has created the resident magistrate’s courts, which have jurisdiction over civil and criminal matters.<sup>80</sup> Unlike the High Court, which has unlimited jurisdiction, the resident magistrates’ courts’ jurisdiction is limited both geographically and monetarily.<sup>81</sup>

At the regional level, the Treaty for the East African Community creates the East African Court of Justice,<sup>82</sup> consisting of the First Instance Division and the Appellate Division.<sup>83</sup> The Court’s jurisdiction is limited to interpretation and application of the Treaty,<sup>84</sup> until such time as the Partner States, on recommendation of the Council of Ministers shall, by protocol, extend the jurisdiction to other areas and issues.<sup>85</sup> So far, no environmental matters have been brought before this court.

In addition to the national- and regional-level courts, there are two other mechanisms for resolving environmental disputes. The first utilizes informal traditional community-level mechanisms, principally the institution of the elders. Although such traditional institutions may vary from place to place, most communities in Kenya, Uganda, and Tanzania have some mechanism to resolve disputes at a local level.<sup>86</sup> Secondly, there exist quasi-judicial mechanisms and institutions for resolving environmental disputes in Kenya and Tanzania. In Kenya, the Environmental Management and Coordination Act creates two bodies with limited powers. The first is the Public Complaints Committee<sup>87</sup> with powers to investigate, either on its motion or on the basis of a report by any person,<sup>88</sup> any action of the National Environmental Management Authority or any case of environmental degradation in Kenya and subsequently prepare

a report. The Committee is essentially Kenya's environmental ombudsman.<sup>89</sup> The second is the National Environment Tribunal,<sup>90</sup> established to "offer specialized, expeditious and cheaper justice than ordinary courts of law."<sup>91</sup> Its mandate is to hear appeals arising from administrative decisions of the National Environmental Management Authority.<sup>92</sup>

Similarly, the Tanzanian Environmental Management Act establishes an Environmental Appeals Tribunal<sup>93</sup> to hear appeals arising from the decision or omission of the minister responsible for environment matters, "restriction or failure to impose any condition, limitation or restriction issued under the Act and approval or disapproval of an environmental impact statement by the Minister."<sup>94</sup> The Tribunal, however, has yet to be actually established.<sup>95</sup> Uganda has not made any provisions for such an institution.

### ANALYSIS OF SIGNIFICANT ENVIRONMENTAL JUDGMENTS

This section reviews the performance of the East African courts as a dispute resolution mechanism for environmental matters. The enactment of the constitutional provisions on environment in Uganda in 1995 followed by the adoption of framework environmental statutes in the three countries heralded a new era in environmental management. With more expansive provisions, recognition of the rights and obligations of citizens to ensure a clean and healthy environment, and more relaxed rules on access to environmental justice in conformity with the requirements of Principle 10 of the Rio Declaration,<sup>96</sup> one would expect more robust action from the judiciary in East Africa than has been seen.

Except for the East African Court of Justice, which has not had occasion to determine a case of an environmental nature since its establishment,<sup>97</sup> the national courts of East Africa have demonstrated their contribution and approach to sustainable development generally and sound environmental management in particular. This section reviews the landmark decisions that have come out of the courts in East Africa so as to determine the emerging trend from such cases. It does not, however, analyze decisions of the subordinate courts in any of the three countries owing principally to the absence of law reporting at these levels.<sup>98</sup>

#### RIGHT TO LIFE AND A HEALTHY ENVIRONMENT

As discussed earlier, of the three countries, only Uganda has constitutional provisions on the right to a clean and healthy environment. The other two enumerate those rights in environmental statutes. However, courts in the countries have been supportive of protecting the right to a clean and healthy environment.

The High Court of Uganda had occasion to address environmental harm as a breach of the right to privacy and the home in *Dr. Bwogi Richard Kanyerezi v. The Management Committee Rubaga Girls School*.<sup>99</sup> The plaintiff complained that the defendants' toilets emitted odiferous gases that reached the plaintiff's home thus unreasonably interfering with and diminishing the plaintiff's ordinary use and enjoyment of his home.<sup>100</sup> In spite of the fact that the defendant's school benefited society, the

court held that the defendants should cease using the toilets.<sup>101</sup> Although this case was argued from the traditional common law principle of nuisance, it illustrates the use of privacy and home rights to protect the environment.<sup>102</sup>

Kenya and Tanzanian courts have had to grapple with what the right to life really means in the context of the environment. The question has been whether the scope should be extended to include a right to the means necessary for supporting life. For example, because air and water are necessary to sustain life, does the right to life necessarily imply a right to clean air and water?<sup>103</sup> The courts of Kenya and Tanzania, which only have a "right to life" standard with which to anchor environmental protection via their constitutions, have both returned a "yes" verdict to the above question.<sup>104</sup>

Tanzania appears to be the first African nation whose courts have addressed the scope of the constitutional right to life in provisions in the context of environmental protection.<sup>105</sup> In the case of *Joseph D. Kessy v. Dar es Salaam City Council*,<sup>106</sup> the residents of Tabata, a suburb of Dar es Salaam, sought an injunction to stop the Dar es Salaam City Council from continuing to dump and burn waste in the area. The City Council in turn sought an extension to continue with the said activities. The Court of Appeals of Tanzania,<sup>107</sup> in denying the City Council its requested extension, held that their actions endangered the health and lives of the applicants and thus violated the constitutional right to life. In the words of Justice Lugakingira:

I have never heard it anywhere before for a public authority, or even an individual to go to court and confidently seek for permission to pollute the environment and endanger people's lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our constitution provides that every person has a right to live and to protection of his life by the society. It is therefore, a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the court in this infringement.<sup>108</sup>

Nearly ten years later the High Court of Kenya reached a similar verdict regarding the constitutional right to life. In the case of *Waweru v. Republic*,<sup>109</sup> the applicants, property owners in the small Kenyan town of Kiserian, had been charged with the offence of discharging raw sewage into a public water source contrary to provisions of the Public Health Act.<sup>110</sup> The applicants filed a constitutional reference against the charge,<sup>111</sup> arguing that they had been discriminated against since not all land owners had been charged, although the actions complained against were carried out by all land owners in Kiserian.<sup>112</sup> Although the Court agreed with the applicants it went on *sua sponte* (without any of the parties raising the issue) to discuss the implications of the applicants' action for sustainable development and environmental management.<sup>113</sup> The Court held that the constitutional right to life as enshrined in section 71 of the

Kenyan Constitution includes the right to a clean and healthy environment. In the Court's words:

Under section 71 of the Constitution all persons are entitled to the right to life – In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment.<sup>114</sup>

Then it went on to hold that:

It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together.<sup>115</sup>

#### LOCUS STANDI AND PUBLIC INTEREST LITIGATION

The effectiveness of substantive legal provisions to protect the environment hinges upon accompanying procedural provisions to facilitate enforcement. One key aspect relates to provisions guaranteeing access to justice. Traditionally, under common law, in environmental matters, access was granted to individuals who had *locus standi* (standing to sue).<sup>116</sup> The normal rule for *locus standi* is that one should have a direct personal and proprietary relationship with the subject matter of litigation.<sup>117</sup> This followed from the fact that litigation was about private rights and interests, and the “common law legal systems . . . always . . . ready to come to the aid of individuals suffering damage, whether of a personal or proprietary nature, where the activities of others may have caused damage or loss.”<sup>118</sup>

This private nature of rights, remedies, and litigation tends to restrict against protecting environmental rights, which are essentially public rights.<sup>119</sup> To remedy this situation, there has arisen public interest environmental litigation, where public spirited individuals and groups seek remedies in court on behalf of the larger public to enforce protection of the environment. The success of Public Interest Litigation requires courts to have a relaxed view on the rule of *locus standi*.<sup>120</sup>

Traditionally, courts in East Africa took a restrictive view on *locus standi*, following the traditional view at common law, espoused in the famous English case of *Gouriet vs. Union of Post Office Workers*,<sup>121</sup> where it was held that unless a litigant could demonstrate personal injury and loss, the matter was one within the realm of public law, where only the Attorney General had *locus standi* to institute the action. The only exceptions to this rule were representative suits or a relator action.<sup>122</sup> However, especially with the enactment of broad provisions in the framework environmental laws, courts have started interpreting the rules of *locus standi* liberally, generally holding that in environmental cases, individuals have standing notwithstanding the lack of a personal and proprietary interest in the matter. The most celebrated case on this point is a case from the Tanzanian High Court, *Rev. Christopher Mtikila v. The Attorney General*,<sup>123</sup> in which Justice Lugakingira departed from the traditional view on *locus standi*, arguing that in the circumstances of Tanzania, if a public spirited individual seeks the Courts' intervention against

legislation or actions that pervert the Constitution, the Court, as a guardian and trustee of the Constitution, must grant him standing.<sup>124</sup>

In *Festo Balegele and 749 others v. Dar es Salaam City Council*,<sup>125</sup> a Tanzanian case, the plaintiffs were residents of Kunduchi Mtongani. The defendant City Council used this site to dump the city's waste in execution of their statutory duty of waste disposal.<sup>126</sup> The dumped refuse endangered the residents' lives.<sup>127</sup> They went to the Court of Appeal of Tanzania seeking restraining orders.<sup>128</sup> On the issue of *locus standi*, the plaintiffs were held to have standing to apply for the orders based on several factors.<sup>129</sup> First, they were residents of the site at issue. Second, the site fell within the area of jurisdiction of the defendant City Council. Third, this site was zoned as a residential area, as opposed to a dumping site. Fourth, the dumped refuse and waste turned the area into a health hazard and a nuisance to the plaintiffs. Therefore, the plaintiffs were aggrieved by the action of the defendant.<sup>130</sup> The Court echoed the sentiments of its earlier decision in *Abdi Athumani and 9 others v. The District Commissioner of Tunduru District and others*.<sup>131</sup> In that case, Judge Rubana, writing for the Court, said that every citizen has a right to seek redress in courts of law when the citizen feels that the Government has not functioned within the orbit or limits dictated by justice that the Government had set for itself.<sup>132</sup>

The courts in Uganda have been the most liberal in granting standing to plaintiffs in environmental cases.<sup>133</sup> Great reliance has been placed on the provisions of Article 50 of the Ugandan Constitution, which provides that “[a]ny person or organization may bring an action against the violation of another person's or group's human rights.”<sup>134</sup> Courts have interpreted this to give every person *locus standi*.<sup>135</sup>

In *Environmental Action Network Ltd. v. The Attorney General and National Environmental Management Authority*,<sup>136</sup> a public interest litigation group brought an application, complaining about the dangers of second-hand smoke on its behalf and on behalf of the non-smoking members of the public under Article 50(2) of the Constitution, to protect their right to a clean and healthy environment and their right to life, and for the general good of public health in Uganda.<sup>137</sup> The applicants stated that non-smoking Ugandans have a constitutional right to life under Article 22 and a constitutional right to a clean and healthy environment under Article 39 of the Ugandan Constitution,<sup>138</sup> and that these rights were being threatened by the unrestricted practice of persons smoking in public places. The respondents raised several preliminary objections to the application, one of them being that the applicants could not claim to represent the public, in essence challenging their *locus standi*.<sup>139</sup> The High Court of Uganda, in dismissing the preliminary objection and holding that the applicants had standing, relied on “cases which decided that an organization can bring a public interest action on behalf of groups or individual members of the public even though the applying organization has no direct individual interest in the infringing acts it seeks to have redressed.”<sup>140</sup>

Kenyan courts, though initially taking a restrictive view on *locus standi*,<sup>141</sup> have in the last few years caught up with their

counterparts in Uganda and Tanzania, liberally granting *locus standi* and promoting public interest litigation. The new view is captured by the words of the High Court in the case of *Albert Ruturi & Another v. Minister for Finance and Others*,<sup>142</sup> subsequently quoted with approval in the case of *El Busaidy v. Commissioner of Lands & 2 Others*:<sup>143</sup>

We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, and public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented<sup>144</sup>

#### REGULATION OF PROPERTY RIGHTS

A critical issue in environmental management that is normally subject to litigation regards the regulation of property rights. Developments in law have led to the evolution of the concept of public rights in private property<sup>145</sup> so as to ensure that use of property does not affect the rights and interests of the larger public. Two particularly critical tools available for the state in regulating property rights are eminent domain and the police power.<sup>146</sup> How both powers are used in practice and courts' attitudes towards these powers demonstrate an emerging approach to sustainable development and environmental protection. In East Africa, courts have started to recognize the state's regulatory powers and the existence of public rights in private property.

In the Kenyan case of *Park View Shopping Arcade Limited v. Charles M. Kangethe and 2 Others*,<sup>147</sup> the Court had to resolve an issue regarding the use of a wetland. The plaintiff corporation, the registered owner a piece of land in Nairobi, applied for an injunction seeking to evict the respondents, who were occupying his land.<sup>148</sup> He argued that their occupation was infringing on his constitutional rights to private property.<sup>149</sup> The respondents on the other hand argued that the land at issue was a sensitive wetlands area along one of the tributaries of the Nairobi River and that, contrary to the applicant's assertion, they were not trespassers, but rather persons enhancing the environmental quality of the land with a permit from the relevant authorities.<sup>150</sup> While the applicant wanted to undertake construction on the land, the respondents were operating a flower business.<sup>151</sup> The respondents argued that the proposed construction was contrary to the general right to a clean and healthy environment guaranteed in law.<sup>152</sup> The Court held that, although the law allows for regulation of property rights in the interest of the public, such regulation must be undertaken in a lawful manner. Justice Ojwang wrote:

If, therefore the defendants/respondents had genuinely wished to pursue the cause of environmental protection . . . the logical and correct cause of action for them would have been to approach the Ministry of environment and plead for compulsory acquisition of the suit land . . . . [I]t is not acceptable that they should forcibly occupy the suit land and then plead public interest in environmental conservation, to keep out the registered owner.<sup>153</sup>

The Court further ordered the Minister for Environment to assess the status of the land and take appropriate action thereafter, in essence recognizing the fact that property rights can be regulated for environmental protection.<sup>154</sup>

The High Court of Uganda has also confirmed the government's right to regulate property rights for environmental protection in the case of *Sheer Property Limited v. National Environmental Management Authority*.<sup>155</sup> The case involved an application by Sheer Property Limited seeking to quash the refusal of the National Environmental Management Authority ("NEMA") to grant an Environmental Impact Assessment license for the respondent's proposed development on its land, a wetlands area near the shores of Lake Victoria.<sup>156</sup> In the May 29, 2009 judgment, Justice Mugamba reached the conclusion that NEMA had the right to regulate land use, the private property owner's rights notwithstanding.<sup>157</sup>

#### ENVIRONMENTAL IMPACT ASSESSMENTS

Environmental Impact Assessments ("EIAs") enable the examination, analysis, and assessment of proposed projects, policies, or programs for their environmental impact, thus integrating environmental issues into development planning and increasing the potential for environmentally sound and sustainable development. The EIA process, as argued by Hunter and others, "should ensure that before granting approval (1) the appropriate government authorities have fully identified and considered the environmental effects of proposed activities under their jurisdiction and control and (2) affected citizens have an opportunity to understand the proposed project or policy and to express their views to decision-makers."<sup>158</sup> The EIA is also a means for the democratization of decision-making on environmental issues and the allocation of natural resources—however, this hinges upon the nature and the extent of public participation in the process.

East African countries provide for EIAs in their framework environmental statutes. In Kenya, a change in philosophy came about before the framework law was enacted due to the clamor by civil society to enact the Physical Planning Act, 1996.<sup>159</sup> This Act sought, *inter alia*, to use planning as a specific method of preventing environmental degradation, and provides for the use of environmental impact assessments.<sup>160</sup> For EIA purposes, the Physical Planning Act obligates developers to seek and obtain plan information from the relevant local authorities.<sup>161</sup> Local authorities are further empowered to demolish buildings built without their permission. In the Kenyan case of *Momanyi v. Bosire*,<sup>162</sup> these planning requirements received judicial

recognition. In this case, Momanyi was a resident of Imara Daima Estate in Nairobi. Bosire obtained plan information to put up a kiosk at the entrance of the Estate. Rather than a kiosk, however, he constructed a resort for selling liquor and other related products. The plaintiff and others instituted a suit against Bosire and the Nairobi City Council. The court held that Bosire was in breach of the Physical Planning Act requirements relating to plan information. Similarly, the City Council was in breach of its statutory obligation for failing to demolish the building as it was built without plan information.<sup>163</sup> Accordingly, the resort was pulled down.<sup>164</sup>

Similarly, the High Court of Uganda in *National Association of Professional Environmentalists (NAPE) v. Nile Power Limited*<sup>165</sup> held that activities of economic benefit to the community must be lawfully authorized. In this case, the applicants sought an injunction to restrain the respondent company from concluding a power project agreement with the government of Uganda until the EIA on the project had been approved. Although the Court declined to grant the injunction sought, it declared that the Lead Agency and the National Environment Authority must approve the EIA study on the project.<sup>166</sup> It observed that the signing of the protested agreements was subject to the law and any contravention of the law would be challenged.<sup>167</sup>

### HARNESSING THE ROLE OF COURTS AS CHAMPIONS FOR SUSTAINABLE DEVELOPMENT

The environmental challenges facing East Africa and the rest of Africa are many and growing. Increasing poverty, land degradation, and the huge threats posed by climate change, against a background of corruption and other governance challenges,<sup>168</sup> require the concerted efforts of all actors. The judiciary, more than any other institution, is uniquely placed to help society implement appropriate strategies for confronting these challenges and to thus deliver on sustainable development because the judiciaries, by their nature, are expected to mediate between different interests in society and they are removed from the daily political pressures and interests that confront the executive and legislature in most African countries. In any case, the laws on environmental management require an arbiter who will ensure that they are adhered to and transgression dealt with. Courts in East Africa are slowly waking up to the reality that they have this critical role. They are starting to be assertive, innovative, and inspirational in their judgments. However, they are still faced with numerous obstacles requiring attention if they are to be fully effective as champions of sustainable development. Moving into the future requires increased capacity building, the development of robust jurisprudence, and a judiciary that realizes that its task is not just to react and adjudicate, but also to inform and provide leadership. Above all, judiciaries must help society to adhere to the rule of law and inculcate environmental ethos and values.

Klaus Toepfer, former United Nations Environment Programme (“UNEP”) Executive Director wrote in the preface to the book *Making Law Work, (Volumes I and II) - Environmental Compliance & Sustainable Development*<sup>169</sup> the following:

The future of the Earth may well turn on how quickly we can improve the legal framework for sustainable development . . . . Sustainable development cannot be achieved unless laws governing society, the economy, and our relationship with the Earth connect with our deepest values and are put into practice internationally and domestically. Law must be enforced and complied with by all of society, and all of society must share this obligation.<sup>170</sup>

The judiciary should be at the forefront in ensuring that East Africa realizes the goal of sustainable development. For, as Justice Ojwang<sup>7</sup> has written:

In the case of the *environment* . . . the state of the law may well be relatively obscure; yet a decision must be pronounced. From my understanding of the law, and from my own experience of judicial decision-making, where the question before the Court relates to the environment, and the legislature’s guidance is by no means comprehensive, the Court, once it ascertains the *facts*, must appreciate the relevant *principles* which ought to be reflected in the law . . . . So, whenever the Court has an opportunity to declare the law on an environmental question, the shape of that law should be *conservatory of the environment and the natural resources*; and the Court should apply this principle to determine, where possible, such rights or duties as may appear to be more immediately linked to economic, social, cultural, or political situations.<sup>171</sup>

The cases reviewed above demonstrate the great strides that courts in East Africa are making in promoting sustainable development in East Africa. The initial seeds have been sown, but more work still lies ahead to ensure that courts become true bastions of justice and champions for sustainable development.

Among the steps that need to be taken are enhanced training and capacity building for the judiciary. Environmental law is a fairly recent branch of law. It was only introduced in law schools after a good number of the judges currently working in East Africa had already graduated. Even after the subject was introduced, it was an elective rather than a required subject. Consequently, not many judges have academic knowledge and experience in environmental law. It is therefore critical that, as called for by the Global Judges’ Symposium on the Rule of Law and Sustainable Development,<sup>172</sup> capacity building programs on environmental law be mounted for members of the judiciary. In Uganda and Kenya, commendable efforts have been made both by UNEP under the Partnership for Development of Environmental Law in Africa program and by local civil society organizations<sup>173</sup> to organize colloquia for judges on environmental law. The efforts in Tanzania on this front are still minimal.<sup>174</sup> With the establishment of judicial training institutes in East Africa,<sup>175</sup> training on environmental law should be entering the mainstream and made continuous so as to ensure that judicial officers keep abreast of the latest developments in the field of environmental law and thus are better able to make sound decisions.

The three East African countries follow the doctrine of *stare decisis* and judicial precedent, where decisions of previous superior courts are binding on inferior tribunals. To be effective, this process requires a functioning legal reporting system. The status of law reporting in East Africa is, however, very weak. Kenya leads with commendable efforts by the National Council for Law Reporting.<sup>176</sup> It has produced a volume of land and environmental reports, containing landmark environmental judgments in Kenya from 1909 to 2006.<sup>177</sup> This program should be emulated in all three countries to provide easy reference and a dedicated law reporting process on environmental cases, and to help develop a sound body of environmental jurisprudence in East Africa.

There is also need to modernize courts generally to increase their effectiveness. The information superhighway has yet to reach the courts in East Africa. They are still traditional and largely archaic institutions. To reap the benefits of information technology, modernization of judiciaries by introduction of computers, stenographers to record court proceedings, and internet connection would greatly enhance the performance of these courts. The effectiveness of the judiciary will also depend to a large degree on its independence and freedom from political interference, especially by the executive branch, and its fidelity to the rule of the law.



## Endnotes: COURTS AS CHAMPIONS OF SUSTAINABLE DEVELOPMENT: LESSONS FROM EAST AFRICA

<sup>1</sup> J. B. OJWANG, CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE 158 (ACTS Press 1990).

<sup>2</sup> WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 44 (Oxford University Press 1987).

<sup>3</sup> D. Kaniaru, L. Kurukulasuriya, & C. Okidi, *UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*, in CONFERENCE PROCEEDINGS 22 (presented to the Fifth International Conference on Environmental Compliance and Enforcement in Monterey, California in Nov. 1998), available at <http://www.inece.org/5thvol1/lal.pdf>.

<sup>4</sup> The summit was held in Johannesburg, South Africa between August 26 and September 4, 2002, ten years after the ground-breaking conference on environment and development in Rio de Janeiro. For information on the summit, see World Summit on Sustainable Development . . . LIVE!, Home Page, <http://www.un.org/events/wssd/> (last visited Nov. 3, 2009).

<sup>5</sup> Johannesburg Principles on the Role of Law and Sustainable Development, reprinted in JOURNAL OF ENVIRONMENTAL LAW 15(1) at 107-110 (2003) [hereinafter Johannesburg Principles], available at <http://www.dfa.gov.za/docs/2002/wssd0828a.htm>.

<sup>6</sup> The symposium was held in Johannesburg, South Africa between August 18 and 20, 2002, just before the World Summit on Sustainable Development. For information on the symposium, see UN Environment Program, Global Judges Symposium on Sustainable Development and the Role of Law, [http://www.unep.org/law/Symposium/Judges\\_symposium.htm](http://www.unep.org/law/Symposium/Judges_symposium.htm) (last visited Nov. 3, 2009).

<sup>7</sup> Johannesburg Principles, *supra* note 5.

<sup>8</sup> *Id.* at preamble.

<sup>9</sup> *Id.* at principle 1.

<sup>10</sup> East Africa as a regional integration entity comprises five countries: Kenya, Uganda, Tanzania, Rwanda, and Burundi. However, this paper restricts itself to Kenya, Uganda, and Tanzania. Secondly, although Zanzibar is part of the United Republic of Tanzania, it has some of its own legal institutions, including a high court. This paper does not discuss Zanzibar where its procedures and laws differ from that of mainland Tanzania.

<sup>11</sup> Every three years, the UN Economic and Social Council reviews and classifies a list of Least Developed Countries (“LDCs”) based on three criteria: a low-income criterion; a human resource weakness criterion; and an economic vulnerability criterion. See UN Office for the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing Countries, The Criteria for the Identification of the LDCs, <http://www.un.org/special-rep/ohrlls/lde/lde%20criteria.htm> (last visited Oct. 23, 2009).

<sup>12</sup> Wabunoha, A., *Environmental Law of East Africa*, in ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW 485, 486–87 (East African Educational Publishers 2008); see also Dr. Tom Okurut, *Leading Environmental Problems of East Africa*, Paper Presented to the Judicial Colloquium on Environmental Law and Access to Justice in East Africa, Mombasa (Apr. 10–15, 2007).

<sup>13</sup> Okurut, *supra* note 12, at 17.

<sup>14</sup> See generally Wabunoha, *supra* note 12; Okurut, *supra* note 12.

<sup>15</sup> Wabunoha, *supra* note 12, at 487.

<sup>16</sup> *Id.* at 494 (defining the environmental law of East Africa to include laws that facilitate environmental protection or management within the community with either a regional scope, or laws that can be commonly applied or practiced in all the partner states).

<sup>17</sup> There are several pieces of legislation governing environmental management within the African region. The preeminent one, however still remains the African Convention on the Conservation of Nature and Natural Resources, available at <http://www.africa-union.org/root/AU/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf> (revised and adopted at Maputo in 2003).

<sup>18</sup> Treaty for the Establishment of the East African Community, Burundi-Kenya-Rwanda-Tanz.-Uganda, Nov. 30, 1999 [hereinafter EAC Treaty], available at <http://www.eac.int/about-eac.html> (select the “About EAC” tab; then select “Treaty Establishing the EAC” from the drop-down menu).

<sup>19</sup> The original East African Community was formed in 1967, but collapsed in 1977 following disagreements amongst the leadership of the three Partner States, Kenya, Uganda, and Tanzania. For an in-depth discussion, see Korwa G. Adar & Mutahi Ngunyi, *The Politics of Integration in East Africa Since Independence*, in POLITICS AND ADMINISTRATION IN EAST AFRICA (Walter O. Oyugi ed., 1992); see also KIBUA, T. & TOSTENSEN, A., FAST-TRACKING EAST AFRICAN INTEGRATION: ASSESSING THE FEASIBILITY OF A POLITICAL FEDERATION BY 2010 (CMI 2005).

<sup>20</sup> EAC Treaty, *supra* note 18, art. 5(1).

<sup>21</sup> *Id.* art. 5(3).

<sup>22</sup> *Id.* art. 111–16.

<sup>23</sup> Protocol for the Sustainable Development of Lake Victoria, Kenya-Tanz.-Uganda, Nov. 29, 2003, available at [http://www.fao.org/fishery/shared/faolex-trans.jsp?xp\\_ISIS\\_MFN=035651&xp\\_faolexLang=E&xp\\_lang=en](http://www.fao.org/fishery/shared/faolex-trans.jsp?xp_ISIS_MFN=035651&xp_faolexLang=E&xp_lang=en).

<sup>24</sup> Protocol on Environment and Natural Resources, Kenya-Tanz.-Uganda, Apr. 3, 2006, available at [http://www.eac.int/advisory-opinions/doc\\_download/5-east-african-community-protocol-on-environmental-and-natural-resources-management.html](http://www.eac.int/advisory-opinions/doc_download/5-east-african-community-protocol-on-environmental-and-natural-resources-management.html).

<sup>25</sup> See Environmental Management and Coordination Act, No. 8 (1999) pt. II § 5(b) (Kenya) [hereinafter EMCA], available at [http://www.reconcile-ea.org/wkelc/env\\_mgt\\_act.pdf](http://www.reconcile-ea.org/wkelc/env_mgt_act.pdf) (last visited Nov. 3, 2009).

<sup>26</sup> CONSTITUTION (1995) (Uganda), available at [http://www.ugandaonlinelawlibrary.com/files/constitution/constitution\\_1995.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf).

<sup>27</sup> CONSTITUTION (1997) (Tanz.), available at <http://www.issafrika.org/cdct/mainpages/pdf/Corruption/Legislation/Tanzania/Tanzania%20Constitution%20in%20English.pdf>.

**Endnotes:** Courts as Champions of Sustainable Development: Lessons from East Africa *continued on page 83*



# IS THE INTERNATIONAL COURT OF JUSTICE THE RIGHT FORUM FOR TRANSBOUNDARY WATER POLLUTION DISPUTES?

by Kate Halloran\*

Clean water is essential to human development and sustainability, yet fragmented management of transboundary waters puts this valuable resource at risk.<sup>1</sup> A recent controversy between the governments of Argentina and Uruguay over the construction of two pulp mills on the River Uruguay<sup>2</sup> illustrates the tension in sustainable development between promoting economic prosperity and protecting the environment.

On May 4, 2006, the Argentine government instituted proceedings with the International Court of Justice (“ICJ”) against the government of Uruguay for allegedly violating a 1975 treaty that imposes obligations on the two nations to curb pollution in the river that forms their border.<sup>3</sup> Argentina contends the discharge of chemicals from the pulp mills will adversely affect the river and communities settled along the river’s banks,<sup>4</sup> an assertion which Uruguay denies.<sup>5</sup> Argentine citizens protested by blockading a bridge over the river, effectively disrupting tourist and commercial activity in Uruguay,<sup>6</sup> which Uruguay insists has resulted in serious economic damage.<sup>7</sup>

The ICJ is currently deliberating *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,<sup>8</sup> but its actions thus far invite doubts about the ICJ’s efficacy in adjudicating transboundary water pollution disputes. One concern is the reluctance of the ICJ to utilize provisional measures, a form of injunctive relief. The ICJ denied requests from Argentina and Uruguay to suspend construction of the pulp mills and end blockading of the bridge, respectively.<sup>9</sup> Between 1946 and 1994, the ICJ employed provisional measures in approximately half of the cases where one or more parties requested such intervention.<sup>10</sup> *Pulp Mills on the River Uruguay* is the first case since 2003 to even request provisional measures.<sup>11</sup> The record indicates that the ICJ resists wielding this powerful tool unless the requesting party can prove imminent and irreparable harm to their interests, opting instead to appeal to the good faith of the parties not to cause injury until the case has been formally decided.<sup>12</sup> Thus, even though the ICJ could have issued provisional measures within six months of Argentina filing its complaint, both Argentina’s environmental interest and Uruguay’s economic interest in the River Uruguay have gone unchecked for over three years.

Further, even if the ICJ exhibited willingness to issue provisional measures, its capacity to enforce such measures is uncertain. While Article 94 of the United Nations Charter allows recourse to the Security Council when a party ignores a final judgment of the ICJ, no such similar proceedings exist for provisional measures.<sup>13</sup> A party could decline to abide by provisional measures asserted against it without penalty.

The extensive transboundary water dispute history between the United States and Canada provides an example of an alternative to the ICJ. The Boundary Waters Treaty of 1909<sup>14</sup> established the International Joint Commission (“Commission”) to prevent disputes regarding the use of boundary waters.<sup>15</sup> The Commission is independent in nature and comprised of officials and permanent employees from both countries.<sup>16</sup> Its responsibilities include: “(1) quasi-judicial determinations; (2) investigative and advisory assignments; and (3) arbitrations.”<sup>17</sup> The Commission first encountered transboundary water pollution concerns in 1912, when it was asked to recommend a plan for preventing and remedying pollution in shared U.S.-Canadian waters.<sup>18</sup> The Commission also played a central role in a contentious dispute between the United States and Canada over transboundary air pollution that spawned the famous Trail Smelter arbitration in 1941.<sup>19</sup> More recently, in 1990, it adopted a policy of zero discharge and virtual elimination of toxic substances.<sup>20</sup>

The longevity and effectiveness of the Commission are the result of a firm commitment to pollution abatement and an inclusive approach to addressing transboundary water pollution disputes, which encourages public participation and consensus-driven initiatives.<sup>21</sup> A transboundary water pollution dispute cannot be settled without the participation of officials from both countries.<sup>22</sup> Moreover, projects that may affect U.S.-Canada boundary water require approval of the Commission, which is tasked with balancing divergent interests fairly.<sup>23</sup>

The Commission, of course, is not flawless. However, if the 1975 River Uruguay treaty included a similar entity to address transboundary water pollution disputes, the *Pulp Mills on the River Uruguay* case may never have progressed to the ICJ. The Commission benefits from a strong framework, dedication of the governments directly affected by transboundary water pollution disputes, and a system of regulation that is flexible yet efficient.<sup>24</sup> Where the ICJ attempts enforcement of practically unenforceable international law, the Commission encourages transparency and compliance. Regardless of the outcome of *Pulp Mills on the River Uruguay*, the international community must develop other methods of resolving transboundary water pollution disputes before economic development and water quality suffer irrevocably.

**Endnotes:** Is the International Court of Justice the Right Forum for Transboundary Water Pollution Disputes? *continued on page 85*

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# THE INTERNATIONAL COURT OF JUSTICE'S TREATMENT OF "SUSTAINABLE DEVELOPMENT" AND IMPLICATIONS FOR ARGENTINA V. URUGUAY

by Lauren Trevisan\*

The International Court of Justice ("ICJ") gave the concept of "sustainable development" its first thorough airing in 1997 in its decision concerning the Gabcikovo-Nagymaros Project.<sup>1</sup> In this decision and all others to date, however, the ICJ has stopped short of treating sustainable development as a core adjudicatory norm.<sup>2</sup> The pending *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*<sup>3</sup> case provides the court an opportunity to refine and further develop its treatment of the concept of sustainable development.

Though the ICJ included the concept of sustainable development in an Advisory Opinion in 1996,<sup>4</sup> the Gabcikovo-Nagymaros case was the ICJ's first use of sustainable development in its jurisprudence. At dispute in the case was the development of a system of locks on the Danube River pursuant to a 1977 treaty between Hungary and Czechoslovakia.<sup>5</sup> The purposes of the project, which began in 1978,<sup>6</sup> were to produce hydroelectricity, improve navigation, and protect against flooding.<sup>7</sup> In 1989 Hungary decided to abandon the project, largely due to intense criticism from Hungarian scientists and environmentalists centering on threats to groundwater and wetlands.<sup>8</sup> In response, Slovakia attempted to continue the project by unilaterally diverting the river to serve a power station on its territory.<sup>9</sup>

The parties took their dispute to the ICJ and requested that the court consider their rights and obligations under the 1977 treaty.<sup>10</sup> In making its determination, the ICJ looked beyond the parties' treaty relationship and referred to other relevant conventions to which the States were a party, as well as to rules of customary international law.<sup>11</sup> It also considered sustainable development as a concept central to the resolution of the dispute:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind . . . new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects

on the environment of the operation of the [Slovakian] power plant.<sup>12</sup>

While in this case the ICJ recommended use of the concept of sustainable development in sovereign decision-making,<sup>13</sup> it "stopped short of declaring or referring to sustainable development as a norm of customary international law."<sup>14</sup>

Currently pending is another case that will call on the panel to consider issues of sustainable development, specifically giving the court the opportunity to resolve the questions of international environmental law and the legal implications of sustainable development that it left open in the Gabcikovo-Nagymaros decision.<sup>15</sup> On October 2, 2009 the Court heard final oral arguments in *Pulp Mills on the River Uruguay*.<sup>16</sup> In 2003 and 2005 Uruguay authorized two pulp mills to be built on its portion of the River Uruguay, which constitutes the border between Uruguay and Argentina.<sup>17</sup> Argentina alleged that the mills threatened the health of the river and local residents and were in violation of the Statute of the River Uruguay, a 1975 agreement between the two nations to govern the river's management.

Argentina claimed that the Statute of the River Uruguay incorporated international environmental standards, and that its right to protect the environment of the river is derived from both the letter of the statute and the "principles and rules of international law."<sup>18</sup> Uruguay contends that its duty is not to prevent all pollution, but rather to follow appropriate rules and measures to prevent it in the context of development.<sup>19</sup> Uruguay claims it is subject to an "obligation of conduct, not an obligation of result" which is "consistent with the principles of general international law."<sup>20</sup>

Both parties in this case frame their rights and obligations to protect the environment of the River Uruguay as complying with "general international law." This case, therefore, is an opportunity for the ICJ to delineate what it considers international environmental standards to be.<sup>21</sup> In its Gabcikovo-Nagymaros decision, the ICJ "missed the opportunity to give further definition to the concept of sustainable development."<sup>22</sup> Over ten years later, in a world where sustainable development is arguably an even greater concern, the court should take this opportunity to set a basis for the enforceability of international environmental norms,<sup>23</sup> including sustainable development.

**Endnotes:** The International Court of Justice's . . . Implications for Argentina v. Uruguay *continued on page 85*

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# TOWARDS A JURISPRUDENCE OF SUSTAINABLE DEVELOPMENT IN SOUTH ASIA:

## LITIGATION IN THE PUBLIC INTEREST

by *Shyami Fernando Puvimanasinghe\**

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*This paper presents an updated version of part of a chapter in “Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development,” published by Koninklijke Brill NV, Leiden, The Netherlands, in 2007, which in turn consisted of an adapted version of the author’s PhD thesis.*

### INTRODUCTION

South Asia, according to the grouping of the South Asian Association for Regional Cooperation, consists of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Although Southern Asia is by and large one of the economically poorest regions of the world, it is rich in non-economic terms—ecological, historical, cultural, ethical, philosophical, and spiritual. The Indian sub-continent is home to a value system involving the spiritual, ethical, individual, and collective dimensions of human life, which are all interconnected and require mutual accommodation, as all phenomena in nature are united in a physical and metaphysical relationship. Religious traditions and philosophical thought in Southern Asia find close links with justice, equity, and sustainable development; non-violence and compassion for all; reconciliation, harmony, equilibrium and the middle path; equitable distribution of resources and moderation in consumption. Throughout the colonial and post-colonial history of most of the countries in the region, however, the traditional wisdom of holistic approaches to development have been gradually replaced by globally dominant models of economic development and today the problems of development versus the environment and human rights, poverty, pollution and overpopulation: indiscriminate liberalization and urbanization are commonplace.

In a variety of issues ranging from a massive leakage of methyl-isocyanate gas to phosphate mining, and from the noise of a thermal power plant generator to Genetically Modified Organisms, public interest litigation<sup>1</sup> (“PIL”) has evolved as a popular tool in the South Asian region<sup>2</sup> since the mid-1980s. It has taken diverse forms, like representative standing, where a concerned person or organization comes forward to espouse the cause of poor or otherwise underprivileged persons; and citizen standing, which enables any person to bring a suit as a matter of public interest, as a concerned member of the citizenry. Given the various and numerous classifications that divide the social fabric in this region, it is fair that poor, illiterate, legally-illiterate, minority, low caste, and other disadvantaged and underprivileged persons gain access to justice through distortions of traditional doctrines of standing. The test for *locus standi* in

these cases has, within limits, been liberalized from the need to be an aggrieved person, to simply being a person with a genuine and sufficient concern. In addition, class actions allow one suit in the case of multiple plaintiffs and/or defendants, and have been useful in this area.

Before the Bhopal disaster, PIL emerged as a tool in cases of social injustice, for instance bonded and child labor, and issues of public accountability, like illegal payments to public officials. In relation to challenges to development projects, Indian courts had consistently been slow to interfere with projects beneficial to development.<sup>3</sup> In the case of the Sardar Sarovar Dam Project, PIL was invoked by the Narmada Bachao Andolan, challenging the failure to ensure rehabilitation for millions of persons displaced by the construction of over 300 dams across the Narmada river. Protracted litigation ended years later in 2000.<sup>4</sup> The main catalyst for the evolution of PIL was the Bhopal disaster. In its immediate aftermath, the victims of this catastrophic industrial accident first brought action against Union Carbide in India. The Indian government then passed legislation, assumed the role of *parens patriae*, and filed suit against the parent company in the US, on behalf of the victims. This course of action was largely due to lack of legislation, enforcement capacity, and legal resources in India at that time. The ensuing case of *In re Union Carbide Corp. Gas Plant Disaster*<sup>5</sup> concerned liability and compensation for thousands of deaths and personal injuries. However, the case was sent back to India on the basis of *forum non conveniens*. Finally, it was settled out of court, and the settlement was given judicial assent in the Supreme Court of India.<sup>6</sup> Thus the issue of liability was never adjudicated by a court of law. Under the settlement, Union Carbide was to pay \$470 million, generally thought to be inadequate.<sup>7</sup> Poor implementation means that victims of Bhopal lacked redress for decades, as highlighted on the 20th anniversary of the disaster, on December 3, 2004.<sup>8</sup>

The realization of the total incapacity of the host state legal system to deal with such a disaster led to the passage of environment-related laws and litigation in India in the years immediately following the Bhopal accident. Most states in the region have since invoked legislative, constitutional, and judicial mechanisms to further environmental protection and sustainable

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development, and their experience can be informative for other developing countries.<sup>9</sup> Legislation for environmental protection has now been passed in most countries in South Asia.<sup>10</sup> This includes provisions requiring environmental impact assessments for development projects, statutory environmental pollution control by administrative agencies,<sup>11</sup> and environmental standards for discharge of emissions and effluents.<sup>12</sup>

Several constitutions in the region recognize an obligation of the state as well as citizens, to protect the environment.<sup>13</sup> In addition, the right to life (and liberty) is enshrined in some constitutions<sup>14</sup> and has been interpreted

by the judiciary to include the right to a clean and healthy environment.<sup>15</sup> In the Indian case of *Subash Kumar v. State of Bihar*, the petitioner filed a public interest litigation pleading infringement of the right to life arising from the pollution of the Bokaro River by the sludge discharged from the Tata Iron and Steel Company, alleged to have made the water unfit for drinking or irrigation. The court recognized that the right to life includes the right to enjoyment of pollution-free water and air. It stated that if anything endangers or impairs the quality of life, an affected person or a genuinely interested person can bring a public interest suit, which envisages legal proceedings for vindication or enforcement of fun-

damental rights of a group or community unable to enforce its rights on account of incapacity, poverty, or ignorance of law.<sup>16</sup>

In Pakistan, an adequate standard of living has been interpreted to include an environment adequate for the health and well-being of the people.<sup>17</sup> In the case of *Shehla Zia and Others v. WAPDA*,<sup>18</sup> the right to life was upheld and interpreted to include a healthy environment. The petitioners, who were residents in the vicinity of a grid station being constructed by the respondents, alleged that the electromagnetic field created by high voltage transmission lines would pose a serious health hazard. It was held that the word “life” cannot be restricted to the vegetative or animal life or mere existence between conception and death. Life should be interpreted widely, to enable a person not only to sustain life, but also to enjoy it. Where life of citizens is degraded, the quality of life is adversely affected, and health hazards are created affecting a large number of people, the court may order the stoppage of activities that create pollution and environmental degradation. Since the scientific evidence was inconclusive in this case, the court applied the precautionary principle. Noting that energy is essential for life, commerce, and industry, the court held that a balance in the form of a policy of sustainable development was necessary,

appointing a Commissioner to examine and study the scheme and report back to it.

A body of jurisprudence on sustainable development and its domestic implementation has evolved in India.<sup>19</sup> Most other countries in the region have followed in the same direction. Their various efforts viewed collectively point to the evolution of a body of regional, or comparative, jurisprudence on issues of development and environment with an overt human rights dimension, largely through the agency of citizen involvement, legal representation in the public interest, and judicial

innovation. The contribution of the judiciary—especially the higher judiciary—is striking, especially in the light of the lesser commitment to sustainability on the part of most third world politicians. The case law should in principle be applicable to both global and local business, provided that transnational corporations can also be subject to domestic law in host states. Most of the cases concern local industries, but some also deal with transnational business. Whatever the factual context may be, the legal issues are the same, and the legal principles have been applied to the balancing of conflicting interests of environment, development, and human rights. The case law is

therefore of basic relevance to this study and to foreign investment activities.

#### JUDICIAL INTERVENTION IN SUSTAINABLE DEVELOPMENT IN THE REGIONAL TERRAIN

Heightened sensitivity and concerted action in the judiciary, legal profession, and civil society have helped to create an expanded notion of access to justice<sup>20</sup> and to foster the phenomenon of PIL.<sup>21</sup> Related developments include a degree of shift from adversarial to inquisitorial judicial methods<sup>22</sup> suited to environmental issues, a broad and purposive approach to statutory interpretation,<sup>23</sup> and a measure of flexibility in procedure adopted and redress granted.<sup>24</sup> *The Dhera Dun case*<sup>25</sup> involved a public interest petition addressed to the Supreme Court of India by the Rural Litigation and Entitlement Kendra. The court directed that all fresh quarrying in the Himalayan region of the Dhera Dun district be stopped and ultimately ordered the closure of several mines. The lessees of the mines submitted a scheme for limestone quarrying, which was rejected. On appeal, the court emphasized that the environmental disturbance caused by limestone mining had to be balanced against the need for limestone in industry. After careful consideration and study of the

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*Heightened sensitivity and concerted action in the judiciary, legal profession, and civil society have helped to create an expanded notion of access to justice and to foster the phenomenon of [Public Interest Litigation]*

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issues, mostly on its own initiative, the court upheld the closure of the quarries. In view of the unemployment that would ensue, the court ordered employment of the workers in the reforestation and soil conservation program in the area. This type of strong and proactive judicial action is evident in a variety of other PIL cases. *Aruna Rodrigues v. Union of India*, for example, is an ongoing litigation over Genetically Modified Organisms in which the Supreme Court has placed tight restrictions on GMO crop testing, like prescribing safe distances for test crops from other farms and requiring testing to confirm that no crop contamination has occurred.<sup>26</sup>

Judicial intervention has served to scrutinize governmental and private sector activities and abate administrative apathy.<sup>27</sup> Significant measures include the creative usage of Directive Principles of State Policy,<sup>28</sup> judicial recognition of a right to a healthy environment,<sup>29</sup> and the interpretation of an adequate standard of living to include an adequate quality of life and environment. In cases like *Juan Antonio Oposa v. The Honourable Fulgencio S. Factoran* in the Philippines, which recognized intergenerational equity and the right to a balanced and healthful ecology,<sup>30</sup> human rights provisions have been used for environmental protection.<sup>31</sup> Judicial measures have also liberalized *locus standi* to include any person genuinely concerned for the environment,<sup>32</sup> placed a public trust obligation on states over natural resources,<sup>33</sup> imposed absolute liability for accidents arising from ultra-hazardous activities,<sup>34</sup> applied the polluter-pays and precautionary principles,<sup>35</sup> and promoted sustainable development and good governance.<sup>36</sup>

The Indian case of *Municipal Council Ratlam v. Vardichand*<sup>37</sup> extended the frontiers of public nuisance through innovative interpretation in light of India's constitutional embodiment of social justice and human rights. The facts arose from what the Supreme Court described as a "Third World Humanscape," where overpopulation, large-scale pollution, ill-planned urbanization, abject poverty, and dire need of basic amenities combined with official inaction and apathy to create a miserable predicament for slum and shanty dwellers in a particular ward in Ratlam, Madhya Pradesh. Justice Krishna Iyer confirmed the finding of public nuisance by the lower courts.<sup>38</sup> Fortifying judicial powers to enforce laws, the judge stated that the nature of the judicial process is not merely adjudicatory nor is it that of an umpire only. Affirmative action to make the remedy effective is the essence of the right, which otherwise becomes sterile. Justice Iyer also referred to the need for the judiciary to be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by the Indian

Constitution. This case adopts a holistic approach in terms of its orders for local development and provision of basic needs.

Several recent cases of public interest litigation in South Asia further elucidate the concept of sustainable development and move its implementation forward. The superior courts of India were the catalysts for judicial activism and innovation in the region and public interest litigation is now also commonplace in the lower courts. Cases include *Akhil v. Secretary A.P. Pollution Control Board W.P.*;<sup>39</sup> *A.P. Pollution Control Board v. Appellate Authority Under Water Act W.P.*;<sup>40</sup> *A.P. Gunnies Merchants Association v. Government of Andhra Pradesh*;<sup>41</sup> *Research Foundation for Science v. Union of India*;<sup>42</sup> *Chinnappa v. Union of India*<sup>43</sup> and *Beena Sarasan v. Kerala Zone Management Authority et al.*<sup>44</sup> In *Research Foundation for Science and Technology and Natural Resources Policy v. Union of India et al.*,<sup>45</sup> a public interest suit led to the appointment by the Supreme Court of a Committee to inquire into the issue of hazardous wastes.

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*PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka*

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In Pakistan, recent cases include *Bokhari v. Federation of Pakistan*<sup>46</sup> and *Irfan v. Lahore Development Authority* ("Lahore Air Pollution Case").<sup>47</sup> The first case concerned the grounding and collapse of a ship in the port of Karachi in 2003, leading to a major oil-spill, which caused far-reaching environmental damage. The ability of the legal system to respond was, in this case before the Supreme Court, found to be totally lacking due to many reasons including lack of preparedness and failure to ratify relevant international conventions. This case was held to be suitable for public interest litigation. The Court went on to discuss public interest litigation as it had evolved in India and Pakistan, where it was said to be particularly useful because of the realities of poverty, illiteracy, and institutional fragility. It was found that in Pakistan, PIL had been used in a very wide range of social issues, from environmental pollution to the prevention of exploitation of children. The Lahore Air Pollution Case concerned air and noise pollution from rickshaws, mini buses, and other vehicles and the non-performance of statutory duties by the relevant authorities, charged with ensuring a pollution free environment for the citizens. The court cited several Indian judgments, including *Ratlam Municipality v. Vardichand*, where Justice Krishna Iyer had touched on the need to be practical and practicable and order only what can be performed.

In Nepal, *Suray Prasad Sharma Dhungel v. Godavari Marble Industries et al.*<sup>48</sup> was a landmark case, decided by a full bench of the Supreme Court. The Court held that a clean and healthy environment is part of the right to life under the Constitution. It upheld the *locus standi* of NGOs or individuals

working for environmental protection, and directed that relevant laws necessary for the protection of the environment be enacted. In *Sharma et al. v. Nepal Drinking Water Corporation et al.*,<sup>49</sup> the Supreme Court emphasized the significance of pure drinking water to public health and, without explicitly saying that it is a basic right, expressed that its provision was a responsibility of a welfare state. The Court took account of several aspects of the Nepali Constitution, including the main objectives of the state, and the spirit of the Constitution. Without issuing a writ of *mandamus* to guarantee the right to pure drinking water, as requested by the petitioner public interest lawyer, it alerted the Ministry of Housing and Physical Development to hold the Drinking Water Corporation accountable in complying with its legal obligations under its governing statute. In *Sharma et al. v. His Majesty's Government Cabinet Secretariat et al.*,<sup>50</sup> the Nepali Supreme Court was petitioned to “quash a government decision allowing unfettered import of diesel taxis and leaded petrol from India.” It held that a healthy environment is a prerequisite to the protection of the right to personal freedom under the Constitution and that the state has a primary obligation to protect the right to personal liberty under Article 12 (1) by reducing environmental pollution as much as possible. Based on the concept of sustainable development, the court stated that the environment cannot be ignored for development. The court issued a directive to enforce essential measures within a maximum of two years in order to reduce vehicular pollution in the Kathmandu Valley, well known for its historical, cultural, and archaeological significance.

In Bangladesh, the case of *Bangladesh Environmental Lawyers Association v. Secretary, Ministry of Environment and Forests*,<sup>51</sup> concerned the neglect, misuse, and lack of coordination by governmental authorities in relation to Sonadia Island, a precious forest area and rich ecosystem. Authorities were instead alleged to be preparing the land for industrial purposes destructive of the environment, like shrimp cultivation, thereby destroying the habitat for fauna and flora, and weakening natural disaster prevention benefits. More recently, in *Bangladesh Environmental Lawyers Association v. Bangladesh et al.*, the Supreme Court ordered the closing of ship breaking yards that were operating without necessary environmental clearance and a variety of actions to be taken by the government to prevent future environmental harm, including establishing a committee to ensure that regulations are created and followed.<sup>52</sup>

#### **PUBLIC INTEREST LITIGATION AND SUSTAINABLE DEVELOPMENT LANDSCAPE IN SRI LANKA**

Sri Lanka's modern domestic jurisprudence is linked closely to relevant international law. The dynamic currents of sustainable development law—especially in the context of human rights, public interest litigation, and the environment—in the domestic courts of the South Asian region have influenced the ebb and flow of the waters of the island's jurisprudence, making fundamental changes in its course. The fabric of the domestic law, therefore, acquires new motifs and designs, creating an interesting mosaic. For a just, equitable, and sustainable

development in Sri Lanka it is necessary to identify where environmental degradation and resource depletion make it difficult to meet basic needs, and to modify human activities to both eliminate undesirable side-effects and satisfy these needs.<sup>53</sup>

Sri Lanka's 1978 Constitution has some provisions on the environment in its chapter on Directive Principles of State Policy and Fundamental Duties. Article 27(2) says that the state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include (e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to sub-serve the common good. Article 27(14) asserts that the state shall protect, preserve and improve the environment for the benefit of the community. According to Article 28(f), it is the duty of every person to protect nature and conserve its riches. Although Article 29 states that the Directive Principles of State Policy and Fundamental Duties are not justiciable,<sup>54</sup> the Sri Lankan Courts have given recognition to these principles, which they have read in the light of principles of international law. In a dualist country such as Sri Lanka, they have been an invaluable aid to the incorporation of international law, and have facilitated the infiltration of international public and community values into the domestic legal system. The Sri Lankan Constitution does not provide for the right to life, and its chapter on fundamental rights deals mainly with civil and political rights, with limited protection of social, economic and cultural rights. Given these limitations, broad interpretations of the Directive Principles by the judiciary can truly advance social justice. As pointed out by Savithri Goonesekere:

The jurisprudence being developed in the Indian Supreme Court is important for Sri Lanka and South Asia, since it provides insights into the manner in which policy perspectives recognized in international standards can be integrated into domestic law. This process is important because international treaties in India and Sri Lanka as well as some other countries do not become locally enforceable as law unless they are integrated into local law by courts and legislatures.<sup>55</sup>

Many public nuisance cases constitute the relevant jurisprudence in the pre-environmental era. The first such major case in Sri Lanka after the enactment of the National Environmental Act (“NEA”) was *Keangnam Enterprises Ltd. v. Abeysinghe*.<sup>56</sup> It arose from a complaint by the inhabitants of a village in the North-Western province to the Magistrate's Court (“MC”) of Kurunegala regarding public nuisance from blasting and metal quarrying operations. The metal was used to develop a major road. Excessive noise and vibration from blasting day and night had led to severe damage to person and property, including insomnia, fear psychosis, loss of hearing and bursting of ear-drums, the drying up of wells, failure of crops, and structural damage to property. The Magistrate granted an injunction restraining the operation of the quarry and a conditional order to remove the nuisance, upon which the company applied for revision to the Court of Appeal (“CA”) under Article 138 of the Constitution. The Keangnam company had obtained some licenses, such as a site clearance, but not an Environmental

Protection Licence (“EPL”) as required by the NEA. The CA insisted on this requirement, which the company had applied for but not yet obtained. The Court also did not accept the argument that the possession of an EPL would oust Magisterial jurisdiction for public nuisance, since the company did not have a license.<sup>57</sup> In a subsequent case, the MC stated that the blasting of rocks and operation of a metal crusher amounted to a public nuisance, even though the company had an EPL, since the terms of the EPL were being violated, causing severe damage, including physical injury to persons, damage to over 100 houses, and metal dust pollution.<sup>58</sup> The quarry was required to comply with the standards set by the Central Environmental Authority (“CEA”) in the EPL. A conditional order for the removal of a public nuisance was also granted in a case of pollution from untreated chemical effluents discharged into public waterways by a textile dyeing plant causing skin rashes; a lime kiln around which there was an increased incidence of cancer and tuberculosis; a factory producing rubber gloves and boots which caused groundwater pollution from toxic chemicals and wastes leading to respiratory problems; and a factory producing sulphuric acid.<sup>59</sup> In *Hettiarachchige Premasiri et al. v. Dehiwala – Mount Lavinia Municipal Council*,<sup>60</sup> public nuisance provisions were used for the removal of a nuisance, in this case garbage, causing a major threat to public health as well as danger to a bird sanctuary in the vicinity. Since the nuisance was not removed by the Municipal Council in spite of having been given ample time, the interim order was made absolute.

In all these cases, the environmental factor weighed heavily with the courts. While this is indeed a welcome position, it is submitted that sustainable development rather than environmental protection *per se* should be the guide to both legislation and case law in the developing country context. Public nuisance being a criminal law remedy does not allow much leeway for the balancing of conflicting interests, unlike its civil law counterpart, private nuisance. The facts of the above cases are such that the decisions appear to be just and equitable. However, this may not always be the case, and it is important that environmental protection does not become a counterproductive issue. Nuisance remedies are *ex post facto*, and in this sense, Environmental Impact Assessments (“EIAs”) provide a better source of protection, as they are prospective and can adopt a preventive approach.

PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka.<sup>61</sup> These cases usually involve executive or administrative action and, frequently, business activities. When major administrative decisions concern the natural resources of the country and other important issues of public interest, there is little room for the community at large to question these decisions, to be informed about their implications, and to ensure accountable and good governance.<sup>62</sup> Decisions are sometimes made behind closed doors and a culture of disclosure is not common in public affairs.<sup>63</sup> In this context, PIL serves as a legal tool to raise issues of social accountability in decision-making by the government and industry.

In Sri Lanka, most environmental cases have been based on remedies in administrative law, fundamental rights, public nuisance, and the public trust doctrine. The question of *locus standi* usually arises in writ applications, which are particularly useful in invalidating unlawful action by governmental bodies and compelling them to carry out their statutory duties, respectively.<sup>64</sup> The first Sri Lankan case in the nature of PIL in the environment/development context was *Environmental Foundation Ltd. v. The Land Commissioner et al.* (“The Kandalama case”),<sup>65</sup> which concerned the granting of a lease of state land to a private company for the purpose of building a tourist hotel. The hotel was to be built in close proximity to an ancient tank and sacred Buddhist temple, upsetting the local environment, both natural and cultural. In spite of the public interest suit questioning the irregularity of the lease, and in contravention of the relevant statutory provisions, the project did go through. The positive effect of the case was that the authorities were ordered by the court to follow the correct procedure and were compelled to do so by providing notice in the newspaper. This case was the first in Sri Lanka to uphold the standing of an NGO dedicated to the cause of environmental protection. It had important implications with respect to access to justice, the role of the judiciary, access to information, public participation in decision-making, and compliance with and implementation of the law. The Environmental Foundation (“EFL”) has since 1981 filed action in environmental matters without its *locus standi* being challenged.

*Environmental Foundation Limited et al. v. The Attorney General* (“The Nawimana case”)<sup>66</sup> was a class action brought by residents of two villages in the south of Sri Lanka and involved a fundamental rights petition over serious damage to health and property caused by quarry-blasting operations. The petitioners alleged the violation of several Constitutional provisions, namely, that sovereignty is in the people and is inalienable and includes fundamental rights; that no person shall be subjected to torture or to cruel, inhuman, or degrading treatment; the freedom to engage in any lawful occupation; freedom of movement and of choosing a residence;<sup>67</sup> as well as the Directive Principles of state policy.<sup>68</sup> The case was settled through mediation of the CEA, and the petitioners obtained relief. The court recognized the possibility of invoking fundamental rights provisions in environment-related cases, and the connection between environment, development, and human rights. It also accepted, by a majority decision, the possibility of public interest litigation, since the first petitioner was an environmental NGO.

In *Environmental Foundation Ltd. v. Ratnasiri Wickrem-anayake, Minister of Public Administration et al.*,<sup>69</sup> there was an unequivocal recognition of the possibility of bringing public interest litigation in suitable cases. Until this judgment, cases in the nature of public interest suits had been heard, but with no pronouncements on their acceptability as a matter of principle. The judgment is therefore significant because it disposes of the issue as to whether public interest litigation is admissible in the Sri Lankan legal system. In this *certiorari* application, Justice Ranaraja expressly extended *locus standi* to a person who shows a genuine interest in the subject matter, who comes before the

court as a public-spirited person, concerned to see that the law is obeyed in the interest of all. Unless any citizen has standing, therefore, there is no means of keeping public authorities within the law except where the Attorney General will act, and frequently he will not.<sup>70</sup> In *Deshan Harinda (a minor) et al. v. Ceylon Electricity Board et al.* (“The Kotte Kids case”),<sup>71</sup> a group of minor children filed a fundamental rights application alleging that the noise from a thermal power plant generator exceeded national noise standards and would cause hearing loss and other injuries. Standing was granted for the case to proceed on the basis of a violation of the right to life. Although the Sri Lankan Constitution does not expressly provide for the right to life, it was argued that all other rights would be meaningless and futile without its existence, at least impliedly. The case was settled, as the petitioners agreed to accept an *ex gratia* payment without prejudice to their civil rights, so there is no adjudicatory decision.

In *Gunarathne v. Homagama Pradeshiya Sabha et al.*,<sup>72</sup> in what was the first express reference to sustainable development by the Supreme Court, it was noted that: “Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved.” Here, the court refers expressly to the prime elements of good governance, intrinsic to the concept of sustainable development. The court stated that the CEA and

local authorities must notify the neighborhood and hear objections, as well as inform the industrialists and hear their views in deciding whether to issue an EPL. The Court imported this requirement in the licensing process even though the law was silent on the matter. The Court also required that agencies give reasons for their decisions and must inform the parties of such reasons, thus introducing facets of natural justice. In *Lalanath de Silva v. The Minister of Forestry and Environment* (“The Air Pollution case”),<sup>73</sup> the petitioner averred that the Minister’s failure to enact ambient air quality standards resulted in a violation of his right to life. The Supreme Court ordered the enactment of regulations to control air pollution from vehicle emissions in the city of Colombo. Regulations were enacted pursuant to this decision, which had the effect of ensuring steps for implementation of the law and compliance with it.<sup>74</sup> Leave to proceed with this case was granted on the basis of a violation of the right to life, however, the case was decided through an order for making regulations without dealing with the issue of the right to life. This case is significant for the role of civil society with regard to

laws and their implementation because the petitioner, although himself a lawyer, appeared in his capacity as a member of the citizenry.

The case of *Tikiri Banda Bulankulama v. Secretary, Ministry of Industrial Development*<sup>75</sup> is a significant example of how consensus reached in New York, Geneva, or The Hague can touch the lives, livelihoods, and environments of people in a remote village on a distant island. This case concerned a joint venture agreement between the Sri Lankan government and the local subsidiary of a transnational corporation for the mining of phosphate in the North-Central Province. The terms of

the mineral investment agreement were highly beneficial to the company and showed little concern for human rights and the environment; indigenous culture, history, religion and value systems; and the requisites of sustainable development as a whole. It was the subject of a public interest suit by the local villagers (including rice and dairy farmers, owners of coconut land, and the incumbent of a Buddhist temple) in the Supreme Court.

The proposed project was to lead to the displacement of over 2,600 families, consisting of around 12,000 persons. The Supreme Court found that at previous rates of extraction, there would be enough deposits for perhaps 1,000 years, but that the proposed agreement would lead to complete exhaustion

of phosphate in around 30 years. According to Justice A.R.B. Amerasinghe, fairness to all, including the people of Sri Lanka, was the basic yardstick in doing justice. The Court held that there was an imminent infringement of the fundamental rights of the petitioners, all local residents.<sup>76</sup> The particular rights were those of equality and equal protection of the law under Article 12(1); freedom to engage in any lawful occupation, trade, business, or enterprise under Article 14(1)(g); and freedom of movement and of choosing a residence within Sri Lanka under Article 14(1)(h). The judge, after referring to the concepts of sustainable development,<sup>77</sup> intergenerational equity,<sup>78</sup> and human development, as well as analyzing the agreement with reference to several principles of international environmental law, including Principles 14 and 21 of the Stockholm Declaration and Principles 1, 2, and 4 of the Rio Declaration, stated as follows:

In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio Declarations are not legally binding in the way in

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*In the South Asian region as a whole, public interest litigation has been useful in injecting an informed, participatory, and transparent approach to the processes of development, and to governmental and private sector actions involving public resources*

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which an Act of our Parliament would be. It may be regarded merely as “soft law.” Nevertheless, as a member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.<sup>79</sup>

This pronouncement could have significant ramifications for a dualist country like Sri Lanka, where international law norms need to be embodied in enabling legislation to be binding on courts. This judgment extends the incorporation process to the intermediary of the Superior Courts.<sup>80</sup> Deepika Udagama comments that it is doubtful that a petition could be grounded directly on international law and that while international human rights standards have been increasingly used as interpretive aids, international law will probably still have to be pleaded to expand the scope of existing domestic legal provisions.<sup>81</sup>

The court disallowed the project from proceeding unless and until legal requirements of rational planning including an EIA was done. It found that the proposed project would harm health, safety, livelihoods, and cultural heritage, as it even interfered with the Jaya Ganga, a wonder of the ancient world declared as a site to be preserved under UNESCO’s World Heritage Convention. This cultural heritage, the court noted, was not renewable, nor were the historical and archaeological value and the ancient irrigation tanks that were to be destroyed. Having considered the question as to whether economic growth is the sole criterion for measuring human welfare, the court stated that ignorance on vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders in current decision-making processes that relate to more than rupees and cents. The judgment, requiring the cancellation of the project unless proper procedures are followed, draws inspiration from principles of international environmental law and sustainable development (in particular the separate opinion of Judge Weeramantry in the ICJ case, *Hungary v. Slovakia*<sup>82</sup>), as well as the ancient wisdom and local history of conservation, sustainability, and human rights. The company’s exemption from submitting its project to an EIA was held to be an imminent violation of the equal protection clause. Although the constitution basically provides only for civil and political rights to be justiciable, the court allowed for a broader interpretation to include social and economic rights.<sup>83</sup> Natural resources of the country were said to be held in guardianship by all three branches of the government and the public trust doctrine was recognized. The judge in this case has been lauded for having taken “the parameters of the discourse on constitutional protection of human rights to new heights.”<sup>84</sup> Moreover:

While harking back to ancient practices does not generally provide grounds for a legal judgment, in this instance, it did make a positive contribution by emphasizing the universal and timeless nature of concepts such as sustainable development, which are at times

perceived as ‘western’ or alien to non-Occidental societies.<sup>85</sup>

*Mundy v. Central Environmental Authority and others*<sup>86</sup> concerned several appeals relating to the building of the Southern Expressway linking Colombo city with the city of Matara on the Southern coast, an important step in terms of infrastructure development towards enhancing industry, trade, and investment. Protracted litigation opposing the project and its different alternative routes involved allegations of potential damage to human rights including large-scale displacement, and injury to the environment including sensitive ecosystems. The Court of Appeal had upheld the developmental interest, holding that when balancing the competing interests, the conclusion necessarily has to be made in favor of the larger interests of the community, which would benefit immensely from the project. The Court gave highest priority to the public interest in development, then to the environmental damage to wetland ecosystems, and lastly, to the human interests of affected persons. Several persons appealed to the Supreme Court with regard to particular sections of the route which resulted in the taking of their lands with no arrangements for compensation. The Supreme Court varied the order of the CA and ordered compensation under the *audi alteram* principle of natural justice and Constitutional Article 12(1) on equality and equal protection. In an innovative, value-laden, and exemplary expression of equity, equality, and social justice, Justice Mark Fernando stated:

If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of “extremely negligible” value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property the greater his right to compensation.<sup>87</sup>

*Weerasekera et al. v. Keangnam Enterprises Ltd.*<sup>88</sup> involved a mining operation alleged to violate public nuisance law by local citizens because of the noise level of its operation. The lower court found that because the mining company had acquired an EPL, they had no jurisdiction to hear the case. The Court of Appeal overturned this, holding that acquiring a license for the operation did not excuse the Keangnam mining company from public nuisance claims over the way they run their operation. This holding is significant because it limits the ability of a company to use their Environmental Protection License as a shield to other legal claims over the impacts of their operation.

Still another significant case, *Environmental Foundation Ltd. v. Urban Development Authority et al.*,<sup>89</sup> concerned the proposed leasing out of the Galle Face Green, a popular seaside promenade in Colombo city and a major public utility built by a British governor in the 19th century. It has always been a treasured public property for use by one and all, but was by the terms of the proposed lease to be handed over by the Urban Development Authority (“UDA”) to a private company to build a “mega leisure complex.” The Supreme Court, in a fundamental

rights application, upheld the argument of the petitioner NGO to preserve the country's national heritage for use of the public. Very significantly, the court upheld the petitioner's argument of infringement of the right to information by reading the Constitutional Article 14(1), on the freedom of speech and expression, as encompassing a right to information. This line of argument was adopted because the Constitution does not expressly include the right to information. In view of the clandestine nature of the agreement between the UDA and the private companies, the Court also held that the petitioner's rights to equality under Article 12(1) had been infringed.

Environmental Foundation Limited has handled over three hundred cases dealing with environmental matters and is currently engaged in litigation covering a wide variety of issues. The Supreme Court has asked the organization to intervene in a case dealing with the environmental impacts of sand mining. Other ongoing cases have dealt with air pollution and included court orders for mandatory vehicle emission testing as well as a variety of actions against private parties for noise pollution and other torts.<sup>90</sup> Public interest applications filed by the Centre for Environmental Justice—another environmental NGO—involve irregular and/or unregulated mechanized mining and transport of sand from sand dunes in a wetland ecosystem in the North-Western Province, without permits under the relevant statutes;<sup>91</sup> activities threatening the coastal zone and its habitats, including destruction of mangroves; sand mining; coral extraction; destructive fishing methods; coastal pollution and improper constructions—all needing urgent coastal pollution control and management.

These cases are filed against relevant governmental authorities, pleading for writs of *mandamus* for carrying out of statutory duties,<sup>92</sup> as the government is the guardian of natural resources on behalf of present and future generations of the people of Sri Lanka. The most recent case now pending before the Court of Appeal, and filed by the same NGO, concerns the protection of a major national park, forming a wetland of international importance under the Ramsar Convention on Wetlands, and alteration of the boundaries of this park by the governmental authorities—*Centre for Environmental Justice v. Ministry of Agriculture, Environment, Irrigation and Mahaweli Development et al.*<sup>93</sup> This alteration would, it is argued, pose a further threat to the ecosystem, already endangered by landfills, aquaculture farms, fisheries, pollution, mining of minerals and the clearing of mangroves. The petition argues that the action of the authorities is in breach of several international conventions including the Wetlands, Cultural and Natural Heritage, Biodiversity Conventions and the Bonn Convention on Migratory Species of Wild Animals, several declarations including the Johannesburg Declaration, and relevant articles of the Sri Lankan Constitution. It requests writs of *certiorari* and *mandamus*.

Three decades of civil unrest in Sri Lanka have undoubtedly slowed the progress of PIL efforts to increase sustainable development, and have retarded all development in the island. A number of other states in South Asia have encountered political turmoil that creates unique obstacles to sustainable development.

In Sri Lanka, several NGOs demonstrated resilience and resolve through difficult times and continued to file suits and push sustainable development forward through the court system, which has by and large been receptive to their efforts. Now with the end of the civil war and what one hopes will be the dawn of an era of recovery, reconciliation and resurrection, there is renewed scope for sustainable development in the context of justice and peace; equity and solidarity in building the nation of post-conflict Sri Lanka.

## CONCLUSION

In the South Asian region as a whole, public interest litigation has been useful in injecting an informed, participatory, and transparent approach to the processes of development, and to governmental and private sector actions involving public resources. It has provided a voice to persons who would otherwise be unheard. Through PIL, multiple sectors and stakeholders become involved in the development process, as envisaged in the idea of sustainable development. PIL has brought forth an element of accountability, and created a space for the portrayal of a human face in development. The tool of PIL has afforded a viable mechanism for compliance with sustainable development norms in a creative, innovative, and imaginative manner, and also helped to make the development process more holistic. On the other hand, however, it has also meant that courts become directly involved in making policy decisions. This in turn has both positive and negative ramifications, and is by no means uncontroversial. It could create a system of decision-making that is, in a sense, *ex post facto* and decentralized. If not kept within certain limits, it could divert the development process away from the policy-planning objectives of the state, leading to inconsistency and incoherence. One safeguard here is that most cases revolve around the central issue of the lawfulness of a decision or action.

PIL could be abused, overused, and misused. There must therefore be checks, balances, and limitations in order that the development process is not interfered with unnecessarily. Principles of international law should be selectively adopted and suitably adapted to domestic contexts. There is a tendency to use these tools to oppose development projects, particularly because of opposition in the political arena or other dynamics including religion, culture, or personal reasons. In order to maintain its credibility, PIL should be steered towards the attainment of sustainable development rather than the opposition to all development. What is important is to promote development that is sustainable. In fact, the concept of sustainable development stands for the spirit of reconciliation and cooperation rather than conflict and confrontation, making environmental protection an integral component of development. Otherwise, it would be counterproductive to the whole project of development, and therefore to all persons, who should be at the center of development, and its true beneficiaries. Sustainable development integrates the right to development, and inter and intra-generational equity. As stated in Article 1 of the Declaration on the Right to Development, “the right to development is an inalienable human

right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”<sup>94</sup>

The content of much of the jurisprudence tends to concern the negative aspects of large development projects, such as displacement, and of industrialization, such as pollution. This could be related to the influence of norms of environmental protection emerging from international law, and the comparative experience and jurisprudence of the “western” developed world. Environmental legislation in developing countries often emulates that of developed countries, and is sometimes a virtual reproduction. This is not an ideal practice, as the context of each country is different. On some occasions, explicit reference has been made to international law. At other times there is no reference and the reasoning process is independent, but the arguments and decisions come remarkably close to the law of sustainable development. What is clear is that the domestic jurisprudence is influenced by international law, and how this law has taken

shape in the domestic courts of several states in South Asia, as judiciaries in the region have been influenced by developments in neighboring states.

Many concerns have been raised about the enforcement of decisions flowing from PIL, which often lags behind the decisions and orders. In fact, the experience of South Asia has been that implementation and enforcement have tended to lag behind the adjudication of cases and making of orders. If enforcement does not keep pace with the jurisprudence, the whole process will become futile and counterproductive. Therefore, an effort must be made to ensure expedient enforcement of orders. Orders frequently give remedies such as the installation of safeguards in factories, rather than their closure, and this is in line with the constructive spirit of sustainable development in its quest for a balance. Equilibrium, the middle path and mutual accommodation interconnect with strands of the complex web of the South Asian heritage - in all its diversity and yet the unity of all phenomena, its abject poverty and yet the abundance of its wealth.



## Endnotes: TOWARDS A JURISPRUDENCE OF SUSTAINABLE DEVELOPMENT IN SOUTH ASIA: LITIGATION IN THE PUBLIC INTEREST

<sup>1</sup> D. Nesiah, Keynote Address at the All-Asian Public Interest Environmental Law Conference in Nuwara Eliya (Dec. 1, 1991); H. Dembowski, Taking the State to Court, Public Interest Litigation and the Public Sphere in Metropolitan India (2001), available at <http://www.asienhaus.de/english/index.php?LINK=6&ULINK=4&UULINK=0#438>.

<sup>2</sup> According to Justice Bhagwathi, former Chief Justice of India: “Law as I conceive it, is a social auditor and this audit function can be put into action when someone with real public interest ignites the jurisdiction . . . public interest litigation is part of the process of participatory justice and standing in civil litigation of that pattern must have liberal reception at the judicial doorsteps.” Fertilizer Corp. Kamgar Union, Sindri & others, A.I.R. 1981 S.C. 344, available at <http://www.commonlii.org/in/cases/INSC/1980/220.html>; S.J. Sorabjee, Judicial Activism in Public Law, Paper presented at the Silver Jubilee Law Conference of the Sri Lankan Bar Association, Colombo (1999).

<sup>3</sup> The High Courts of Kerala, Karnataka, Gujarat, Bombay and New Delhi, for instance, refused to interfere with several development projects in the 1980s, including those relating to power production, oil refineries, bridges and international airports.

<sup>4</sup> Narmada Bachao Andalan v. Union of India & others, A.I.R. 1999 S.C. 3345, available at <http://www.ielrc.org/content/c0001.pdf>.

<sup>5</sup> In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844 (S.D.N.Y. 1986) (aff’d as modified); In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 197 (2d Cir. 1987).

<sup>6</sup> Union Carbide Corp. v. Union of India, A.I.R. 1990 S.C. 273, available at <http://www.commonlii.org/cgi-commonlii/displ.in/cases/INSC/1989/179.html?query=union+carbide>.

<sup>7</sup> See, e.g., Indira Jaising, *Bhopal, Settlement or Sell-Out?*, THE LAWYERS, Mar. 1984, at 4.

<sup>8</sup> Proceedings of the Int’l Conference on the 20th Anniversary of the Bhopal Gas Tragedy, “The Bhopal Gas Tragedy and its Effects on Process Safety,” Dec. 1–3, 2004, Indian Institute of Technology, Kanpur, India, available at <http://www.iitk.ac.in/che/jpg/bhopal2.htm>.

<sup>9</sup> C.G. Weeramantry, *Private International Law & Public International Law*, 34 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATE E PROCESSUALE 313, 324 (1998).

<sup>10</sup> Environmental Conservation Act, No.1 (1995) (Bangl.); The Environment Protection Act, No. 29 of 1986; INDIA CODE (1991); Water (Prevention and Control of Pollution) Act of 1974, No. 6 of 1974; INDIA CODE (1974); Air (Prevention and Control of Pollution) Act, No. 14 of 1981; INDIA CODE (1981); The National Environmental Act, No. 47 (1980) (Sri Lanka); The Environmental Protection Act, No. 34 (1997) (Pak.); The Environmental Protection Act, No. 24 (1997) (Nepal); The Environmental Protection & Preservation Act of 1993, No. 4 (1993) (Maldives); The National Environmental Protection Act of 2007 (Bhutan). In Bhutan, environmental conservation and sustainable development form part of the beliefs and values, inherent to the community. They are high on the policy agenda, integrated into measures like the Environmental Assessment Act 2000, Biodiversity Act 2003, and the work of the National Environmental Commission, and will be central in the National Environmental Protection Act presently in the process of formulation.

<sup>11</sup> In Sri Lanka for example, the Central Environmental Authority and local authorities issue Environmental Protection Licenses.

<sup>12</sup> Part IV B of the National Environmental Act of Sri Lanka regulates environmental quality for inland waters and the atmosphere. The National Environmental Act, *supra* note 10.

<sup>13</sup> INDIA CONST. arts. 48a & 51a(g); NEPAL CONST. art. 26(4) (referring to the need to prevent further damage to the environment through development, by raising public awareness); SRI LANKA CONST. art. 27(14) (“the State shall protect, preserve and improve the environment for the benefit of the community”); SRI LANKA CONST. art. 28(f) (“the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka (f) to protect nature and conserve its riches”); SRI LANKA CONST. art. 27(4) (providing that the State shall strengthen and broaden the democratic structure of government and the democratic rights of “the People by decentralizing administration and affording all possible opportunities to the People to participate at every level of national life and in government.”).

**Endnotes:** Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest *continued on page 86*

# TENSION BETWEEN HYDROELECTRIC ENERGY'S BENEFITS AS A RENEWABLE AND ITS DETRIMENTAL EFFECTS ON ENDANGERED SPECIES

by Janet M. Hager\*

Renewable energy has come to the forefront politically as one of the means of achieving energy independence, addressing the problem of climate change, and restoring the economy.<sup>1</sup> Although renewable energy sources will be a crucial tool in the fight against climate change, they often create other environmental problems.<sup>2</sup> A recent Ninth Circuit Court of Appeals decision, *National Wildlife Federation v. National Marine Fisheries Service*, exemplifies how one form of renewable energy, hydroelectric power, has been challenged by the environmental community for its detrimental effect on endangered fish species.<sup>3</sup> The case demonstrates that, as Congress moves to incentivize hydroelectric power, there may be a temptation for Congress to exploit a judicial loophole to make the Endangered Species Act ("ESA") inapplicable to dam operations.

Hydroelectric power is created by converting the kinetic energy of flowing water into electricity, typically through the release of river water held in a reservoir behind a dam through a turbine.<sup>4</sup> Although hydroelectric power is the most prevalent form of renewable electricity production in the United States,<sup>5</sup> currently only about three percent of America's dams have the capability to generate electricity.<sup>6</sup> In 2007, hydroelectric power constituted 5.8% of the net generation of electric power,<sup>7</sup> while all other forms of renewable energy combined were only 2.5% of the net generation of electric power.<sup>8</sup>

Hydroelectric power has garnered increasing political support as the nation's interest in clean energy has gained momentum. U.S. Department of Energy ("DOE") recently announced that it would dedicate up to thirty-two million dollars in funding received from the American Reinvestment and Recovery Act of 2009 to add new turbines and control technologies to existing non-federal hydroelectric power projects.<sup>9</sup> Additionally, the Act extends eligibility for the renewable energy production tax credit by three years.<sup>10</sup> Hydroelectric energy is also included as one of the qualified renewable energy sources that would count toward

an electric utility's federal renewable electricity credit in federal global warming legislation currently under consideration.<sup>11</sup>

Although hydroelectric power has gained support politically, hydroelectric projects raise significant environmental concerns, such as frustration of fish migration and reduced oxygen levels in downstream water.<sup>12</sup>

As a recent article in the Los Angeles Times dramatically explained: "The emerging boom in hydroelectric power pits two competing ecological perils against each other: widespread fish extinctions and a warming planet."<sup>13</sup> Fish mortality resulting from passage through turbines at hydroelectric facilities can be as much as 30%, although the use of the best existing turbines can reduce that to 5-10%.<sup>14</sup> Some of the affected fish, such as species of salmon and steelhead, are listed on the federal list of endangered or threatened species under the ESA.<sup>15</sup>

The ESA has provided a mechanism for challenges to hydroelectric power projects in the courts when an endangered or threatened species is put at risk by dam development. The seminal opinion by the Supreme Court of the United States in *Tennessee Valley Authority v. Hill* demonstrates that the ESA has the power to defeat a major construction project if necessary to save an endangered species.<sup>16</sup> In *Tennessee Valley Authority*, the Court enjoined the operation of the Tellico Dam, a project to which Congress had appropriated over one hundred million dollars, because of the potential risk to the survival of the endangered snail darter.<sup>17</sup> The authority for such a powerful result comes from the unequivocal language of section 7 of the ESA, which requires that each federal agency "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . ."<sup>18</sup>

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*The ESA has provided a mechanism for challenges to hydroelectric power projects in the courts when an endangered or threatened species is put at risk by dam development*

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Similar to the decision of the Supreme Court in *Tennessee Valley Authority*, the recent opinion of the United States Court of Appeals of the Ninth Circuit in *National Wildlife Federation v. National Marine Fisheries Service* shows the power of the ESA to affect the development and operation of hydroelectric facilities. The National Wildlife Federation (“NWF”) claimed that the National Marine Fisheries Service failed to adequately prepare a biological opinion (“BiOp”) for the operations of the Federal Columbia River Power System dams.<sup>19</sup> At issue in *NWF* were various species of salmon and steelhead in the Columbia River that must migrate downstream through a series of dams.<sup>20</sup> The court determined that the 2004 BiOp issued by the National Marine Fisheries Service “contained structural flaws that rendered it incompatible with the ESA.”<sup>21</sup>

One issue in *NWF* that will continue to be relevant in other actions against dam projects is whether the Congressional mandate of flood control, irrigation, and power production created a nondiscretionary duty.<sup>22</sup> Nondiscretionary duties of agencies need not meet the requirements of section 7 of the ESA.<sup>23</sup> In *NWF* the Ninth Circuit determined that, while the broad Congressional goals were mandatory, Congress did not mandate that the goals be accomplished in any particular way; thus the agency actions in implementing the goals were discretionary and subject to requirements of the ESA.<sup>24</sup> Thus, Congress could exempt the actions of an agency engaged in dam operations from the ESA by specifically dictating by statute the manner in which the agency is to carry out the construction and operation of the dam.<sup>25</sup>

As a result of the recent growing political interest in hydroelectric power, there will likely be a substantial increase in the nation’s hydroelectric energy capacity.<sup>26</sup> Although Congress could facilitate its goal of increasing hydroelectric power by exempting the operation of hydroelectric facilities from the ESA, the better solution would be to mitigate the effects of hydroelectric facilities on fish populations with advanced technology.<sup>27</sup> The DOE’s decision to incorporate the reduction of environmental impacts into its plan for the modernization of the nation’s hydropower infrastructure lends hope that the DOE will make environmental mitigation a priority during the expansion of hydroelectric projects.<sup>28</sup>



## Endnotes:

- <sup>1</sup> Organizing for America, New Energy for America, <http://www.barackobama.com/issues/newenergy/index.php> (last visited Oct. 20, 2009).
- <sup>2</sup> See U.S. Department of Energy, Advantages and Disadvantages of Hydropower, [http://www1.eere.energy.gov/windandhydro/hydro\\_ad.html](http://www1.eere.energy.gov/windandhydro/hydro_ad.html) (last visited Oct. 20, 2009).
- <sup>3</sup> *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008).
- <sup>4</sup> U.S. Department of Energy, How Hydropower Works, [http://www1.eere.energy.gov/windandhydro/hydro\\_how.html](http://www1.eere.energy.gov/windandhydro/hydro_how.html) (last visited Oct. 20, 2009); U.S. Department of Energy, Types of Hydropower Plants, [http://www1.eere.energy.gov/windandhydro/hydro\\_plant\\_types.html](http://www1.eere.energy.gov/windandhydro/hydro_plant_types.html) (last visited Oct. 20, 2009).
- <sup>5</sup> ENERGY INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF ENERGY, ELECTRIC POWER ANNUAL 2007 2 (2007), available at <http://www.eia.doe.gov/cneaf/electricity/epa/epa.pdf>.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> U.S. Department of Energy, Recovery Act Announcement: Obama Administration Announces up to \$32 Million Initiative to Expand Hydropower (June 30, 2009), [http://apps1.eere.energy.gov/news/progress\\_alerts.cfm/pa\\_id=195](http://apps1.eere.energy.gov/news/progress_alerts.cfm/pa_id=195).
- <sup>10</sup> Internal Revenue Service, Energy Provisions of the American Recovery and Reinvestment Act of 2009, <http://www.irs.gov/newsroom/article/0,,id=206871,00.html> (last visited Oct. 20, 2009); World Resources Institute, *Renewable Energy Tax Credits*, ISSUE 4, THE BOTTOM LINE ON . . . 1, available at [http://pdf.wri.org/bottom\\_line\\_renewable\\_energy\\_tax\\_credits.pdf](http://pdf.wri.org/bottom_line_renewable_energy_tax_credits.pdf).
- <sup>11</sup> PEW CENTER ON GLOBAL CLIMATE CHANGE, PEW CENTER SUMMARY OF H.R. 2454: AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (WAXMAN-MARKEY) 4 (2009), available at [http://www.pewclimate.org/docUploads/Waxman-Markey%20summary\\_FINAL\\_7.31.pdf](http://www.pewclimate.org/docUploads/Waxman-Markey%20summary_FINAL_7.31.pdf).
- <sup>12</sup> U.S. Department of Energy, *supra* note 2.
- <sup>13</sup> Kim Murphy, *A Hydroelectric Future Faces a Fish Predicament*, LOS ANGELES TIMES, July 27, 2009, <http://articles.latimes.com/2009/jul/27/nation/nahydro-power27>.
- <sup>14</sup> Idaho National Laboratories, Hydropower, <http://hydropower.inel.gov/turbines> (last visited Oct. 20, 2009).
- <sup>15</sup> U.S. Fish & Wildlife Service, Species Report, [http://ecos.fws.gov/tess\\_public/SpeciesReport.do?groups=E&listingType=L&mapstatus=1](http://ecos.fws.gov/tess_public/SpeciesReport.do?groups=E&listingType=L&mapstatus=1) (last visited Oct. 20, 2009).
- <sup>16</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978).
- <sup>17</sup> *Id.* at 172.
- <sup>18</sup> Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2008).
- <sup>19</sup> *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 922 (9th Cir. 2008).
- <sup>20</sup> *Id.* at 923.
- <sup>21</sup> *Id.* at 927.
- <sup>22</sup> *Id.* at 928.
- <sup>23</sup> *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 673 (2007).
- <sup>24</sup> *Nat’l Wildlife Fed’n*, 524 F.3d at 928.
- <sup>25</sup> Clay R. Smith, *Salmon, Dams and the Endangered Species Act Jeopardy Standard*, ADVOCATE, May 2009, at 23, 24.
- <sup>26</sup> See Murphy, *supra* note 13 (noting that the National Hydropower Association has set out to double the nation’s capacity for hydroelectric energy by 2025).
- <sup>27</sup> See Idaho National Laboratories, *supra* note 14 (explaining the benefits of advanced turbine technology).
- <sup>28</sup> U.S. Department of Energy, *supra* note 9.

# HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION: THE PRESSURE OF THE CHARTER FOR THE ENVIRONMENT ON THE FRENCH ADMINISTRATIVE COURTS

by David Marrani\*

## INTRODUCTION

The French National Assembly adopted the Charter for the Environment (“Charter”) in 2004 and integrated it into the Constitution of the French Fifth Republic by the amendment of March 1, 2005. On June 19, 2008, the French constitutional council, *Conseil constitutionnel*, in a landmark decision on the constitutionality of the statute on Genetically Modified Organisms (“law on genetically modified organisms”), reaffirmed the constitutional value of every right and duty defined in the 2004 Charter for the Environment.<sup>1</sup> On October 3, 2008, the *Conseil d’Etat* (“French Administrative Supreme Court”), for the first time quashed a government regulation on the grounds that it did not respect the Charter for the Environment. While constitutional control based on the Charter is typical, judicial review on the grounds of the Constitution is exceptional. In fact, the French Administrative Supreme Court has always been opposed to considering the Constitution, treating it almost as taboo. However, this position is evolving. On the one hand, the Constitution has changed to incorporate declarations of rights, and on the other the French Administrative Supreme Court has always been enthusiastic about environmental protection. Therefore, the French Administrative Supreme Court looked to the terms of the Charter, even though it had been incorporated into the Constitution. The main problem in the reasoning of the French Administrative Supreme Court, even in cases involving the issue of environmental protection, is that the *Conseil d’Etat* articulated a “classic” judicial review of administrative acts. For instance, the French Administrative Supreme Court applied judicial review to central and local government regulations, but never to constitutional control. The 2008 French Administrative Supreme Court ruling is therefore a major step towards constitutional control and should be analyzed.

Since it is only recently that the Constitution has developed as a corpus of “higher” norms that consider directly or indirectly environmental protection,<sup>2</sup> it is interesting to look at how the operation of the French Administrative Supreme Court has changed and will, for environmental reasons, go against the taboo of touching the Constitution. In this paper, I will start by looking at the link between human rights and the environment before considering the move from “transnational” and “international” rights to domestic ones through “constitutionalisation.” I will then present the recent evolution of the jurisprudence of the French Administrative Supreme Court and consider a recent 2008 case.

## HUMAN RIGHTS AND THE ENVIRONMENT, A “TRANSNATIONAL” AND “INTERNATIONAL” AFFAIR

This section will analyze the relationships between human rights and the environment. In attempting to classify human rights,<sup>3</sup> first generation rights refer to traditional civil and political liberties of the western liberal democracies. Expressed in constitutional texts,<sup>4</sup> or in separate declarations,<sup>5</sup> first generation rights aim to protect rights such as the freedom of speech, of religion, and of expression. Those rights presuppose a duty of non-interference on the part of governments towards the individuals. Second generation rights have generally been considered as “collective rights,” in that they influence the whole society. Second generation rights require affirmative government action for their realization: the right to education, to work, to social security, to food, to self-determination, and to an adequate standard of living.<sup>6</sup> Third generation or “solidarity” rights are the most recently recognized category of human rights and include the right to health, to peace, and to a healthy environment, among others. The right to health, which also falls under the right to an adequate standard of living, is now linked with maintaining environmental quality.

Until recently, the instruments of international human rights have typically accorded minimal attention to environmental issues. The Universal Declaration of Human Rights<sup>7</sup> mentions in article 25 (1), “the right to a standard of living adequate for the health and well-being of himself and of his family,” while the International Covenant on Civil and Political Rights mentions “public health.”<sup>8</sup> The International Covenant on Economic, Social and Cultural Rights<sup>9</sup> recognizes in article 12, “[t]he improvement of all aspects of environmental and industrial hygiene” in relation to “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” In fact, the three primary general international human rights instruments barely mention the relationship between environment and human rights.

The 1972 Stockholm Declaration acted as one of the first major international law instruments to link human rights and environmental protection objectives. Specifically, Principle 1 states that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and

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he bears solemn responsibility to protect and improve the environment, for present and future generations.<sup>10</sup>

This proto-declaration of environmental rights stated every idea that is now topical in environmental law. But the Declaration does not stop there. In fact, Principle 15 refers more specifically to environmental protection, while indirectly referring to the precautionary principle:

In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. *Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*<sup>11</sup>

The 1994 Draft Principles on Human Rights and the Environment expressly links human rights and the environment, particularly Principle 7, which states that “[a]ll persons have the right to the highest attainable standard of health free from environmental harm.”<sup>12</sup> Furthermore, Article 12 of the International Union for Conservation of Nature Draft International Covenant on Environment and Development also articulates states’ responsibility as facilitating agents by asserting that, “[p]arties undertake to achieve progressively the full realization of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity.”<sup>13</sup>

The third generation rights, as exemplified by the Charter for the Environment, are those rights primarily connected to the environment. Naturally, the first two categories of rights sometimes ensure the protection of third generation rights, as highlighted by state practice. In Europe, the precautionary principle could be added to this trend, as part of the wave of new developments to protect the environment.<sup>14</sup> Article 6 of the Treaty on European Union expresses the necessity for the EU to respect the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECPHRFF” or “Convention”).<sup>15</sup> Within the rights protected by the Convention, the European Court for Human Rights (“ECHR”) has considered environmental protection, as well as threats that may impact people’s right to life (*Guerra & Others v. Italy*),<sup>16</sup> property (*Chasagnou & Others v. France*),<sup>17</sup> privacy (*Guerra & Others v. Italy*),<sup>18</sup> access to court (*Athannossoplan & Others v. Switzerland*),<sup>19</sup> and freedom of expression (*Guerra & Others v. Italy*).<sup>20</sup> The concerns for health and the welfare of the environment are human rights that require protection and evaluation.

Even though there is no direct reference to the environment in the ECPHRFF, the Court aims to protect human rights and fundamental liberties based on recent developments. The

Convention became a charter of rights in Europe, with human dignity at its heart.<sup>21</sup> In 1976 the commission in *X v. Iceland*<sup>22</sup> held that Article 8 of the Convention did not extend so far as to protect an individual’s relationship with his immediate surroundings so long as the relationship did not involve human relationships. The Court of Strasbourg reminded us that no general right to protection of the environment exists in the Convention (*Kyrtatos v. Greece*).<sup>23</sup> However, in today’s society there has always been the necessity for a certain level of protection (*Fredin v. Sweden [No. 1]*).<sup>24</sup> The Court of Strasbourg has often considered questions pertaining to environmental protection and highlighted their importance (as seen in *Ta kin and Others v. Turkey*;<sup>25</sup> *Moreno Gómez v. Spain*;<sup>26</sup> *Fadeieva v. Russia*;<sup>27</sup> *Giacomelli v. Italy*).<sup>28</sup> Protection of the environment is therefore:

... a value, the defence of which arouses a constant and steady interest of public opinion, and as a consequence public authorities. Economic imperatives and even some fundamental rights, like the right of property, should not be granted primacy ahead of considerations relating to environmental protection, in particular when the state has legislated on the subject.<sup>29</sup>

In the light of the case law of the Court of Strasbourg, any-

thing may be used in order to counter solutions that may not bring about the right objectives (*Chassagnou and Others v. France*).<sup>30</sup> In fact, in areas like environmental protection, the Court respects the assessment of the national legislator, except when the result is manifestly unreasonable (*Immobiliare Saffi v. Italy*).<sup>31</sup> The confrontation between state law and the law of the acephalous society<sup>32</sup> shows how under the guidance of human rights, the levels of law have evolved over time.

### “CONSTITUTIONALISATION” OF ENVIRONMENTAL HUMAN RIGHTS AS A DOMESTIC SOLUTION

In this respect, the case of the Constitution of the French Fifth Republic is extremely interesting. As mentioned, the French National Assembly incorporated the 2004 Charter for the Environment into the declaration of rights. The Charter can be classified as a third generation declaration of rights. The National Assembly’s procedure included amending the first line of the Preamble of the Constitution of the French Fifth Republic.<sup>33</sup> The Preamble of the Constitution refers to the first and second generation of rights, through the Declaration of the Rights of Man and Citizens of 1789 (the first generation of rights) and the Preamble of the Constitution of the French Fourth Republic (the second generation of rights). In 2005, the National Assembly updated the Constitution and inserted a reference to the third generation

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of rights by applying the Charter. In the comment made during the preparation of the Charter, legislators made clear that third generation rights were a continuation of the earlier generations.<sup>34</sup> The first and second generations of rights created a veil of protection for the environment prior to the enshrinement of third generation rights into law.<sup>35</sup> Thus, the constitutionalisation of rights has become an important process.

The “constitutionalisation” of environmental protection through the “constitutionalisation” of human rights saw an exponential increase since the 1972 Stockholm conference,<sup>36</sup> and environmental protection is now a component of many constitutions in Western Europe.<sup>37</sup> Then again, the environment itself is characterized by an absence of limit and it seems logical to think about international rules rather than a patchwork of domestic solutions. However, “constitutionalisation” could be perceived as a more efficient way of protecting the environment. “Constitutionalisation” replaces international law in Rodolfo Sacco’s terms the law of the “grande Société acéphalique,”<sup>38</sup> and is supposed to make the protection effective. After 1972, more nation-states “constitutionalised” environmental law, initially by enshrining it more or less explicitly within their constitutions.<sup>39</sup> This enshrinement came via second generation rights such as the right to a healthy environment, which derived more or less from the right to health and the duty of the state, and sometimes the citizen, to protect the environment, and natural resources.<sup>40</sup> The right to a healthy environment, considered here as a general human right of environmental protection, established the idea of environmental protection based on human rights that evolve around the protection of the human both now and in the future. The Charter, as a sort of pure third generation declaration, went further in defining the link between human rights and the environment.

In 1958, the Constitution of the French Fifth Republic created the French Constitutional Council to control the constitutionality of statutes.<sup>41</sup> As a consequence, France assumed that the French Administrative Supreme Court would not operate any kind of constitutional control. In this respect, the French Administrative Supreme Court considers a statute as a specific set of norms operating as a “screen” between the Constitution and the administrative acts of central and local governments that the administrative courts examine. Therefore, the administrative judges reviewing an administrative act’s conformity to a statute that manifestly did not conform to the Constitution would always refuse to declare the administrative act void, because the judges would not want to consider the non-constitutionality of the statute. One could argue that because of the way that constitutional control and judicial review operate under the imperium of the Constitution of the French Fifth Republic, declarations of rights are the basis for constitutional control rather than for judicial review. It is important to note that the Constitution of the French Fifth Republic never intended to incorporate any declarations of rights. The 1958 Constitution conformed to French tradition by creating a formal constitution composed only of an institutional architecture and very few substantive rules. Due to the rulings of the constitutional council, the legislators built

a formal constitution around the core of the formal one. Thus, this movement to enlarge the notion of the Constitution included the 2004 Charter for the Environment. As such, this movement acknowledged certain changes. Specifically, the movement acknowledged that human rights are recognized as part of the most authoritative norm on French territory. At the same time, however, the rationale behind the 1958 novelty of having one institution for constitutional justice and one for administrative justice, made it fairly certain that the Charter, like the other declarations of rights, would remain a text presenting rights to be protected by the French Constitutional Council rather than the French Administrative Supreme Court. Thus, only under the specific procedure of constitutional control would the extended Constitution be used to protect human rights. The use of the text of the Charter by French courts and particularly by administrative justice shocked many observers.

### THE 2004 CHARTER FOR THE ENVIRONMENT AND THE FRENCH *CONSEIL D’ETAT*

The issue becomes more complex when considering how the French Administrative Supreme Court applies the Charter. Major developments highlight the environmental protection at different levels, from the “simple” action of declaring rights, to more complex and more operational system of protection of these declared rights.

The French Administrative Supreme Court was not a novice in terms of environmental protection. It has shown an openness towards environmental protection in various judgements, such as quashing the authorization for a high-voltage power line to cross the Verdon park in the south of France;<sup>42</sup> stopping the construction of a dam because it would endanger species;<sup>43</sup> ordering the dismantling of a nuclear power plant by *Electricité de France* because of a failure to respect the public right to information;<sup>44</sup> or in the matter of exporting the aircraft carrier *Clemenceau* to be dismantled in India because of risks to environmental protection and public health.<sup>45</sup> The work of the French Administrative Supreme Court on environmental protection seems to have been steady. More specifically, the precautionary principle in its legislative version has long been a reference point for operating judicial review. Since the transposition of the principle into French law, the administrative courts have enforced the respect of the precautionary principle in central and local governments’ decision-making.<sup>46</sup> The precautionary principle acted as an embryo of environmental protection, until the administrative courts extended the scope of control to general environmental protection and public health. Following the “constitutionalisation” of the Charter, and particularly the precautionary principle, an administrative court may now analyze the nature of the uncertainty of risk to health as a fundamental ground for the court’s ruling. The recognition of environmental protection as a human right, therefore, developed and went even further than expected. The Charter became a usable document so that the “layman-citizen” reified the declaration of rights and used it as an instrument of protection.



During the first years of the Charter (2005-06), the lower courts' rulings were clearly going in that direction. However, at that time, a discrepancy existed in the appreciation of the Charter's value within the administrative courts and between local lower courts and the French Administrative Supreme Court. On the one hand, local administrative courts ruled using the basis of the Charter, establishing it as containing fundamental freedoms considered to be of constitutional value.<sup>47</sup> On the other, the French Administrative Supreme Court's reticence to change showed in the way it applied the Charter, as demonstrated in two 2006 rulings.<sup>48</sup> That said, the French Administrative Supreme Court merely respected its function of control of legality and avoided operating a control of constitutionality. In December 2006, the *Conseil d'Etat* rejected the Charter's legal authority because it believed it would be too vague to solely mention the breach of the Charter.<sup>49</sup>

In 2007 and 2008, a series of cases referred to the Charter in various ways. In each case, the parties, mainly environmental associations, acted consistently in considering the Charter as one of their legal bases for seeking judicial review. In January, the French Administrative Supreme Court considered the Charter together with the Kyoto Protocol and the political context of an area in northeast of France as the legal basis for its decision. In this case, however, the French Administrative Supreme Court rejected the review of a decision to build the A 52 motorway.<sup>50</sup> In February, the French Administrative Supreme Court referred to the Charter, and particularly to the precautionary principle, to reject the review of a regulation concerning the closing dates of hunting on the application of four environmental associations.<sup>51</sup> In May and June, the French Administrative Supreme Court used similar reasoning to that used in the December 2006 case, considering that it was too vague to solely mention the breach of the Charter.<sup>52</sup> In three cases from June and October 2007, the French Administrative Supreme Court cited the Charter as a legal basis (the highest one), but did not consider it in its ruling.<sup>53</sup> In October 2007, in the case *M. F., M. E., M. C., M et Mme B., M. et Mme A.*, the French Administrative Supreme Court developed an interesting point of view.<sup>54</sup> The French Administrative Supreme Court argued that when the French Parliament acted to apply the principles enshrined in article 7 of the Charter (the right to information and public participation), the legality of regulations would be considered in light of the statutes.<sup>55</sup> The judges went on to explain that statutes enacted prior to the Charter should respect the Charter.<sup>56</sup> Consequently, the French Administrative Supreme Court followed tradition and the judges ruled on the basis of the French Environmental Code and not on the Charter.<sup>57</sup> This decision marked progress on the path towards the 2008 landmark case analyzed in the next section. However, the French Administrative Supreme Court did not confirm this position and, in two separate cases on the same day, acted according to its previous position of December 2006,<sup>58</sup> as it did in cases in December 2007 and August 2008.<sup>59</sup> Though the Charter became valued as a legal instrument and is now taken into account by claimants in the administrative courts, the way the courts have considered and used this instrument remains variable. This is

perhaps because of the lack of clarity in the preparation of the Charter in defining the real aims of the text. The administrative judges have mentioned in many instances, such as in the December 2006 case, that the use of the Charter as a legal basis is not legitimate because of its lack of precision. In fact, the changes affecting the administrative judges may be seen as an evolution and passage from one phase of modernity to another from "the land does not lie" to "human rights do not lie."

#### A RADICAL CHANGE? THE 2008 CASE

In the 2008 case, *Commune d'Annecy*, the French Administrative Supreme Court went a step further. The *Commissaire du gouvernement* Aguila, charged with presenting a final report to the French Administrative Supreme Court before the decision of its plenary assembly, concluded in eight points. These eight points will be examined here as an introduction to this section. First, Aguila considered that the context needed clarification, for the following three reasons: the case law of the French Administrative Supreme Court in the matter was not yet clearly fixed; the work of the committee reviewing the fundamental rights that contributed to a general reflection on the necessity for clarifying the value of the principles enshrined in the Preamble of the Constitution of the French Fifth Republic (together with the principles included in the Charter);<sup>61</sup> and the constitutional amendment of July 2008, introducing the possibility to bring a statute before the constitutional council after its promulgation. In the second point the *Commissaire* noted that the Charter served as an autonomous constitutional text, unique in the world although the unfinished preparatory work created uncertainty making judicial use difficult.<sup>62</sup> The third point served as a reminder that administrative justice has always been involved in the development and the application of environmental law.<sup>63</sup> The fourth and fifth points concern the case itself, and will be developed later. The *Commissaire* created point six in the form of a question: is the Charter for the Environment a text that may be invoked before an administrative court directly by the parties concerned and does it have "full" constitutional value?<sup>64</sup> Point seven concerned the increase of parliamentary power over environmental issues as a result of the charter.<sup>65</sup> On this last point, Aguila concluded by listing the expected results of the case thereby quashing the government regulation on the grounds of a violation of the charter; reinforcing the role of Parliament in the area of environmental law, as sought by the authors of the Charter; and renewing the traditional mission of the administrative judge to look after the respect of the common good, and the fundamental rights of citizens.<sup>66</sup> The report of Aguila reflected the materialization of deep change.

The 2008 case relates to the specific protection of large mountain lakes (larger than 1,000 hectares).<sup>67</sup> These lakes are currently protected by both the "mountain law"<sup>68</sup> and the "littoral law."<sup>69</sup> Some towns and cities are very happy about this double protection, while other towns and cities tried to relax the laws to allow for new developments (principally real estate projects). The case concerns article 187 of the statute of February 23, 2005.<sup>70</sup> This covers the development of rural territories,<sup>71</sup>

which introduced a new paragraph to article L. 145-1 of the town planning code:

However, concerning mountain lakes having an area greater than 1,000 hectares, a government regulation after advice of the *Conseil d'Etat* delimits the sector within which the measures specific to littoral (as stated in Chapter VI of the present title) apply solely, having taken into account the topology of the area and the advice of waterside municipalities. This sector cannot reduce the littoral strip of 100 metres defined by article L. 164-4, part III. In other areas of waterside municipalities, and located within the areas of mountains mentioned in the first paragraph, the dispositions specific to mountains of the present chapter apply solely.<sup>72</sup>

The *Commune d'Annecy* contested the government regulation of August 1, 2006,<sup>73</sup> adopted as part of the application of the new article of the town planning code, to complete and introduce new measures into the "regulations" section of the code.<sup>74</sup> In the local authority's opinion, the new measures would reduce the protection of mountain lakes, by reducing the perimeter of application of the littoral law around mountain lakes. According to the government regulation, the perimeter should be delimited by local authorities' decisions, made on a case-by-case basis for each lake. The 2006 decree introduced a series of regulations, codified under articles R. 145-11 to -14, which outline a detailed decision-making process. Article R. 145-11 stated that either the state or the waterside municipalities (town or city) had the authority to delimit the perimeter around mountain lakes of more than a 1,000 hect-

ares. Article R. 145-12 stated in section I that when the responsibility for delimiting the perimeter falls to the state, then the prefect (representing the state in the *département*<sup>75</sup>) should forward a file to the waterside municipalities comprising: a) a map of the perimeter; and b) a note presenting the rationale behind the limits of the perimeter (considering places, built or unbuilt; visibility from the lake; waterside preservation of economic and ecologic equilibrium; and sites and landscape quality). The municipalities had two months from the transmission of the file to the local mayors to decide on the project before their approval was assumed. Section II stated that when the municipalities were responsible for the process, they should send a similar file to the prefect with each administrative decision (i.e. namely a *délibération* from each local council). Article R. 145-13 stated that the file had to be sent with the advice or proposal from each municipality to be submitted to a public inquiry by the prefect (as stated by articles R. 123-7 to -23 of the Environmental code). The prefect had to communicate the file and the results of the

inquiry to the government minister in charge of town planning. Finally, article R. 145-14 stated that the central government had to approve the perimeter by decree upon receiving advice of the French Administrative Supreme Court, which the *Journal Officiel de la République Française* published.<sup>76</sup>

The *Commune d'Annecy* criticized the government regulation specifically because it would breach the right to information and participation of the public in the decision making process which would impact the environment. The government regulation did not allow for public consultation before the decisions required by the public inquiry of article R. 145-13 and -14 and therefore violated article 7 of the Charter. Aguila's sixth point concerned this issue: can the Charter for the Environment be invoked before an administrative court directly by the parties concerned? Or in other words, can human rights influence the way administrative courts operate?

The Constitution of the French Fifth Republic introduced a mini revolution in 1958. The French Parliament is not free to enact everything it desires but can only act on the matters listed, which became the "domain of statute law," as stipulated in article 34 of the Constitution. The responsibility of the 2005 constitutional amendment that constitutionalised the Charter for the Environment and also added to article 34's list that the expression of the fundamental principles on the preservation of the environment fell to Parliament. In consequence, only a statute could be adopted to determine those principles, not a regulation.<sup>77</sup> In the 2008 case, the administrative judges of the French Administrative Supreme Court considered that the scope of action of the French parliament

had been altered by the 2005 amendment. Furthermore, the judges declared in article 7 of the Charter that, "[e]veryone has a right, within the conditions and limits of Law, to access information relating to the environment in the possession of public authorities and to participate in the public decision making process which have an incidence on the environment."<sup>78</sup> The collection of rights and duties defined in the Charter (indeed, all rights and duties that proceed from the Preamble of the 1958 Constitution), therefore had constitutional value.<sup>79</sup> These rights and duties are imposed on public powers and administrative authorities in their respective domains of responsibility.

In addition, the French Administrative Supreme Court considered that under the constitutional amendment of March 1, 2005, the French Parliament had sole legislative competence for fixing conditions and limiting the exercise of the right to information relative to the environment. This competence included the right to access all information held by public authorities and to participate in the elaboration of public decisions that

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may have an effect on the environment. As a consequence, the government had no general competence in this area, although it could exceptionally make complementary legislation. Therefore, since 2005, a regulation could be taken as a complement to a statute, within the scope of article 7 of the Charter, posterior or anterior to 2005, so long as the regulation conformed with the substantive rights included in the Charter.

The French Administrative Supreme Court went on to comment on the importance of article L. 110-1 of the Environmental code. The French Administrative Supreme Court decided that the article should proclaim principles and not determine the conditions and limits required by article 7 of the Charter. Furthermore, as explained above, according to article L. 145-1 of the town planning code, which protects mountain lakes of an area greater than 1,000 hectares, a decree following the advice of the French Administrative Supreme Court should not determine the conditions and limits of the right to information and participation of the public or competence of the French parliament. Since no statute has been enacted to determine these conditions or limits, the French Administrative Supreme Court properly used the 2004 Charter as a reference. In consequence, the 2006 governmental regulation became illegal because it fixed measures that were within the scope of article 7 of the 2004 Charter for the Environment. This is a great evolution for many reasons, but especially because human rights and environmental considerations finally came together in the same legal culture.

## CONCLUSION

This paper described the links between human rights and environmental protection, and the modification in the operation of French administrative courts under the pressure of the constitutionalisation of environmental human rights. The paper noted the evolution from the adoption of the Charter for the Environment and its incorporation into the (material) Constitution of the French Fifth Republic. The Charter represents a domestic development in terms of human rights, as it expresses the third generation of human rights. The weight and pressure of environmental issues forced the French Administrative Supreme Court to modify its way of operating. This is a profound modification, as the French Administrative Supreme Court is not separated from the administration of the Republic. Indeed, the French Administrative Supreme Court is not only the highest administrative court; it is also a government advisor and the organ in charge of preparing the bills and regulations for both the French parliament and the government. We now see the increased consideration for human rights and their dissemination in the legal culture to such an extent that we may have entered a new spatio-temporal dimension. Mankind fears the reality of its mortality, and has realized that its area of “play” must be protected. For some, and France in particular, environmental protection is best accomplished by declaring it a constitutionally protected human right. The Charter is aligned with this new trend. The evolution of the jurisprudence of the highest French administrative court is a witness of the changes as is illustrated in the recent case law of the French Administrative Supreme Court. 

## Endnotes: Human Rights and Environmental Protection: THE PRESSURE OF THE CHARTER FOR THE ENVIRONMENT ON THE FRENCH ADMINISTRATIVE COURTS

<sup>1</sup> CC decision no. 2008-564DC, June 19, 2008, J.O. 8 available at [http://www.conseil-constitutionnel.fr/conseilconstitutionnel/root/bank\\_mm/anglais/2008\\_564dc.pdf](http://www.conseil-constitutionnel.fr/conseilconstitutionnel/root/bank_mm/anglais/2008_564dc.pdf) (“These provisions, like all the other rights and duties set out in the Charter for the Environment, have constitutional status.”).

<sup>2</sup> 1958 CONST. The Constitution of the Fourth Republic incorporated in its Preamble a socio-economic rights declaration that has now been added to the Constitution of the Fifth Republic and has implicit reference to the environment in paragraphs 10 and 12. *Id.* The next step was, of course, the adoption of the 2004 Charter.

<sup>3</sup> See ANTONIO CASSESE, I DIRITTI UMANI OGGI, 9-27 (2007) (developing classifications of human rights).

<sup>4</sup> See, e.g., IR. CONST., 1937, arts. 40-4, available at [http://www.taoiseach.gov.ie/eng/Publications/Publications\\_Archive/Publications\\_2006/Publications\\_for\\_2002/Bunreacht\\_na\\_hEireann\\_-\\_Constitution\\_of\\_Ireland.html](http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006/Publications_for_2002/Bunreacht_na_hEireann_-_Constitution_of_Ireland.html).

<sup>5</sup> Declaration of the Rights of Man and of the Citizen of August 26, 1789, Duv. & Boc. (Fr.).

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>7</sup> *Id.* at art. 25(1).

<sup>8</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Mar. 23, 1976), available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>.

<sup>9</sup> International Covenant on Economic, Social, and Cultural Rights, art. 12, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), available at <http://www1.umn.edu/humanrts/instree/b2esc.htm> (last visited Nov. 7, 2009).

<sup>10</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm, June 16, 1972, 11 INT’L LEG. MAT. 1416 (1972).

<sup>11</sup> Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/26 (Vol. I); 31 ILM 874 (1992) (emphasis added).

<sup>12</sup> 1994 Draft Principles on Human Rights and the Environment, art. 7, E/CN.4/Sub.2/1994/9, Annex I (1994), available at <http://www1.umn.edu/humanrts/instree/1994-dec.htm>.

<sup>13</sup> International Union for Conservation of Nature Commission on Environmental Law, Draft International Covenant on Environment and Development, Third Edition: Updated Text (2004), available at [http://data.iucn.org/dbtw-wpd/edocs/EPLP-031\\_rev2.pdf](http://data.iucn.org/dbtw-wpd/edocs/EPLP-031_rev2.pdf).

<sup>14</sup> Committee of the Regions, 10 Oct. 2003, 2003 JO C 244; CDR-02/DEVE; BOCKLET, at 26–30.

<sup>15</sup> Treaty of the European Union, art. 6, Feb. 2, 1992, 1992 O.J. (C340) 3.

<sup>16</sup> Guerra & Others v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998).

<sup>17</sup> Chassagnou & Others v. France, App. nos. 25088/94, 28331/95, & 28443/95, 1999-III Eur. Ct. H.R. 112.

**Endnotes:** Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on the French Administrative Courts continued on page 88

# THIRD PARTY PETITIONS AS A MEANS OF PROTECTING VOLUNTARILY ISOLATED INDIGENOUS PEOPLES

by Nickolas M. Boecher\*

There are more than one hundred isolated indigenous groups worldwide with more than half living in Peru and Brazil.<sup>1</sup> Loggers, colonists, and oil companies are encroaching on the lands of these groups, which are at an additional risk of extinction from diseases to which they have no immunity.<sup>2</sup> A procedural element of the Inter-American Commission on Human Rights allowing the entry of petitions by third parties may provide an important means to ensure the future protection of these groups, their culture, and the forests they inhabit.

Oil and gas development in the western Amazon may soon increase rapidly.<sup>3</sup> These blocks overlap some of the most biologically diverse regions on the planet that are still inhabited by native indigenous groups, many of which are voluntarily isolated.<sup>4</sup> The combination of oil, primary rain forest, and isolated indigenous groups is a recipe for disaster.

A line of decisions from the Inter-American human rights system recognizing indigenous property rights offers hope. The Inter-American Commission on Human Rights (“Commission”) is a human rights body that exercises jurisdiction to hear contentious human rights cases over all Member States of the Organization of the American States (“OAS”).<sup>5</sup> The Commission can submit a case to the Inter-American Court of Human Rights (“Court”) if the offending state has ratified the American Convention on Human Rights and has explicitly accepted the Court’s jurisdiction.<sup>6</sup> The States encompassing the western Amazon - Brazil, Peru, Ecuador, Colombia and Bolivia - have all done so.<sup>7</sup>

In *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,<sup>8</sup> the Court ordered Nicaragua to grant property rights to the Awas Tingni people who faced threats of logging on their ancestral lands.<sup>9</sup> This landmark case recognized the rights of indigenous groups to the land that they inhabit based on their need to sustain themselves and their culture.<sup>10</sup> With this precedent, the Court has simultaneously permitted other indigenous groups to establish their rights to property, and presented a potential solution to the problem of environmental degradation in the Amazon.

Indigenous cultures have lived with the Amazon forest for millennia, and its composition is a result of their active management.<sup>11</sup> The UN has recognized the importance of indigenous culture and its ability to contribute to sustainable development.<sup>12</sup> Since *Awes Tingni*, other contacted indigenous groups have succeeded in asserting indigenous property rights before the Court.<sup>13</sup> Studies have demonstrated that contacted tribes rapidly acquire modern technologies and after a single generation can

drastically move away from the lifestyles that maintained their population in closer balance with the surrounding environment.<sup>14</sup>

The Commission permits third parties to submit petitions on behalf of an injured party if the actual injured party is unable to submit a petition for itself.<sup>15</sup> Concerned parties have submitted petitions in favor of isolated groups and have successfully elicited precautionary measures from the Commission in their favor.<sup>16</sup> This procedural mechanism provides a means to simultaneously protect indigenous groups, their culture, and the forests they inhabit.

There are also challenges to the establishment of indigenous property rights for isolated groups, many associated with effective representation. First, it may be difficult to determine the true interests of isolated groups. Second, self-interested parties could enter a petition in the name of an isolated group to advance their own interests. Similarly, there is a risk that third party petitioners will not be zealous advocates. Finally, there are often severe difficulties in gathering evidence documenting human rights abuses of silent victims in remote regions.

Further, Inter-American Court precedent, while promising, also poses problems. The Court has limited indigenous land rights to the traditional use of the territory, therefore, state parties can still grant concessions for the extraction of natural resources after consultation with the affected group.<sup>17</sup> Additionally, the Court has permitted state parties to make the ultimate determination of which lands are returned to indigenous groups after consultation with them.<sup>18</sup> These rulings are incompatible with the nature of isolated groups, which face extinction on contact with foreign diseases, are not available for consultation, and live an itinerant lifestyle irrespective of established boundaries.

A possible solution includes referencing neighboring contacted groups as a proxy for the interests of uncontacted groups, as well as for a source of information about where traditional territories lie. Additionally, natural boundaries such as rivers or settlements of contacted groups can assist in delimiting land rights. If similar solutions are not implemented soon, it could be to the detriment of the rights of isolated groups, their culture, and the forests they inhabit. Any future Court decision, therefore, must be tailored to the groups’ unique and compelling situation.



**Endnotes:** Third Party Petitions as a Means of Protecting Voluntarily Isolated Indigenous Peoples *continued on page 89*

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# SUSTAINABILITY AND THE COURTS:

## A SNAPSHOT OF CANADA IN 2009

by Katia Opalka and Joanna Myszka\*

### INTRODUCTION

Canada is a country with a small population, a large resource base, and only one big neighbor. Canada's influence in the post-World War II period owed a lot to the role of External Affairs Minister Lester B. Pearson, who found a peaceful resolution to the Suez Canal Crisis.<sup>1</sup> The future Prime Minister helped shape the world's image of Canada as a big, green place populated by reasonable, peace-loving people. Likewise, the desire of Canada's governments and its people to solve problems amicably has limited the role of the courts in advancing sustainable development in Canada. While the government continues to view litigation as "un-Canadian," citizens and environmental groups are using litigation as a means to protect the environment. Meanwhile, Canada's green brand has lost value, mainly because the government has shied away from environmental regulation and enforcement.

### USE OF THE COURTS BY THE GOVERNMENT

We should begin by saying that sustainable development—that is, development that meets the needs of current generations without compromising the ability of future generations to meet their needs—is achieved through standard-setting and planning, not litigation. In other words, judicial action can enforce compliance with plans (like land use plans) and standards (like building codes), but it cannot fill the void when plans and standards are missing.

### LAND USE PLANNING

After Canada became the first industrialized country to ratify the *United Nations Convention on Biological Diversity* in 1992,<sup>2</sup> it developed, but ultimately failed to put into practice, an ecological land use planning framework<sup>3</sup> that would provide a degree of certainty to natural resource industries (for example, mining, oil and gas, and forestry). The framework was intended to help establish where development would be prohibited and where it might be allowed, subject to intense coordination across industry sectors. For example, such coordination could minimize the overall impacts associated with expansion of the road network into wild areas.<sup>4</sup>

The reason for Canada's relative failure to plan resource development in a sustainable fashion lies in the constitutional division of legislative powers between the provinces and the federal government.<sup>5</sup> The provinces own most of the land in Canada.<sup>6</sup> In that respect, the provinces still resemble the individual colonies that banded together to form a compact in 1867.<sup>7</sup> The provinces also have exclusive legislative authority, subject to rules of federal paramountcy, to legislate regarding natural

resource development on these "provincial Crown lands."<sup>8</sup> In principle, regardless of how poorly a province performs in conserving biodiversity on its land base, the federal government does not step in.

### TREATIES

In Canada, as in the United States, the federal government represents the country when it comes to reporting on the implementation of international treaties.<sup>9</sup> Because of their wide ranging legislative jurisdiction under the Constitution, the provinces play a key role in treaty implementation. Thus, in regard to the *Biodiversity Convention*, for example, while the federal government must report to the international community regarding Canada's progress on implementation, there is little the federal government can do to force the provinces to achieve such implementation. Similarly, the federal government cannot force the provinces to implement the *North American Agreement on Environmental Cooperation* ("NAAEC"),<sup>10</sup> under which each of Canada, the United States, and Mexico commit to effectively enforce their environmental laws. Only Alberta, Manitoba, and Quebec have ratified the NAAEC, and therefore, Canada is only accountable for those three provinces as regards enforcement of provincial environmental laws in Canada.<sup>11</sup>

For all rules, there are exceptions, and the *Migratory Birds Convention*<sup>12</sup> signed with the United States in 1916 is the exception here. Great Britain entered into the Convention on behalf of Canada, and therefore, because of a rule in the Canadian Constitution, the federal government has sole authority to implement that treaty.<sup>13</sup> Because birds are everywhere, the federal government has very broad power to use the courts to enforce migratory bird protection legislation on provincial Crown land (and by extension regulate natural resource extractive industries that operate there) but has hesitated to do so.

### *R. v. HYDRO-QUÉBEC*

The decision of the Supreme Court of Canada ("SCC") in *R. v. Hydro-Québec*<sup>14</sup> is a leading SCC ruling on the federal authority to legislate on environmental matters, but the decision

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is controversial. In *Hydro-Québec*, the SCC upheld the toxics provisions of the *Canadian Environmental Protection Act, 1988* on the basis that the provisions constituted a valid exercise of the federal government's constitutional authority to legislate criminal law.<sup>15</sup> That decision, though a victory for the federal government, also seemed to tie its hands. Because the criminal law power is the power to create prohibitions and impose sanctions, not the power to create elaborate regulatory schemes, some commentators argue that the SCC should have upheld the legislation as a valid exercise of the federal government's constitutional power to make laws for the "peace, order and good government" of Canada (the "POGG Power").<sup>16</sup> Had the legislation been upheld under the POGG Power, the federal government would not have been left feeling hampered in its ability to adopt federal environmental regulations, though here again, views differ.<sup>17</sup>

#### THE COMMON LAW

There is no common law requirement that governments enforce the law—environmental or otherwise.<sup>18</sup> There is only potential civil liability if the government adopts an enforcement policy and then acts contrary to that policy, causing harm.<sup>19</sup> Enforcement policies for federal environmental laws in Canada are fraught with provisions that make prosecution highly unlikely. The policies identify enforcement responses to instances of suspected non-compliance, reserving prosecution for cases where the intent to commit the offense can be established, and where harm to the environment is significant.<sup>20</sup> Because most violations of environmental laws are unintended, and because most violations do not have major environmental impacts (though thousands of little violations by hapless violators probably do), prosecution normally does not occur.

#### THE DEPARTMENT OF JUSTICE

While a department such as Environment Canada may recommend prosecution in certain cases, the decision to press charges is made by the Attorney General (the Department of Justice).<sup>21</sup> That department has its own rules for deciding which cases will go forward.

#### BUDGETS AND POLITICS

Finally, budgetary and political concerns affect the Government's use of the courts to enforce environmental legislation. Politicians decide whether to allocate human and financial resources to environmental law enforcement. In Canada, environmental budgets have been cut in successive rounds of program review every couple of years since the early 1990s.<sup>22</sup> With

most of the senior personnel at Environment Canada, Fisheries and Oceans, and all provincial environmental departments retired or preparing to retire, many posts have been eliminated or left vacant.<sup>23</sup> Because prosecution sometimes results in constitutional challenges to the underlying legislation<sup>24</sup> and cross-demands against the Government, private firms must be hired and costs can quickly spiral out of control.<sup>25</sup> Those costs are absorbed by departments with environmental protection responsibilities. Those departments normally choose to use their scant resources to focus on programs that are assured to deliver some benefits for the environment, rather than take a risk with protracted litigation.<sup>26</sup> However, Canada does have one notable prosecution success story. In 1993, Tioxide Canada Inc. was fined four million Canadian dollars for consistently failing to heed Government demands that it install a system to treat its toxic effluent before discharging it into the Saint Lawrence River.<sup>27</sup>

#### USE OF THE COURTS BY CITIZENS AND ENVIRONMENTAL GROUPS

As explained above, governments in Canada have generally not relied on the courts to achieve sustainable development. This is in part owed to a failure to adopt a planning framework and regulations that courts would help enforce compliance with. That said, citizens and environmental groups have turned to the courts with some success, using the very limited regulatory tools at their disposal. These citizens and environmental groups have succeeded when they have used the publicity that comes with litigation as a high profile means of forcing the government's hand. Litigants have been less successful in their attempts to get around carefully worded provisions in environmental laws that essentially allow the government to do nothing. Examples are provided below.

#### PRIVATE PROSECUTIONS (*FISHERIES ACT*)

Under the federal *Fisheries Act*, it is an offense to disturb or destroy fish habitat and to discharge deleterious substances into waters frequented by fish.<sup>28</sup> Individuals can bring charges against violators, though the provincial or federal attorneys general can stay those charges or take over the prosecution.<sup>29</sup> Private prosecutions are often stayed. When they have not been stayed, however, private prosecutions have led to high profile guilty verdicts, notably against municipalities.<sup>30</sup> Environmental scientists who were laid off by governments have helped environmental groups, such as the Environmental Bureau of Investigation, gather evidence of *Fisheries Act* violations. EcoJustice, a non-governmental organization, has provided legal representation for environmental groups seeking judicial redress for

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*Enforcement policies for federal environmental laws in Canada are fraught with provisions that make prosecution highly unlikely*

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environmental wrongs.<sup>31</sup> These groups document government and industry failures regarding compliance with the *Fisheries Act* by tracking municipal effluent quality across the country,<sup>32</sup> discharges from pulp and paper mills, etc. The groups also publish publicly-available guides on how to launch a private prosecution.<sup>33</sup>

## CIVIL SUITS

Two interesting decisions of the SCC involving civil suits on environmental matters are summarized below.<sup>34</sup> Here, we will only mention a civil suit provision in a Canadian environmental statute.

Under the NAAEC, Canada committed to provide environmental remedies to its citizens.<sup>35</sup> The *Canadian Environmental Protection Act, 1999* (“CEPA”) creates an “environmental protection action,” a civil suit that can be launched by adult residents of Canada against a party alleged to have committed an offense under CEPA.<sup>36</sup> Provided that the alleged harm to the environment is significant, the plaintiff may apply for various sorts of injunctive relief, but not damages.<sup>37</sup> Before taking such an action, the plaintiff must have first requested that Environment Canada investigate the matter, and then must have convinced a judge that Environment Canada’s response was either too slow or unreasonable.<sup>38</sup> To our knowledge, no environmental protection actions have been brought since the act came into force.

## JUDICIAL REVIEW

Applications for judicial review are favored by environmental groups in Canada as a means of forcing the government to implement conservation statutes such as environmental assessment or endangered species legislation. Such litigation generally turns on an analysis of the administrative authority’s discretion—in other words, does the act say “the Minister *shall*” or “the Minister *may*”? The SCC ruling in *Friends of the Oldman River Society v. Canada (Minister of Transport)*<sup>39</sup> is the leading case regarding ministerial discretion on permitting decisions that trigger environmental assessment requirements. The decision of the SCC in that case set in motion a process that resulted in the adoption of the *Canadian Environmental Assessment Act* (“CEAA”).<sup>40</sup>

The principal focus of judicial review applications under CEAA has been the federal government’s reluctance to conduct wide-ranging reviews of project environmental impacts. Though environmental groups have had some notable successes in this area,<sup>41</sup> the tendency of the Federal Court has been to stick to the plain language of the act, which gives federal authorities broad discretion as regards project and assessment “scoping,” provided

the agency can establish that it did not actively avoid applying the law—for example, by relying on a provincial agency to follow up on matters covered by the federal legislation.<sup>42</sup>

Environmental groups have been somewhat successful in using judicial review to pressure the federal government to develop recovery strategies for species listed under the *Species at Risk Act*.<sup>43</sup> Here, the litigation has focused on questions, such as whether it is reasonable for the federal government not to intervene where provincial recovery actions are potentially ineffectual,<sup>44</sup> and whether the federal government must identify (and therefore protect) the critical habitat of a species as part of the development and implementation of a recovery strategy, along with the question of what is the difference between habitat and critical habitat.<sup>45</sup>

## SUPREME COURT DECISIONS

Summarized below are leading SCC decisions, rendered in the last decade, on matters related to sustainable development.

### THE PRECAUTIONARY PRINCIPLE—*SPRAYTECH*

In *Spraytech v. Hudson*,<sup>46</sup> the SCC decided the constitutionality of a by-law adopted by the Town of Hudson, Québec, banning the use of cosmetic pesticides. Charged with using pesticides in violation of the by-law, Spraytech moved to have the Superior Court of Québec declare the by-law inoperative and *ultra vires* the town’s authority because it conflicted with the provincial *Pesticides Act*.<sup>47</sup> The Superior Court held, and the Québec Court of Appeal confirmed, that Hudson had the power to enact the by-law.<sup>48</sup>

The SCC upheld the by-law because it did not impose a total ban on the use of pesticides.<sup>49</sup> The by-law only prohibited the use of pesticides in non-essential cases, such as for “purely aesthetic pursuits.”<sup>50</sup>

The SCC’s decision in *Spraytech* appears to be informed by a broad vision of environmental law and the role of government in promoting the general welfare. For example, Justice L’Heureux Dubé began her opinion by stating that the context of the case includes “the realization that our common future, that of every Canadian community, depends on a healthy environment.”<sup>51</sup> The Court deferred to the authority of elected municipal bodies, holding that courts should not dictate to municipalities what is best for their constituents.<sup>52</sup> The Court also emphasized that the purpose of the by-law was in line with the precautionary principle recognized in international law, namely, that sustainable development policies “anticipate, prevent and attack the causes of environmental degradation.”<sup>53</sup>

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*[C]itizens and environmental groups have succeeded when they have used the publicity that comes with litigation as a high profile means of forcing the government’s hand*

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THE POLLUTER PAYS PRINCIPLE (CLEAN-UP ORDERS)—  
*IMPERIAL OIL*

In *Imperial Oil Ltd v. Quebec (Minister of the Environment)*<sup>54</sup> the SCC decided the legality of a clean-up order issued by the Quebec Minister of the Environment (the “Minister”) against Imperial Oil (“Imperial”) under provincial polluter-pay legislation. In the 1980s, a real estate developer discovered oil pollution at a former Imperial oil site on the shore of the Saint Lawrence River, opposite Quebec City. The land was decontaminated with the approval of provincial governmental authorities and houses were built, but the pollution resurfaced in the 1990s. Residents brought an action against the developer, the town, Imperial Oil, and the environment ministry.<sup>55</sup> The Minister ordered Imperial to carry out a site assessment.<sup>56</sup> Imperial claimed that the Minister had a conflict of interest because the Minister had approved earlier clean-up work and was now being sued.

In deciding that the Minister did not have a conflict of interest, the SCC held that the Minister wears two hats, adjudicative and managerial, and that when the Minister issued the assessment order the Minister was not adjudicating but rather performing the Minister’s jobs of implementing Québec’s environmental protection legislation.<sup>57</sup> The Minister had a political duty to address the contamination problem and “choose the best course of action, from the standpoint of the public interest.”<sup>58</sup> The SCC went beyond analyzing principles of administrative law when it decided *Imperial Oil* by also considering the context of environmental protection legislation. As in *Spraytech*, the SCC emphasized that Québec environmental legislation is concerned not only with safeguarding the environment of today, but it is also concerned with “evidence of an emerging sense of inter-generational solidarity and acknowledgment of an environmental debt to humanity and the world of tomorrow.”<sup>59</sup>

THE POLLUTER PAYS PRINCIPLE (CLASS ACTIONS)—  
*ST. LAWRENCE CEMENT*

In *St. Lawrence Cement Inc v. Barrette*,<sup>60</sup> residents of Beauport, Québec, instituted a class action against St. Lawrence Cement Inc. (“SLC”) for dust, odor, and noise nuisances related to the operation of a local cement plant. The residents based their claim on the general rules of fault-based civil liability, as well as on the good-neighbour provision of the Québec Civil Code.<sup>61</sup>

Under Article 1457 of the Civil Code, the claimants were required to establish fault, damage, and causation.<sup>62</sup> The SCC reversed the Québec Court of Appeal and upheld the decision of the trial judge, finding that SLC had not committed a civil fault since plant operations complied with applicable standards. The

SCC also found that Article 976 of the Civil Code requires no proof of fault.<sup>63</sup> This article reads: “Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.”<sup>64</sup>

According to the SCC, conduct is not the deciding criterion when it comes to abnormal annoyances under Article 976.<sup>65</sup> Rather, liability is triggered when the nuisance becomes excessive or intolerable. The SCC relied on legal commentary and precedent to find that Article 976 required no proof of fault, but the court also asserted that no-fault liability “furthers environmental protection objectives” and “reinforces the application of the polluter-pay principle, which [the] Court discussed in [*Imperial Oil*].”<sup>66</sup> Quoting *Imperial Oil*, the SCC reinforced the principle that, in order to promote sustainable development, polluters should be liable for the direct and immediate costs of pollution.<sup>67</sup>

ENVIRONMENTAL LOSS—  
*CANFOR*

In *British Columbia v. Canadian Forest Products Ltd.*,<sup>68</sup> the British Columbia (“BC”) government sought a damages award against Canadian Forest Products Ltd. (“Canfor”) in connection with a forest fire that burned 1,491 hectares of forest in the BC interior. Canfor was largely responsible for the fire.<sup>69</sup> The BC government sued in its capacity as owner of the land, that is, it

launched a commercial action for the diminution of the value of timber.<sup>70</sup> The SCC ruled that the government could also have sued as a representative of the public, for damages resulting from the environmental impact of the forest fire.

The SCC held that as defender of the public interest, the government can sue for environmental loss based on the law of public nuisance.<sup>72</sup> The Court considered, and eventually dispensed with, the argument that in such cases, only injunctive relief is available. First, it noted that Canadian courts have not always adhered to the narrow view that the role of the government in public nuisance is to put a stop to the activity that constitutes an interference with the public’s rights.<sup>73</sup> Second, the Court indicated that, under the common law of the United States, “it has long been accepted that the state has a common law *parens patriae* jurisdiction to represent the collective interests of the public.”<sup>74</sup>

According to the Court, the *parens patriae* doctrine has led to successful claims for monetary compensation for environmental damage in the United States, and there should be no legal barrier to a government claim for compensation in an action based on public nuisance in Canada.<sup>75</sup> Nonetheless, the SCC refused to assess and award such damages because complete arguments for such a claim were not made at the trial and appellate level.<sup>76</sup>

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*Canada’s refusal to own up to its shortcomings has resulted in Canadian delegations being sidelined at global summits*

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## CONCLUSION

Neither the common law nor Canada's environmental statutes make the government liable for failing to enforce environmental laws. This makes it difficult for environmental groups to require government to improve its performance in this area. Private law is returning to the fore as a source of remedies for citizens seeking redress for environmental wrongs. Until Canada has a government plan for sustainable development, one that is translated into binding standards, the courts will be of limited assistance. Canada's international influence will continue to wane.

There is some irony to Canada's predicament. Since the 1950's, Canada has enjoyed an unlikely place at the sides of the world's powerful countries because of its ability to exercise moral suasion effectively. In the 1980's, when Canada and the world began to fully appreciate the need to protect people and nature from the negative effects of economic development, the government sought to gain acceptance of domestic

environmental regulation by inviting stakeholders to do the right thing, an approach that had worked for Canada in international relations. If only the federal government could work on a cooperative basis with industry and the provinces to achieve mutually beneficial outcomes, it was thought, Canada would again shine through its non-confrontational approach. Unfortunately, after twenty years of industry self-regulation, voluntary programs, and federal-provincial environmental accords, the country is nowhere near its goal of building a sustainable economy.

Canada's refusal to own up to its shortcomings has resulted in Canadian delegations being sidelined at global summits. In all likelihood, it is not so much the failure itself as the refusal to own up to it that has other countries riled. What they are probably thinking is: if the country with the second largest land base (and one of the smallest populations) in the world cannot figure out how to meet the needs of current generations without compromising the ability of future generations to meet theirs, then at the very least, we should stop taking their advice. 

## Endnotes: SUSTAINABILITY AND THE COURTS: A SNAPSHOT OF CANADA IN 2009

<sup>1</sup> See CBC History, Suez Canal Crisis: Lester B. Pearson Pulls the World Back from the Brink of War and Wins the Nobel Peace Prize, [http://history.cbc.ca/history/?Mlval=EpisContent&series\\_id=1&episode\\_id=15&chapter\\_id=1&page\\_id=3&lang=E](http://history.cbc.ca/history/?Mlval=EpisContent&series_id=1&episode_id=15&chapter_id=1&page_id=3&lang=E) (last visited Oct. 9, 2009) (hailing Pearson's proposal for the French and British to withdraw but allow United Nations forces to stay, resulted in the first international peacekeeping force helping to deescalate the Suez Canal Crisis).

<sup>2</sup> United Nations Convention on Biological Diversity art. 27, Jun. 5, 1992, 31 I.L.M. 1004.

<sup>3</sup> See generally I.B. MARSHALL & P.H. SHUT, AGRIC. & AGRI-FOOD CAN., A NATIONAL ECOLOGICAL FRAMEWORK FOR CANADA 2 (1999), <http://sis.agr.gc.ca/cansis/nsdb/ecostrat/intro.html> (last visited Oct. 30, 2009) (explaining the ecological framework established in response to a report by the Ecological Stratification Working Group).

<sup>4</sup> See CAN. DEP'T OF FISHERIES & OCEANS, POLICY FOR THE MANAGEMENT OF FISH HABITAT 3 (1986), [http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/operating-operation/fhm-policy/page08\\_e.asp](http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/operating-operation/fhm-policy/page08_e.asp) (last visited Oct. 10, 2009) (defining "integrated resources planning" in Canada).

<sup>5</sup> See Constitution Act, 1867, 30 & 31 Vict., Ch. 3 (U.K.), §§ 91-92 [hereinafter Constitution Act] (showing two lists dividing legislative authority among Parliament and provincial legislatures).

<sup>6</sup> *Id.* at §. 109; see also BRITISH COLUMBIA MINISTRY OF AGRIC. & LANDS, CROWN LAND FACTSHEET 1, [http://www.agf.gov.bc.ca/clad/crownland\\_factsheet.pdf](http://www.agf.gov.bc.ca/clad/crownland_factsheet.pdf) (last visited Oct. 30, 2009) (noting that ninety-four percent of land in British Columbia is Provincial Crown land).

<sup>7</sup> Reference Re: Offshore Mineral Rights, [1967] S.C.R. 792, 799 (Can.) (recounting the historical development of provincial land control in British Columbia).

<sup>8</sup> See CROWN LAND FACTSHEET, *supra* note 6, at 1.

<sup>9</sup> LAURA BARNETT, PARLIAMENTARY INFORMATION & RESEARCH SERV., CANADA'S APPROACH TO THE TREATY-MAKING PROCESS 1, 5 (2008), available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0845-e.htm>.

<sup>10</sup> North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 5, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC], available at [http://www.ccc.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec/naaec03.cfm?varlan=english](http://www.ccc.org/pubs_info_resources/law_treat_agree/naaec/naaec03.cfm?varlan=english).

<sup>11</sup> NAAEC, Canadian Implementation, [http://www.naaec.gc.ca/eng/implementation/implementation\\_e.htm](http://www.naaec.gc.ca/eng/implementation/implementation_e.htm) (last visited Oct. 30, 2009) (noting that most environmental legislation in Canada falls under the jurisdiction of the provinces).

<sup>12</sup> Migratory Birds Convention Act, 1994 S.C. ch. 22, schedule 1 (Can.), available at <http://www.canlii.org/en/ca/laws/stat/sc-1994-c-22/latest/sc-1994-c-22.html>.

<sup>13</sup> See Constitution Act, *supra* note 5, § 132 ("The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.").

<sup>14</sup> R. v. Hydro-Québec, [1997] 3 S.C.R. 213 (Can.), available at <http://csc.lexum.umontreal.ca/en/1997/1997rcs3-213/1997rcs3-213>.

<sup>15</sup> See *id.* at para. 161 (finding that the provisions of the Canadian Environmental Protection Act are constitutional because the Parliament of Canada acted within its jurisdiction pursuant to the Constitution Act, 1867).

<sup>16</sup> Paul Muldoon & Richard D. Lundgren, *The Hydro-Quebec Decision: Loud Hurray or Last Hurrah?*, LAW TIMES, Sept. 16, 1997, available at <http://www.cela.ca/publications/hydro-quebec-decision-loud-hurray-or-last-hurrah>.

<sup>17</sup> *Cf. id.* (explaining that the federal government is being forced to push its environmental responsibilities onto the provinces because of budgetary concerns).

<sup>18</sup> *Laurentide Motels Ltd. v. City Beauport*, [1989] 1 S.C.R. 705, para. 355 (Can.), available at <http://csc.lexum.umontreal.ca/en/1989/1989rcs1-705/1989rcs1-705.html> (explaining that the public authority to enforce the law is discretionary).

<sup>19</sup> *Id.*

<sup>20</sup> See ENVIRONMENT CANADA, COMPLIANCE AND ENFORCEMENT POLICIES FOR THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 4 (2001), available at <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=8233E4B5-1> (weighing multiple factors, including intent of the alleged violator, past violations, and the seriousness of the harm when determining the nature of an alleged violation).

<sup>21</sup> See *id.* (stating that Environment Canada's enforcement activities include measures to compel compliance through court action but remaining silent on how such actions are initiated).

**Endnotes:** Sustainability and the Courts: A Snapshot of Canada in 2009 continued on page 89

# PRECAUTIONARY PRINCIPLE IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

by Yoona Cho\*

The World Trade Organization (“WTO”) encourages its members to fully exhaust negotiations and consultations before bringing a case before its Dispute Settlement Body.<sup>1</sup> Indeed, a majority of all WTO disputes are resolved in consultations,<sup>2</sup> allowing its members to gain accountability, “save face,” and preserve sovereignty. The International Tribunal for the Law of the Sea (“ITLOS”), an international environmental dispute resolution body, should follow the lead of the WTO in requiring a pre-dispute consultation period and encouraging its members to resolve differences outside of the Tribunal’s dispute settlement process.<sup>3</sup> Although the WTO sets a fine example in the area of consultations and dispute settlement, it sets a less impressive and less relevant standard on the precautionary principle. In contrast to the WTO, the ITLOS should continue to deftly define and employ the precautionary principle to increase its authority and protect ocean resources.

The precautionary-like principle that WTO members may invoke is set forth in Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>4</sup> It allows members to make a final decision on the safety of a product when faced with insufficient scientific data.<sup>5</sup> It also requires the members to actively seek new information and to review the measures within “a reasonable period of time.”<sup>6</sup> In reality, this approach has failed to achieve much success within the WTO system. The debate over the use of the precautionary principle presented itself in WTO cases such as the beef hormone debate where the European Communities (“EC”) tried to ban all hormone-treated beef from the United States, and in the EC Biotech Products dispute where the EC attempted to ban all genetically modified food and seed.<sup>7</sup> In these decisions, the WTO rejected the use of the precautionary principle.<sup>8</sup> Similarly, when Japan tried to ban American apples from entering its domestic market by invoking Article 5.7, the Appellate Body of the WTO ruled that determination of “reasonable period of time” was on a case-by-case analysis and that Japan had failed to meet the requirement for reviewing its measures.<sup>9</sup>

In contrast to the treatment the precautionary principle has received at the WTO, the precautionary principle has been instrumental to achievements in the area of international environmental law. When scientists began linking the use of chlorofluorocarbons to ozone depletion, the use of the precautionary principle in an international agreement galvanized and justified global action.<sup>10</sup> The Montreal Protocol forced the international community to take cost effective actions to deal with irreversible consequences even in light of scientific uncertainties.<sup>11</sup> Effective implementation of environmental law needs to proceed in

spite of scientific uncertainties in order to prevent irreversible damage.

The ITLOS has successfully increased its legitimacy by demonstrating an effective formula through incorporation of the precautionary approach in its judgments.<sup>12</sup> In the Southern Bluefin Tuna case, the ITLOS encouraged the parties to act with “prudence and caution” in order to ensure conservation of marine life.<sup>13</sup> In 1999, its decision revealed a precautionary approach and became the first instance of an international judicial decision employing this notion.<sup>14</sup>

To avoid overuse of the precautionary approach, which could result in diminished legitimacy, the ITLOS established a clear threshold in the Mixed Oxide Fuel plant case (“MOX”).<sup>15</sup> MOX involved a dispute over marine pollution between the United Kingdom (“UK”) and Ireland in which Ireland requested that ITLOS stop the UK from releasing radioactive waste from the MOX plant into the Irish Sea, amongst other provisional measures.<sup>16</sup> The Tribunal took this opportunity to clarify the extent and limits in the use of the precautionary approach. In doing so, the Tribunal emphasized the requirement of indicating the seriousness of the potential harm to the marine environment.<sup>17</sup> The ITLOS ruled that Ireland had failed to meet the necessary threshold in demonstrating the urgency and the seriousness of the potential harm.<sup>18</sup>

The Tribunal’s judgment in the MOX plant case was in line with Montreal Protocol’s Principle 15, in which the precautionary approach was narrowly construed.<sup>19</sup> In order to invoke the precautionary approach, the harm to be prevented cannot be general, but has to be identifiable and clear. Furthermore, the threat must pose serious or irreversible damage to the environment.

The precautionary principle is not without its constraints. There is a threshold that the parties have to prove in order for the Tribunal to use the approach.<sup>20</sup> Effective international environmental law requires a precautionary approach, and the existence of scientific uncertainties should not hinder society from taking effective actions today. The willingness of the ITLOS to employ the precautionary approach in its judgments has not only demonstrated its appreciation and concern for environmental issues, but has also given it legitimacy and a workable formula to enhance its role.

**Endnotes:** Precautionary Principle in the International Tribunal for the Law of the Sea *continued on page 90*

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# GIVING POWER TO THE PEOPLE: COMPARING THE ENVIRONMENTAL PROVISIONS OF CHILE'S FREE TRADE AGREEMENTS WITH CANADA AND THE UNITED STATES

by Rachel T. Kirby\*

*"Trade, of course, is neither inherently good nor bad; but how it is conducted in the future is now a matter of deep concern—and unprecedented opportunity."*<sup>1</sup>

## INTRODUCTION

Sixteen years ago, a new U.S. President offered an opportunity to increase North American environmental protection with an environmental side agreement to the North American Free Trade Agreement ("NAFTA") that gave citizens a voice in enforcing environmental laws.<sup>2</sup> The side agreement, known as the North American Agreement on Environmental Cooperation ("NAAEC"), provides a mechanism for citizens to aim the international spotlight on a government's failure to enforce domestic environmental laws.<sup>3</sup> A similar agreement between Chile and Canada, the Canada-Chile Agreement on Environmental Cooperation ("CCAEC"), allows ordinary citizens to ask an international body to investigate alleged non-enforcement of environmental laws.<sup>4</sup> While these mechanisms are commonplace in a number of international trade agreements, the U.S.-Chile Free Trade Agreement ("USCFTA") includes a state-to-state dispute resolution mechanism, but does not allow for citizen submissions on enforcement.<sup>5</sup>

As the international community turns its attention to environmental crises around the world, the United States must decide how to address lax enforcement of environmental laws by its trading partners.<sup>6</sup> While a free trade agreement is only one avenue for the United States and environmental activists to pursue more effective enforcement of every country's environmental laws, this article argues that a citizen enforcement mechanism is a vital tool that must be included in future agreements. Part I outlines the enforcement mechanisms under the CCAEC, NAAEC, and the USCFTA. Part II argues that agreements without citizen enforcement mechanisms cannot effectively increase environmental enforcement, while agreements with these provisions encourage interest in environmental issues and pressure to strengthen environmental regulations. Part III recommends including citizen enforcement mechanisms in future U.S. trade agreements. Finally, Part

IV concludes that free trade agreements offer an avenue for increased enforcement of environmental laws, and that citizen enforcement procedures strengthen those agreements.

## BACKGROUND

### CCAEC & NAAEC CITIZEN ENFORCEMENT PROCEDURES

The CCAEC and NAAEC address ineffective enforcement of domestic environmental laws in two ways. The first is a state-to-state dispute resolution mechanism for a persistent failure to enforce a party's own environmental laws in a manner that interferes with free trade.<sup>7</sup> The second is a citizen submission on enforcement procedure.<sup>8</sup> This mechanism allows any citizen to send a submission to either National Secretariat asserting that a party to the CCAEC or NAAEC is "failing to effectively enforce its environmental law."<sup>9</sup>

The CCAEC established a Commission for Environmental Cooperation ("CEC") made up of a Council, a Joint Submission Committee, and a Joint Public Advisory Committee.<sup>10</sup> A citizen submission to the CEC must meet seven largely procedural criteria and be grounded in a specific incident of non-enforcement.<sup>11</sup> The Joint Submission Committee decides whether the submission merits a response from the state, then decides whether to produce a public factual record.<sup>12</sup> While the intent of the factual record is

to describe and report events without passing judgment on parties' actions, parties still resist the process.<sup>13</sup>

### USCFTA ENVIRONMENTAL STATE-TO-STATE DISPUTE RESOLUTION PROCEDURES

Like the CCAEC and NAAEC, the USCFTA obliges both parties to "effectively enforce" domestic environmental laws.<sup>14</sup> The process can only begin if a party has persistently failed to effectively enforce its environmental laws "in a manner affecting

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*The United States must decide how to address lax enforcement of environmental laws by its trading partners.*

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trade between the Parties.”<sup>15</sup> Under the CCAEC, a citizen can pursue an enforcement matter for a single failure to effectively enforce an environmental law.<sup>16</sup> The dispute settlement provisions of the USCFTA, however, are strictly between government parties, and require both a persistent pattern of non-enforcement and a showing that the failure affects trade between the parties.<sup>17</sup>

Parties first address disputes under the environmental provisions of the USCFTA with consultations.<sup>18</sup> If consultations fail to resolve the matter within sixty days, the complaining party can initiate the USCFTA dispute resolution procedures.<sup>19</sup> First, the parties convene a meeting of the Commission to resolve the issue.<sup>20</sup> Next, the parties convene an arbitral panel if the issue remains unresolved.<sup>21</sup> The panel can impose fines of up to fifteen million dollars per day on the non-enforcing party.<sup>22</sup> The complaining party can suspend USCFTA trade benefits if the party fails to pay the fine.<sup>23</sup>

### ANALYSIS

#### EFFECTIVE ENFORCEMENT OF ENVIRONMENTAL LAWS PROTECT THE ENVIRONMENT, HUMAN HEALTH, AND FOREIGN INVESTMENT STREAMS

Environmental laws do not enforce themselves; governments or private citizens must enforce those laws.<sup>24</sup> The importance of enforcement is especially true in Latin America, where many countries have an inconsistent historical relationship with the rule of law.<sup>25</sup> Effective environmental protection requires both effective environmental laws and consistent enforcement of those laws.<sup>26</sup>

Foreign and domestic investors are unlikely to comply with environmental laws if there are no consequences for violations. Because environmental compliance can be expensive, companies and investors that violate environmental regulations gain a competitive advantage against those who do comply. Effective enforcement reassures investors that competitors are not gaining a competitive advantage by avoiding environmental compliance.<sup>27</sup> Overall, trade and investment that leads to increased prosperity may strengthen effective environmental protections, but the government or citizens must enforce those protections.<sup>28</sup>

#### STATE-TO-STATE DISPUTE RESOLUTION ALONE DOES NOT INCREASE ENFORCEMENT OF ENVIRONMENTAL LAWS

While state-to-state dispute resolution theoretically provides a venue for environmental advocates to work through their governments, government action carries burdens that make action unlikely.<sup>29</sup> States have neither the capacity nor authority to effectively monitor enforcement of another state’s environmental laws.<sup>30</sup> The absence of a citizen enforcement mechanism and the requirement that the disputed pattern of non-enforcement affect trade between the parties hampers efforts to improve environmental protection through treaty provisions.<sup>31</sup>

#### State Espousal Mechanisms Lead to Mutual Non-Enforcement

Both states in a free trade agreement have non-environmental reasons to sign an agreement.<sup>32</sup> As a result, environmental disputes are unlikely because each state has an interest in not enforcing environmental provisions of the treaty.<sup>33</sup> A citizen alleging that her government has failed to enforce environmental laws has little control over the diplomatic concerns of either government party to the treaty.<sup>34</sup> Because environmental issues are not a priority, neither party has an interest in enforcing environmental treaty provisions. At the same time, the consequences of state-to-state dispute resolution are trade sanctions, which undermine the purpose of the agreement: free trade.<sup>35</sup> As a result, no party has used the NAAEC or CCAEC government arbitration provisions or the USCFTA state-to-state dispute resolution procedures.<sup>36</sup>

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*No state party has used the state-to-state dispute resolution procedures*

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#### High Burdens of Proof Make an Unused Procedure More Difficult

The USCFTA provides a dispute resolution mechanism for state parties to pursue trade sanctions.<sup>37</sup> A state party must show that there is a persistent pattern of non-enforcement and that the pattern affects trade between Chile and the United States.<sup>38</sup> These hurdles to successful sanctions are high even if a state had an incentive to pursue a dispute.<sup>39</sup>

The state must first show that there was a persistent pattern of non-enforcement.<sup>40</sup> Effective enforcement requires consistency to be effective, but enforcement in Latin America is more likely to be inconsistent, precluding proof of a consistent pattern.<sup>41</sup> Second, a state must show that the pattern of non-enforcement affected trade between the countries.<sup>42</sup> For example, the state could show that non-enforcement gives domestic facilities in the complained-against country an advantage over facilities in the complaining country.<sup>43</sup> In a complex global economy, a state is unlikely to be able to prove a specific impact on trade between the parties.<sup>44</sup> These high burdens of proof substantially limit the already unlikely state-to-state dispute resolution procedure.

#### A CITIZEN ENFORCEMENT PROCEDURE IS A BETTER MECHANISM FOR INCREASING ENFORCEMENT OF ENVIRONMENTAL LAWS AND PROMOTING PUBLIC INTEREST IN THE ENVIRONMENT

A citizen enforcement mechanism strikes a balance between state sovereignty and the public desire for a cleaner environment.<sup>45</sup> Because citizen submissions do not rely on government action, countries cannot subsume environmental issues to other diplomatic concerns.<sup>46</sup> Enforcement of domestic law preserves state interest in sovereignty because the treaty does not impose an international standard.<sup>47</sup> At the same time, a defined mechanism for action fosters civil society interest in the environment.<sup>48</sup>

## Citizen Submissions Do Not Rely on a Government to Initiate Treaty Enforcement Actions

Unlike state-to-state dispute resolution, the citizen submission process provides a venue for citizens to report instances of non-enforcement in their own neighborhoods or in a protected area used by the public.<sup>49</sup> Citizens have an interest in protecting the natural areas they use, and are more likely to report a failure to enforce than the government.<sup>50</sup> Citizens can directly observe environmental violations and a lack of state action in their neighborhoods.<sup>51</sup> In contrast, limited resources restrict state monitoring of another state's enforcement activity.<sup>52</sup> Citizens and other private actors are also better equipped to identify ineffective enforcement because they are closer to violations.<sup>53</sup>

## Citizen Submissions Balance State Sovereignty and Public Interest in Enforcement of Environmental Laws

Relying on citizen enforcement addresses the widespread concern of Latin American countries that environmental provisions in free trade agreements are an effort to restrict their sovereignty with outside standards.<sup>54</sup> The CAAEC's requirement to enforce domestic environmental laws allows a country to set a level of environmental protection it feels is appropriate.<sup>55</sup> At the same time, as an environmental community develops, that community can pressure the government to increase levels of environmental protection and enforcement.<sup>56</sup> States also see the citizen submission as a lesser threat because of the absence of trade sanctions associated with a factual record.<sup>57</sup>

Enforcement of domestic environmental law imposes lower sovereignty costs on Latin American states.<sup>58</sup> Because only citizens can initiate the submission process, the process does not raise concerns of a lack of democratic accountability.<sup>59</sup> As a community of environmental activists develops, that community can lobby for more protective environmental laws, making the government more responsive to community concerns.

In contrast to the dispute resolution proceeding under the USCFTA, the citizen submission process does not carry a direct threat of trade sanctions and instead relies on the deterrent effect of factual records.<sup>60</sup> This limitation preserves the benefits of the free trade agreement while providing consequences for non-enforcement of the terms of the agreement.<sup>61</sup> The absence of trade sanctions also prevents a state-to-state dispute resolution from punishing exporters and other private parties who might not have been involved in the state's non-enforcement.<sup>62</sup>

## Citizen Enforcement Fosters the Development of a Community of Environmental Activists

While the citizen submission process is theoretically accessible to the general public without legal assistance, this process can be more successful when there is a civil society community ready to bring claims.<sup>63</sup> At the same time, the process' concrete avenue for action provides a

mechanism for environmental organizations in more developed countries to work with growing organizations in Latin America.<sup>64</sup> These connections between environmental organizations foster the development of the environmental community, strengthening domestic environmental protections as well as the citizen submission process.<sup>65</sup> Some criticize the citizen submission process because it does not legally bind the government to take any action.<sup>66</sup>

However, even a limited citizen submission process is a valuable tool for environmental advocates to pressure government actors to pursue environmental protection.<sup>67</sup>

## RECOMMENDATIONS

As long as the United States continues to expand free trade with Latin America, free trade agreements should include a citizen enforcement mechanism. To ensure citizens have environmental laws to monitor, the United States should refrain from signing agreements with states that do not have an effective legal framework for environmental protection. While access to a citizen submission process will not immediately provide effective environmental protection, it is an important step.

### INCLUDE A CITIZEN SUBMISSION ON ENFORCEMENT MECHANISM IN FUTURE FREE TRADE AGREEMENTS

While the CCAEC citizen submission process is weak when compared to U.S. citizen suit provisions, the process is an innovative mechanism in international law.<sup>68</sup> Historically, private citizen action in the international arena was only available through state action, but citizen submissions allow governments to stay an arm's length from the proceedings. States cannot accuse other governments of manipulating the environmental dispute resolution process for other purposes because the submission process does not involve government action.

A citizen submission mechanism harnesses the collective knowledge of citizens to identify instances of environmental non-enforcement.<sup>69</sup> State interests in preserving sovereignty would likely limit any effort for states to monitor each others' domestic environmental enforcement.<sup>70</sup> A citizen enforcement mechanism balances the public interest in consistent enforcement and the state interest in sovereignty.

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*Because citizen submissions do not rely on government action, countries cannot subsume environmental issues to other diplomatic concerns*

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At the same time, the CEC governing bodies should have more freedom to prepare factual records without political interference.<sup>71</sup> The practical consequences of a factual record are limited to public disclosure of state action, and the state can blunt criticism of any absence of enforcement with future enforcement action.<sup>72</sup> Because treaties require enforcement of domestic law, not of a politically unattainable international standard, governments should be able to effectively enforce their own domestic law.<sup>73</sup> Overall, a citizen submission process within a free trade agreement can be an effective mechanism to improve enforcement of environmental laws if the CEC has the political freedom to pursue factual records.<sup>74</sup> A trading partner, however, needs a basic environmental framework before increased enforcement will increase environmental protection.

DO NOT ENACT FREE TRADE AGREEMENTS WITH STATES THAT DO NOT PROVIDE FOR ENVIRONMENTAL PROTECTION

While a citizen submission process can increase effective enforcement of environmental laws, increased enforcement of laws that do not exist cannot protect the environment. While some argue that free trade brings increased prosperity that will in turn increase environmental protections, investor protection provisions in free trade agreements are a threat to new environmental laws.<sup>75</sup> Because of these investor protection provisions, effective environmental laws must be in place before a free trade agreement can improve their enforcement.<sup>76</sup>

While the United States and Chile enacted the USCFTA after Chile had achieved a high level of environmental protection,

the recent U.S.-Peru Agreement does not increase environmental protection.<sup>77</sup> Peru has environmental laws, but those laws do not meet the “high level” of environmental protection required by the treaty.<sup>78</sup> Trade agreements can foster increased environmental enforcement, but only if the partner country has effective environmental laws. If increasing environmental protection is a goal of the United States and other developed countries, those countries should not sign trade agreements with countries that lack legal environmental protection.

CONCLUSION

While inclusion of any environmental provisions in free trade agreements is a step forward, lip service to increased enforcement of environmental laws is not sufficient. Effective enforcement of domestic environmental laws should be a standard condition of future U.S.

free trade agreements. Allowing state-to-state dispute resolution on environmental issues is not sufficient to actually increase enforcement because states tend to rely on mutual non-enforcement when there are no other consequences. A citizen submission on enforcement process is much more effective at increasing enforcement because it takes advantage of, and even increases, public awareness of non-enforcement. While a citizen enforcement process alone will not solve the world’s envi-

ronmental problems, it is an important step towards increasing government accountability for effective enforcement of environmental laws.



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*Effective environmental laws must be in place before a free trade agreement can improve their enforcement*

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## Endnotes: GIVING POWER TO THE PEOPLE: COMPARING THE ENVIRONMENTAL PROVISIONS OF CHILE’S FREE TRADE AGREEMENTS WITH CANADA AND THE UNITED STATES

<sup>1</sup> HILARY F. FRENCH, COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT 61 (1993) (arguing that the United States should use free trade agreements to increase global environmental protection), available at <http://www.world-watch.org/node/877>.

<sup>2</sup> North American Agreement on Environmental Cooperation, Sept. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC]. See also William J. Clinton, Governor of Ark., Expanding Trade and Creating American Jobs, at North Carolina State University, Raleigh, N.C. (Oct. 4, 1992) (calling for environmental and labor agreements with NAFTA), available at <http://www.ibiblio.org/pub/academic/political-science/speeches/clinton.dir/c151.txt>.

<sup>3</sup> NAAEC, *supra* note 2, art. 14, 15, 22.

<sup>4</sup> Canada-Chile Free Trade Agreement, Dec. 5, 1996, Can.-Chile, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en> [hereinafter CCFTA]; Canada-Chile Agreement on Environmental Cooperation, Feb. 6, 1997, Can.-Chile, available at [http://www.sice.oas.org/trade/chican\\_e/Environ.asp](http://www.sice.oas.org/trade/chican_e/Environ.asp) [hereinafter CCAEC].

Endnotes: Giving Power to the People: Comparing the Environmental Provisions of Chile’s Free Trade Agreements with Canada and the United States *continued on page 91*

# CONFERENCE PROCEEDINGS

## 21ST CENTURY INFRASTRUCTURE: OPPORTUNITIES AND HURDLES FOR RENEWABLE ENERGY DEVELOPMENT<sup>1</sup>

### INTRODUCTION: OVERVIEW

Not enough attention has been paid to renewable energy infrastructure development critical to ensure successful project development for wind, biomass, solar, biofuels, geothermal, distributed generation, and waste management projects. With almost \$13 trillion slated to be spent in the upcoming decade on energy supply and infrastructure, the Conference sought to elucidate the type of integrated Federal, State, and Wall Street support for infrastructure, we need to see:

- Renewable energy and efficiency supplies growing in the mix
- An estimated market clearing price for carbon
- Increased renewable infrastructure investment
- Access to capital

The American University Washington College of Law (“WCL”) and the Renewable & Distributed Generation Resources Committee of the ABA Section of Environment, Energy and Resources co-sponsored this conference to evaluate the issues surrounding renewable infrastructure development. The national Conference was held at WCL on September 10, 2009. Podcasts of the panel discussions and lunch keynote speech by the Federal Energy Regulatory Commission (“FERC”) Chairman Jon Wellinghoff are available through the WCL podcast directory.<sup>2</sup>

### ELECTRIC TRANSMISSION GAPS AND BOTTLENECKS: ISSUES AND POTENTIAL SOLUTIONS<sup>3</sup>

Assuming that we can generate all the renewable energy we need in this country, sufficient electric transmission, distribution, and storage is critical to move power from where it is generated to where it is needed and used. One of the primary issues with transmission development is determining who is going to pay and how. The issue of who pays is in flux between the regulated model with long-term purchase agreements and the participant pay model, where the beneficiaries of the additional transmission themselves pay for the cost of development.

### TRANSMISSION DEVELOPMENT: RTO/ISO CONTEXT

In the RTO/ISO reliability and planning processes, several payment methodologies have emerged. First is the cost allocation method, whereby one-third of the transmission development

costs are shared regionally through an increase in rate base, and two-thirds of the costs are allocated to the regional zones in which the transmission upgrade/expansion is located. The cost allocation method is the basic plan generally used for adding a designated network resource on the transmission grid.

Another payment method is the balanced portfolio approach. In the balanced portfolio, 100 percent of the costs are spread across the entire region. Strict tests are in place to show how the benefits exceed the costs for the whole region. This approach is flexible enough to make adjustments to ensure that the costs are balanced region-wide. If the analysis shows that certain areas will not see as much benefit, then adjustments can be made to the cost assessment for better parity within the region.

### TRANSMISSION DEVELOPMENT: PRIVATE INVESTORS

The goal of merchant transmission development is for private investors to enter the market to build transmission lines, often to connect renewable generation. On February 19, 2009, the FERC, by order, adjusted the policy for merchant lines.<sup>4</sup> The pre-existing FERC policy required negotiated rates based on ten criteria to qualify as a merchant line. In contrast, the new policy enables private negotiations with an “anchor customer” to help diversify the risk. Instead of ten criteria, the new policy for merchant transmission lines consists of only four criteria: (1) just and reasonable rates (i.e. merchant has to be an investor assuming the full risk of the line), (2) no undue discrimination (i.e. when the remaining assets of the line are sold in an open market, there must be consistency among all investors with regards to the investment terms and conditions), (3) no undue preference and affiliate concern (i.e. the anchor cannot be an affiliate of the investor), and (4) regional reliability and operation efficiency (i.e. RTO classification no longer required).

### LESSONS LEARNED FROM THE TRANSMISSION DEVELOPMENT PROJECTS

- Eminent domain and control of the environmental permitting process can be trumped by “NIMBY” conditions in the relevant market
- Municipal utilities and cooperatives are more receptive to building transmission than IOUs because of differences in their business models

- Computing and quantifying the benefits of transmission construction can help minimize potential lawsuits enjoining development and also attract stakeholder support
- Having state regulators and permitting authorities review transmission projects in groups, not one-by-one, together with stakeholder engagement can accelerate the permitting process

The crucial question is still who pays for the transmission investment. State and Federal government cooperation is essential in answering this question because to date it has been the combination of state mandates and federal tax incentives that have enabled the success of renewable energy. FERC has solid experience in siting and approving natural gas pipelines and LNG terminals that can be applied to this task. If regulatory certainty can be provided, transmission investment by third parties could be a major cleantech financial play for the upcoming decade.

### GENERATION RESOURCES: FINDING THE RIGHT MIX<sup>5</sup>

Renewable energy has had several technologies dominate the market for years, but new innovations are developing all the time. The panel also examined what the renewable energy generation portfolio could look like under proposed climate legislation.

A longstanding player in renewable energy is solar power. Solar power has numerous benefits like low operating and maintenance costs, very little degradation, low variability, and relatively easy permitting. The price for photovoltaic panels has dropped dramatically in the last 18 months, but solar power still faces issues with scale-up. Government policies have been too focused on single rooftop installations and provide more money for small solar installations by imposing size limits. To achieve greater market penetration, solar power will have to become more than a small distributed generation resource.

Transmission is the largest current constraint on the use of renewable energy sources regardless of whether that energy is wind, solar, biomass, or geothermal. New transmission lines must be built to accommodate new population centers and new locations of renewable energy. But even with the potential problems of transmission, wind power is the most ready for large-scale production today. The Department of Energy has reported that the United States could meet 20 percent of its total energy needs using wind energy. Baseload renewables for the future to watch are: biomass, geothermal, hydropower, and waste management projects. Their dispatchability offers premium renewable energy

benefits to the utility and its customers especially in a carbon constrained world.

Natural gas has emerged as the largest competitor to renewable energy. Prices for natural gas have dropped due to advances in drilling technology. However, government policies are shifting to promote renewable energy with natural gas support as a transition fuel through 2030. The policy drivers for an efficient energy mix include: energy security, energy independence, national security, stabilization of energy prices, and, most importantly, decreasing greenhouse gas emissions. These policies will result in a better renewable energy generation portfolio with more innovation and operating efficiencies from transmission and storage.

Any climate or energy legislation incentives must address the characteristics of project finance in order to encourage the development of renewable energy. Projects must have a firm method of revenue generation (either through a contract or rate base) and revenue streams must be able to be aggregated (securitized). Furthermore, a market must be fluid to function properly, but must promote regulatory certainty for long-term planning. Only by keeping these project finance characteristics in mind will policy-makers effectively incentivize and promote the development of renewable energy.

### PRIVATE INVESTMENT AND THE ROLE OF THE FEDERAL GOVERNMENT: “THE GOLDILOCKS CONUNDRUM”<sup>6</sup>

The government’s role in the development and promotion of renewable energy needs to be the right size to be effective—neither too big nor too small. Typically, the government role in

development is to fund basic and early applied research. As technologies develop, entrepreneurs and industry begin to identify technologies with market applications, and the government’s role shifts. In the energy field, however, the government role in investment is more important because of the high risk involved in financing capital-intensive projects. The limited availability of capital since 2008 has also fostered an important government role in facilitating market transformation.

The government must reconcile competing national interests: national security, climate change, supply reliability, and economic competitiveness. Free market investors are hesitant to invest when policies are uncertain. Without a national legislative mandate, unpredictability reigns as regulations change rapidly and state government policies develop in patchwork fashion. The utility market is a particularly conservative market that tends to wait to see which

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*Transmission is the largest current constraint on the use of renewable energy sources regardless of whether that energy is wind, solar, biomass, or geothermal*

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technologies the government will mark as winners and losers. Adding to the uncertainty, Wall Street is recasting its business model after the financial meltdown. Particularly in a market downturn, private investors tend to avoid risking corporate investment into new technologies.

To develop domestic energy in the United States, the government must assume a strong role by providing increased funding. If left solely to the free market, energy development will happen slowly; megacities, population growth, and resource pressure will eventually force prices to rise and result in new technologies in response to the need. However, the U.S. can become an energy leader and avoid the painful spikes in energy costs if the government steps in to fund the bridge to facilitate market transformation. Export markets for clean technology products must also be preserved. Small businesses will be hurt by large government investment because they lack the resources to participate in the government contracting process; but small businesses will always foster technology development by assuming entrepreneurial risk and will require special private investment and government support to be an incubator of future innovation.

To make a difference in addressing greenhouse gas emissions, we need to focus on three objectives: (1) a reliable electric system; (2) reasonable prices for electricity; and (3) an environmentally benign electric utility system. The federal government can encourage more private sector participation and entrepreneurial response by clearly defining its legislative goals. The current climate legislation proposals are not clearly defined enough for capital markets to play a crucial role as advisor or principal investor. The capital markets need stability and certainty to function properly. Markets are more efficient than government policies for picking winners and losers. The market-based process of seeking the most commercially viable projects tends to eliminate those that are not viable based on price, scale, or capital cost recovery.

### **FINANCING ISSUES: VIEWS FROM WALL STREET TO SAND HILL ROAD<sup>7</sup>**

The issue of project financing is where the rubber hits the road—where the sources of capital assess the project to determine whether it is worthy of investment. Venture capitalists (“VCs”) are one source for financing renewable energy project development. VCs have made significant investments in renewable energy “moonshot” projects in fields such as solar, wind, and biofuels, but only 20–30 percent of those investments are likely to mature to the projected rate of return. The short-term effect of the financial downturn has been that VCs are increasingly concerned about return on capital. Many VCs have gravitated toward conservative investment approaches in familiar

sectors of investment for the mid-term which will be harmful to renewable energy companies.

Entrepreneurs and project developers must focus on the basic *needs* and *benefits* of project proposals when positioning for institutional support. Consumers in general are technology neutral, meaning that they do not care what technology is used to power their cars as long as the car performs. Instead, consumers are concerned with whether a technology meets their needs (low cost) and has additional benefits (quality and convenience).

Technological advancements in each sector of renewable energy will create winners and losers in the short term. However, the market will likely create the long-term winners, subject to regulatory policy.

Reviving the Initial Public Offering (“IPO”) market is critical for funding emerging renewable energy technologies. During the NASDAQ bust of

2000-2001, the market responded with larger investment banks taking over smaller ones. Since the smaller investment banks were the primary sources of funding for the research and development of new products and services by entrepreneurs, the bust caused a shortage of capital for new ventures and innovations. The demise of the IPO market has also caused a stressed environment for VCs. The lack of a vibrant IPO market means that VCs are locked into current investments and are unable to recoup original investments to fund new projects. If the IPO market is not revived, new technologies may die on the vine for want of funding during this decade.

Acquiring credit to fund renewable energy projects has become very difficult. The financial downturn has pushed banks into an ultra-conservative mode in order to stay solvent. The question remains, has the IPO market experience been transferred to the credit markets? Notably, credit markets are still considering investments in sound renewable energy projects with quality participants and a strong cash flow. In order to secure credit, projects require concrete yields, well-structured deals, and investment grade credits. Investment grade credits are critical for power purchase agreements, construction, and ongoing operations and maintenance in today’s markets.

As an alternative, the United States should not establish a sovereign wealth fund. The federal government often funds “political” projects and continues to fund them even when they are not profitable. Elected officials are ill-positioned to make difficult decisions that will cause companies to fold and cause constituents to become unemployed. On the other hand, a fund created by a group of states and modeled on the National Science Foundation, where projects do not have specific outcome requirements, could be more successful than a sovereign wealth fund. Such a fund could team with private equity investors to form joint ventures to fund renewable project development. The Clean Energy Development Authority (“CEDA”) under

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*Free market investors are  
hesitant to invest when  
policies are uncertain*

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consideration in the Senate also offers promise as an alternate financing vehicle.

### **POLICIES FOR THE TRANSITION TO A CARBON-CONSTRAINED ECONOMY<sup>8</sup>**

Climate change has created a pressing need for a technological transition to a reduced carbon infrastructure, but the transition also requires our vigilance against unintended economic and environmental consequences. Distributed power generation will be part of this solution, but it is not economical enough to be the only approach. We need to develop a utility-scale renewable energy generation sector. This new energy sector will require revising federal and state laws and regulations. Currently, renewable energy policies are developed at the state level. The need for rapid development of renewable energy to meet climate and carbon-reduction goals will require the federal government to provide more stable direction and a market clearing price that properly evaluates the cost of carbon.

Large scale renewable generation will require a grid overhaul. Climate legislation alone is insufficient in reducing carbon emissions without addressing the national transmission issues. While a national super-grid may not be effective from a cost perspective, an alternative proposal would be to create several regions to plan total energy infrastructure and transmission systems. Such plans would simultaneously conform to a national carbon budget. The federal government can facilitate renewable energy development by accelerating siting approval instead of the current difficult and slow state approval processes. Smart grid and advanced metering will be essential for the solution.

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*Climate legislation alone is insufficient in reducing carbon emissions without addressing the national transmission issues*

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This approach should also recognize that effective energy and environmental policy in the U.S. is best implemented on the regional level.

At present, carbon prices are neither high enough, nor integrated on a national level, to prompt a national renewable energy source portfolio. Compounding this situation are the differing needs of states, and varying amounts of in-state renewable resources, forcing states to grapple with the choice of whether to create in-state green jobs through development of renewable energy, or simply buy cheap, out-of-state energy credits. Many energy and environmental policy decisions are best made at the state or regional level. However, decisions about transmission infrastructure, planning, and siting, which must often be done simultaneously, are best coordinated at the federal level to remove barriers to development and allow access to capital investment.

### **CONCLUSION**

Energy, economics, and the environment have merged to drive renewable energy development. We must manage these sectors in an integrated manner by coupling the power of internet technology, advanced metering, storage, and smart grid with access to capital. The U.S. is a center of innovation and financial structuring as well as the “Saudi Arabia” of waste heat, materials, and greenhouse gases. We will need 21st century infrastructure to achieve important national solutions, meet our renewable energy goals, and compete with emerging global economies. Achieving these goals requires political leadership working with the wisdom of men and women and the rule of law to contribute to a better modern global society.



## **Endnotes: 21ST CENTURY INFRASTRUCTURE: OPPORTUNITIES AND HURDLES FOR RENEWABLE ENERGY DEVELOPMENT**

<sup>1</sup> Conference sponsored by American University Washington College of Law and the Renewable & Distributed Generation Resources Committee of the ABA Section of Environment, Energy and Resources. The Committee is co-chaired by Michael J. Zimmer and Baird Brown. The Committee would like to acknowledge and thank the following law students who attended and provided content for the Conference Proceedings: Eric Adams, Amanda Bartmann, Adam Burrowbridge, Paulo Lopes, Lyndsay Gorton, Rachel T. Kirby, Scott Richey, Winfield Wilson, Meti Zegeye, and Beth Zgoda. The Committee also thanks WCL, the Committee Program Vice-Chairs Roger Stark and Girard Miller, and the special assistance of Jennifer Rohleder of Thompson Hine LLP.

<sup>2</sup> <http://www.wcl.american.edu/podcasts/>

<sup>3</sup> Moderator: William Snape, Fellow in Environmental Law and Practitioner in Residence, Washington College of Law. Panelists: Stephen Zaminski, Executive Vice President and Managing Director, Starwood Energy Group Global; Craig Roach, Ph.D., President, Boston Pacific Company, Inc.

<sup>4</sup> 126 FERC ¶ 61,134.

<sup>5</sup> Moderator: Girard Miller, Partner, Fulbright & Jaworski, L.L.P. Panelists: Roger Feldman, Andrews & Kurth LLP; Greg Wetstone, Director, Government Relations, Terra-Gen Power, LLC; Robert Hemphill, President & CEO, AES/SOLAR.

<sup>6</sup> Moderator: Girard Miller, Partner, Fulbright & Jaworski, L.L.P. Panelists: Todd Lee, Morgan Stanley; Elliot Roseman, Vice President, ICF International; Patti Glaza, Executive Director/CEO, Clean Technology and Sustainable Industries.

<sup>7</sup> Moderator: Roger Stark, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP. Panelists: Peter Flynn, Principal, Bostonia Partners; Scott Livingston, Principal, Livingston Securities, LLC; Jean-Luc Park, Calvert Funds.

<sup>8</sup> Moderator: Roger Stark, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP. Panelists: Nathanael Greene, Natural Resources Defense Council; George Knapp, General Counsel, Wind Capital Group; Peter Fox-Penner, Principal and Chairman Emeritus, The Brattle Group.

# LITIGATION PREVIEW

by Jessica B. Goldstein\*

In June 2009, the Supreme Court granted *certiorari* to *Stop the Beach Renourishment v. Florida Department of Environmental Protection*,<sup>1</sup> a case concerning the rights of states to maintain and restore coastal areas. The case has created a great deal of interest, with a majority of U.S. state attorneys general, as well as a number of public interest groups, filing amicus briefs in support of Florida and multiple private property rights groups filing in support of the land owners.<sup>2</sup> The case will be heard in December and the Supreme Court may use it to answer the question of whether a judicial decision can create a constitutional taking.

Judicial taking occurs when a statute is challenged for “taking” private property and the court rules that the property right in dispute never existed.<sup>3</sup> In this case, the question is whether the Florida Supreme Court was correct in ruling that landowners did not have rights over increased future beach property resulting from natural deposition and, therefore, a Florida law did not violate the Constitutional regulatory takings clause.<sup>4</sup> The U.S. Supreme Court has previously declined to intervene in similar cases because they are deeply rooted in state property law.<sup>5</sup>

Although the challenge that led to the present case was filed in 2004 by landowners in Florida attempting to stop a planned beachfront restoration,<sup>6</sup> the Florida Beach and Shore Preservation Act was enacted in 1961 by the Florida Legislature. The purpose of the Act is to address beach erosion, which the legislature found to be a problem affecting the local economy and general welfare of society.<sup>7</sup> The state has a duty under the State Constitution to protect and conserve Florida’s beaches as they are important natural resources and held in trust for public use.<sup>8</sup> The Act charged the Florida Department of Environmental Protection with the determination of which beaches are in need of restoration and authorized spending for up to seventy-five percent of the actual costs of restoration.<sup>9</sup>

Under the Florida Beach and Shore Preservation Act, the Board of Trustees of the Internal Improvement Trust Fund establishes a fixed erosion control line (“ECL”) to replace the mean high water line (“MHWL”), which fluctuates with the rise

and fall of the water level.<sup>10</sup> In establishing the ECL, the Board considers the MHWL, the extent of erosion, and landowners’ rights.<sup>11</sup> As a result, the ECL becomes the new fixed property line, dividing public lands and upland property.<sup>12</sup> When cities and towns restore beaches eroded by hurricanes, the increased beach area below the ECL becomes public beach because the restoration is done using public funds.<sup>13</sup> The ECL allows upland owners to continue to exercise littoral rights,<sup>14</sup> such as boating, fishing, and swimming.<sup>15</sup> The Act states that “there is no intention on the part of the state to extend its claims to lands not

already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property.”<sup>16</sup>

At issue in *Stop the Beach Renourishment* is the plan to “renourish” beaches critically eroded by a hurricane in 1995 through the addition of sand, and the establishment of an ECL in conjunction with the project.<sup>17</sup> In 2006, a Florida District Court held that the state’s restoration effort was an unconstitutional property taking that denied

property owners their right to water contact and accretion, which is the increase of shoreline gradually added by a body of water.<sup>18</sup> Under Florida case law, landowners were allowed to use the doctrine of accretion to own land.<sup>19</sup> However, upon appeal, the Florida Supreme Court ruled that the Florida Beach and Shore Preservation Act does not deprive owners of their littoral rights and reversed the district court’s ruling.<sup>20</sup>

While the Florida Supreme Court acknowledged landowners’ littoral rights, it drew a distinction between the present rights of use and access and the future rights of accretion and reliction,<sup>21</sup> unrelated to the present use of the shore and water. Landowners claim these littoral rights are private property rights and, therefore, that the state’s action constitutes a taking, which requires just compensation.<sup>22</sup> The Florida Supreme Court held, however, that the right does not exist unless land is added

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*There is much speculation over whether the Supreme Court will address the issue of judicial takings and use this case to establish precedent*

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\*Jessica B. Goldstein is a J.D. Candidate, May 2012, at American University Washington College of Law.

through accretion or reliction.<sup>23</sup> Because the state adds the sand for restoration, landowners do not have a property right to the increased beachfront.<sup>24</sup> Furthermore, the court adds that there is no right of contact with water under Florida common law.<sup>25</sup>

The Supreme Court of Florida stated the Florida Beach and Shore Preservation Act carefully balances private property and public interests because it not only prevents future erosion but also restores presently damaged beaches.<sup>26</sup> The court also noted that, in the interest of upland owners, the Act restores their beaches and protects their property from future damage and erosion.<sup>27</sup> Beach restoration costs between three and five million dollars per mile and Florida officials believe restoring the beach is enough to compensate landowners.<sup>28</sup> The Surfrider Foundation, a non-profit environmental organization, filed an amicus brief arguing that (1) the Florida beach access provisions are consistent with the Florida Constitution; (2) that private property owners' rights are not violated by the Act; and (3) judicial takings do not apply under the Fifth and Fourteenth Amendments.<sup>29</sup>

However, the upland owners argue that the Act converts private waterfront property into merely water view property without compensation, as required under the Constitution.<sup>30</sup> The

Coalition of Property Rights, which includes Florida coastal property owners,<sup>31</sup> claims that the Act lowers property values by allowing the general public to use the beach.<sup>32</sup> They argue that in order to implement this Act, the government abandoned the decades-old right of accretion, and landowners claim that this constitutes an uncompensated taking of private property, violating the Fifth and Fourteenth Amendments.<sup>33</sup>

There is much speculation over whether the Supreme Court will address the issue of judicial takings and use this case to establish precedent, since it has avoided the issue in the past. The Florida Supreme Court reasonably determined that accretion rights are future property rights and if the state did not preserve the beaches, accretion would not occur due to the erosion problem. In fact, landowners could lose more of

their beach than what the Act makes public. The Court should take into consideration the benefit that landowners derive from the Florida Beach and Shore Preservation Act. Not only is the state restoring their beachfront property but also continuing to preserve it and, therefore, beachfront property values. Is it too great a price to pay that the public has access to that beach? The Supreme Court will have to decide.



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*upland owners argue that the Act converts private waterfront property into merely water view property without compensation*

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## Endnotes: LITIGATION PREVIEW

<sup>1</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008) *cert. granted sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 129 S.Ct. 2792 (U.S. June 15, 2009) (No. 08-1151).

<sup>2</sup> Jennifer Koons, *Supreme Court's Regulatory Takings Case Draws Wide-spread Interest*, N.Y. TIMES, Oct. 6, 2009, available at <http://www.nytimes.com/gwire/2009/10/06/06greenwire-supreme-courts-regulatory-takings-case-draws-w-78107.html>.

<sup>3</sup> Reed Watson, *A chance to close the judicial takings loophole* 27 PERC REPORTS, Fall/Winter 2009 at 37, available at [http://www.perc.org/pdf/PRfall\\_winter09.pdf](http://www.perc.org/pdf/PRfall_winter09.pdf).

<sup>4</sup> Koons, *supra* note 2.

<sup>5</sup> Watson, *supra* note 3.

<sup>6</sup> Koons, *supra* note 2.

<sup>7</sup> Beach and Shore Preservation Act, FLA. STAT. §§ 161.011-45 (2003).

<sup>8</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110-11, 1114-15 (Fla. 2008); FLA. CONST. art. X, § 11.

<sup>9</sup> § 161.101.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> § 161.191.

<sup>13</sup> Koons, *supra* note 2.

<sup>14</sup> "Littoral rights" refer to the property right to the shore between the high and low tide waterlines.

<sup>15</sup> Beach and Shore Preservation Act, FLA. STAT. § 161.201 (2003).

<sup>16</sup> *Id.* § 161.141.

<sup>17</sup> *Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot.*, 31 Fla. L. Weekly D1173, 1 (Dist. Ct. App. 2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Walton County*, 998 So. 2d at 1111; *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919).

<sup>20</sup> *Walton County*, 998 So. 2d at 1105.

<sup>21</sup> "Reliction" (also known as "dereliction") is the gradual increase of land as a water body recedes to leave permanently dry land.

<sup>22</sup> Watson, *supra* note 3.

<sup>23</sup> *Walton County*, 998 So. 2d at 1112.

<sup>24</sup> Koons, *supra* note 2.

<sup>25</sup> *Walton County*, 998 So. 2d at 1115.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Steve Patterson, *Florida's beach restoration program threatened by suit*, JACKSONVILLE NEWS, Oct. 8, 2009, available at [http://jacksonville.com/news/metro/2009-10-07/story/florida%E2%80%99s\\_beach\\_restoration\\_program\\_threatened\\_by\\_suit](http://jacksonville.com/news/metro/2009-10-07/story/florida%E2%80%99s_beach_restoration_program_threatened_by_suit).

<sup>29</sup> *Surfrider Foundation Argues for Public Access in Brief*, ENVTL PROTECTION, Oct. 13, 2009, available at <http://eponline.com/articles/2009/10/13/surfrider-foundation-argues-for-public-access-in-brief.aspx> (last visited Oct. 17, 2009).

<sup>30</sup> Warren Richey, *Supreme Court takes up property-rights case*, CHRISTIAN SCI. MONITOR, June 15, 2009, at 2.

<sup>31</sup> Koons, *supra* note 2.

<sup>32</sup> Coalition for Property Rights, *CPR takes fight to US Supreme Court*, Aug. 24, 2009, available at [http://www.proprights.com/newsviews/display\\_newsletter.cfm?ID=827](http://www.proprights.com/newsviews/display_newsletter.cfm?ID=827) (last visited Oct. 17, 2009).

<sup>33</sup> *Id.*

# WORLD NEWS

by Nick Alarif and Kate Halloran\*

## AMERICAS

The Caribbean's fragile marine ecosystem is at a grave risk due to a non-native intruder, the red lionfish.<sup>1</sup> The red lionfish is especially destructive to ecosystems because of its voracious eating habits.<sup>2</sup> A single red lionfish is able to reduce the number of small fish in a coral patch reef by eighty percent in as little as five weeks.<sup>3</sup> It is believed that the red lionfish was introduced to the Atlantic during Hurricane Andrew in 1992, which is thought to have shattered private aquariums releasing the fish into Miami's Biscayne Bay.<sup>4</sup> Covered with poisonous pectoral spines, the red lionfish has no natural predator in the Atlantic and has increased in numbers tenfold from 2005 through 2007.<sup>5</sup>

To try and solve this potentially devastating ecological threat, conservationists have developed an innovative plan by combining business and conservation: sell the fish to consumers.<sup>6</sup> Companies, such as Sea to Table, have begun to work with local fishermen in the Bahamas by helping the fishermen sell their red lionfish catch to upscale metropolitan restaurants in the United States.<sup>7</sup> During initial trials in New York and Chicago, restaurants sold out of the red lionfish within two nights.<sup>8</sup>

## ASIA

A former luxury American ocean liner that is believed to be laden with high quantities of toxins recently arrived in Alang, India, the hub of India's ship-breaking yards.<sup>9</sup> The Platinum-II was previously anchored forty miles from Alang as the Indian government decided whether or not to allow the ship to be dismantled on its shores.<sup>10</sup> According to the Indian Platform on Ship-breaking, the Platinum-II contains close to 200 tons of asbestos and about 210 tons of materials contaminated by toxic polychlorinated biphenyls ("PCBs") as well as radioactive substances.<sup>11</sup> Groups such as Greenpeace opine that Alang's ship-breaking yards are ill-equipped to safely dismantle such poison-laden ships.<sup>12</sup>

The scrapping of the Platinum-II is in violation of the Basel Treaty,<sup>13</sup> which bans signing countries, including India, from receiving hazardous waste from countries who have not signed the treaty, which includes the United States.<sup>14</sup> However, Indian authorities have stipulated that the Platinum-II should be beached and disassembled in Alang, citing safety concerns that the Platinum-II was in too poor a condition and may break apart in the open ocean.<sup>15</sup> Earlier this year, the Environmental Protection Agency enacted fines against the owners of the Platinum-II

in amounts close to \$518,000 for illegal distribution and export of a ship containing PCBs. The Platinum-II, however, was not recalled to U.S. shores.<sup>16</sup>

In addition, the health costs of dismantling aging ocean-liners is extremely high to the local Indian shipyard workers; a 2006 report by India's Supreme Court showed that one in six Alang shipyard laborers was suffering from symptoms of asbestosis, a fatal illness, and that the number of fatal accidents in the shipyard was six times higher than even the average in the nations mining industry.<sup>17</sup> Most shipyard laborers earn only about \$2 to \$3 a day. Even with such risks to workers, Indian authorities are hesitant to close down the shipyard as it is extremely profitable; scrapping a single ship can bring in revenues of close to \$10 million.<sup>18</sup>

## AFRICA

The proposed construction of a hydroelectric dam along the Zambezi River in Mozambique has stirred conflict between locals and environmental advocates.<sup>19</sup> While government officials argue the dam will benefit local villages by supplying electricity and fostering development, environmental activists assert the construction will displace approximately 1,400 small farmers.<sup>20</sup> The advocates also contend that another dam on the Zambezi River has negatively affected the ecology of the river, disrupting fishing and agriculture in the area, and that a second dam would only worsen the situation.<sup>21</sup> The Mozambican government believes it can build the dam and minimize impacts to the environment.<sup>22</sup> Construction is scheduled to begin in 2011.<sup>23</sup>

In eastern Africa, the United Nations World Food Programme projects that \$285 million is needed to stem a hunger crisis resulting from disastrous drought conditions.<sup>24</sup> Some harvests have been completely wiped out.<sup>25</sup> A severe lack of rainfall has contributed to the crisis and forced residents to drink water from contaminated sources.<sup>26</sup> Oxfam argues that, in addition to addressing the immediate food needs of eastern Africa, better irrigation and wells are essential tools to reduce the impact of drought in the future.<sup>27</sup> The Food and Agricultural Organization advocates a resilient variety of rice packed with more nutrition that could help curb the food crisis.<sup>28</sup>

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# EUROPE

Swedes are gaining a fresh perspective on their food as many markets and restaurants are listing the amount of carbon dioxide emitted on package labels and menus.<sup>29</sup> This initiative follows new nutritional guidelines released over the summer by the Swedish National Food Administration.<sup>30</sup> The pioneering labels couple environmental concerns over climate change with

health concerns.<sup>31</sup> The guidelines advocate choosing vegetables and meats that require less energy to produce and do not recommend consuming fish due to Europe's suffering fish stocks.<sup>32</sup> Critics argue that the average consumer may feel overwhelmed by the deluge of considerations when buying a bunch of carrots, and that it is difficult to accurately calculate the emissions generated by a food product.<sup>33</sup>



## Endnotes: World News

<sup>1</sup> See *Invasive Red Lionfish Threatens Reef Fish in Caribbean*, YALE ENV'T 360, Aug. 15, 2008, available at <http://e360.yale.edu/content/digest.msp?id=1383>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See David McFadden, *Red lionfish invade the Caribbean*, L.A. TIMES, Aug. 16, 2008, available at <http://articles.latimes.com/2008/aug/16/science/sci-lionfish16>.

<sup>5</sup> National Aquarium Waterlog, *Now serving, red lionfish*, Oct. 14, 2009, available at <http://nationalaquarium.wordpress.com/2009/10/14/now-serving-red-lionfish/>.

<sup>6</sup> See Science & Technology, *Eat for the ecosystem*, ECONOMIST.COM, Oct. 15, 2009, available at [http://www.economist.com/sciencetechnology/Printer-Friendly.cfm?story\\_id=14637325](http://www.economist.com/sciencetechnology/Printer-Friendly.cfm?story_id=14637325).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> Common Dreams, *US Toxic Ship Lands in India*, Oct. 23, 2009, available at <http://www.commondreams.org/newswire/2009/10/23> [hereinafter Common Dreams].

<sup>10</sup> Suda Ramachandran, *Toxic Alert as US Ship Heads for India*, ASIA TIMES ONLINE, Oct. 24, 2009, available at [http://www.atimes.com/atimes/South\\_Asia/KJ24Df01.html](http://www.atimes.com/atimes/South_Asia/KJ24Df01.html).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989, 1673 UNTS 126, available at <http://basel.int/text/text.html>.

<sup>14</sup> Common Dreams, *supra* note 9.

<sup>15</sup> Nitin Sethi, *Toxic Waste on U.S. Ship: Gujarat Panel*, TIMES OF INDIA, Oct. 17, 2009, available at <http://timesofindia.com/articleshow/msid-5132641,prtpage-1.cms>.

<sup>16</sup> Ramachandran, *supra* note 10.

<sup>17</sup> Jacob Baynham, *India, World Shipping's Toxic Waste Dump*, SFGATE, July 6, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/06/MN2510MASF.DTL&type>.

<sup>18</sup> See *id.*

<sup>19</sup> Pete Browne, *Debate Over Dams on Africa's Zambezi River*, N.Y. TIMES, Oct. 19, 2009, available at <http://greeninc.blogs.nytimes.com/2009/10/19/debate-over-dams-on-africas-zambezi-river/>.

<sup>20</sup> Zenaida Machado, *Watching the Water Flow Away*, ALLAFRICA.COM, Oct. 23, 2009, available at <http://allafrica.com/stories/200910230853.html>.

<sup>21</sup> See *id.*

<sup>22</sup> See Browne, *supra* note 19.

<sup>23</sup> See *id.*

<sup>24</sup> Ethiopia asks for Urgent Food Aid, BBC NEWS, Oct. 22, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8319741.stm>.

<sup>25</sup> See *id.*

<sup>26</sup> Millions Facing Famine in Ethiopia as Rain Fails, THE INDEPENDENT, Aug. 30, 2009, available at <http://www.independent.co.uk/news/world/africa/millions-facing-famine-in-ethiopia-as-rains-fail-1779376.html>.

<sup>27</sup> See Machado, *supra* note 20.

<sup>28</sup> Mark Kapchanga, *FAO Introduces New Rice to Fight Food Shortages in Region*, ALLAFRICA.COM, Oct. 19, 2009, available at <http://allafrica.com/stories/200910210461.html>.

<sup>29</sup> Elizabeth Rosenthal, *To Cut Global Warming, Swedes Study Their Plates*, N.Y. TIMES, Oct. 22, 2009, available at [http://www.nytimes.com/2009/10/23/world/europe/23degrees.html?\\_r=1&ref=europe](http://www.nytimes.com/2009/10/23/world/europe/23degrees.html?_r=1&ref=europe).

<sup>30</sup> See *id.*

<sup>31</sup> Jennifer LaRue Huget, *For Food Labels, First Calories, Now Carbon Footprints?*, WASHINGTON POST, Oct. 26, 2009, available at [http://voices.washingtonpost.com/checkup/2009/10/folks\\_in\\_the\\_us\\_who.html](http://voices.washingtonpost.com/checkup/2009/10/folks_in_the_us_who.html).

<sup>32</sup> See Rosenthal, *supra* note 29.

<sup>33</sup> Madeleine Kennedy, *Is Carbon Counting the New Calorie Counting?*, ATLANTIC, Oct. 30, 2009, available at [http://business.theatlantic.com/2009/10/earlier\\_this\\_month\\_the.php](http://business.theatlantic.com/2009/10/earlier_this_month_the.php).

# BOOK REVIEW

## ADJUDICATING CLIMATE CHANGE

*Edited by William C.G. Burns and Hari M. Osofsky*

*Reviewed by Scott M. Richey and Karla O. Torres\**

The U.S. Federal Government has been slow in accepting and adapting to empirical findings of human affected climate change. Some, therefore, are turning to the judiciary to affect change. *Adjudicating Climate Change*<sup>1</sup> is a collection of self-contained essays discussing a range of law suits brought against those who directly or indirectly produce greenhouse gases. The book brings together relevant and topical case studies of recent litigation, many of which are also available online at the Social Science Research Network.<sup>2</sup>

The book comprises three sections: subnational, national, and supranational litigation. The subnational section includes case studies from the United States, Australia, and New Zealand. Stephanie Stern posits in “State Action as Political Voice in Climate Change Policy: A Case Study of the Minnesota Environmental Cost Valuation Regulation” that litigation, even under substantially symbolic state statutes, opens discourse, encourages further legislation, and pressures private actors to take voluntary regulation. She focuses on a Minnesota statute requiring that public utilities report their environmental impact to a state commission. These reports allow the state to pursue utilities with the lowest societal cost. Although no utility provider has ever been turned down for potentially having too great an environmental impact, Stern points out that no utility company in Minnesota has applied to construct a high-emissions coal-fired power plant in the ten years since enactment of the law.

The national section presents case studies based on federal litigation. In “Tort-based Climate Litigation,” David A. Grossman proposes viable tort theories for climate litigation. The author describes currently pending tort actions for public nuisance, comparing them to pollution and handgun cases. He then suggests that a products liability action might also be viable based on claims for failure to warn and design defect. An action

might be brought against a manufacturer for failing to warn consumers of the dangers of climate change resulting from use of its products. Alternatively, a manufacturer might be found liable for a design defect if an alternative design with reduced or no emissions is possible.

Federal district courts, however, have dismissed public nuisance actions as within the purview of legislators, not judges, and the actions are currently pending on federal circuit court dockets. Grossman contends the Supreme Court has affirmed

justiciability in cases where a producer of noxious pollution in one state was successfully sued by those harmed by the nuisance in another state and this is sufficiently analogous to producers of greenhouse gases. Further, he asserts that the pending actions do not comprise political questions, but rather are ordinary actions in the context of a politically charged problem. While standing, preemption, and justiciability are impediments to a plaintiff’s claims, Grossman seems optimistic in view of

*Massachusetts v. EPA*,<sup>3</sup> in which several states successfully sued the Environmental Protection Agency for its failure to regulate greenhouse gases.

The book’s final section presents supranational case studies highlighting how climate change can be addressed in international forums. “The Inuit Petition as a Bridge? Beyond Dialects of Climate Change and Indigenous Peoples’ Rights,” an essay by co-editor Hari Osofsky, discusses creative lawyering by Inuit in the United States and Canada who filed a petition with the Inter-American Commission on Human Rights in 2005. They asserted that the United States contributed a substantial portion of the world’s greenhouse gases but was not taking adequate

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*environmental change  
can be affected by  
governmental and  
nongovernmental actors  
through the judiciary*

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policy steps to reduce them, and that the resulting global climate change phenomenon had significant impacts on the Inuit. The petition further claimed that these impacts violated the Inuit's rights protected under the Inter-American human rights system, including their rights to life, physical integrity, and security. Osofsky suggests that, notwithstanding the petition's initial rejection, it generated publicity that may have placed pressure on states to change their behavior or at least engage in a dialogue with affected indigenous communities. More importantly, petitions like these reinforce the idea that international human rights tribunals are appropriate forums for addressing problems that cut across several legal issues. Echoing one of the book's goals,

this essay emphasizes how the Inuit petition can serve as a "port of entry" for making progress on climate change and environmental rights issues.

*Adjudicating Climate Change* presents an interesting survey of climate change litigation at local, national, and international levels. The book optimistically points out how political and environmental change can be affected by governmental and non-governmental actors through the judiciary. Further, the essays describe how such litigation works to create dialogue with and place pressure on slow moving lawmakers and large producers of greenhouse gases.



## Endnotes: Book Review

<sup>1</sup> ADJUDICATING CLIMATE CHANGE (William C.G. Burns & Hari M. Osofsky eds., 2009).

<sup>2</sup> See Social Science Research Network, <http://www.ssrn.com> (searching for the author of a chapter from the main webpage will lead to chapters 1-4, 6, 8, 11, 12, 14, and 16) (last visited Oct. 27, 2009).

<sup>3</sup> 549 U.S. 497 (2007).

### ENDNOTES: THE ROLE OF INTERNATIONAL FORUMS IN THE ADVANCEMENT OF SUSTAINABLE DEVELOPMENT

*continued from page 18*

<sup>17</sup> *Id.* §§9.1-22.9 (addressing atmosphere, land resources, deforestation, desertification and drought, mountain ecosystems, sustainable agriculture and rural development, biological diversity, biotechnology, oceans and seas, fresh waters, toxic chemicals, hazardous wastes, solid and sewage wastes, and radioactive wastes).

<sup>18</sup> *Id.* §§23.1-32.14 (addressing the roles in achieving sustainable development to be played by women, children and youth, indigenous people, non-governmental organisations, local authorities, workers and trade unions, business and industry, science and technology, and farmers).

<sup>19</sup> *Id.* §§33.1-40.30 (addressing financing mechanisms, technology transfers, science, education, capacity building in developing countries, international institutional arrangements, international legal instruments, and information for decision-making).

<sup>20</sup> See *Id.* §§ 39.1-10.

<sup>21</sup> United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38, U.N. Doc. A/AC.237/18 (Part II)/Add.1, 31 I.L.M. 849 (1992), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC].

<sup>22</sup> United Nations Convention on Biodiversity, June 5, 1992, 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (1992), available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf> [hereinafter UNCBD].

<sup>23</sup> United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 15, 1994, 33 I.L.M. 1328, available at <http://www.unccd.int/convention/text/pdf/conv-eng.pdf> [hereinafter UNCCD].

<sup>24</sup> See Programme for the Further Implementation of Agenda 21, G.A. Res. S/19-2, ¶ 109-10, U.N. Doc. A/Res/S-19/2 (Sept. 19, 1997).

<sup>25</sup> Ten-Year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development, G.A. Res. 55/199, ¶1, U.N. Doc. A/RES/55/199 (Dec. 20, 2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/571/15/PDF/N0057115.pdf?OpenElement>.

<sup>26</sup> Johannesburg Declaration on Sustainable Development, Sept. 4, 2000, U.N. Doc. A/Conf.199/20, ¶ 5, available at <http://www.un-documents.net/jburgdec.htm>.

<sup>27</sup> Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, U.N. Doc. A/Conf.199/20, Annex I, Ch. XI, available at [http://www.unctad.org/en/docs/aconf199d20&c1\\_en.pdf](http://www.unctad.org/en/docs/aconf199d20&c1_en.pdf). Other significant commitments include: reducing biodiversity loss by 2010; restoring fisheries to their maximum sustainable yields by 2015; establishing a representative network of marine protected areas by 2012; improving developing countries' access to environmentally-sound alternatives to ozone depleting chemicals by 2010; and undertaking initiatives to implement the Global Programme of Action for the protection of the Marine Environment from Land Based Sources by 2004. *Id.*

<sup>28</sup> See OSITADINMA ANAEDU & LARS-GORAN ENGFELDT SUSTAINABLE DEVELOPMENT GOVERNANCE ¶3, <http://www.un.org/jsummit/html/documents/prepcom-3docs/governance30.3.rev1.doc> (last visited Nov. 8, 2009) (outlining general institutional framework necessary to improve sustainable development implementation).

<sup>29</sup> See MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES AND PROSPECTS 18 (Oxford University Press 2005).

<sup>30</sup> UN Department of Economic and Social Affairs, Johannesburg Declaration on Sustainable Development, [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm) (last visited Nov. 11, 2009).

<sup>31</sup> CORDONIER SEGGER & ASHFAQ KHALFAN, *supra* note 29.

<sup>32</sup> M.C. Cordonier Segger et al., *Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation*, 12 REV. EUROPEAN COMTY. & INT'L ENVTL. L. 54 (2003).

<sup>33</sup> See U.N. GAOR, 46th Sess., Agenda Item 21, U.N. Doc. A/Conf.151/26 (1992), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement>; C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

<sup>34</sup> PHILIP ALLOT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 308 (Cambridge University Press 2002).

<sup>35</sup> Alan Boyle, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 149-53 (M. Evans ed., 2006).

<sup>36</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29.



- <sup>37</sup> Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, art. 3(1)(a) (2002), available at <http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE001350.txt>.
- <sup>38</sup> See UNFCCC, *supra* note 21, at Preamble (“Recognizing that States should enact effective environmental legislation . . .”); see also *Decision 1/CP.8 Delhi Ministerial Declaration on Climate Change and Sustainable Development*, in REPORT OF THE CONFERENCE OF THE PARTIES ON ITS EIGHTH SESSION, HELD AT NEW DELHI FROM 23 OCTOBER TO 1 NOVEMBER 2002, U.N. Doc. CCC/CP/2002/7/Add.1 (Mar. 28, 2003) (“Resolve that, in order to respond to the challenges faced now and in the future, climate change and its adverse effects should be addressed while meeting the requirements of sustainable development . . .”), available at <http://unfccc.int/resource/docs/cop8/07a01.pdf>.
- <sup>39</sup> See generally UNFCCC, *supra* note 21; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998), available at [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) [hereinafter Kyoto Protocol].
- <sup>40</sup> *Id.* art. 2(1).
- <sup>41</sup> UNCCD, *supra* note 23, art. 2(2).
- <sup>42</sup> See UNCBD, *supra* note 22, art. 2 (defining “sustainable use”).
- <sup>43</sup> See generally International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, available at <ftp://ftp.fao.org/ag/cgrfa/it/ITPGRE.pdf> [hereinafter FAO Seed Treaty].
- <sup>44</sup> See SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005); see also MARIE-CLAIRE CORDONIER SEGGER, *Sustainable Development in Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 331-39 (Lorand Bartels & Federico Ortino eds., 2006) [hereinafter *Sustainable Development in Regional Trade Agreements*].
- <sup>45</sup> Compare WTO DECISION ON TRADE AND ENVIRONMENT (Apr. 15, 1994) with DRAFT DECISION ON TRADE AND ENVIRONMENT (Dec. 13, 1993) MTN.TNC/W/123, available at [http://www.wto.org/gatt\\_docs/English/SULPDF/92150036.pdf](http://www.wto.org/gatt_docs/English/SULPDF/92150036.pdf).
- <sup>46</sup> Agreement Establishing the World Trade Organization, preamble, Apr. 15, 1994, 1867 U.N.T.S. 3, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> [hereinafter WTO Agreement].
- <sup>47</sup> In international law, in general, the preamble is part of the context in which the international treaty has to be interpreted. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. The preamble can contain important information about the object and purpose of the treaty. *Id.*
- <sup>48</sup> Doha Ministerial Declaration, Nov. 14, 2001, U.N. Doc. WT/MIN(01)/DEC/1, ¶ 7, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).
- <sup>49</sup> Pascal Lamy, Trade can be a Friend, and not a Foe, of Conservation (Oct. 10, 2005), available at [http://www.wto.org/english/news\\_e/spl\\_e/spl07\\_e.htm](http://www.wto.org/english/news_e/spl_e/spl07_e.htm).
- <sup>50</sup> *Sustainable Development in Regional Trade Agreements*, *supra* note 44.
- <sup>51</sup> Marie-Claire Cordonier Segger et al., *Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation*, 12 REV. EUROPEAN CMTY. & INT’L ENVTL. L. 54 (2003).
- <sup>52</sup> *Our Common Future*, *supra* note 12.
- <sup>53</sup> LAVANA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 191-212 (Vaughan Lowe ed., Oxford University Press 2006).
- <sup>54</sup> E.g., Gabcikovo-Nagymaros Project (Hungary v. Slovakia) 1997 I.C.J. 7, 70, 75 (Sept. 25) available at <http://www.icj-cij.org/docket/files/92/7375.pdf>. See also Alan Boyle, *Soft Law in International Law-Making* in INTERNATIONAL LAW 142 (M. Evans ed., 2006); CORDONIER SEGGER & KHALFAN, *supra* note 29; DUNCAN FRENCH, INTERNATIONAL LAW AND POLICY OF SUSTAINABLE DEVELOPMENT (Manchester University Press 2005); Food & Agriculture Organization of the United Nations, *Law and Sustainable Development Since Rio: Legal Trends in Agriculture and Natural Resource Management*, FAO Legislative Study 73 (2002), available at <http://www.fao.org/docrep/005/Y3872E/y3872e00.htm>.
- <sup>55</sup> U.N. Comm’n on Sustainable Dev., Div. for Sustainable Dev., *Background Paper: Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* (Apr. 18-May 3, 1996), available at [www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm](http://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm).
- <sup>56</sup> Programme of Action for Further Implementation of Agenda 21, G.A. Res. S-19/2, ¶ 14, U.N. GAOR, 19th Sess., U.N. Doc. A/RES/S-19/2 (Sept. 19, 1997) available at <http://www.un.org/documents/ga/res/spec/ares19-2.htm>.
- <sup>57</sup> International Law Association, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002, 2 Int’l Envtl. Agreements: Politics, Law and Econ. 209 (2002).
- <sup>58</sup> See, e.g., INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE (Nico Schrijver & Freidl Weiss eds., Martinus Nijhoff Publishers 2004) 1-152, 699-706; CORDONIER SEGGER & KHALFAN, *supra* 29; DUNCAN FRENCH, INTERNATIONAL LAW AND POLICY OF SUSTAINABLE DEVELOPMENT (Manchester University Press 2005).
- <sup>59</sup> Marie-Claire Cordonier Segger, *Significant Developments in Sustainable Development Law and Governance: A Proposal*, 28 Natural Res. Forum 61 (2004); Marie-Claire Cordonier Segger et al., *Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation*, 12 REV. EUROPEAN COMTY. & INT’L ENVTL. L. 54 (2003).
- <sup>60</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29 (arguing that both central norms highlighted by this principle have been recognized as rules of customary international law). See also Kathleen Bottriel & Duncan French, *The Duty of States to Ensure Sustainable Use of Natural Resources: Recent Developments in International Law Related to Sustainable Development* (CISDL Legal Working Papers 2005), available at [http://www.cisd.org/pdf/sdl/SDL\\_Sustainable\\_Use.pdf](http://www.cisd.org/pdf/sdl/SDL_Sustainable_Use.pdf).
- <sup>61</sup> See UNCBD, *supra* note 22, arts. 3 & 10.
- <sup>62</sup> See UNCCD, *supra* note 23, arts. 3(c), 10.4, 11, 17.1(a), 19.1(c) & (e).
- <sup>63</sup> WTO Agreement, *supra* note 46.
- <sup>64</sup> FAO Seed Treaty, *supra* note 43.
- <sup>65</sup> EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 17-26 (Transnational Publishers 1989).
- <sup>66</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29 (arguing that while this principle guides a significant number of social and other treaties related to sustainable development, it has not yet been recognized as a customary rule, due in part to difficulties in identifying with certainty the needs of future generations and a lack of consensus between States on actual obligations related to distributional justice). See also Jarrod Hepburn & Ashfaq Khalfan, *The Principle of Equity and the Eradication of Poverty*, (CISDL Legal Working Papers 2005), available at [http://www.cisd.org/pdf/sdl/SDL\\_Equity.pdf](http://www.cisd.org/pdf/sdl/SDL_Equity.pdf).
- <sup>67</sup> See UNCBD, *supra* note 22, art. 15.7.
- <sup>68</sup> UNFCCC, *supra* note 21, art. 3 (1992).
- <sup>69</sup> UNCCD, *supra* note 23, art. 16(g), 17.1(e).
- <sup>70</sup> FAO Seed Treaty, *supra* note 43, arts. 1.1, 10, 13.
- <sup>71</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29, at 132-43 (arguing that while this principle guides a significant number of treaties related to sustainable development, it has not yet been recognized as a customary rule, due in part to a lack of consensus between States on the extent of greater responsibility by developed countries); see also Jarrod Hepburn & Imran Ahmad, *The Principle of Common but Differentiated Responsibilities*, 4-5 (CISDL Working Paper), available at [http://www.cisd.org/pdf/sdl/SDL\\_Common\\_but\\_Diff.pdf](http://www.cisd.org/pdf/sdl/SDL_Common_but_Diff.pdf).
- <sup>72</sup> UNFCCC, *supra* note 21.
- <sup>73</sup> Kyoto Protocol, *supra* note 39.
- <sup>74</sup> UNCCD, *supra* note 23.
- <sup>75</sup> FAO Seed Treaty, *supra* note 43, arts. 7.2(a), 8, 15.1(b)iii, 18.4(d).
- <sup>76</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29, at 143-55 (suggesting that a good argument can be made that this principle is emerging as an international customary rule to address certain specific problems related to health, ecosystems, and natural resources); see also Hepburn et al., *supra* note 71, at 17.
- <sup>77</sup> UNCBD, *supra* note 22.
- <sup>78</sup> United Nations Cartagena Protocol on Biosafety, *opened for signature* May 15, 2000, available at <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> [hereinafter UNCPB].
- <sup>79</sup> UNFCCC, *supra* note 21.
- <sup>80</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *opened for signature* Sep. 10, 1998, available at <http://www.pic.int/en/ConventionText/ONU-GB.pdf>.
- <sup>81</sup> Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products* WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998).

- <sup>82</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29, at 156-66 (noting that participation, including access to information and justice, is one of the most recognized and operationalized principles of treaty law on sustainable development, but may only be emerging as an international customary obligation between States, as consensus has mainly focused on its relevance in national decision-making); *see also* Kathleen Bottriel & Marie-Claire Cordonier Segger, *The Principle of Public Participation and Access to Information and Justice*, (CISDL Legal Working Paper), available at [http://www.cisd.org/pdf/sdl/SDL\\_Participation.pdf](http://www.cisd.org/pdf/sdl/SDL_Participation.pdf).
- <sup>83</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *opened for signature* June 25, 1998, 38 I.L.M. 517, available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.
- <sup>84</sup> *See generally* UN Human Rights Council, available at <http://www2.ohchr.org/english/bodies/hrcouncil>.
- <sup>85</sup> UNCBD, *supra* note 22.
- <sup>86</sup> UNCPB, *supra* note 78.
- <sup>87</sup> UNCCD, *supra* note 23.
- <sup>88</sup> North American Agreement on Environmental Cooperation, Dec. 8, 1993, 32 I.L.M. 1480, available at [http://www.cec.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec/download/Naaec-e.txt](http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/download/Naaec-e.txt).
- <sup>89</sup> FAO Seed Treaty, *supra* note 43, art. 9.2(c).
- <sup>90</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29, at 166-70 (arguing that while this principle is becoming increasingly influential in international discourse, it is doubtful that it would be recognized as a customary rule due to lack of consensus among States on its actual meaning, normative character, and practical implications); *see also* Nupur Chowdhury & Corinne Elizabeth Skarstedt, *The Principle of Good Governance*, 20 (CISDL Legal Working Paper), available at [http://www.cisd.org/pdf/sdl/SDL\\_Good\\_Governance.pdf](http://www.cisd.org/pdf/sdl/SDL_Good_Governance.pdf).
- <sup>91</sup> United Nations Convention Against Corruption, *opened for signature* Dec. 9 2003, 43 I.L.M. 37, available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).
- <sup>92</sup> *Id.* at art. 5.1.
- <sup>93</sup> *Id.* at art. 62.1.
- <sup>94</sup> UNCCD, *supra* note 23.
- <sup>95</sup> Rio Declaration on Environment and Development, princ. 4, G.A. Res. 47/190, Annex, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).
- <sup>96</sup> CORDONIER SEGGER & KHALFAN, *supra* note 29, at 102-09 (suggesting that if formulated as a norm to regulate sustainable development-related decision-making processes, such as that States “must ensure that social and economic development decisions do not disregard environmental considerations and not undertake environmental protection without taking into account relevant social and economic implications,” this principle is highly likely to be recognized as a rule of customary international law); *see also* Sébastien Jodoin, *The Principle of Integration*, 26 (CISDL Legal Working Paper), available at [http://www.cisd.org/pdf/sdl/SDL\\_Integration.pdf](http://www.cisd.org/pdf/sdl/SDL_Integration.pdf).
- <sup>97</sup> UNCBD, *supra* note 22.
- <sup>98</sup> FAO Seed Treaty, *supra* note 43, art. 5.1.
- <sup>99</sup> General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 187, available at [http://docsonline.wto.org/GEN\\_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta\\_Symbol+LT%FCUR%FCA-1A%FC1%FCGATT%FC2%29+%26+%28@meta\\_Types+Legal+text%29..](http://docsonline.wto.org/GEN_searchResult.asp?RN=0&searchtype=browse&q1=%28@meta_Symbol+LT%FCUR%FCA-1A%FC1%FCGATT%FC2%29+%26+%28@meta_Types+Legal+text%29..)
- <sup>100</sup> North American Free Trade Agreement, Dec. 8, 1993, 32 I.L.M. 1519, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=ALL>.
- <sup>101</sup> *See* Gabčíkovo-Nagymaros, *supra* note 54, at 140.
- <sup>102</sup> *See* Nuclear Tests Case (*Australia v. France*) 1974 I.C.J. 253, 341-44 (Dec. 20), available at <http://www.icj-cij.org/docket/files/58/6109.pdf>.
- <sup>103</sup> *See* Kasikili/Sedudu Island (*Botswana v. Namibia*) 1999 I.C.J. 1045, 1087-88 (Dec. 13), available at <http://www.icj-cij.org/docket/files/98/7577.pdf>.
- <sup>104</sup> *See* Pulp Mills on the River Uruguay (*Argentina v. Uruguay*) 2007 I.C.J. 135, 180.
- <sup>105</sup> *See* Iron Rhine (“Ijzeren Rijn”) Railway Case (*Belg. v. Neth.*) Perm. Ct. Arb. 1, 28-29, 49 (2005), available at <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20240505.pdf>.
- <sup>106</sup> Gabčíkovo-Nagymaros, *supra* note 54, at 140.
- <sup>107</sup> *Id.* (emphasis added).
- <sup>108</sup> *Id.* at 85.
- <sup>109</sup> Iron Rhine, *supra* note 105, at 67-69.
- <sup>110</sup> *Id.*
- <sup>111</sup> Gabčíkovo-Nagymaros, *supra* note 54, at 140.
- <sup>112</sup> *Id.*
- <sup>113</sup> Iron Rhine, *supra* note 105, at 67-69.
- <sup>114</sup> *Id.* at 90 (emphasis added).
- <sup>115</sup> in “the inverse sense” as well.
- <sup>116</sup> Pulp Mills, *supra* note 104, at 30-31 (Verbatim Record of the Public sitting held on Thursday 8 June 2006, at 3 p.m., at the Peace Palace), available at <http://www.icj-cij.org/docket/files/135/13128.pdf>.
- <sup>117</sup> *Id.*
- <sup>118</sup> *Id.* at 80.
- <sup>119</sup> *See, e.g.*, Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 (2002); Howard F. Chang, *Toward A Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31 (2000); Petros C. Mavroidis, *Trade and Environment after the Shrimp-Turtles Litigation*, 34 J. WORLD TRADE 73 (2000).
- <sup>120</sup> Retrospective Analysis of the 1994 Canadian Environmental Review - Uruguay Round of Multilateral Trade Negotiations (Dep’t of Foreign Affairs and Int’l Trade, Ottawa 1999).
- <sup>121</sup> WTO, *United States: Shrimps-Panel Report* XXX 161.
- <sup>122</sup> *Id.* at 284.
- <sup>123</sup> GATT XX (g).
- <sup>124</sup> WTO, *United States: Shrimps-Appellate Body Report* at 12.
- <sup>125</sup> WTO, *United States: Shrimps-Panel Report* at 3.146 (emphasis added).
- <sup>126</sup> *United States-Restrictions on the import of Tuna* (1991) GATT BISD 39S/155, (1991) 30 ILM 1594.
- <sup>127</sup> D. Palmeter and P.C. Mavroidis, *The WTO Legal System: Sources of Law*’ 92 AJIL 398, 402 (1998).
- <sup>128</sup> WTO, *United States: Shrimps-Panel Report* at 7.52.
- <sup>129</sup> *Id.*
- <sup>130</sup> Note 107, in the Appellate Body Report, reads “This concept has been generally accepted as integrating economic and social development and environmental protection,” WTO, *United States: Shrimps-Appellate Body Report*. *See e.g.*, G. Handl, *Sustainable Development: General Rules versus Specific Obligations*, in W LANG (ED), SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 35 (1995); *Our Common Future*, *supra* note 12, at 43.
- <sup>131</sup> WTO, *United States: Shrimps-Appellate Body Report* at 123.
- <sup>132</sup> *Id.* (emphasis added).
- <sup>133</sup> ECHR 9 December 1994 *Lopez Ostra v. Spain* 20 EHRR [1995] 277; ECHR 19 February 1998 *Guerra v. Italy* 26 EHRR 357 [1998] 357; ECHR 9 June 2005 *Fadeyeva v. Russia* EHRR[2005] 376; ECHR 10 November 2004 *Taskin v. Turkey* 42 EHRR [2006] 50.
- <sup>134</sup> *Fredin v. Sweden* (1991) ECHR Ser. A/192; ECHR 8 July 2003 *Hatton v. UK* [2003] 37 EHRR 611 (Grand Chamber).
- <sup>135</sup> *See* *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter-Am Ser. C, No. 79; *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004); *Yanomani Indians v. Brazil*, Decision 7615, Inter-Am.C.H.R., *Inter-American YB on Hum.Rts.* 264 (1985). Several other claims have been held admissible: *Yakye Axa indigenous community of the Enxet-Lengua people v. Paraguay*, Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 387 (2002); *The Kichwa Peoples of the Sarayaku community and its members v. Ecuador*, Case 167/03, Report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 308 (2004).
- <sup>136</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR, Communication 155/96 (2002).
- <sup>137</sup> *Ilmari Lansman v. Finland*, (1996) ICCPR Communication No. 511/1992.

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ENDNOTES: THE IMPORTANCE OF REGULATING TRANSBOUNDARY GROUNDWATER AQUIFERS *continued from page 19*

<sup>5</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (describing a dilemma in which the combined effect of multiple individuals acting in their own self interest diminishes the value of a shared limited resource, even when this result is not in any individual's best interest in the long run).

<sup>6</sup> Compl. at 4, *Hood v. City of Memphis*, 533 F. Supp. 2d 646 (N.D. Miss. 2008) (No. 2:05CV32-D-B).

<sup>7</sup> *Id.* at 6-7.

<sup>8</sup> *Id.* at 6-7.

<sup>9</sup> SUSAN S. HUTTON ET AL., US GEOLOGICAL SURVEY, ESTIMATED USE OF WATER IN THE UNITED STATES IN 2000, 40 (2005), available at <http://pubs.usgs.gov/circ/2004/circ1268/pdf/circular1268.pdf> (providing time series data on water consumption by source used to calculate percentage changes).

<sup>10</sup> NATIONAL GROUND WATER ASSOCIATION, GROUND WATER: A CRITICAL COMPONENT OF THE NATION'S WATER RESOURCES 1 (2004), available at [http://www.ngwa.org/ASSETS/04491558AACB498CAF8C58DB3DCF612A/position\\_paper\\_gw\\_sustainability%2009.pdf](http://www.ngwa.org/ASSETS/04491558AACB498CAF8C58DB3DCF612A/position_paper_gw_sustainability%2009.pdf).

<sup>11</sup> See DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, EFFECTS OF CLIMATE VARIABILITY AND CHANGE ON GROUNDWATER RESOURCES OF THE UNITED STATES, available at <http://pubs.usgs.gov/fs/2009/3074/pdf/FS09-3074.pdf>.

<sup>12</sup> See DEPLETION, *supra* note 3, at 2 (explaining that poor-quality surface water can be drawn into an aquifer and effectively contaminate the aquifer as a whole and that pumping may cause salt water to migrate into a freshwater aquifer located in a coastal zone).

<sup>13</sup> *Food and Water Watch*, *supra* note 4, at 2-3 (illuminating the interconnectedness of the hydrological system such that a decrease in the water level of an underground aquifer also causes a drop in the water level of surrounding streams, rivers, lakes, and other water features).

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ENDNOTES: NOT AT ALL: ENVIRONMENTAL SUSTAINABILITY IN THE SUPREME COURT *continued from page 29*

<sup>8</sup> See, e.g., Mike Berry & Anitra Nelson, *Steering Sustainability: What, When, and Why*, in STEERING SUSTAINABILITY IN AN URBANIZING WORLD: POLICY PRACTICE AND PERFORMANCE 1, 2-3 (Anitra Nelson ed., 2007) (explaining the national policy and reform considerations behind urban sustainability); James R. May, *The North American Symposium on the Judiciary and Environmental Law: Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, APPENDIX B (2005/2006) (listing countries that have constitutionally entrenched environmental policies as governing principles, some including sustainability).

<sup>9</sup> See, e.g., Virginia MacLaren et al., *Engaging Local Communities in Environmental Protection with Competitiveness: Community Advisory Panels in Canada and the United States*, in SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE 31, 36 (John J. Kirton & Peter I. Hajnal eds., 2006) (examining examples of Community Advisory Panels in the United States and Canada and how they affect sustainability in the communities).

<sup>10</sup> See, e.g., Isabelle Biagiotti, *Emerging Corporate Actors in Environment and Trade Governance: New Vision and Challenge for Norm-setting Processes*, in PARTICIPATION FOR SUSTAINABILITY IN TRADE 121, 122 (Sophie Thoyer & Benoit Martimort-Asso eds., 2007) (describing how global corporations are focusing more on environmental sustainability).

<sup>11</sup> See generally James R. May, *Of Development, daVinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States*, 3 WIDENER L. SYMP. J. 197 (1998).

<sup>12</sup> See Roslyn Higgins, *Natural Resources in the Case Law of the International Court*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 87, 111 (Alan Boyle & David Freestone, eds., 1999) (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

<sup>13</sup> See generally James R. May, *U.S. Supreme Court Environmental Cases 2008-2009: A Year Like No Other*, 40 Env't Rep. (BNA), No. 36, at 2154 (Sept. 11, 2009); James R. May, *U.S. Supreme Court Decisions: Review for 2006-2007 and Outlook*, 38 Env't Rep. (BNA), No. 34, at 1851 (Aug. 24, 2007). See also, *Constitutional Law: 2008 Annual Report*, in ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2008 349 (ABA Section of Env't, Energy & Resources 2009) (survey of environmental cases); James R. May, *Constitutional Law: 2007 Annual Report*, in ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2008 349 (ABA Sec. of Env't, Energy & Resources 2008).

<sup>14</sup> See Richard Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703, 708 (2000) (estimating the Court decided more than 240 environmental law cases between 1969 and 2000); see also, James R. May, *The Intersection of Constitutional Law and Environmental Litigation*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 359 (Cary R. Perlman ed., ABA 2009) (number approaching 300); James R. May & Robert L. Glicksman, *Justice Rehnquist and the Dismantling of Environmental Law*, 36 Env'tl. L. Rep.10585 (2006).

<sup>15</sup> In 2009, Associate Justice Sonia Sotomayor replaced David Souter.

<sup>16</sup> *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

<sup>17</sup> *Id.* at 367.

<sup>18</sup> *Natural Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008).

<sup>19</sup> *Winter*, 129 S. Ct. at 375.

<sup>20</sup> *Id.* at 374.

<sup>21</sup> *Id.* at 380.

<sup>22</sup> *Id.* at 381.

<sup>23</sup> *Id.* at 378.

<sup>24</sup> *Id.* at 370.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 371.

<sup>27</sup> *Id.* at 378.

<sup>28</sup> *Id.* at 380.

<sup>29</sup> *Id.* at 370, 378.

<sup>30</sup> *Id.* at 378.

<sup>31</sup> *Id.* at 374.

<sup>32</sup> *Id.* at 393 (Ginsberg, J., dissenting).

<sup>33</sup> *Id.* at 392.

<sup>34</sup> *Id.* at 393.

<sup>35</sup> *Id.* at 386-87 (Breyer, J., concurring in part and dissenting in part).

<sup>36</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

<sup>37</sup> *Id.* at 1510.

<sup>38</sup> 33 U.S.C. § 1326(b).

<sup>39</sup> 129 S. Ct. at 1505-06.

<sup>40</sup> *Id.* at 1506.

<sup>41</sup> *Id.* at 1508.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1516 (Stevens, J., dissenting).

<sup>44</sup> *Id.* at 1517-18.

<sup>45</sup> *Id.* at 1519.

<sup>46</sup> *Id.* at 1517.

<sup>47</sup> *Id.* (quoting *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 467-68 (2001) (Scalia, J.)).

<sup>48</sup> See *Id.* at 1516.

<sup>49</sup> *Id.* at 1512 (Breyer, J., concurring).

<sup>50</sup> *Id.* at 1513 (quoting 118 Cong. Rec. 33693 (1972)).

<sup>51</sup> See *Id.*

<sup>52</sup> *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

<sup>53</sup> *Id.* at 649.

<sup>54</sup> *Id.*

<sup>55</sup> *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004).

<sup>56</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

<sup>57</sup> *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009).

<sup>58</sup> *Id.* at 2463.

<sup>59</sup> *Id.* at 2463-64.  
<sup>60</sup> See 40 C.F.R. § 440.104(b)(1); 33 C.F.R. § 323.2(e).  
<sup>61</sup> 40 C.F.R. § 232.2.  
<sup>62</sup> See *Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 647 (9th Cir. 2007).  
<sup>63</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).  
<sup>64</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).  
<sup>65</sup> 129 S. Ct. at 2465.  
<sup>66</sup> *Id.*  
<sup>67</sup> *Id.* at 2483.  
<sup>68</sup> *Id.* at 2480, n.1.  
<sup>69</sup> See *Id.* at 2477-78.  
<sup>70</sup> *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).  
<sup>71</sup> *Id.* at 1149-53.  
<sup>72</sup> *Id.* at 1147.  
<sup>73</sup> *Id.*  
<sup>74</sup> *Id.* at 1147-48.  
<sup>75</sup> *Id.* at 1148.  
<sup>76</sup> *Earth Island Inst. v. Pengilly*, 376 F. Supp.2d 994 (E.D. Cal. 2005).  
<sup>77</sup> *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 697-98 (9th Cir. 2007).  
<sup>78</sup> 129 S. Ct. at 1149-50.  
<sup>79</sup> *Id.*  
<sup>80</sup> *Id.* at 1150.  
<sup>81</sup> *Id.* at 1150-51.  
<sup>82</sup> *Id.* at 1154.  
<sup>83</sup> *Id.* at 1157.  
<sup>84</sup> *Id.*  
<sup>85</sup> *Id.* at 1156.  
<sup>86</sup> *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007)) (emphasis in original).  
<sup>87</sup> *BNSF Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).  
<sup>88</sup> *Id.* at 1881.  
<sup>89</sup> *Id.* at 1877.  
<sup>90</sup> *Id.*  
<sup>91</sup> *Id.* at 1878.  
<sup>92</sup> *Id.* at 1879.  
<sup>93</sup> *Id.* at 1878.  
<sup>94</sup> *Id.* at 1879.  
<sup>95</sup> *Id.* at 1880.  
<sup>96</sup> *Id.* at 1878-79.  
<sup>97</sup> *Id.* at 1882-83.

<sup>98</sup> *Id.* at 1885 (Ginsberg, J., dissenting).  
<sup>99</sup> *Id.*  
<sup>100</sup> *Id.*  
<sup>101</sup> *Id.*  
<sup>102</sup> *Id.*  
<sup>103</sup> *Id.*  
<sup>104</sup> *Id.*  
<sup>105</sup> *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007).  
<sup>106</sup> See also *E.I. du Pont de Nemours & Co. v. United States*, 551 U.S. 1129 (2007).  
<sup>107</sup> *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004).  
<sup>108</sup> *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).  
<sup>109</sup> *Id.* at 334.  
<sup>110</sup> *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).  
<sup>111</sup> *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).  
<sup>112</sup> 550 U.S. 330 at 332.  
<sup>113</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).  
<sup>114</sup> *Id.* at 533, 534.  
<sup>115</sup> *Id.* at 501.  
<sup>116</sup> *Id.* at 560.  
<sup>117</sup> *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).  
<sup>118</sup> *Id.* at 576.  
<sup>119</sup> *Sierra Club v. Morton*, 405 U.S. 727 (1972).  
<sup>120</sup> Based on the author's search of cases, briefs, and transcripts of the search terms "sustainability," "sustainable development," and "ecologically sustainable development," on Westlaw (last searched Nov. 9, 2009), and on the U.S. Supreme Court database, <http://www.supremecourtus.gov/> (last visited Nov. 9, 2009).  
<sup>121</sup> One amicus brief makes a passing reference to "sustainability." Brief of economists Frank Ackerman, et al. as Amici Curiae in Support of Respondents at 14, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (Nos. 07-588, 07-589, 07-597) ("When such goals are recognized as politically- or normatively-imposed constraints, economic theory evaluates them under frameworks that are analytically distinct from conventional cost-benefit optimization. For instance, an extensive economic literature exists analyzing environmental and natural resource decisionmaking under "sustainability" or "safe minimum standard"). Other than incorporation of the word "sustainable" in corporate titles or mission statements in briefs filed before the Court, this is the sole tenable reference found to the word "sustainability," "sustainable development," "ecologically sustainable development," and like phrases.

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## ENDNOTES: ENVIRONMENTAL LITIGATION STANDING AFTER MASSACHUSETTS V. EPA: CENTER FOR BIOLOGICAL DIVERSITY V. EPA continued from page 30

<sup>1</sup> Ctr. for Biological Diversity v. EPA, Case No: 2:09cv00670 (W.D. Wash. filed May 14, 2009).  
<sup>2</sup> *Id.* at 5.  
<sup>3</sup> *Id.*  
<sup>4</sup> *Massachusetts v. EPA*, 549 U.S. 497, 536-535 (2007).  
<sup>5</sup> Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 66 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>.  
<sup>6</sup> Adler, *supra* note 5 at 68; *Mass.*, 549 U.S. at 518.  
<sup>7</sup> *Mass.*, 549 U.S. at 518.  
<sup>8</sup> See, e.g., *Comer v. Murphy Oil*, No: 07-60756, 2009 WL 3321493 at 2 (5th Cir. Oct. 16, 2009) (holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims); *Connecticut v. Am. Elec. Power*, Nos. 05-5104-cv, 05-5119-cv, 2009 WL 2996729 at 32 (2d Cir. Sept. 21, 2009) (holding that plaintiffs had standing to maintain their nuisance claim); Ctr. for Biological Diversity v. DOI, 563 F.3d 466 at 479 (D.C. Cir. 2009) (holding that petitioner established procedural standing for the OCSLA and NEPA based climate change claims).

<sup>9</sup> Ctr. for Biological Diversity, Case No: 2:09cv00670 at 7.  
<sup>10</sup> Clean Water Act § 303(d), 33 U.S.C. § 1313(d)(2) (2008).  
<sup>11</sup> Ctr. for Biological Diversity, Case No: 2:09cv00670 at 13.  
<sup>12</sup> *Id.*  
<sup>13</sup> *Id.* at 14.  
<sup>14</sup> *Id.*  
<sup>15</sup> Ctr. for Biological Diversity, Case No: 2:09cv00670 at 14.  
<sup>16</sup> *Id.*  
<sup>17</sup> *Id.*; Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2008).  
<sup>18</sup> Ctr. for Biological Diversity, Case No: 2:09cv00670 at 15.  
<sup>19</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

- <sup>28</sup> CONSTITUTION (2008) (Kenya), available at <http://aceproject.org/ero-en/regions/africa/KE/the-constitution-of-the-republic-of-kenya-as/view>.
- <sup>29</sup> For a discussion of constitutional treatment of environmental issues in African constitutions, see generally ENVIRONMENTAL LAW INSTITUTE & UN ENVIRONMENTAL PROGRAMME, CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO FUNDAMENTAL PRINCIPLES IN AFRICA (2007) [hereinafter ELI & UNEP].
- <sup>30</sup> CONSTITUTION (Uganda), *supra* note 26, directive XIII.
- <sup>31</sup> *Id.* princ. XXVII(i).
- <sup>32</sup> *Id.* princ. XXVII(iii).
- <sup>33</sup> *Id.* princ. XXVII(ii).
- <sup>34</sup> *Id.* art. 39.
- <sup>35</sup> *Id.* art. 50.
- <sup>36</sup> See Brian J. Preston, *The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific*, 9 ASIA PACIFIC JOURNAL OF ENVIRONMENTAL LAW 109 (2005).
- <sup>37</sup> See *Joseph D. Kessy and others v. The City Council of Dar es Salaam*, High Court of Tanzania, Civil Case No. 29 of 1998 (unreported); *Waweru v. Republic*, (2006) 1 K.L.R. 677-700 (H.C.K) (Kenya) (interpreting the right to life provisions in the constitution to include a right to a clean and healthy environment).
- <sup>38</sup> CONSTITUTION (Tanz.), *supra* note 27, part II.
- <sup>39</sup> *Id.* art. 9(1)(c).
- <sup>40</sup> CONSTITUTION (Kenya), *supra* note 28.
- <sup>41</sup> The history of the review process in Kenya, however, predates this year. It was originally linked with the agitation for, and the 1991 introduction of, multi-party politics. For an exhaustive treatment of this history, see MAKAU MUTUA, KENYA'S QUEST FOR DEMOCRACY: TAMING THE LEVIATHAN (Fountain Publishers 2009); see also WILLY MUTUNGA, CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997 (1999).
- <sup>42</sup> Draft Constitution, art. 67 (Kenya) (adopted by the National Constitutional Conference Mar. 15, 2004), available at <http://ancl-radc.org.za/sites/ancl-radc.org.za/files/Constitution%20of%20Kenya%20Review%20Commision%20%27Bomas%27%20Draft%20Constitution%20Adopted%20by%20the%20National%20Constitutional%20Conference%20%2015%20March%202004.pdf>
- <sup>43</sup> See Anthony Kagiri, *Central MPs Tie Boundaries to Constitution*, CAPITAL NEWS (Oct. 23, 2009), available at <http://www.capitalfm.co.ke/news/Kenyanews/Central-MPs-tie-boundaries-to-Constitution-6240.html> (reporting on delay in ratification of the 2004 amended constitution as part of political struggle over redistricting in Kenya).
- <sup>44</sup> Charles O. Okidi, *Concept, Function and Structure of Environmental Law*, in ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 12, 3-60 at 3 (discussing the rationale for framework environmental law, pointing out that the three countries adopted fairly similar paths in enacting their framework laws).
- <sup>45</sup> National Environmental Act, (1995) Cap. 153 (Uganda) [hereinafter NEA].
- <sup>46</sup> EMCA, *supra* note 25.
- <sup>47</sup> Environmental Management Act, (2004) Cap. 191 (Tanz.) [hereinafter EMA].
- <sup>48</sup> NEA (Uganda), *supra* note 45; EMCA (Kenya), *supra* note 25; and EMA (Tanz.), *supra* note 47.
- <sup>49</sup> NEA (Uganda), *supra* note 45, at § 4(1); EMCA (Kenya), *supra* note 25, at § 3(1); EMA (Tanz.), *supra* note 47, at § 4(1).
- <sup>50</sup> NEA (Uganda), *supra* note 45, at § 4; EMCA (Kenya), *supra* note 25, at § 7; EMA (Tanz.), *supra* note 47, at § 16.
- <sup>51</sup> NEA (Uganda), *supra* note 45, at § 19; EMCA (Kenya), *supra* note 25, at § 58; EMA (Tanz.), *supra* note 47, at § 81.
- <sup>52</sup> For a discussion of the sectoral legislations in Kenya, Uganda, and Tanzania, see Patricia Kameri-Mbote, *Kenya*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 351, 461-2 (Kluwer Law International 2009); Emmanuel Kasimbazi, *Uganda*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 479, 483-4 (Kluwer Law International 2009); and J.P. Kabudi, *Tanzania*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 505, 514 (Kluwer Law International 2009).
- <sup>53</sup> See CONSTITUTION (Uganda), *supra* note 26, §§ 126, 129.
- <sup>54</sup> CONSTITUTION (Kenya) *supra* note 28.
- <sup>55</sup> CONSTITUTION (Tanz.) *supra* note 27.
- <sup>56</sup> Judicature Act, (1996) Cap. 13 (Uganda).
- <sup>57</sup> Magistrates Courts Act, (1971) Cap. 16 (Uganda).
- <sup>58</sup> CONSTITUTION (Uganda), *supra* note 26, art. 130.
- <sup>59</sup> *Id.* art. 132.
- <sup>60</sup> *Id.* art. 134.
- <sup>61</sup> *Id.* arts. 130-32, 137.
- <sup>62</sup> *Id.* art. 138.
- <sup>63</sup> *Id.* art. 139(1).
- <sup>64</sup> *Id.* art. 129(1)(d).
- <sup>65</sup> Judicature Act, *supra* note 56, pt. IV §18.
- <sup>66</sup> See Kasimbazi, *supra* note 52, at 487.
- <sup>67</sup> See Uganda Peoples' Defence Forces Act, (1992) Cap 307 (Uganda).
- <sup>68</sup> CONSTITUTION (Tanz.), *supra* note 27, art. 117.
- <sup>69</sup> *Id.* art. 108.
- <sup>70</sup> See Magistrates' Courts Act, (1984) Cap. 11 (Tanz.); see also Kabudi, *supra* note 51, at 516 (discussing these courts).
- <sup>71</sup> CONSTITUTION (Kenya), *supra* note 28, §§ 60-64.
- <sup>72</sup> Judicature Act, (2007) Cap. 8 (Kenya).
- <sup>73</sup> Magistrates' Courts Act, (2002) Cap. 10 (Kenya).
- <sup>74</sup> Appellate Jurisdiction Act, (2009) Cap. 9 (Kenya).
- <sup>75</sup> CONSTITUTION (Kenya), *supra* note 28.
- <sup>76</sup> *Id.* § 60.
- <sup>77</sup> *Id.* § 60.
- <sup>78</sup> See Judiciary of the Republic of Kenya, New Courts Set Up to Handle Land Cases, [http://www.judiciary.go.ke/news\\_info/view\\_article.php?id=408673](http://www.judiciary.go.ke/news_info/view_article.php?id=408673) (last visited Nov. 3, 2009).
- <sup>79</sup> CONSTITUTION (Kenya), *supra* note 28, § 64.
- <sup>80</sup> Magistrates' Courts Act (Kenya), *supra* note 73.
- <sup>81</sup> *Id.* § 5(1) (establishing caps on monetary damages in civil suits).
- <sup>82</sup> EAC Treaty, *supra* note 18, art. 23.
- <sup>83</sup> *Id.* art. 23(2).
- <sup>84</sup> *Id.* art. 27(1.)
- <sup>85</sup> *Id.* art. 27 (2).
- <sup>86</sup> See Kameri-Mbote, *supra* note 52, at 465.
- <sup>87</sup> See EMCA, *supra* note 25, § 31.
- <sup>88</sup> *Id.* § 32.
- <sup>89</sup> See Albert Mumma, *The Role of Administrative Dispute Resolution Institutions and processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and Public Complaints Committee of Kenya*, in LAND USE LAW FOR SUSTAINABLE DEVELOPMENT (Cambridge University Press 2007) (discussing the Public Complaints Committee).
- <sup>90</sup> EMCA, *supra* note 25, §125.
- <sup>91</sup> See Kameri-Mbote, *supra* note 52, at 464.
- <sup>92</sup> See EMCA, *supra* note 25, §129. See generally Mumma, *supra* note 89.
- <sup>93</sup> EMA (Tanz.), *supra* note 47, art. 204.
- <sup>94</sup> *Id.* art. 206(2)(b)-(c).
- <sup>95</sup> See Tanzania Government Website, <http://www.tanzania.go.tz/administration.html> (making no mention of the environmental court).
- <sup>96</sup> UN Conference on Environment and Development, Rio Declaration on Environment and Development, June 14, 1992, available at <http://www.un-documents.net/rio-dec.htm>.
- <sup>97</sup> In fact as at the time of writing the Court has heard and determined only 10 cases. See South African Legal Information Institute, East African Court of Justice, <http://www.saflii.org/ea/cases/EACJ/> (last visited Nov. 3, 2009).
- <sup>98</sup> Cf. KenyaLaw.Org, <http://www.kenyalaw.org/CaseSearch/> (indicating that KenyaLaw.org contains only High Court, Court of Appeals, and Supreme Court cases); Uganda Legal Information Institute, <http://www.ulii.org/> (indicating that cases from Uganda courts below the High Court are unavailable, except for a special Commercial Court); Southern African Legal Information Institute, <http://www.saflii.org/content/tanzania-index> (indicating that only Tanzanian cases at or above the High Court level are reported).
- <sup>99</sup> *Dr. Bwogi Richard Kanyerezi v. The Management Committee Rubaga Girls School*, High Court Civil Appeal No. 3 of 1996 (Uganda) (unreported).
- <sup>100</sup> *Id.*
- <sup>101</sup> *Id.*
- <sup>102</sup> *Id.*
- <sup>103</sup> ELI & UNEP, *supra* note 29, at 39.

- <sup>104</sup> See *Waweru*, *supra* note 37 (construing the right to life in Kenya's Constitution to include some environmental protections); see also *Kessy*, *supra* note 37 (construing the right to life in Tanzania's Constitution to include some environmental protections).
- <sup>105</sup> ELI & UNEP, *supra* note 29, at 41.
- <sup>106</sup> *Kessy*, *supra* note 37 (construing the right to life in Tanzania's Constitution to include some environmental protections).
- <sup>107</sup> *Id.*
- <sup>108</sup> *Id.* at 15.
- <sup>109</sup> *Waweru*, *supra* note 37.
- <sup>110</sup> Public Health Act, Cap. 242 (Kenya).
- <sup>111</sup> *Waweru*, *supra* note 37, at 2.
- <sup>112</sup> *Id.*
- <sup>113</sup> *Id.* at 12.
- <sup>114</sup> *Id.* at 687.
- <sup>115</sup> *Id.* at 691.
- <sup>116</sup> See, e.g., *Wangari Maathai v. Kenya Times Media Trust Ltd*, (1989) H.C.K. 5403 (Kenya).
- <sup>117</sup> Cf. *Gouriet v. Union of Postal Office Workers*, (1977) A.C. 729 (Q.B.).
- <sup>118</sup> M.O. MAKOLOO ET AL., PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN KENYA: PROSPECTS AND CHALLENGES 13 (ILEG 2007).
- <sup>119</sup> Cf. *Waweru*, *supra* note 37, at 691.
- <sup>120</sup> MAKOLOO, *supra* note 118.
- <sup>121</sup> *Gouriet*, *supra* note 117.
- <sup>122</sup> *Gouriet*, *supra* note 117 at 754 (using relator action in opposition to ex-officio action, and defining it as an action taken by the Attorney General on the information given by Gouriet, so that the Attorney-General would be party to the suit and Gouriet considered the life of the suit).
- <sup>123</sup> *Rev. Christopher Mtikila v. The Attorney General*, Civil Case No. 5 of 1993, High Court of Tanzania, T.L.R. 31.
- <sup>124</sup> *Id.* at 43.
- <sup>125</sup> *Festo Balegele and 749 others v. Dar es Salaam City Council*, Civil Case No. 90 of 1991, High Court of Tanzania (Rubana, J).
- <sup>126</sup> *Id.* at 129.
- <sup>127</sup> *Id.*
- <sup>128</sup> *Id.* at 128.
- <sup>129</sup> *Id.*
- <sup>130</sup> *Id.*
- <sup>131</sup> *Id.*
- <sup>132</sup> *Id.*
- <sup>133</sup> For an exhaustive discussion of the Ugandan Experience, see MAKOLOO, *supra* note 118, at 56-59; see also *Kasimbazi*, *supra* note 52.
- <sup>134</sup> National Environmental Act, (1995) Cap. 153 § 71 (Uganda) ("it shall not be necessary for the plaintiff to show that he or she has a right of or interest in, the property, in the environment, or land alleged to have been harmed or in the environment or land contiguous to such land or environment").
- <sup>135</sup> Kenneth Kakuru, *Re-thinking Legislative and Judicial Approaches to Environmental Procedural Rights in Uganda*, Address at Green Watch Symposium on Environmental law, available at [http://greenwatch.or.ug/index2.php?option=com\\_docman&task=doc\\_view&gid=3&Itemid=64](http://greenwatch.or.ug/index2.php?option=com_docman&task=doc_view&gid=3&Itemid=64).
- <sup>136</sup> *The Environmental Action Network v. NEMA*, H.C. Misc. Appl. 39 of 2001 (Uganda) (unreported) [hereinafter TEAN], available at <http://www.greenwatch.or.ug/pdf/judgements/TEAN%20Versus%20A.G%20%20NEMA.pdf>.
- <sup>137</sup> *Id.* at 3.
- <sup>138</sup> *Id.* at 4.
- <sup>139</sup> *Id.*
- <sup>140</sup> TEAN, *supra* 136, at 7.
- <sup>141</sup> See, e.g., *Wangari Maathai*, *supra* note 116.
- <sup>142</sup> *Albert Ruturi & Another v. Minister for Finance and Others*, (2002) 1 K.L.R. 61 (Kenya).
- <sup>143</sup> *El Busaidy v. Commissioner of Lands & 2 Others* (2006) 1 K.L.R. 479-501 (Kenya).
- <sup>144</sup> *Id.* at 498-9 (citing *Ruturi*, *supra* note 142).
- <sup>145</sup> B.D. Ogolla & J. Mugabe, *Land Tenure and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 107 (Calestous Juma & J.B. Ojwang, eds., 1996).
- <sup>146</sup> See generally *Id.*
- <sup>147</sup> *Park View Shopping Arcade Limited v. Charles M. Kangethe and 2 Others*, (2006) 1 K.L.R. 591 (Kenya).
- <sup>148</sup> *Id.* at 593.
- <sup>149</sup> *Id.*
- <sup>150</sup> *Id.* at 594-595.
- <sup>151</sup> *Id.* at 597-598.
- <sup>152</sup> *Id.*
- <sup>153</sup> *Id.* at 607.
- <sup>154</sup> *Id.* at 610.
- <sup>155</sup> *Sheer Property Limited v. National Environmental Management Authority*, High Court, Misc. Civil cause No. 232 of 1998 (Uganda).
- <sup>156</sup> *Id.*
- <sup>157</sup> *Id.*
- <sup>158</sup> DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 366-67 (Foundation Press 1998).
- <sup>159</sup> Physical Planning Act, (1996) Cap. 286 (Kenya) (accompanying regulation enacted as the Physical Planning Regulations in Nov. 1998).
- <sup>160</sup> *Id.* § 36.
- <sup>161</sup> Sara Kisare, *Strategic Planning Experiences in Kenya*, Paper for Regional Workshop on Local Government Strategic Planning/Management in Eastern and Southern Africa, 7, 17, available at <http://www.mdpafrica.org.zw/Publications/Strategic%20Planning%20Experiences%20in%20Kenya.pdf>; see also Patricia Kameri-Mbote, *Strategic Planning and Implementation in Environmental Decision-Making as they Relate to Environmental Impact Assessment in Kenya*, IELRC Working Paper 1, 18-22 (2000), available at <http://www.ielrc.org/content/w0003.pdf>.
- <sup>162</sup> *Momanyi v. Bosire*, (1996) H.C.K. (unreported) (Kenya) (Decision of Hayanga, J.).
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.*
- <sup>165</sup> *National Association of Professional Environmentalists (NAPE) v. Nile Power Limited*, High Court, Misc. Cause No. 268 of 1999 (unreported) (Uganda), available at <http://www.greenwatch.or.ug/pdf/judgements/NAPE%20Versus%20AES%20Nile%20Power.pdf> (last visited Oct. 30, 2009).
- <sup>166</sup> *Id.*
- <sup>167</sup> *Id.* at 9.
- <sup>168</sup> See 2009 Transparency International East African Bribery Index, available at [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2009/2009\\_07\\_02\\_kenya\\_index](http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index).
- <sup>169</sup> DURWOOD ZAELKE ET AL., MAKING THE LAW WORK, (VOLUMES I AND II) - ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT (Cameron May Ltd. 2005).
- <sup>170</sup> *Id.*, Preface at 13, available at <http://www.inece.org/mlw/Preface.pdf> (last visited Oct. 30, 2009).
- <sup>171</sup> J.B. Ojwang, *The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development*, 1 KENYAN LAW REVIEW 19, available at [http://www.kenyalaw.org/Downloads\\_Other/ojwang\\_jud\\_env.pdf](http://www.kenyalaw.org/Downloads_Other/ojwang_jud_env.pdf).
- <sup>172</sup> Symposium, *supra* note 6.
- <sup>173</sup> These include organizations such as Greenwatch Uganda and the Institute for Law and Environmental Governance in Kenya, which in partnership with the University of Nairobi and NEMA has organized judicial colloquia for all the judges of the High Court and Court of Appeal; see generally UNEP, available at <http://www.unep.org/Padelia/structure/structure.htm> (last visited on Oct. 30, 2009) (showing that PADELIA conducts projects in Uganda, Kenya, and Tanzania); see also UNEP Regional Office for Africa, <http://www.unep.org/roa/> (last visited Nov. 3, 2009) (showing that UNEP holds office in Kenya).
- <sup>174</sup> See Kabudi, *supra* note 52, at 522-3.
- <sup>175</sup> See e.g. Judicial Studies Institute of Uganda, <http://www.judicature.go.ug/Uganda/index.html> (last visited Nov. 4, 2009).
- <sup>176</sup> The Council was created under a statute, National Council for Law Reporting Act, Act No. 11 of 1994 (Kenya). It has undertaken a very ambitious law reporting project including an online process. See National Council for Law Reporting, Kenyan Law Reports, [http://www.kenyalaw.org/kenyalaw/klr\\_home/](http://www.kenyalaw.org/kenyalaw/klr_home/) (last visited Nov. 4, 2009).
- <sup>177</sup> NATIONAL COUNCIL FOR LAW REPORTING, KENYA LAW REPORTS (ENVIRONMENT & LAND) (2006), available at [www.kenyalaw.org](http://www.kenyalaw.org).

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**ENDNOTES: IS THE INTERNATIONAL COURT OF JUSTICE THE RIGHT FORUM FOR TRANSBOUNDARY WATER POLLUTION DISPUTES?** *continued from page 39*

- <sup>1</sup> U.N. Educ., Scientific, & Cultural Org. [UNESCO], World Water Assessment Programme, *The United Nations World Water Development Report 3: Water in a Changing World*, 150, U.N. Doc. R551.46/49 WAT, (2009).
- <sup>2</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.) (Arg. Application Instituting Proceedings) (Submitted May 4, 2006), 3, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=0>.
- <sup>3</sup> See *id.* at 5-7.
- <sup>4</sup> See *id.* at 11, 17.
- <sup>5</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.) (Uruguay Request for Provisional Measures) (Submitted November 30, 2006), 2-3, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=7>.
- <sup>6</sup> See *id.* at 4.
- <sup>7</sup> See *id.*
- <sup>8</sup> Press Release, International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay): Conclusion of the public hearings: Court begins its deliberations, U.N. Doc. 2009/28 (Oct. 2, 2009), available at <http://www.icj-cij.org/docket/files/135/15507.pdf>.
- <sup>9</sup> Pulp Mills on the River Uruguay (Arg. v. Uru.) (Requests for the Indication of Provisional Measures) (Order of July 13, 2006), 21, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=3>; Pulp Mills on the River Uruguay (Request for Indication of Provisional Measures) (Order of January 23, 2007), 14, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=3>.

- <sup>10</sup> See Pieter H.F. Bekker, *Argentina-Uruguay Environmental Border Dispute Before the World Court*, 10 ASIL INSIGHTS (2006), ¶ 11, available at [http://www.asil.org/insights060516.cfm#\\_edn10](http://www.asil.org/insights060516.cfm#_edn10).
- <sup>11</sup> See *id.*
- <sup>12</sup> See *id.*
- <sup>13</sup> U.N. Charter art. 94, para. 2.
- <sup>14</sup> Boundary Waters Treaty, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448 (U.K. entered treaty on behalf of Canada).
- <sup>15</sup> See *id.* art. 7-8.
- <sup>16</sup> See James G. Chandler & Michael J. Veshcler, *The Great Lakes-St. Lawrence River Basin from an IJC Perspective*, 18 CAN.-U.S. L.J. 262 (1992).
- <sup>17</sup> See *id.* at 263.
- <sup>18</sup> See *id.* at 272.
- <sup>19</sup> See Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21 NAT. RES. & ENV'T 18, 19-20 (Summer 2006) (explaining how the Trail Smelter case over sulfur dioxide emissions from a plant in Canada has become a prime example of resolving transboundary disputes in international environmental law).
- <sup>20</sup> See Chandler, *supra* note 16 at 278.
- <sup>21</sup> See *id.* at 281.
- <sup>22</sup> See *id.* at 264.
- <sup>23</sup> See *id.* at 263-64.
- <sup>24</sup> See *id.* at 281-82.

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**ENDNOTES: THE INTERNATIONAL COURT OF JUSTICE'S TREATMENT OF "SUSTAINABLE DEVELOPMENT" AND IMPLICATIONS FOR ARGENTINA V. URUGUAY** *continued from page 40*

- <sup>1</sup> See Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. ¶ 140 (Sept. 25, 1997) [hereinafter Gabcikovo-Nagymaros Project], available at <http://www.icj-cij.org/docket/files/92/7375.pdf>. See also John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Statue of "Environmental Sustainability" in International Jurisprudence*, 42 STAN. J. INT'L L. 1, 27-30 (describing the ICJ's recognition of sustainable development as a concept in international law that had to be taken into account by both states in their resolution of the Gabcikovo-Nagymaros case); see also Phillipe Sands, *International Courts and the Concept of "Sustainable Development"*, in 3 MAX PLANK YEARBOOK OF UNITED NATIONS LAW 389 (Armin von Bogdandy & Rudiger Wolfrum eds.) (1999), available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/sands\\_3.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/sands_3.pdf).
- <sup>2</sup> KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE* 69 (Ashgate Publishing Ltd. 1988).
- <sup>3</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.) (Arg. Application Instituting Proceedings) 3 (May 4, 2006), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=0>.
- <sup>4</sup> See Legality of the Use by a State of Nuclear Weapons in an Armed Conflict, Advisory Opinion, 1996 I.C.J. 67 (July 8), available at <http://www.icj-cij.org/docket/files/93/7407.pdf>.
- <sup>5</sup> See Gabcikovo-Nagymaros Dam Case, 1997 I.C.J. at ¶ 18.
- <sup>6</sup> See *id.* at ¶ 21.
- <sup>7</sup> See *id.* at ¶ 17.
- <sup>8</sup> See *id.* at ¶ 22.
- <sup>9</sup> See *id.* at ¶ 23..
- <sup>10</sup> See *id.* at ¶ 24 (noting that on October 28, 1992, the parties agreed to submit the dispute to the ICJ).

- <sup>11</sup> See Prue Taylor, *Case concerning the Gabcikovo-Nagymaros Project: A Message from the Hague on Sustainable Development*, 3 N.Z. J. ENVTL. L. 109, 114 (1999).
- <sup>12</sup> See Gabcikovo-Nagymaros Dam Case, 1997 I.C.J. at ¶ 140.
- <sup>13</sup> Gillroy, *supra* note 1, at 29.
- <sup>14</sup> Taylor, *supra* note 11, at 110.
- <sup>15</sup> Jorge E. Viñuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 FORDHAM INT'L L.J. 232, 254 (2008).
- <sup>16</sup> Press Release, International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay): Conclusion of the public hearings: Court begins its deliberations, U.N. Doc. 2009/28 (Oct. 2, 2009), available at <http://www.icj-cij.org/docket/files/135/15507.pdf>.
- <sup>17</sup> See Fernando Cabrera Diaz, *Oral arguments held in ICJ dispute over pulp mills on the River Uruguay*, INVESTMENT TREATY NEWS, October 2, 2009, available at <http://www.investmenttreatynews.org/cms/news/archive/2009/09/28/oral-arguments-held-in-icj-dispute-over-pulp-mills-on-the-river-uruguay.aspx>.
- <sup>18</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.), 4 (Summary of the Order of July 13, 2006), available at <http://www.icj-cij.org/docket/files/135/11237.pdf>.
- <sup>19</sup> See Pulp Mills on the River Uruguay (Arg. v. Uru.), 55 (Counter-Memorial of Uru. of July 20, 2007), available at <http://www.icj-cij.org/docket/files/135/15427.pdf>.
- <sup>20</sup> See *id.*
- <sup>21</sup> See Viñuales, *supra* note 15, at 254.
- <sup>22</sup> See Adriana Koe, *Damming the Danube: The International Court of Justice and the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, 20 SYD. L. REV. 612 (1998).
- <sup>23</sup> See Viñuales, *supra* note 15, at 254.

<sup>14</sup> BANGLADESH CONST. art 32, available at <http://www.pmo.gov.bd/constitution/>; INDIA CONST. art. 21, available at <http://lawmin.nic.in/coi/contents.htm>; PAKISTAN CONST. art. 9, available at <http://www.pakistani.org/pakistan/constitution/>.

<sup>15</sup> Subhash Kumar v. Bihar & others, A.I.R. 1991 S.C. 420 (1991) (India), available at <http://www.ielrc.org/content/e9108.pdf>; General Secretary, West Pakistan Salt Miners Labor Union, Khwra, Khellum v. Director, Industries & Mineral Development, Punjab, Lahore, 1996 SC MR 2061; Mohiuddin Farooque v. Bangladesh, 48 D.L.R. (1996) H.C.D. 438, available at <http://www.worldlii.org/cgi-bin/disp.pl/int/cases/ICHRL/1996/45.html?query=farooque>; Mohiuddin Farooque v. Secretary, Ministry of Communication, Bangladesh, W.P. 300 H.C.D (1995), available at <http://www.elaw.org/node/2578>.

<sup>16</sup> Subhash Kumar v. Bihar & others, A.I.R. 1991 S.C. 420 (1991). Although the case was dismissed since it was found that personal enmity motivated the petitioner, it is still important for the principle it upholds. *Id.*

<sup>17</sup> Ms. Shehla Zia & others v. WAPDA, P.L.D. 1994 S.C. 693, available at <http://www.elaw.org/node/1342> (interpreting the word 'life' widely to include the enjoyment of life).

<sup>18</sup> *Id.*

<sup>19</sup> See SACEP/UNEP/NORAD, REPORT OF THE REGIONAL SYMPOSIUM ON THE ROLE OF THE JUDICIARY IN PROMOTING THE RULE OF LAW IN THE AREA OF SUSTAINABLE DEVELOPMENT (1997); See also SACEP/UNEP/NORAD, Compendium of Summaries of Judicial Decisions in Environment Related Cases, <http://www.unescap.org/drpad/vc/document/compendium/> (last visited Nov. 8, 2009) (including evolving jurisprudence from the larger Asia Pacific region).

<sup>20</sup> Enhanced access to justice, stemming from the broadening of the class of persons who can sue, has far reaching ramifications for good governance and sustainable development.

<sup>21</sup> Public interest litigation expands the scope of the class of persons that can sue beyond the horizons of aggrieved persons and is thus a vehicle for actions in the cause of the public/social/democratic interest.

<sup>22</sup> In these cases, judges tend to shed their Anglo-American tradition of keeping a low profile and letting lawyers lead the case to take a more inquisitorial and active role. For instance, in India, in the case of *Rural Litigation Entitlement Kendra, Dehra Dun v. Uttar Pradesh & others*, A.I.R. 1988 S.C. 2187, available at <http://www.commonlii.org/in/cases/INSC/1985/220.html>, the judges virtually directed the investigation and evidence.

<sup>23</sup> In the Indian case of *Ratlam Municipality v. Vardichand*, statutes of ancient vintage like the Criminal Procedure Code, Penal Code, and Municipalities Act were read in a new light, taking into account the social justice orientation of the Indian Constitution, human rights, and concern for the environment. *Municipal Council Ratlam v. Vardichand & others*, A.I.R. 1980 S.C. 1622, available at <http://www.commonlii.org/in/cases/INSC/1980/138.html>.

<sup>24</sup> For example, in the *Nawimana case* in Sri Lanka, what emerged from litigation was in fact a mediated settlement between the parties laying down the terms and conditions for quarry mining, which in turn received judicial assent. *Envtl. Found. Ltd. et al. v. The Attorney General (The Nawimana Case)*, (1994) 1(1) SAELR 17.

<sup>25</sup> *Dehra Dun v. Uttar Pradesh*, *supra* note 22.

<sup>26</sup> Aruna Rodrigues v. Union of India, available at [http://www.envfor.nic.in/divisions/csurv/geac/writ\\_petition.htm](http://www.envfor.nic.in/divisions/csurv/geac/writ_petition.htm).

<sup>27</sup> The *Keangnam case* in Sri Lanka, dealing with pollution from quarry blasting coupled with failure on the part of governmental authorities, and the *Ratlam case* in India, involving pollution from industry coupled with neglect of duty by local authorities are examples. *Keangnam Enterprises Ltd. v. Abeyinghe & others*, (1994) 2 Sri L.R. 271 (13 July 1992), available at <http://www.commonlii.org/cgi-bin/disp.pl/lk/cases/LKCA/1992/18.html?query=keangnam>; *Municipal Council Ratlam v. Vardichand & others*, A.I.R. 1980 S.C. 1622, available at <http://www.commonlii.org/in/cases/INSC/1980/138.html>.

<sup>28</sup> These Constitutionally entrenched principles are intended to be guides in the enactment of laws and governance, and are not justiciable/legally enforceable. In India, the Directive Principles of State Policy have been used to create a range of new rights not referred to in the Constitution as legally enforceable rights. In Sri Lanka too, the directive principles have been used as guides to interpretation.

<sup>29</sup> See, e.g., *Rural Litigation Entitlement Kendra, Dehra Dun v. Uttar Pradesh & others*, *supra* note 23; *M.C. Mehta v. Union of India and others*, A.I.R. 1988 S.C. 1086; *Ms. Shehla Zia & others v. WAPDA*, *supra* note 17; *Mohiuddin Farooque v. Bangladesh*, 48 D.L.R. (1996) H.C.D. 438, available at <http://www.worldlii.org/cgi-bin/disp.pl/int/cases/ICHRL/1996/45.html?query=farooque>.

<sup>30</sup> *Juan Antonio Oposa v. The Honourable Fulgencio S. Factoran*, (1994) 1(3) S. Asian Env'tl. L. Rep. 113, available at <http://www.law.uoregon.edu/faculty/mwood/docs/oposav.pdf>.

<sup>31</sup> See, e.g., *The Nawimana case*, *supra* note 24, *the Kotte Kids case*, (1998), 5(4) S. Asian Env'tl. L. Rep. 116, *Lalanath de Silva v. Minister of Forestry & Env. (The Air Pollution Case)*, SC of Sri Lanka, 1998; *Bulankulama & others v. Secretary, Ministry of Industrial Development & others*, 3 Sri L.R. 243 (2 June 2000), available at <http://www.commonlii.org/cgi-bin/disp.pl/lk/cases/LKSC/2000/18.html?query=Bulankulama%20v.%20Secretary>.

<sup>32</sup> See, e.g., *M.C. Mehta v. Union of India & others*, A.I.R. 1988 S.C. 1086, available at <http://www.commonlii.org/in/cases/INSC/1987/262.html> (India); *Environmental Foundation Ltd. et al v. Land Commissioner & others*, (1993) 2 Sri LR 41 (30 July 1992), available at <http://www.commonlii.org/lk/cases/LKCA/1992/25.html> (Sri Lanka).

<sup>33</sup> *M.C. Mehta v. Kamal Nath & others*, (1997) 1 S.C.C. 388, available at <http://ielrc.org/content/e0216.pdf>.

<sup>34</sup> In the *Shriram Gasleak case*, the ideas of cost internalization, polluter pays, and absolute liability long preceded the Rio Declaration. *M.C. Mehta v. Union of India and others (Shriram Gas Leak case)*, A.I.R. 1988 S.C. 1086, available at <http://www.commonlii.org/in/cases/INSC/1987/262.html>. A more recent case in point is *Indian Council for Enviro-Legal Action v. Union of India and others*, A.I.R. 1996 S.C. 1446, available at <http://www.commonlii.org/in/cases/INSC/1996/244.html>.

<sup>35</sup> *Vellore Citizens' Welfare v. Union of India*, (1996) 5 S.C.C. 647, available at <http://www.commonlii.org/in/cases/INSC/1996/1027.html>.

<sup>36</sup> *Gunaratne v. Homagama Pradeshia Sabha & others*, (1998) 2 Sri LR 11 (3 April 1998), available at <http://www.asianlii.org/lk/cases/LKSC/1998/35.html>; *Parvez Hassan, Environmental & Sustainable Development: A Third World Perspective*, 31 ENVTL. L. & POL'Y 36 (2001) (stating that good environmental governance is of particular importance to developing countries, as it is only when their policies are democratic, participative, transparent, founded on the rule of law and supported by a strong and independent judiciary that donor countries will have the confidence to deal with them).

<sup>37</sup> *Ratlam v. Vardichand & others*, *supra* note 24.

<sup>38</sup> The Sub-Divisional Magistrate, Ratlam, acting under section 133 of the Indian Code of Criminal Procedure (counterpart of section 98 of the Sri Lankan Code), ordered, by way of affirmative action, the municipality to provide toilets, drainage facilities, access to fresh water, and basic sanitation within a given time and according to certain guidelines. The order was upheld by the Supreme Court which confirmed that a court of law could compel a statutory body to carry out its duties, here under the Madhya Pradesh Municipalities Act of 1961, section 123. Although the provisions of the Criminal Procedure Code on granting conditional orders were discretionary in tone, the Court stated that sometimes discretion could become a duty. After being urged by the local authority, the Supreme Court modified the magisterial orders, allowing more time and less costly options. The Court asserted that the courts are a last resort, unnecessary if public bodies carried out their functions. It suggested mobilization of the voluntary services of the local community, known in South Asian societies as "sramdan," as well as the need for the central government to provide more funds to local authorities. *Ratlam v. Vardichand & others*, *supra* note 24; The Code of Criminal Procedure, No. 2 of 1974; India Code Crim. Proc. (1973), Section 133; Madhya Pradesh Municipalities Act of 1961, Section 123.

<sup>39</sup> *Akhil v. Sec'y of the A.P. Pollution Control Bd. (Garbage Burning)*, No. 15490, <http://www.elaw.org/node/2020> (Andhra Pradesh H.C. 2001).

<sup>40</sup> *A.P. Pollution Control Bd. v. Appellate Auth. Under Water Act*, No. 33493, <http://www.elaw.org/node/2524> (Andhra Pradesh H.C. 2001).

<sup>41</sup> *A.P. Gunnies Merchants Ass'n v. Gov't of Andhra Pradesh*, No. 386, <http://www.elaw.org/node/2043> (Andhra Pradesh H.C. 2001).

<sup>42</sup> *Research Found. for Science Tech. Nat'l Res. Policy v. Union of India*, No. 657, <http://www.elaw.org/node/1988> (S.C. 2003).



<sup>43</sup> Chinnappa v. Union of India, No. 202, <http://www.elaw.org/node/2469> (S.C. 2002).

<sup>44</sup> Sarasan v. Kerala Zone Mgmt. Auth., No. 19547, <http://www.elaw.org/node/1892> (Kerala H.C. 2005).

<sup>45</sup> Research Found. for Science and Tech. and Natural Res. Policy v. Union of India, No. 657, <http://www.elaw.org/node/2192> (S.C. 2005).

<sup>46</sup> Bokhari v. Fed'n of Pak., (2003), *available at* <http://www.elaw.org/node/1848>.

<sup>47</sup> Irfan v. Lahore Dev. Auth., No. 25084, <http://www.elaw.org/node/2390> (Lahore H.C. 2003).

<sup>48</sup> Dhungel v. Godavari Marble Indus., No. 35, <http://www.elaw.org/node/1849> (Nepal S.C. 1995).

<sup>49</sup> Sharma v. Nepal Drinking Water Corp., No. 2237, <http://www.elaw.org/node/1383> (Nepal S.C. 2001).

<sup>50</sup> Sharma v. His Majesty's Gov't Cabinet Secretariat, No. 2237, <http://www.elaw.org/node/1594> (Nepal S.C. 2003).

<sup>51</sup> Bangl. Evtl. Lawyers Ass'n v. Sec'y Ministry of Env't and Forest, <http://www.elaw.org/node/2452> (Writ Petition to Bangl. S.C. Oct. 10, 2003).

<sup>52</sup> Bangl. Evtl. Lawyers Ass'n v. Sec'y Ministry of Shipping (Bangl. S.C. 2009), *available at* <http://www.elaw.org/node/3747>.

<sup>53</sup> K.H.J. WIJAYADASA, TOWARDS SUSTAINABLE GROWTH: THE SRI LANKA EXPERIENCE 5 (Central Environmental Authority and Ministry of Environment and Parliamentary Affairs Revised and Updated Edition 1994) (1986).

<sup>54</sup> SRI LANKA CONST. ch. VI, Article 29, *available at* [http://www.priu.gov.lk/Cons/1978Constitution/Chapter\\_06\\_Amd.html](http://www.priu.gov.lk/Cons/1978Constitution/Chapter_06_Amd.html) ("The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.")

<sup>55</sup> Centenary Seminar Series, Ladies College, Colombo, Inaugural Lecture: Law and Social Policy in Post-Independence Sri Lanka, (Feb. 17 2000) (discussing *Seneviratne v. University Grants Commission*, (1978) 1 SLR 182, and *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, (1987) 2 SLR 312).

<sup>56</sup> Keangnam Enterprises Ltd. v. Abeysinghe & others, *supra* note 27.

<sup>57</sup> The company subsequently obtained an EPL and the Court of Appeal stated that new submissions could then be made in the MC, where the main inquiry on public nuisance was pending. By that time however, the road was built by obtaining metal from other sources and public nuisance was no longer in issue. The Magistrate terminated the proceedings, and some of the villagers brought civil actions for damages in the District Court. This case illustrates the urgency that development/environment cases involve, in contrast with the slowness of the traditional adversarial system of administration of justice. Alternative Methods of Dispute Resolution as well as rational planning may provide more practical and expedient solutions. *Id.*

<sup>58</sup> Ariyaratne v. Shashidharan, (1994) 1(4) S. Asian Evtl. L. Rep. 151.

<sup>59</sup> Singalanka Standard Chemicals Ltd. v. T. A. Sirisena, (1996) 3(3) S. Asian Evtl. L. Rep. 69.

<sup>60</sup> Hettiarachchige Premasiri v. Dehivala-Mount Lavinia Municipal Council (*Garbage Dumping Case*), Mount Lavinia Magistrate Court, (Sri Lanka Feb. 28, 2002), <http://www.elaw.org/node/2579>. Another recent case in Sri Lanka was *Kottabadu Durage Sriyani Silva v. Chanaka Iddamaloda*, decided on Aug. 8, 2003 (summarized at <http://www.elaw.org/node/2487>).

<sup>61</sup> Most of these cases have proceeded on the basis that, as pointed out by Justice Matthew in *Kesavananda Bharthai v. State of Kerala*, the scope of human rights is not static and its contents must be guided by the experience and context of each generation. *Kottabadu Durage Sriyani Silva v. Chanaka Iddamaloda*, (Sri Lanka Aug. 8, 2003), <http://www.elaw.org/node/2487>. See also SUMUDU ATAPATTU, ENVIRONMENTAL RIGHTS AND HUMAN RIGHTS, IN SRI LANKA: STATE OF HUMAN RIGHTS 149 (Law & Soc'y Trust ed. 1997); L. De Silva, Human Rights and the Environment, (Dec. 1991) (unpublished paper presented at the All-Asian Public Interest Environmental Law Conference, Nuwara Eliya, Sri Lanka); L. De Silva, Access to Information and Public Participation, (Jan. 1995) (unpublished paper presented to the SAARC Public Interest Environmental Law Conference, Colombo, Sri Lanka); Shyami Puvimanasinghe, *Development, Environment and the Human Dimension: Reflections on the Role of Law and Policy in the Third World, with Particular Reference to South Asia*, 12 SRI LANKA J. INT'L L. 35, 40 (2000); Shyami Puvimanasinghe, *Public Interest Litigation, Human Rights and the Environment in the Experience of Sri Lanka*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT, PRINCIPLES AND PRACTICE 653 (Nico Schrijver & Freidl Weiss eds. 2005).

<sup>62</sup> Here issues arise not only about public participation in general, but also about the inclusion of particular groups, often marginalized in decision-making

in the region—like women, children, minorities and indigenous peoples, whose participation the Rio Declaration expressly provides for. R. Kapur, Women's Rights in Troubled Waters: The Gendered Impact of the Narmada Dam (Aug. 1993) (unpublished paper presented at the Conference on Displacement and Democracy, organized by LST, Colombo, Sri Lanka) (exploring how women were rendered invisible in the Narmada Valley projects in India).

<sup>63</sup> L. De Silva, Access to Information and Public Participation, *supra* note 61 (advocating recognition of a right to access to environmental information as it is often a matter of life and death. The author points out that the SAARC region is replete with situations in which citizens, affected by pollution, hazardous chemicals, badly planned or executed development projects, do not have adequate information to make decisions concerning their life).

<sup>64</sup> The case of *Wijesiri v. Siriwardene* is the first reported case involving PIL in Sri Lankan jurisprudence. *Wijesiri v. Siriwardene*, (1982) 1 S.L.R. 171.

<sup>65</sup> Evtl. Found. Ltd. v. Land Comm'r (*The Kandalama Case*), (1994) 1(2) S. Asian Evtl. L. Rep. 53.

<sup>66</sup> Nawimana, *Supra* note 24.

<sup>67</sup> SRI LANKA CONST. arts. 3, 11, 14 (1) (g), 14 (1) (h), *available at* <http://www.priu.gov.lk/Cons/1978Constitution/Introduction.htm>.

<sup>68</sup> See discussion, note 13.

<sup>69</sup> Evtl. Found. Ltd. v. Ratnasiri Wickremanayake, 3(4) S. Asian Evtl. L. Rep. 103 (1996), *available at* <http://www.elaw.org/node/1324>.

<sup>70</sup> The judge went on to state that private persons should be able to obtain some remedy and that this was a matter of "high constitutional principle." *Id.*

<sup>71</sup> The Kotte Kids case, *supra* note 31.

<sup>72</sup> Gunaratne v. Homagama Pradeshiya Sabha, *supra* note 37.

<sup>73</sup> Lalanath de Silva v. Minister of Forestry & Env. (*The Air Pollution Case*), *supra* note 31

<sup>74</sup> The National Environmental (Air Emission, Fuel and Vehicle Importation Standards) Regulation no. 1 of 2000, published by Gazette Extraordinary no. 1137/35 of 23 June 2000.

<sup>75</sup> Bulankulama & others v. Secretary, Ministry of Industrial Development & others, *supra* note 32.

<sup>76</sup> "Imminent" since the agreement had not yet entered into force. *Id.*

<sup>77</sup> The three main principles of sustainable development referred to in the judgment were conservation of natural resources in accordance with the inter-generational equity principle, exploitation of natural resources in a sustainable manner, and integration of environmental considerations into development projects. *Id.*

<sup>78</sup> Section 17 of the NEA refers to the basic policy on the management and conservation of the country's natural resources, which should obtain optimum benefits therefrom and preserve the same for future generations.

<sup>79</sup> Bulankulama & others v. Secretary, Ministry of Industrial Development & others, *supra* note 32, at 28.

<sup>80</sup> DEEPIKA UDAGAMA, LAW AND SOCIETY TRUST, SRI LANKA: STATE OF HUMAN RIGHTS 154 (2001).

<sup>81</sup> *Id.*

<sup>82</sup> Gabcikovo-Nagymaros Project, 1997 I.C.J. 7 (Sept. 25), *available at* <http://www.icj-cij.org/docket/files/92/7375.pdf>.

<sup>83</sup> UDAGAMA, *supra* note 80, at 150.

<sup>84</sup> *Id.* at 150.

<sup>85</sup> *Id.* at 152.

<sup>86</sup> Mundy v. Cent. Evtl. Auth., (2004), *available at* <http://www.elaw.org/node/1947>

<sup>87</sup> *Id.*

<sup>88</sup> Weerasekera et al. v. Keangnam Enterprises Ltd., (2009), *available at* <http://www.elaw.org/system/files/Metal+Quarry+Balangoda+-+Judgement0001.pdf>.

<sup>89</sup> Evtl. Found. Ltd. v. Urban Dev. Auth., (2005).

<sup>90</sup> Environmental Foundation Limited, [http://efl.lk/?page\\_id=21](http://efl.lk/?page_id=21) (last visited Nov. 6, 2009).

<sup>91</sup> Withanage v. Geological Survey and Mines Bureau and Others, (2004), *available at* <http://www.elaw.org/node/1464>.

<sup>92</sup> Withanage v. Director Coast Conservation, CA Application no. 551/2005 of 7 April 2005.

<sup>93</sup> Petition, Centre for Environmental Justice v. Ministry of Agriculture, Environment, Irrigation and Mahaweli Development and others (*Bundala National Park Case*) (Sri Lanka Court of Appeal 23 Feb. 2006), *available at* [www.elaw.org/node/2070](http://www.elaw.org/node/2070).

<sup>94</sup> G.A. Res. 41/128, U.N. Doc. A/41/53 (Dec. 4, 1986), *available at* <http://www.un.org/documents/ga/res/41/a41r128.htm>.

- <sup>18</sup> Guerra & Others v. Italy, Feb. 1, 1998, Reports 1998-I.
- <sup>19</sup> Athanassoglou & Others v. Switzerland, App. No. 27644/95, 2001 Eur. Ct. H.R.
- <sup>20</sup> See JANS & VEDDER, EUROPEAN ENVIRONMENTAL LAW 23 (3d ed. 2008) (“Where scientific opinion differs from one country to another, countries should apply the precautionary principle”).
- <sup>21</sup> CASSESE, *supra* note 3, at 54.
- <sup>22</sup> X v. Iceland, App. No. 6825/74, 5 Eur. Comm’n H.R. Dec. & Rep. 87 (1976).
- <sup>23</sup> Kyrtatos v. Greece, App. No. 41666/98, 2003-VI Eur. Ct. H.R. 52.
- <sup>24</sup> Fredin v. Sweden (No. 1), App. No. 12033/86, 13 Eur. H.R. Rep. 784 (1991).
- <sup>25</sup> Taskin & Others v. Turkey, App. No. 46117/99, 2004-X Eur. Ct. H.R. 621.
- <sup>26</sup> Moreno Gomez v. Spain, App. No. 4143/02, 2004-X Eur. Ct. H.R.
- <sup>27</sup> Fadejeva v. Russia, App. No. 55723/00, 2005-IV Eur. Ct. H.R.
- <sup>28</sup> Giacomelli v. Italy, App. No. 59909/00, 2006-XII Eur. Ct. H.R.
- <sup>29</sup> Köktepe v. Turkey, App. No. 35785/03, 2007 Eur. Ct. H.R.
- <sup>30</sup> Chassagnou, *supra* note 17.
- <sup>31</sup> Immobiliare Saffi v. Italy, App. No. 22774/93, 1999-V Eur. Ct. H.R. 65.
- <sup>32</sup> RODOLFO SACCO, ANTHROPOLOGIE JURIDIQUE: APPORT A UNE MACRO-HISTOIRE DU DROIT 86 (2008).
- <sup>33</sup> 1958 CONST. Preamble, available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/constitution\\_anglais\\_oct2009.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais_oct2009.pdf) (“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.”).
- <sup>34</sup> See Declaration of the Rights of Man, *supra* note 5 (exemplifying 1<sup>st</sup> generation human rights); 1946 CONST. Preamble (exemplifying 2<sup>nd</sup> generation human rights); 1958 CONST. Charter for the Environment available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/constitution\\_anglais\\_oct2009.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais_oct2009.pdf) (exemplifying 3<sup>rd</sup> generation human rights).
- <sup>35</sup> See generally SACCO, *supra* note 32, at 86.
- <sup>36</sup> Les débats et documents du Sénat, Ministère de l’écologie et du développement durable Feb. 13, 2003, Réponse à la question écrite No. 05714, J.O. 2468, July 31, 2003 (from a question posed by Jacques Ouidin of the group Union pour une Mouvement Populaire).
- <sup>37</sup> Vanessa Barbé, Le Droit de l’environnement en droit constitutionnel comparé: contribution à l’étude des effets de la constitutionnalisation, (Sept. 25-27, 2008), available at <http://www.droitconstitutionnel.org/congresParis/comC8/BarbeTXT.pdf>.
- <sup>38</sup> See SACCO, *supra* note 32.
- <sup>39</sup> E.g. C.E.; available at [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Normas/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Normas/const_espa_texto_ingles_0.pdf) (translating Spain’s Constitution into English); Cost., available at [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (translating the Republic of Italy’s Constitution into English).
- <sup>40</sup> *Id.*
- <sup>41</sup> A bill may be referred to the *Conseil constitutionnel* by the following: the Head of State; the Prime minister; the President of both chambers of Parliament; and because of the Constitutional amendment of 1974, by 60 members of either parliament chambers.
- <sup>42</sup> CE, July 10, 2006, Association interdépartementale et intercommunale pour la protection du lac de Ste Croix, des lacs et sites du Verdon et autres, No. 288108.
- <sup>43</sup> CE, Oct., 2003, Association SOS-rivières et environnement et autres, No. 231953.
- <sup>44</sup> CE, June 6, 2007, Association Le réseau sortir du nucléaire, No. 292386, available at <http://www.conseil-etat.fr/cde/node.php?articleid=227>.
- <sup>45</sup> CE, Feb. 15, 2006, Association Ban Asbestos France et autres, No. 288801, available at <http://www.conseil-etat.fr/cde/node.php?articleid=229>; see generally Tim Finan & Jasper Copping, *Asbestos-Laden Warship to Set Sail for Britain*, DAILY TELEGRAPH (Jan. 31, 2009), available at <http://www.telegraph.co.uk/news/worldnews/europe/france/4409964/Asbestos-laden-warship-to-set-sail-for-Britain.html#>.
- <sup>46</sup> CE, Jan. 4, 1995, Ministère de l’Intérieur c/Rossi, No. 94967.
- <sup>47</sup> TA Châlons-sur-Marne, Apr. 29, 2005, AJDA 2005, 978.
- <sup>48</sup> CE, Apr. 6, 2006, Ligue pour la protection des oiseaux (LPO), No. 283103; CE, June 19, 2006, Association Eau et Rivières de Bretagne, No. 282456.
- <sup>49</sup> CE, Dec. 29, 2006, M.A, unpublished, No. 289548.
- <sup>50</sup> CE, Jan. 24, 2007, Association du Toulouais pour la Preservation du Cadre de Vie, unpublished, No. 287248.
- <sup>51</sup> CE, Feb. 2, 2007, Association Convention vie et Nature Pour Une Ecologie Radicale, Ligue Pour La Protection des Oiseaux, Ligue pour la Preservation de la Faune Sauvage et la Defense des Non-Chasseurs, Association France Nature Environnement, unpublished, No. 289758.
- <sup>52</sup> CE, May 7, 2007, ANPER-TOS, Association OABA, No. 286103; CE June 6, 2007, Commune de Groslay, Association Ville et Aéroport, No. 292942.
- <sup>53</sup> CE, June 6, 2007, Association Sortir Du Nucleaire, n.292386; CE, 27 June 2007, ANPER-TOS, No. 297531; CE, référés, Oct. 2007, Association Ornithologique et Mammalogique de Saone et Loire, unpublished, No. 309286; CE, Mar. 19 2008, Association General des Producteurs de Mais, SCEA de Malaprade et s., Monsanto et s., Pioneer Genetique et s., SEPROMA, SA Causade Semences, SA Limagrain Verneuil, SA Maisadour Semences, SA RAGT Semences, SAS Euralise Semences et s., unpublished, No. 313547. CE, Aug. 26, 2008, Association SOS Grand Bleu, unpublished, No. 320025.
- <sup>54</sup> See Ligue, *supra* note 48.
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.*
- <sup>57</sup> CE, Oct. 26, 2007, M. F, M. E, M. C, M et Mme B., M. et Mme A, unpublished, No. 299883; see also CE, May 7, 2008, Association Ornithologique et Mammalogique de Saone et Loire, unpublished, No. 309285.
- <sup>58</sup> CE, Oct. 26, 2007, ADVOCNAR, No. 297301 (discussing Charter articles 1 and 5); CE, Oct. 26, 2007, CIRENA, unpublished, No. 298490 (discussing Charter articles 1, 3, and 6).
- <sup>59</sup> CE, Dec. 21, 2007, Ministre de l’Economie, Des Finances et de l’Industrie, No. 300041; CE, Aug. 7, 2008, Collectif Inter-Associatif du Refus des Nuisances Dans le Nord-Ouest, M. A, *Département du Val d’Oise, Commune de Groslay, et s., Association de Defense contre les Nuisances Aeriennes et la Commune de Gonesse*, unpublished, No. 306109.
- <sup>60</sup> ULRICH BECK, POUVOIR ET CONTRE-POUVOIR 536 (2005).
- <sup>61</sup> Décret de President No. 2008-328 Apr. 9, 2008, Journal Officiel de la République [J.O.] [Official Gazette of France], Apr. 9, 2008 (creating the Comité de réflexion sur le préambule de la Constitution to study the possibility or necessity of including fundamental rights in the Constitution’s Preamble).
- <sup>62</sup> CE, Oct. 3, 2008, Commune d’Annecy, No. 297931.
- <sup>63</sup> *Id.*
- <sup>64</sup> *Id.*
- <sup>65</sup> *Id.*
- <sup>66</sup> *Id.*
- <sup>67</sup> *Id.*
- <sup>68</sup> Law No. 85-30 of Jan. 9, 1985, Journal Officiel de la République [J.O.] [Official Gazette of France], Jan. 10, 1985, p. 320 (establishing mountain law).
- <sup>69</sup> Law No. 86-2 of Jan. 3, 1986, Journal Officiel de la République [J.O.] [Official Gazette of France], Jan. 4, 1986, p. 200 (establishing littoral law).
- <sup>70</sup> Commune d’Annecy, *supra* note 62.
- <sup>71</sup> Law No. 2005-157, Feb. 23, 2005, Journal Officiel de la République [J.O.] [Official Gazette of France], Feb. 24, 2005, p. 3073 (introducing a new paragraph to art. L. 145-1 of the town planning code).
- <sup>72</sup> *Id.*
- <sup>73</sup> Décret No. 2006-993, Aug. 1, 2006, Journal Officiel de la République [J.O.] [Official Gazette of France], Aug. 5, 2006 p. 11719.
- <sup>74</sup> Law No. 2005-157, *supra* note 71.
- <sup>75</sup> The *département* is similar to county-level government in the United Kingdom.
- <sup>76</sup> Law No. 2005-157, *supra* note 71.
- <sup>77</sup> French statutes are promulgated by the legislative branch, while regulations are issued by the Prime Minister, certain government ministers, or local authorities.
- <sup>78</sup> Commune d’Annecy, *supra* note 62.
- <sup>79</sup> Law No. 2005-205, Mar. 1, 2005, Journal Officiel de la République [J.O.] [Official Gazette of France], Mar. 2, 2005, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000790249&dateTexte=#L. EGIARTI000006276527> (determining that the rights and duties defined in the Charter had constitutional value).

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## ENDNOTES: THIRD PARTY PETITIONS AS A MEANS OF PROTECTING VOLUNTARILY ISOLATED INDIGENOUS PEOPLES

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- <sup>1</sup> See Press Release, Survival International, Uncontacted tribe photographed near Brazil-Peru border (May 29, 2008), available at <http://www.survivalinternational.org/news/3340> (showing photo of an uncontacted Amazonian tribe launching a frenzied arrow attack on an airplane).
- <sup>2</sup> See Press Release, Survival International, One year on – New report reveals five uncontacted tribes most at risk (May 29, 2009), available at <http://www.survivalinternational.org/news/4597>.
- <sup>3</sup> See *id.*
- <sup>4</sup> See *id.* at 5.
- <sup>5</sup> See Inter-American Commission on Human Rights, What is the IACHR?, <http://www.cidh.oas.org/what.htm> (last visited Oct. 28, 2009).
- <sup>6</sup> Organization of American States, American Convention on Human Rights arts. 51, 62, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123, available at <http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm>.
- <sup>7</sup> See Inter-American Commission on Human Rights, Signatures and Current Status of Ratifications, <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.
- <sup>8</sup> *Mayagna (Sumo) Awas Tingni Community V. Nicaragua*, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79 (Aug. 31, 2001).
- <sup>9</sup> See *id.* at 5, 80.
- <sup>10</sup> Claudio Grossman, *Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, 8 HUM. RTS. BRIEF 2, 2 (2001).
- <sup>11</sup> John G. Robinson & Elizabeth L. Bennett, *Carrying Capacity Limits to Sustainable Hunting in Tropical Forests*, in HUNTING FOR SUSTAINABILITY IN TROPICAL FORESTS 15 (John G. Robinson & Elizabeth L. Bennett eds., 2000).

- <sup>12</sup> United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2004, 61 U.N.T.S. 295, available at <http://www.un.org/esa/socdev/unpfi/en/drip.html>.
- <sup>13</sup> See *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (2006); *Sarayaku Indigenous Cmty. v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 62 (2004) (enforcing the property rights of indigenous groups in contact with local government prior to petitioning the Commission).
- <sup>14</sup> Patricio Mena V., Jody R. Stallings, Jhanira Regalado B., & Ruben Cueva, *The Sustainability of Current Hunting Practices by the Huaorani*, in HUNTING FOR SUSTAINABILITY 71, 77 (John G. Robinson & Elizabeth L. Bennett eds., 2000).
- <sup>15</sup> Inter-Am. C.H.R., Human Rights: How to Present a Petition in the Inter-American System 6 (2002).
- <sup>16</sup> See Press Release, Inter-American Commission on Human Rights, IACHR Concludes its 130th regular sessions, No. 54/07 (October 19, 2007) available at <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.
- <sup>17</sup> See Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 80-81, 85 (2009).
- <sup>18</sup> *Id.* at 84.

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## ENDNOTES: SUSTAINABILITY AND THE COURTS: A SNAPSHOT OF CANADA IN 2009 continued from page 63

- <sup>22</sup> See generally CANADA, HOUSE OF COMMONS STANDING COMM. ON THE ENV'T AND SUSTAINABLE DEV., THIRD REPORT, ENFORCING CANADA'S POLLUTION LAWS: THE PUBLIC INTEREST MUST COME FIRST! (1998), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031521&Language=E&Mode=1&Parl=36&Ses=1&File=2> (discussing the shrinking budget of Environment Canada throughout the country over recent years).
- <sup>23</sup> See TREASURY BOARD OF CANADA SECRETARIAT, PUBLIC SERVICE RENEWAL—MAKING A DIFFERENCE! (2009), available at <http://www.tbs-sct.gc.ca/ren/psrpres-eng.asp> (charting the declining employment numbers in public service); Environment Canada, *Careers at Enforcement—Enforcement Officers Wanted!*, <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=C10CCF9D-1> (last visited Sept. 29, 2009) (recruiting new enforcement officers).
- <sup>24</sup> See, e.g., *Irving Launches Constitutional Challenge of Migratory Birds Act*, CBC NEWS, Mar. 10, 2008, available at <http://www.cbc.ca/canada/new-brunswick/story/2008/03/10/irving-herons.html> (detailing the constitutional challenge to Canada's Migratory Birds Convention Act by a New Brunswick company accused of violating the act during tree-felling activities).
- <sup>25</sup> See, e.g., British Columbia Environmental Appeal Board, available at <http://www.eab.gov.bc.ca/waste/2003was002a.pdf> (noting one of many decisions of the British Columbia Environmental Appeal Board on applications brought by responsible parties seeking to have governments and government entities added as responsible parties under a provincial site clean-up order).
- <sup>26</sup> See DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY 239 (2003) (explaining that federal departments with environmental responsibilities saw their budgets cut by up to seventy-two percent in the 1990s).
- <sup>27</sup> Minister of the Environment, Fact Sheet No. 27 Tioxide Canada Inc. (1996), available at [http://www.slv2000.qc.ec.gc.ca/bibliotheque/centre\\_docum/protection/027\\_a.pdf](http://www.slv2000.qc.ec.gc.ca/bibliotheque/centre_docum/protection/027_a.pdf).
- <sup>28</sup> Fisheries Act, R.S.C., ch. F-14, §§. 35(1), 36(3), 40 (1985).
- <sup>29</sup> See Department of Justice Canada, *The Federal Prosecution Service Deskbook* ch. 26, July 31, 2009, available at <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch26.html> (noting the Department of Justice's policies regarding staying charges and pursuing prosecution).

- <sup>30</sup> See, e.g., *R. v. Robert G. Lutes & Gemtec Ltd.*, File 16355201, 2006 N.P.P.C. 12, paras. 67-68 (Apr. 26, 2006) (Can.) (convicting a company hired to develop a landfill of *Fisheries Act* violations); *Fletcher v. Kingston (City)*, [2004] 7 C.E.L.R. (3d) 198 (Ont. C.A.) (Can.) (affirming the City's conviction for violations under the *Fisheries Act* for seepage into the shoreline caused by rusty pipes); see also Sentinelles Petitcodiac Riverkeeper, *Landfill Investigation Case Update*, <http://www.petitcodiac.org/riverkeeper/english/Campaigns/PolutionPrevention/landfupdate.htm> (last visited Oct. 30, 2009) (explaining that engineers in the Gemtec litigation had recently been found guilty of environmental statutory breaches).
- <sup>31</sup> See EcoJustice, *Private Prosecution Process*, <http://www.eco-justice.ca/media-centre/media-backgrounder/private-prosecution-process/?searchterm=None> (last visited Nov. 5, 2009) (recounting the efforts of a Sierra Legal Defence Fund investigator to lay a charge of environmental violations against the Vancouver government).
- <sup>32</sup> See INFRASTRUCTURE CANADA, SIERRA LEGAL DEFENCE FUND'S NATIONAL SEWAGE REPORT CARD III (2009), available at [http://www.infcc.gc.ca/research-recherche/results-resultats/rp-pr/rp-pr-2004-10\\_02-eng.html](http://www.infcc.gc.ca/research-recherche/results-resultats/rp-pr/rp-pr-2004-10_02-eng.html) (summarizing a 2004 Sierra Legal Defence Fund report).
- <sup>33</sup> E.g., ENVIRONMENTAL BUREAU OF INVESTIGATION, CITIZEN'S GUIDE TO ENVIRONMENTAL INVESTIGATION AND PRIVATE PROSECUTION (2009), available at <http://www.e-b-i.net/ebi/guide.html>.
- <sup>34</sup> *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392 (Can.); *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (Can.).
- <sup>35</sup> See NAAEC, art. 6.1 (ensuring that private citizens have a right to request the competent authorities to investigate allegations of environmental law violations).
- <sup>36</sup> Canadian Environmental Protection Act, S.C. 1999, ch. C-33, §§. 22 *et seq.* [hereinafter CEPA].
- <sup>37</sup> *Id.* § 22(a) (noting orders preventing action, orders requiring the cessation of action, and orders to create mitigation or correction plans as valid forms of injunctive relief).
- <sup>38</sup> *Id.* § 25.

<sup>39</sup> Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 (Can.), available at <http://csc.lexum.umontreal.ca/en/1992/1992rcs1-3/1992rcs1-3.html>.

<sup>40</sup> See Canadian Environmental Assessment Act, 1992 S.C., ch. 37 (Can.), available at <http://www.canlii.org/en/ca/laws/stat/sc-1992-c-37/latest/sc-1992-c-37.html> (establishing the right of judicial review to decisions made by the Minister of the Environment).

<sup>41</sup> See, e.g., Pembina Inst. for Appropriate Dev. v. Canada (Minister of Fisheries & Oceans), [2006] 3 F.C. D-13 (Can.), available at <http://recueil.cmf.gc.ca/eng/2005/2005fc1123/2005fc1123.html>; Alberta Environmental Network, *Environmentalists Win Landmark Tar Sands Lawsuit*, Mar. 5, 2008, available at <http://www.aenweb.ca/node/2151>; Robert R.G. Williams, Env'tl. Law Ctr., *Court Affirms Federal Role in Environmental Assessment*, 17 News Brief No.1, 6-9 (2002), available at [http://www.elc.ab.ca/Content\\_Files/Files/NewsBriefs/CourtAffirmsFederalRole-V17-1.pdf](http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/CourtAffirmsFederalRole-V17-1.pdf) (summarizing *Environmental Resource Centre v. Minister of Environment (Canada)*, [2002] 3 F.C. D-7 (Can.)).

<sup>42</sup> See *Prairie Acid Rain Coal. v. Minister of Fisheries & Oceans of Canada*, [2006] 3 F.C. 610 (Can.), available at [http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=FDD096400CA5C37BFF353F38104EB8A1?id=COU-143872&index=courtdecisions](http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=FDD096400CA5C37BFF353F38104EB8A1?i d=COU-143872&index=courtdecisions); see also MiningWatch Canada, *Fight for Public Involvement in Environmental Assessment Heads To Supreme Court: First Time Environmental Group Granted Leave to Appeal to Supreme Court of Canada*, Dec. 18, 2008, available at <http://www.miningwatch.ca/en/fight-public-involvement-environmental-assessment-heads-supreme-court-first-time-environmental-group>.

<sup>43</sup> See, e.g., Ecojustice, *Piping Plover Lawsuit: Victory*, <http://www.ecojustice.ca/cases/reprieve-for-piping-plover> (last visited Oct. 10, 2009) (noting that the federal government identified critical habitat for endangered shorebirds after the environmental group filed a lawsuit).

<sup>44</sup> Media Release, Ecojustice, *BC Government Interfering with Endangered Species: Groups Call for Federal Investigation*, Dec. 6, 2007, available at <http://www.ecojustice.ca/media-centre/press-releases/bc-government-interfering-with-endangered-species/>.

<sup>45</sup> Janice Walton, Blakes LLP, *Federal Court Decision Interpreting Species at Risk Act May Create Problems for Landowners and Resource Users*, July 16, 2009, available at [http://www.blakes.com/english/view\\_disc.asp?ID=3280](http://www.blakes.com/english/view_disc.asp?ID=3280).

<sup>46</sup> [2001] 2 S.C.R. 241 (Can.).

<sup>47</sup> R.S.Q., ch. P-9.3 (2009).

<sup>48</sup> *Spraytech*, 2 S.C.R. at paras. 55-56.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at para. 24.

<sup>51</sup> *Id.* at para. 1.

<sup>52</sup> *Id.* at para. 55.

<sup>53</sup> *Id.* at para. 31.

<sup>54</sup> [2003] 2 S.C.R. 624 (Can.).

<sup>55</sup> *Id.* at para. 1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at paras. 35-39.

<sup>58</sup> *Id.* at para. 38.

<sup>59</sup> *Id.* at para. 19.

<sup>60</sup> *St. Lawrence Cement Inc v. Barrette*, [2008] 3 S.C.R. 392 (Can.).

<sup>61</sup> *Id.* at paras. 6-7.

<sup>62</sup> *Id.* at para. 14.

<sup>63</sup> *Id.* at para. 75.

<sup>64</sup> *Id.* at para. 30.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at para. 80.

<sup>67</sup> *Id.*

<sup>68</sup> *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (Can.).

<sup>69</sup> *Id.* at para. 1.

<sup>70</sup> *Id.* at para. 3.

<sup>71</sup> *Id.* at para. 9.

<sup>72</sup> *Id.* at paras. 10-12, 150.

<sup>73</sup> *Id.* at paras. 66-72.

<sup>74</sup> *Id.* at para. 78.

<sup>75</sup> *Id.* at para. 80.

<sup>76</sup> *Id.* at para. 150.

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**ENDNOTES: PRECAUTIONARY PRINCIPLE IN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA** *continued from page 64*

<sup>1</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) [hereinafter Understanding on Rules].

<sup>2</sup> DENCHO GEORGIEV & KIM VAN DER BORGH, REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT *System* 80 (2006).

<sup>3</sup> Understanding on Rules, *supra* note 1.

<sup>4</sup> See WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493, available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm) [hereinafter WTO Agreement].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm) (follow link for “Appellate Body Report” and download report from new window) [hereinafter *Hormones*]; see Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (Sept. 29, 2006), available at [http://docsonline.wto.org/GEN\\_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/293R-00.doc](http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/293R-00.doc) [hereinafter *Biotech Products*].

<sup>8</sup> See *Hormones*, *supra* note 7; see also *Biotech Products*, *supra* note 7.

<sup>9</sup> See Appellate Body Report, *Japan—Apples*, WT/DS245/AB/R (Nov. 26, 2003), available at [http://docsonline.wto.org/GEN\\_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/245ABR.doc](http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/245ABR.doc).

<sup>10</sup> See The Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 29, available at <http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf> [hereinafter Montreal Protocol].

<sup>11</sup> *Id.*

<sup>12</sup> See TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 225 (2009).

<sup>13</sup> See *Southern Bluefin Tuna* (Nos. 3 & 4) (New Zealand v. Japan; Australia v. Japan), 117 I.L.R. 148 and 119 I.L.R. 508 (Int'l Trib. L. of the Sea 1999) available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow link under “Proceedings and Judgments” to “List of Cases”); see also PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 275 (2003).

<sup>14</sup> STEPHENS, *supra* note 12, at 225.

<sup>15</sup> See *The MOX Plant Case* (Ireland v. United Kingdom), 126 I.L.R. 334 (Int'l Trib. L. of the Sea 2001) available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow link under “Proceedings and Judgments” to “List of Cases”); see also STEPHENS, *supra* note 12, at 237.

<sup>16</sup> STEPHENS, *supra* note 12, at 237; see also M. Bruce Volbeda, *The MOX Plant Case: The Question of “Supplemental Jurisdiction” for International Environmental Claims Under UNCLOS*, 42 Tex. Int'l L.J. 211, 213 (2006).

<sup>17</sup> STEPHENS, *supra* note 12, at 237.

<sup>18</sup> STEPHENS, *supra* note 12, at 237.

<sup>19</sup> Montreal Protocol, *supra* note 10.

<sup>20</sup> STEPHENS, *supra* note 12, at 237-38.

<sup>5</sup> U.S.-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 19, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> [hereinafter USCFTA].

<sup>6</sup> See, e.g., Heather Corbin, Note, *The Proposed United States-Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 119, 141-42 (2003) (arguing that free trade agreements should be used to advance environmental protection standards). But see FRENCH, *supra* note 1, at 51 (detailing the difficulties of reforming existing trade agreements to address environmental concerns).

<sup>7</sup> CCAEC, *supra* note 4, art. 23.1; NAAEC, *supra* note 2, art. 23.1.

<sup>8</sup> CCAEC, *supra* note 4, art. 14-15; NAAEC, *supra* note 2, art. 14-15.

<sup>9</sup> CCAEC, *supra* note 4, art. 14.1. A citizen is any "person or organization residing or established in the territory of a Party." *Id.* art. 14.1(f).

<sup>10</sup> CCAEC, *supra* note 4, art. 8. See generally COMMISSION FOR ENVIRONMENTAL COOPERATION, BRINGING THE FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NAAEC (2007) (providing information about the NAAEC process to the public), available at [http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts\\_en.pdf](http://www.cec.org/files/PDF/SEM/Bringing%20the%20Facts_en.pdf).

<sup>11</sup> CCAEC, *supra* note 4, art. 14.1; NAAEC, *supra* note 2, art. 14.1. The National Secretariat will forward a submission that:

- (a) is in writing . . . ; (b) clearly identifies the person or organization making the submission; (c) provides sufficient information . . . ; (d) appears to be aimed at promoting enforcement rather than at harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; (f) is filed by a person or organization residing or established in the territory of a Party; and (g) includes, in the case of submissions [regarding] Canada, a declaration to the effect that the matter will not subsequently be submitted [under the NAAEC], with a view to avoiding duplication in the handling of submissions.

CCAEC, *supra* note 4, art. 14.1. While these criteria are largely procedural, the CCAEC Council found one of four submissions to the CCAEC governing body to be insufficient, and terminated the submissions. CCAEC Submissions Registry, <http://can-chil.gc.ca/English/Profile/JSC/Registry/Registry.cfm>.

<sup>12</sup> CCAEC, *supra* note 4, art. 14.2; NAAEC, *supra* note 2, art. 14.2. The Committee considers whether:

- (a) the submission alleges harm to the person or organization making the submission; (b) the submission . . . raises matters whose further study in this process would advance the goals of this Agreement; (c) private remedies available under the Party's law have been pursued; and (d) the submission is drawn exclusively from mass media reports.

*Id.* Of the three submissions the CCAEC Joint Submission Committee has considered, all three merited a response from the party. CCAEC Submissions Registry, <http://can-chil.gc.ca/English/Profile/JSC/Registry/Registry.cfm> (last visited Oct. 15, 2009).

<sup>13</sup> See Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation to the Americas*, 33 ENVTL. L. 501, 517-18 (2003) (describing Canada's efforts to constrain the citizen submission process and defend against preparation of factual records, but also its support of the citizen submissions process as a mechanism for calling attention to environmental enforcement problems in individual provinces where the federal environmental agency does not have control).

<sup>14</sup> USCFTA, *supra* note 5, art. 19.2.

<sup>15</sup> *Id.* art. 19.2.1(a).

<sup>16</sup> CCAEC, *supra* note 4, art. 14.1; NAAEC, *supra* note 2, art. 14.1.

<sup>17</sup> USCFTA, *supra* note 5, art. 19.6. The USCFTA requires both parties to accept comments and suggestions from the public and allow for a public committee to advise the parties in their implementation of the agreement. *Id.* art. 19.4.

<sup>18</sup> *Id.* art. 19.6, 22.4. Either party can unilaterally initiate consultations. *Id.* art. 19.6.1, 22.4.

<sup>19</sup> *Id.* art. 19.6.6.

<sup>20</sup> *Id.* art. 22.5.2.

<sup>21</sup> *Id.* art. 22.6.1.

<sup>22</sup> *Id.* art. 22.15. See also Jay V. Sagar, *The Labor and Environment Chapters of the United States-Chile Free Trade Agreement: An Improvement Over the Weak Enforcement Provisions of the NAFTA Side Agreements on Labor and the Environment?*, 21 ARIZ. J. INT'L & COMP. L. 913, 928-29 (2004) (describing the USCFTA dispute resolution process in more detail). The fine goes to a fund for environmental programs, including increasing environmental enforcement. USCFTA, *supra* note 5, art. 22.16(4).

<sup>23</sup> USCFTA, *supra* note 5, art. 22.16(5).

<sup>24</sup> See JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE 71 (2d ed. 2003) (explaining the crucial roles of the U.S. Environmental Protection Agency, state environmental agencies, and environmental organizations in the effective enforcement of U.S. environmental statutes); cf. Victor B. Flatt, *Spare the Rod and Spoil the Law: Why the Clean Water Act Has Never Grown Up*, 55 ALA. L. REV. 595, 596 (2004) (blaming the failure of the Clean Water Act to bring about clean water in the United States on ineffective enforcement).

<sup>25</sup> Cf. Guillermo O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion*, in THE (UN)RULE OF LAW AND THE UNDER-PRIVILEGED IN LATIN AMERICA 303, 307-08 (Juan E. Méndez et al. eds. 1999) (explaining that the "rule of law" means legal rules are applied consistently without consideration of the power or status held by the subject of a proceeding). But see Laura C. Bickel, Note, *Baby Teeth: An Argument in Defense of the Commission for Environmental Cooperation*, 37 NEW ENG. L. REV. 815, 845-46 (2003) (arguing that the focus on enforcement is misplaced and suggesting that a focus on environmental management would better achieve the stated goals of the NAAEC).

<sup>26</sup> See, e.g., FRENCH, *supra* note 1, at 32 (describing toxic discharges into open ditches at three-quarters of the sampled factories in Mexico's border region, even though Mexico's environmental laws were comparable to those in the United States).

<sup>27</sup> E.g., Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1223 (1998) ("In environmental law, consistent treatment is particularly crucial so that regulated entities believe they are competing on a level playing field.").

<sup>28</sup> See HAKAN NORDSTRÖM & SCOTT VAUGHAN, WORLD TRADE ORGANIZATION, SPECIAL STUDIES 4: TRADE AND ENVIRONMENT 57 (1999), [http://www.wto.org/english/tratop\\_e/envir\\_e/environment.pdf](http://www.wto.org/english/tratop_e/envir_e/environment.pdf) (concluding that income growth in developing countries is a necessary but not sufficient condition for increased environmental protection). But see Howard Mann & Monica Araya, *An Investment Regime for the Americas: Challenges and Opportunities for Environmental Sustainability*, in GREENING THE AMERICAS 121, 130-137 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (explaining that some corporations have used NAFTA's investor protection provisions to lobby against and gain compensation for financial harm from domestic laws strengthening environmental protection).

<sup>29</sup> See USCFTA, *supra* note 5, art. 19.4 (requiring "receipt and consideration of public communications" on environmental matters that affect trade).

<sup>30</sup> E.g., *id.*, art. 19.2.3 ("Nothing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party.").

<sup>31</sup> See Philip M. Moremen, *Private Rights of Action to Enforce Rules of International Regimes*, 79 TEMP. L. REV. 1127, 1153 (2006) (describing pressure on the NAAEC governing body to limit the "independence and discretion" of the body to prepare factual records as more submissions have challenged state failures to enforce environmental laws).

<sup>32</sup> United States Trade Representative, Trade Agreements Home, (2009) <http://www.ustr.gov/trade-agreements> (providing the U.S. trade strategy to "create opportunities for Americans and help to grow the U.S. economy").

<sup>33</sup> See Bickel, *supra* note 25, at 847 (explaining that states do not have an interest in pursuing state-to-state dispute resolution because doing so would highlight the accusing state's own enforcement record).

<sup>34</sup> See, e.g., 22 U.S.C. § 2656 (2008) (delegating power over foreign affairs to the Secretary of State in the manner in which the President directs).

<sup>35</sup> USCFTA, *supra* note 5, preamble (providing that the United States and Chile resolved to "AVOID distortions in their reciprocal trade; [and] ESTABLISH clear and mutually advantageous rules governing their trade," among other goals).

<sup>36</sup> See Eric Miller, *Did Mexico Suffer Economically from the NAFTA's Environmental Provisions?*, in GREENING THE AMERICAS 121, 130–137 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (finding no economic impact from trade sanctions because no party has ever used the sanction provisions of the NAAEC); see also Blanca Torres, *The North American Agreement on Environmental Cooperation: Rowing Upstream*, in GREENING THE AMERICAS 201, 207 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (describing the “lengthy” and unlikely process of applying trade sanctions for environmental non-enforcement but saying Mexican officials still find the potential “threatening”).

<sup>37</sup> USCFTA, *supra* note 5, art. 19.

<sup>38</sup> *Id.*, art. 19.2.1(a) (providing that a state party must show that the accused party has “[failed] to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”).

<sup>39</sup> FRENCH, *supra* note 1, at 50–51 (praising the NAFTA dispute resolution procedures for placing the burden of proof on the challenging state instead of the defending state). Placing the burden on the challenging state makes environmental regulations more likely to survive a challenge. FRENCH, *supra* note 1, at 50–51.

<sup>40</sup> USCFTA, *supra* note 5, art. 19.2.1(a).

<sup>41</sup> See, e.g., *Special Report: Environmental Laws on the Books in Latin America But Enforcement, Environmental Infrastructure Lacking*, 20 INT’L ENV’T REP. 176, 176 (1997) (describing environmental enforcement in Latin America as “uneven, sporadic, ineffectual, and sometimes, non-existent”).

<sup>42</sup> USCFTA, *supra* note 5, art. 19.2.1(a) (providing that a state party must show that the accused party has “[failed] to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”).

<sup>43</sup> See, e.g., *Rechtschaffen*, *supra* note 27, at 1224 (explaining that companies will hesitate to invest in compliance with environmental laws without effective enforcement in fear that their competitors are not in compliance, thereby gaining a competitive advantage with lower costs).

<sup>44</sup> Cf. Moremen, *supra* note 31, at 1154 (explaining that the complicated NAFTA provisions for state-to-state dispute resolution makes the imposition of trade sanctions “unlikely”).

<sup>45</sup> See *Id.* at 1155 (speculating that developing states do not have to fear crippling numbers of submissions because there are few submissions and only real sanction is “sunshine”).

<sup>46</sup> See discussion *supra* (explaining that states generally have little incentive to bring environmental enforcement claims against other states).

<sup>47</sup> See FRENCH, *supra* note 1, at 55 (speculating that the Mexican government would not agree to a side agreement to NAFTA that included U.S. enforcement of environmental laws inside Mexico).

<sup>48</sup> See Block, *supra* note 13, at 516 (marking on the increased citizen participation in public fora in Mexico after the NAAEC); see also Torres, *supra* note 36, at 210–14 (describing the strengthening of the Mexican environmental community around the NAFTA negotiation process and rise in public interest in environmental issues as the public became more aware of environmental monitoring data).

<sup>49</sup> Cf. *Sierra Club v. Morton*, 405 U.S. 734, 734–35 (1972) (holding that a plaintiff must be a current user of a resource to have standing to bring a lawsuit protecting that resource).

<sup>50</sup> See Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT’L & COMP. L. REV. 389, 404–05 (2004) (explaining that citizens and NGOs are more likely than a government to report violations because they are close to the affected environment or specialize in identifying violations).

<sup>51</sup> See generally *id.* (contrasting three citizen alert mechanisms: “police patrols,” “fire alarms,” and government monitoring of treaty compliance; and crediting the diffusion of information to the success of citizen monitoring efforts and citizen suits under U.S. environmental law).

<sup>52</sup> See *infra* (arguing that states concerned about sovereignty are also unlikely to accept foreign patrols to identify ineffective enforcement).

<sup>53</sup> See Raustiala, *supra* note 50, at 406 (explaining that private actors have various incentives to report violations; compliant facilities have an economic incentive to report violations by competitors, users of a natural resource have an interest in preventing harm, and environmental NGOs have an interest in fulfilling their common purpose).

<sup>54</sup> See Benjamin Martin, Note, *An Environmental Remedy to Paralyzed Negotiations for a Multilateral Foreign Direct Investment Agreement*, 1 GOLDEN GATE U. ENVTL. L.J. 209, 226 (2007) (explaining that developing nations have hesitated to enter into investment and trade agreements that include human rights and religious freedom conditions because they see these conditions as “an unreasonable interference with state sovereignty”).

<sup>55</sup> See CCAEC, *supra* note 4, art. 3 (allowing each party to “select its own levels of domestic environmental protection” as well as requiring a “high level” of environmental protection). But see FRENCH, *supra* note 1, at 13 (explaining that environmental regulations in one country can cause “massive degradation” in other countries in the absence of global environmental regulations).

<sup>56</sup> See FRENCH, *supra* note 1, at 57 (describing the European environmental community’s increased involvement with enforcement when European Union treaties provided for a citizen enforcement mechanism with little power to impose penalties).

<sup>57</sup> While a factual record could form the basis of a state-to-state dispute, there have been no such disputes under the NAAEC or CCAEC, which makes that possibility remote. John J. Kirton, *Winning Together: The NAFTA Trade-Environment Record*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION 74, 90 (John J. Kirton & Virginia W. Maclaren eds., 2002) (contrasting the twenty-eight citizen submissions with the absence of any state-to-state disputes in the first six and a half years of the NAAEC).

<sup>58</sup> See Moremen, *supra* note 31, at 1155 (explaining that the limited nature of the NAAEC’s capacity imposes limited sovereignty costs, but any complaint-based procedure has a greater sovereignty cost than a state-dependent procedure); see also FRENCH, *supra* note 1, at 55 (describing Mexico’s concern with the powers of an international governing body).

<sup>59</sup> But see Raustiala, *supra* note 50, at 410 (arguing that relying on citizen “fire alarms” removes autonomy from the government, and may advance private interests at the expense of the collective interest).

<sup>60</sup> See Sagar, *supra* note 22, at 942 (explaining that Mexico stopped a pier project after the release of a factual record suggesting that going forward would violate Mexico’s environmental laws).

<sup>61</sup> See *id.* (finding evidence of a deterrent from the preparation of a factual record alone, although a record is not as “detrimental as monetary penalties or trade sanctions”).

<sup>62</sup> Cf. David Rieff, *Were Sanctions Right?*, N.Y. TIMES, July 27, 2003, (Magazine) at 41 (describing the effects of long-lasting trade sanctions against Iraq and concluding that sanctions had little impact on Iraqi rulers while causing much suffering among the Iraqi population).

<sup>63</sup> See Moremen, *supra* note 31, at 1177 (suggesting that the NAAEC citizen submissions mechanism is reasonably successful because of the active environmental community in North America that has the capacity and organizational incentive to monitor and challenge instances of non-enforcement).

<sup>64</sup> See Natural Resources Defense Council, NRDC’s BioGems: Save Patagonia (2009), <http://www.savebiogems.org/Patagonia> (describing the Natural Resources Defense Council’s work with Chilean activists to call for an environmental review of a dam project in Patagonia, Chile). The campaign involves a submission to the CCAEC. Along with other international and domestic pressure, the citizen submission led Chile’s environmental minister to reject the disputed environmental impact statement and request a new study from the developers. Allison Siverman, Natural Resources Defense Council, Patagonia BioGem Campaign Status Update, (2008) (on file with author).

<sup>65</sup> See Moremen, *supra* note 31, at 1177 (explaining that a system reliant on citizen complaints can only be effective if there is a “community of . . . NGOs willing to bring claims”).

<sup>66</sup> See, e.g., Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 160, 178–79 (2006) (criticizing the NAAEC process for insufficient independence and lack of citizen enforcement autonomy). Some commentators call for an independent arbitration process, which citizens could begin autonomously, for environmental disputes. *Id.* at 192.

<sup>67</sup> See David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation’s Citizen Submissions Process*, 30 N.C. J. INT’L L. & COM. REG. 759, 790–92 (2005) (marking that environmental organizations continued to file submissions after the NAAEC governing body refused to consider patterns of non-enforcement).

<sup>68</sup> See, e.g., Raustiala, *supra* note 50, at 392 (remarking that the citizen submissions process was “ground-breaking” direct involvement of individuals in generally “state-centric” international law).

<sup>69</sup> See *id.* at 398 (noting that the NAAEC submissions process “shifts the search for noncompliance” from governments to private actors).

<sup>70</sup> See FRENCH, *supra* note 1, at 55 (speculating that the Mexican government would be hesitant to sign an agreement that delegated too much sovereignty to an international environmental body).

<sup>71</sup> See *id.* at 541–42 (decrying the requirement that the politicized Council has to vote to allow preparation and release of each factual record as an unwelcome intrusion of politics into the process); see also Geoff Garver, *Tooth Decay*, THE ENVIRONMENTAL FORUM, May-June 2008 at 34, 36 (criticizing U.S. interference with the CEC process).

<sup>72</sup> See Sagar, *supra* note 22, at 941–42 (using the Cozumel Island factual record, which prompted the Mexican government to cancel a cruise ship pier project, to argue that a factual record has some deterrent effect).

<sup>73</sup> See Torres, *supra* note 36, at 207 (explaining that Mexican non-governmental organizations recognize the risk of less effective enforcement if Mexican government institutions are overwhelmed by citizen submissions and have held back to avoid that possibility).

<sup>74</sup> See Markell, *supra* note 67, at 788–89 (reporting that many environmental advocacy groups support the NAAEC process and offer some evidence that environmental governance has improved under the NAAEC); see also Torres, *supra* note 36, at 210–14 (concluding that the NAAEC has helped Mexico improve its environmental governance by strengthening the environmental community and the capacity of government institutions charged with environmental protection).

<sup>75</sup> E.g., North American Free Trade Agreement, Dec. 8, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, art. 1110; see also INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT & WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 1 (2001), available at [http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf) (criticizing NAFTA’s Chapter 11 for allowing foreign investors to bring the host country into binding, confidential arbitration without proving for community input, and potentially requiring the host country to compensate a foreign investor for costs associated with new environmental regulations).

<sup>76</sup> See, e.g., PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 69–110 (1996) (explaining that new environmental legislation must not unjustifiably restrict trade).

<sup>77</sup> U.S.-Peru Trade Promotion Agreement, Apr. 12, 2006, U.S.-Peru, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

<sup>78</sup> See Aaron Cosbey, *Brave New Deal? Assessing the May 10th U.S. Bipartisan Compact on Free Trade Agreements*, IISD COMMENTARY, 3–4, Aug. 2007 (concluding that enacted changes to the USPTPA “probably [do] not” increase the effectiveness of environmental enforcement in Peru), available at <http://www.iisd.org/PUBLICATIONS/pub.aspx?id=888>.

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