Denver Journal of International Law & Policy

Volume 39
Number 3 *Summer*

Article 11

April 2020

Vol. 39, no. 3: Full Issue

Denver Journal International Law & Policy

Denver Journal
of International Law and Policy

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Denver Journal

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VOLUME 39 NUMBER 3 SUMMER-2011

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Current Volume: 39
Current Year: 2010-2011
Number of Issues Published per year: Between 3 and 5 on a quarterly basis beginning in October.

The Denver Journal of International Law and Policy

is online with Hein Online, LEXIS®, and WESTLAW®; and is indexed and abstracted in Current Index to Legal Periodicals, Environmental Abstracts, ICEL References, Index to Federal Legal Periodicals, Index to Legal Periodicals, LegalTrac, and Shepard's Law Review Citations.

Cite as: DENV. J. INT'L L. & POL'Y

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Denver Journal
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VOLUME 39 NUMBER 3 SUMMER-2011

THE 2010 DENVER CONFERENCE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION: SUSTAINABLE DEVELOPMENT, CORPORATE GOVERNANCE, AND INTERNATIONAL LAW

JOHN E. NOYES*

The American Branch of the International Law Association (ILA) is grateful to the *Denver Journal of International Law and Policy* for publishing selected essays from the regional American Branch International Law Weekend held at the University of Denver Sturm College of Law on February 12th-13th, 2010. The Branch also thanks the various hosts of the Weekend: the *Journal*; the Sturm College of Law; the College of Law's International Law Society and International Legal Studies Program; and the Ved Nanda Center for International Law. Both Katherine Nanda and Professor Ved Nanda were personally involved in planning and running this conference, and their organizational skill, graciousness, and hospitality helped make it a grand success. Professor Nanda is of course known internationally as the Evans University Professor and the Thompson G. Marsh Professor of Law at the University of Denver.[1] He has, for many years, actively supported the American Branch through speaking at its conferences, participating in its Executive Committee meetings, and serving as Honorary Vice President. Professor Nanda was recently named a Patron of the Branch.[2]

The theme of this regional International Law Weekend, "Sustainable Development, Corporate Governance, and International Law," links a major value underlying modern international law to practical governance issues.[3] Speakers addressed both theoretical perspectives and practical questions about improving corporate and international institutional practices. The conference explored values, problems facing attorneys, and law development – all significant emphases of the ILA and its American Branch.

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* Roger J. Traynor Professor of Law, California Western School of Law; President (2008-2010), American Branch of the International Law Association

1. *Faculty Profile: Ved P. Nanda*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, http://law.du.edu/index.php/profile/ved-nanda (last visited Feb. 19, 2011).

2. *New American Branch Patrons*, ABILA NEWSLETTER (Am. Branch of the Int'l Law Ass'n, Los Angeles, CA), May 2010, at 3, *available at* ila-americanbranch.org/newsletters/201005_ABILA_NEWSLETTER.pdf.

3. *International Law Week – Midwest*, AM. BRANCH OF THE INT'L LAW ASS'N, http://ila-americanbranch.org/Intl_Law_Wknd_Midwest.aspx (last visited Feb. 19, 2011).

Established in Brussels in 1873 to further international relations and the cause of peace, the ILA has long promoted the development of private as well as public international law.[4] When the ILA was organized, it welcomed as members academics, practicing lawyers, and business people. The ILA's reports concerning a wide range of topics link international legal theory and practice.

When the ILA's American Branch was created in 1922,[5] its founders set out some utopian goals and also sought to help solve concrete private international law problems. Addressing the first meeting of the American Branch, Arthur K. Kuhn, both a scholar and a leading member of the New York bar, stressed the importance of ILA members collaborating "to promote international peace and good will and to lay the foundations for a profitable and peaceful international trade and commerce."[6] Other founders envisioned practical benefits from Branch activities. Frederic Coudert, a partner at Coudert Brothers, thought the American Branch could usefully further the "reasoned development of international law,"[7] and Dean Charles Noble Gregory urged attention to codification projects.[8]

The world and international law have changed dramatically in the ensuing decades. The ILA and its American Branch have remained committed to the study and development of public and private international law. Today, the London-based ILA continues as the preeminent international non-governmental international law organization devoted to developing and restating international law. Reports developed by the ILA's numerous committees and study groups are adopted by the Association as a whole at its biennial conferences – most recently in The Hague in August 2010. These reports have shaped treaties and influenced international law and practice on a wide range of public and private international law topics.[9] This Denver International Law Weekend complemented the focus of the ILA's International Law on Sustainable Development Committee.[10] The American Branch, the largest of the ILA's forty-five national and regional branches,[11] has its own active committees, some investigating topics within the

4. *See* MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776-1939, at 134-38 (2010).

5. *The History of the ILA*, AM. BRANCH OF THE INT'L LAW ASS'N, http://ila-americanbranch.org/ILA_History.aspx (last visited Feb. 19, 2011).

6. Arthur K. Kuhn, Speech at the Inaugural Dinner of the American Branch of the International Law Association (1922), *in* AM. BRANCH OF THE INT'L LAW ASS'N, REPORT OF PROCEEDINGS OF THE FIRST ANNUAL MEETING 42, 43 (1922).

7. Frederic R. Coudert, Speech at the Inaugural Dinner of the American Branch of the International Law Association (1922), *in* AM. BRANCH OF THE INT'L LAW ASS'N, REPORT OF PROCEEDINGS OF THE FIRST ANNUAL MEETING 13, 16 (1922).

8. *See* Charles Noble Gregory, Speech at the Inaugural Dinner of the American Branch of the International Law Association (1922), *in* AM. BRANCH OF THE INT'L LAW ASS'N, REPORT OF PROCEEDINGS OF THE FIRST ANNUAL MEETING 28, 29 (1922).

9. For information about the ILA's committees and study groups and links to recent reports, see *Committees*, INT'L LAW ASS'N, http://www.ila-hq.org/en/committees/index.cfm (last visited Feb. 19, 2011). The ILA's biennial *Reports* contain a complete record of the ILA's resolutions and committee reports.

10. *See International Law on Sustainable Development*, INT'L LAW ASS'N, http://www.ila-hq.org/en/committees/index.cfm/cid/1017 (last visited Feb. 19, 2011).

11. *The History of the ILA*, *supra* note 5.

mandates of ILA committees and others working on projects of their own. The Branch's committees have produced books, academic reports, and amicus briefs and other policy statements.[12]

The American Branch also organizes major conferences.[13] International Law Weekend, which spans three days each October in New York, coincides with the American Branch's annual meeting. Approximately 800 to 1000 registrants attend the Weekend's thirty plus panels, many of which the American Branch's committees organize.[14] Since 2001, International Law Weekend – West has been a popular biennial event, with conferences held to date in various cities in California and Oregon. ILW West 2011 is scheduled at Southwestern Law School in Los Angeles on February 25th-26th, 2011.[15] The Denver conference that gave rise to this symposium marked the start of a new biennial series of regional American Branch International Law Weekends, with the next one to be held at Case Western University in Cleveland, Ohio.[16] The Denver conference carried on the tradition of the ILA and its American Branch by exploring timely topics and seeking to link underlying values to proposals for developing international law.

Again, on behalf of the American Branch of the International Law Association, I sincerely thank Katherine and Ved Nanda, the University of Denver Sturm College of Law, the Ved Nanda Center, and other cosponsors for hosting the American Branch's 2010 regional International Law Weekend. The *University of Denver Journal of International Law and Policy* is to be commended for publishing important essays from the Weekend.

12. For information about the American Branch's committees and links to recent committee reports, see *Committees*, AM. BRANCH OF THE INT'L LAW ASS'N, http://www.ila-americanbranch.org/Committees.aspx (last visited Feb. 19, 2011). The Branch's biennial *Proceedings*, which have been published since 1922, are available through Hein On-line and contain American Branch committee reports.

13. *See International Law Weekend*, AM. BRANCH OF THE INT'L LAW ASS'N, http://www.ila-americanbranch.org/Events.aspx (last visited Feb. 19, 2011).

14. *Id.*

15. *International Law Weekend – West*, AM. BRANCH OF THE INT'L LAW ASS'N, http://ila-americanbranch.org/Intl_Law_Wknd_West.aspx (last visited Feb. 19, 2011).

16. *International Law Weekend – Midwest*, *supra* note 3.

BASIC FUNCTIONS AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW IN THE CONTEXT OF MANAGING WATER RESOURCES

JAMES A.R. NAFZIGER*

I. INTRODUCTION

International environmental law plays an important role in shaping and giving effect to institutional policies for managing natural resources. Its rules, principles, and procedures are normative not only when they are binding as hard law but also when they provide non-binding guidance as soft law for national and sub-national policies. In either normative capacity, international environmental law lends greater authority and coherence to divergent sectoral policies and fills gaps where effective policies are incomplete or do not exist. The law also facilitates the transfer of institutional policies and techniques from one political unit or system to another. This harmonizing effect is particularly apparent within integrated regional systems such as the European Union and federal systems such as the United States. But the systems themselves are also becoming more congruent with each other. The growing structural convergence of the European and United States systems is itself a good reason to undertake trans-Atlantic analysis of institutional policies for regulating and managing resources. We can learn a great deal from each other's experiences in having to grapple, more and more, with the same or similar complexities.

The purpose of this survey is to introduce the essentials of international environmental law and suggest how it can be efficiently integrated into post-secondary education concerning the comparative environmental impacts of different institutional policies for managing natural resources. The focus is on the environmental management of shared water resources. The aim is to give students, whether law-trained or not, a deeper understanding of the uses of international environmental law in a variety of ecological sectors, from the oceans to the mountains, and on all tiers of natural resource management, from local to international.

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* Thomas B. Stoel Professor of Law and Director of International Programs, Willamette University College of Law. The author served as a United States member of a project entitled *Trans-Atlantic International Environmental Policy in Relation to Environmental Education*, organized by the Directorate General for Education and Culture of the European Commission and the United States Department of Education (Atlantis Project P116J060002). This article is adapted from a project report by the author, and a paper based on it was presented on February 12, 2010, at International Law Weekend-Midwest, organized by the International Law Association (American Branch) at the University of Denver, Sturm College of Law. The theme of the Weekend was "Sustainable Development, Corporate Governance, and International Law." The author thanks Brandon Espinosa for his careful assistance.

This survey therefore summarizes the general legal framework and historical development of international environmental law, then identifies several of its essential functions and general principles, and concludes with a brief commentary on a few of its contributions and challenges to it. Expressing the uses of the law primarily in terms of the essential functions of multilateral agreements and the most important principles is intended to highlight the utility of international environmental law and institutions. At the very least, a familiarity with such functions and principles, within the context of shared water resources, yields a common vocabulary to express diverse policy alternatives.

II. THE GENERAL LEGAL FRAMEWORK

Public international law, primarily, but also private international law[1] play significant roles in resolving transboundary, environmental disputes. Limited extraterritorial application of national regulatory law is also noteworthy.[2]

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1. Private international law, otherwise known as "conflict of laws," refers largely to the rules that govern jurisdiction of courts, choice of law, and the recognition and enforcement of foreign judgments in civil actions.

2. Courts in the United States generally have been reluctant to extend federal environmental laws extraterritorially even when foreign activity causes harmful effects in the country. *See, e.g.*, Born Free U.S.A. v. Norton, 278 F. Supp. 2d 5, 19-20 (D.D.C. 2003) (refusing to apply the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370H [hereinafter NEPA], extraterritorially in cases involving importation of elephants from a foreign state), *vacated*, No. 03-5216, 2004 WL 180263 (D.C. Cir. 2004). The main exception is where either the conduct or effects at issue occur in the global commons, outside any national jurisdiction. *See* Natural Res. Def. Council v. United States, No. CV-01-07781 CAS(RZX), 2002 WL 32095131, at 9-12 (C.D. Cal. Sept. 17, 2002) (holding that the presumption against extraterritorial application of U.S. statutes did not bar extraterritorial application of NEPA to Navy sea tests affecting the U.S. Exclusive Economic Zone); Envtl. Def. Fund v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993) (holding "that the presumption against the extraterritorial application of statutes . . . does not apply where the conduct regulated by the statute occurs primarily . . . in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica—a continent without a sovereign, and an area over which the United States has a great measure of legislative control"). But courts are becoming less inhibited in extending statutory law to events and persons in other countries with effects in the United States. *See, e.g.*, Pakootas v. Cominco Teck Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, at 16-17 (E.D. Wash. Nov. 8, 2004). There, the U.S. members of the Confederated Tribes of the Colville Reservation brought an action against a Canadian-owned smelter in Trail, British Columbia, on the basis of an extraterritorial application of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *Id.* at 1. The court denied the defendant corporation's motion to dismiss, finding as follows:

> There is no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States. There is also no direct evidence that Congress did not intend such application. There is, however, no doubt that Congress intended CERCLA to clean up hazardous substances at sites within the jurisdiction of the United States. That fact, combined with the well-established principle that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, leads the court to conclude that extraterritorial application of CERCLA is not precluded in this case. The Upper Columbia River Site is a "domestic condition" over which the United States has sovereignty and

Although public international law as a whole was once confined, in the positivist tradition, to relations between States, it infuses nearly every sector of human activity today.[3] Regardless of whether particular rules of law are hard, in the sense of being legally binding, or soft, when they are normative but non-binding, they not only govern relations *between* sovereign States but also shape expectations and decisions *within* national and sub-national systems. Thus, clean-air issues implicate the law of transfrontier pollution whereas issues of water quality and accessibility engage the international law of watercourses and drainage basins. By the same token, local management of fisheries may need to take account of international rules applicable in coastal zones. International environmental law also promotes such ecological projects as the establishment of natural heritage sites, reserves, other protected areas, and biological diversity programs.

Several examples illustrate the role of international environmental law in managing water resources. In the *Case Concerning the Gabčíkovo-Nagymaros Project*,[4] Hungary and Slovakia disputed each other's construction of dams on the Danube River.[5] The International Court of Justice, quoting from its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*,[6] reiterated that

> [T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[7]

It should be noted that much of international environmental law is sectoral. For example, wetlands constitute one sector with its own regime, watercourses another, and forests yet a third sector. Of particular significance is the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (also

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> legislative control. Extraterritorial application of CERCLA in this case does not create a conflict between U.S. laws and Canadian laws.

Id. at 16.

3. Since its origins in the sixteenth and seventeenth centuries, the "law of nations"—a term that appears, for example, in the eighteenth-century United States Constitution—was premised on a "universal law of society." United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820). In the late eighteenth century Jeremy Bentham converted the "law of nations" into what he was the first to call "international law." Bentham's positivist concept of law, based on the consent of sovereign States, led to John Austin's analytic jurisprudence. It adopted a formalistic view of law as the product of sovereign command, purely and simply. Austin's extreme version of positivism temporarily relegated international law to the status of moral suasion from the mid-nineteenth century to the first quarter of the twentieth century. Today, however, a more cosmopolitan view of international law, freed of Austinian positivism, broadly extends the authority and legitimacy of international law into human affairs.

4. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).

5. *Id.* ¶¶ 40-41, 44.

6. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

7. *Id.* ¶ 29.

known as the Ramsar Convention),[8] to which the United States and all members of the European Union are parties. It seeks "to stem the progressive encroachment and loss of wetlands . . . by combining far-sighted national policies and co-ordinating international action."[9] Although the treaty was the first to focus sharply on the habitat of an endangered species (waterfowl), its scope has broadened to encompass the entire wetlands ecology. Article 5 mandates that

> The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties.
>
> They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.[10]

The Convention further requires parties to engage in the conservation and "wise use" of wetlands, particularly those of international importance that each party designates for inclusion on the Ramsar Convention List.[11] Parties also agree to undertake environmental impact assessments, resource inventories, the establishment of nature reserves, ecological training programs, and consultations with other parties.[12]

The 2004 Berlin Rules on Water Resources,[13] though soft law, and the 1997 U.N. Convention on the Law of Non-Navigational Uses of International Watercourses,[14] though not yet in force, are also influential. Each of these instruments sets forth important principles, rules, and general practices. The Convention on Watercourses, for example, requires States Parties to cooperate in preventing, reducing, and controlling pollution that may cause significant harm to watercourses and related environments[15] and to protect and preserve the watercourse ecosystems within their control.[16] It also instructs States to settle their disputes related to their treaty obligations according to a graduated process, beginning with negotiations and, as a last resort, concluding with binding arbitration or contentious proceedings before the International Court of Justice.[17]

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8. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245 [hereinafter Convention on Wetlands].

9. *Id.* at pmbl.

10. *Id.* art. 5.

11. *Id.* arts. 2-3.

12. *Id.* arts. 3-5.

13. Int'l Law Ass'n, *Report of the Seventy-First Conference*, 71 INT'L L. ASS'N REP. CONFS. 334 (Aug. 16-21, 2004) [hereinafter Berlin Rules].

14. Convention on the Law of the Non-navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 36 I.L.M. 700 [hereinafter Convention on Watercourses].

15. *Id.* art. 21, ¶ 2.

16. *Id.* art. 20.

17. *Id.* art. 33.

This survey might have simply identified other legal authority applicable to individual case studies, or it might have focused sharply on the particular geographical regions addressed by published case studies—for example, the framework of integrated coastal management along the Spanish Mediterranean littoral.[18] Alternatively, the survey might have focused, somewhat more broadly, on the European Union, taking account of its established rules as well as the evolving norms of its marine and other policies. Instead, the survey's scope is global so as to facilitate a comprehensive understanding of the role of international environmental law in shaping and giving effect to a wide variety of institutional policies with environmental impacts.

III. HISTORICAL DEVELOPMENT AND ESSENTIAL CHARACTERISTICS OF INTERNATIONAL ENVIRONMENTAL LAW

A. Early Initiatives

The earliest recorded treaty in human history, between the city states of Lagash and Umma in Mesopotamia, in about 3100 B.C.,[19] confirms their settlement of a dispute concerning shared water resources. In modern times, bilateral agreements between sovereign States have helped manage fisheries, protect migratory birds, and resolve issues of marine and riparian regulatory jurisdiction. Eventually treaties began to require international collaboration and establish institutions to coordinate national implementation of international agreements. For example, the Fur Seals Conventions of 1893[20] mandated regional consultations and cooperation to protect that species of wildlife in the North Pacific. The 1909 Treaty Relating to the Boundary Waters and Questions Along the Boundary between Canada and the United States[21] was ahead of its time. It was especially innovative in two respects: its establishment of a bilateral institution, the International Joint Commission, for consultation and dispute resolution; and its ban on "pollution"[22] of boundary waters. Today, we take the term "pollution" for granted, but it was quite novel as a legal concept in 1909 when the Boundary Waters Treaty was concluded. Although the term was originally limited to navigational obstructions, it has evolved to include the contaminants with which we are most apt to associate "pollution" today.

B. Arbitral Awards

International environmental law that transcends rules for regulating specific natural resources is, however, of recent origin. In particular, the landmark series of

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18. *See* Juan Suárez de Vivero & J.C. Rodríguez Mateos, *Coastal Crisis: The Failure of Coastal Management in the Spanish Mediterranean Region*, 33 COASTAL MGMT. 206 (2005).

19. *See* Amnon Altman, *Tracing the Earliest Recorded Concepts of International Law. The Early Dynastic Period in Southern Mesopotamia*, 6 J. HIST. INT'L L. 153 (2004).

20. Fur Seal Fisheries in Bering Sea, U.S.-U.K., Apr. 18, 1892, 27 Stat. 952, T.S. No. 140-3, 12 Bevans 226 (1968).

21. Treaty Relating to Boundary Waters and Questions Along the Boundary between Canada and the United States, U.S.-U.K., Jan. 11, 1909, T.S. No. 548, 12 Bevans 319 [hereinafter Treaty Relating to Boundary Waters].

22. *Id.* art. IV.

arbitration between the United States and Canada in the *Trail Smelter Case*[23] during the late 1930s and 1940s began the development of general principles to govern state responsibility for environmental injury. In particular, the *Trail Smelter* tribunal held Canada responsible, on a theory of strict liability, for injury to persons and property in the State of Washington resulting from transboundary emissions of sulfur dioxide.[24] In doing so, the tribunal articulated a principle of tort law, *sic utere tuo ut alienum non laedas* (*sic utere tuo*). As elaborated in *Trail Smelter*, it provides that

> no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[25]

In the *Lac Lanoux Arbitration*,[26] another arbitral tribunal resolved a dispute between Spain and France concerning a French plan to divert boundary waters from their natural flow into Spain and thereby create a reservoir in France. The tribunal formulated a general principle of procedure that requires States, particularly upper riparian States, to negotiate in good faith with other States concerning any intended diversion or other changes in the use of shared water resources.[27] "[T]he reality of the obligation thus undertaken," the tribunal wrote, is

> uncontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in case of violation of the rules of good faith.[28]

The opinion also confirmed that in undertaking a project affecting transboundary resources, a State (France in the case) must always take into consideration the interests of other potentially affected States (Spain).[29]

These principles, obvious as they might seem today, formed the foundation of international environmental law. They also led to the formulation of new sectoral principles and rules. These include, for example, provisions in the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses[30] as well as two important instruments adopted by the non-governmental International Law Association: the 1965 Helsinki Rules on the Uses

23. Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A. 1911 (1941).
24. *Id.* at 1958.
25. *Id.* at 1965.
26. Lac Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281.
27. *Id.* at 302.
28. *Id.* at 301.
29. *Id.* at 311.
30. Convention on Watercourses, *supra* note 14.

of the Waters of International Rivers[31] and the 2004 Berlin Rules on Water Resources.[32]

C. United Nations Conferences

By 1972, the global community was ready to formulate a comprehensive set of environmental principles. The project was prompted by an accretion of divergent national practices, a growing appreciation of the need for improving environmental quality on the basis of international cooperation, and a greater scientific orientation to complex ecologies. The United Nations General Assembly therefore convened the first of three conferences on environmental issues. The 1972 Stockholm Conference created four mechanisms: the United Nations Environment Programme (UNEP), a coordinating mechanism among existing institutions, a framework for future action, and a set of non-binding general principles known as the Stockholm Declaration.[33] The Declaration's most significant principles are these:

Principle 21

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[34]

Principle 22

> States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[35]

Building on Principle 22, a second U.N.-sponsored conference on environmental issues was held in 1992, hosted by Rio de Janeiro. It focused on the critical relationship between the environment and developmental needs, particularly of developing countries. The Rio Conference—formally, the United Nations Conference on the Environment and Development (UNCED), also known as the "Earth Summit"—is remembered for its integration of non-governmental organizations into the process of formulating law and policy as well as a new orientation toward a requirement of "sustainable development." The conference

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31. *Report of the Fifty-Second Conference*, 52 INT'L L. ASS'N REP. CONF. 447 (Aug. 14-20, 1966).

32. Berlin Rules, *supra* note 13.

33. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, 3-5, U.N. Doc. A/CONF.48/14/Rev.1, 11 I.L.M. 1416 (June 16, 1972) [hereinafter Stockholm Declaration].

34. *Id.* princ. 21.

35. *Id.* princ. 22.

also created three non-binding instruments: Agenda 21,[36] an extensive set of recommendations on more than 100 topics for ongoing consultation and further development; the Forest Principles;[37] and the Rio Declaration on Environment and Development.[38] Agenda 21, in turn, led to the creation of the high-level U.N. Sustainable Development Commission, which provides an ongoing process of cooperation in implementing the Agenda 21 recommendations at both national and international levels. The Commission's emerging capacity to harmonize divergent state practices and unify international rules, along with new post-9/11 priorities in the international community, may help explain why the third U.N.-sponsored conference on the environment, the Johannesburg Conference in 2002,[39] had a less-than-urgent agenda and an unambitious, generally static outcome.

D. Treaties

The Stockholm Conference was a watershed in the development of international agreements to protect the environment. Before the conference in 1972, a less than a dozen treaties pertained to the environment whereas today well over a thousand are in force. These range geographically from the Antarctic Treaty Protocol on Environmental Protection[40] to the Agreement on the Conservation of Polar Bears.[41] Among the best-known treaties are the 1999 Basel Protocol on Liability and Compensation for Damages Resulting from Transboundary Movements of Hazardous Wastes and their Disposal,[42] the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer,[43] and the Kyoto Protocol to the U.N. Framework Convention on Climate Change.[44]

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36. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12-13, 1992).

37. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservations and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. III), Annex III (Aug. 14, 1992).

38. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Conference].

39. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26 – Sept. 4, 2002, U.N. Doc. A/CONF.199/20 [hereinafter Johannesburg Conference].

40. Protocol on Environmental Protection to the Antarctic Treaty, *done* Oct. 4, 1991, 30 I.L.M. 1455.

41. Agreement on the Conservation of Polar Bears, *done* Nov. 15, 1973, 27 U.S.T. 3918, T.I.A.S. No. 8,409.

42. Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, Switz., Dec. 6-10, 1999, *Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention*, U.N. Doc. UNEP/CHW.5/29 (Dec. 10, 1999).

43. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept.16, 1987, 26 I.L.M. 1541.

44. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, *adopted* Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

Some of the treaties provide detailed, binding rules. For example, the Stockholm Convention on Persistent Organic Pollutants sets detailed rules for controlling the effects of chemical pollutants that travel long distances in water or air and resist degradation.[45] On the other hand, there has been a trend toward so-called framework treaties that provide only broad guidance, relying not on precise rules but rather on general directives and procedural commitments by which States agree to undertake specific initiatives and cooperate with each other in prescribed processes for policy and rule-making. The Vienna Convention for the Protection of the Ozone Layer is a particularly good example of a framework agreement within which required follow-up conferences among the parties have led to effective protocols and other initiatives such as non-compliance procedures in the Montreal Protocol. Another trend has been to establish ongoing mechanisms and institutions for reporting, compliance-monitoring, and dispute resolution.

In a blueprint for general education on the comparative impacts of different institutional policies, there would be little point in cataloguing the myriad environmental treaties in force or enumerating their specific provisions in detail. Instead, it is more instructive to identify the general functions of the treaties, as follows:

1. Imposition of obligations to notify, consult, and negotiate agreements in good faith. *Example*: the post-Chernobyl Convention on the Early Notification of a Nuclear Accident.[46]

2. Establishment of qualitative standards, requiring specific technological safeguards or imposing limits on the emission of pollutants or other adverse activities. *Example*: the Kyoto Protocol to the U.N. Framework Convention on Climate Change.[47]

3. Limited authorization of hazardous activities, through cooperative review of proposals for such authorization, grants of permission, and prior informed consent procedures. *Example*: the Cartagena Protocol on Biosafety.[48]

4. Establishment of liability-and-compensation regimes, often providing for the award of damages on a theory of strict liability (substance-oriented) or for enhanced access to courts of law or arbitral tribunals in order to redress injury (process-oriented). *Example*: the Civil Liability Convention for Oil Pollution Damage.[49]

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45. Stockholm Convention on Persistent Organic Pollutants, *adopted* May 22, 2001, 40 I.L.M. 532.

46. Convention on the Early Notification of a Nuclear Accident, *done* Sept. 26, 1986, 25 I.L.M. 1369.

47. Kyoto Protocol, *supra* note 44.

48. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *adopted* Jan. 29, 2000, 39 I.L.M. 1027.

49. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 17 U.S.T. 1523, 973 U.N.T.S. 3.

5. Provision of funds to provide compensation and technical assistance. *Example*: the World Bank/UNEP/UNDP-based Global Environmental Facility (GEF)[50] for assisting developing countries to address problems relating to biodiversity, climate change, ozone depletion, and international water resources.

6. Formulation of regimes for species and habitat protection. *Example*: the U.N. Convention on Biological Diversity.[51]

7. Exemptions for otherwise questionable schemes of environmental protection in more general agreements, some of whose non-environmental objects and purposes may even threaten environmental initiatives. Especially problematic have been the modalities of free trade, as enshrined in the General Agreement on Tariffs and Trade (GATT)[52] and related instruments in the Marrakesh Agreement that established the World Trade Organization.[53] GATT and WTO dispute-resolution panels have had to deal with the tensions between trade and environmental disciplines on the basis of stipulated exemptions. *Example*: GATT's chapeaus and specific provisions for natural resource and environment-related exemptions from otherwise mandatory trade disciplines. (The tuna-dolphin,[54] shrimp-turtle,[55] and beef hormone rulings[56] of GATT/WTO panels are particularly instructive.)

E. General Principles

International environmental law encapsulates several general principles. They grew out of substantive and procedural elements that were first articulated in the foundational arbitral awards. They are enshrined and further elaborated in U.N.-sponsored declarations and other legal instruments. As time went on, new principles, often forming the core of binding rules, have helped shape multilateral treaties and decide cases. Ten governing principles, as follows, are noteworthy. All of them could be integrated quite easily into case studies suitable for post-secondary education.

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50. World Bank, *Documents Concerning the Establishment of the Global Environment Facility*, World Bank Res. No. 91-5 (Nov. 1991).

51. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

52. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

53. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, 1867 U.N.T.S. 3.

54. Panel Report, *United States – Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991).

55. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

56. Appellate Body Report, *United States – EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998).

1. *Prevention of Environmental Harm Principle* (the *sic utero tuo* principle articulated in the *Trail Smelter* award[57] and refined as Principle 21 of the 1972 Stockholm Declaration).[58]

2. *Good Neighborliness Principle* (the requirement of information-sharing, notification, consultation, good-faith negotiations, and cooperation in planning projects with potential environmental impacts and responding to emergencies).[59]

3. *Principle of Non-Discrimination* (the constraint against responding more favorably toward one particular State or States affected by harmful activity than other affected States).[60]

4. *Principle of Common but Differentiated Responsibilities* (the recognition that developed States, having disproportionately caused environmental degradation and having the wherewithal to finance environmental improvements and recompense injury, should bear more of the cost of sustainable development initiatives).[61]

5. *Precautionary Principle* (the requirement, found in most recent environmental agreements, that in the face of scientific uncertainty about environmental risks inherent in a particular activity, decisions about that activity should err on the side of taking effective measures to avoid potential harm).[62]

6. *Polluter-Pays Principle* (a rule, well-established in Europe, that the polluter should internalize and be prepared to pay the costs of remedying any injury that might result from its activity).[63]

7. *Principle of Inter-Generational Equity* (the recognition that, in fairness to future generations, resources should be used in such a way as to maintain abundance and environmental quality for the benefit of future generations).[64]

8. *Principles of Territorial Integrity and Permanent Sovereignty Over Natural Resources* (the territorially-based understanding that each sovereign State has the primary custody of its own resources, subject to principles of good

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57. Trail Smelter Case, *supra* note 23, at 1965.

58. Stockholm Declaration, *supra* note 33, princ. 21.

59. United Nations Environment Programme, Environmental Law Guidelines and Principles on Shared Natural Resources, princs. 1, 5-7, 9 (1978).

60. Summary Records of the 2528th Meeting, [1998] Y.B. Int'l L. Comm'n, vol. 1, U.N. Doc.A/CN.4/SR.2528/1998.

61. EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 197 U.N. (2d ed. 2007).

62. Rio Conference, *supra* note 38, princ. 15.

63. *Id.* princ. 16.

64. The seminal work is EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989).

stewardship including those of preventing environmental harm and ensuring inter-generational equity).[65]

9. *Principle of a Common Heritage* (the understanding that all human beings are stakeholders in the resources of common areas—outer space, the high seas, the seabed, and Antarctica—and in the natural heritage within sovereign States that is of acknowledged global importance and commonality).[66]

10. *Principle of Sustainable Development* (the requirement, closely related to that of inter-generational equity, that States must ensure the sustainability over time of their use of natural resources).[67]

After the 1992 Rio Conference, the principle of sustainable development became a bottom-line or benchmark for international cooperation and planning. In the *Case Concerning the Gabčíkovo-Nagymaros Project*,[68] for example, the International Court of Justice endorsed this principle, as follows:

> 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—of 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 This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[69]

The International Law Commission (ILC), the United Nations' chosen instrument for the codification and progressive development of international law, has reinforced these principles in its 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities.[70] These principles address internationally harmful activity that is not prohibited by international law. (The ILC's Articles on Responsibility of States for Internationally Wrongful Acts[71] addresses the responsibility of States for

65. The cornerstone is Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17 at 15, U.N. Doc. A/5217 (Dec. 14, 1962).

66. Agreement Relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982, G.A. Res. 48/263, U.N. Doc. A/Res/48/263 (Aug. 17, 1994).

67. Report of the World Commission on Environment and Development, G.A Res. 42/187, ¶ 2, U.N. Doc. A/RES/42/187 (Dec. 11, 1987).

68. Gabčíkovo-Nagymaros Project, *supra* note 4.

69. *Id.* at 78.

70. Rep. of the Int'l Law Comm'n, Fifty-eighth Session, U.N. GAOR, 61st Sess., Supp. No. 10, ¶ 66, U.N. Doc. A/61/10 (2006).

71. Rep. of the Int'l Law Comm'n, Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

internationally injurious activity within their jurisdiction that violates international law, regardless of the activity's environmental consequences).

These Draft Principles are non-binding.[72] They are soft law, premised in a list of the elements of environmental damage for which transboundary remedies are prescribed. Among the most important principles are "prompt and adequate compensation for victims of hazardous transboundary activity"; adequate administrative and judicial competence to ensure such compensation; international cooperation, including claims-settlement procedures and cooperative funding to avoid and compensate for injury; notification to other States of potentially injurious incidents; and best efforts to mitigate or eliminate damages.[73]

The ILC has also undertaken a project to develop principles on the use of transboundary groundwater aquifers and aquifer systems, including recharge zones, discharge zones and external sources with major impacts on groundwater.[74] This project essentially retraces the regimes established by the International Law Association's 1965 Helsinki Rules and 2004 Berlin Rules.

IV. INSTITUTIONS

As even a brief history of international environmental law and treaty-based implementation discloses, numerous international institutions are instrumental in the global system of environmental management. Some of these institutions are established under general international law not specifically addressed to environmental concerns. Such institutions include, for example, the International Court of Justice, the European Union, the Law of the Sea Tribunal, and the dispute-settlement panels of the World Trade Organization. Other global institutions, however, have been specifically established by environmental treaties (for example, the International Union for the Conservation of Nature[75] (IUCN), established in 1948 as one of the first global environmental bodies, and the Secretariat for the Convention on International Trade in Endangered Species[76]).

Regional institutions, too, have become important. These include several that were established under general international law (for example, the European Union and the Arctic Council) and others designed specifically to protect the environment and manage natural resources. The latter category includes, for example, the South Pacific Resource and Environmental Protection Agreement,[77] the Caribbean

72. Rep. of the Int'l Law Comm'n, Fifty-eighth Session, U.N. GAOR, 61st Sess., Supp. No. 10, ¶ 67, U.N. Doc. A/61/10 (2006).

73. *Id.*

74. International Law Commission, *Third Report on Shared Natural Resources: Transboundary Groundwaters*, U.N. Doc. A/CN.4/551 (Feb. 11, 2005).

75. International Union for Conservation of Nature, *IUCN – About IUCN*, http://www.iucn.org/about/.

76. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), art. 12, Mar. 3, 1973, 993 U.N.T.S. 243, 27 U.S.T. 1087.

77. South Pacific Region: Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38 (1987).

Regional Seas Convention,[78] the Asia-Pacific Partnership on Clean Development,[79] the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution and its Protocols,[80] and the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area.[81]

V. CONTRIBUTIONS OF THE LAW AND CHALLENGES TO IT

We have seen that international environmental law can provide substantive guidance for utilizing natural resources responsibly and promoting sustainable development. We have also seen that the law can help avoid and resolve disputes. These and other uses of the law can be conveniently and efficiently expressed in terms of several treaty functions and general principles. Together, they form an authoritative framework of relatively stable expectations about both the substance and procedures for institutionalized resource management.

It is important to recall that international environmental law applies not only at the international level of authority but at national and sub-national levels as well. Depending largely on national constitutions, legal traditions and political will, the authority of international environmental law varies among national systems. In some systems it may control decision-making even in a purely domestic context. For example, the High Court of Australia, in a landmark decision of 1983,[82] held that the listing of wilderness areas in Tasmania as World Heritage Sites under the 1972 World Heritage Convention effectively barred plans for a large-scale hydroelectric dam project.[83]

In the United States, a seminal judicial decision by the Supreme Court in *Missouri v. Holland*[84] held that a migratory bird treaty between the United States and Great Britain (as the then treaty-making authority in Canada) was the Supreme Law of the Land.[85] The decision thereby granted federal agents the authority to enforce the country's cooperative obligations to Canada under the treaty, even though doing so required the federal government to preempt the established authority of the States over wildlife conservation.[86] The implications of *Missouri v. Holland* are not limited, however, to treaty obligations. The Supreme Court ruled long ago that *all* international law, including international custom and general principles, is "our law," with the same legal compulsion as Acts of

78. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, S. Treaty Doc. No. 98-13 (1984).

79. See Charter, Asia-Pacific Partnership on Clean Development and Climate, *adopted* Jan. 11-13, 2006.

80. Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, 15 I.L.M. 285.

81. Convention on the Protection of the Marine Environment of the Baltic Sea Area, Mar. 22, 1974, 13 I.L.M. 544.

82. Commonwealth v. Tasmania (1983) 158 C.L.R. 1 (Austl.).

83. *Id.* ¶ 2.

84. State of Missouri v. Holland, U.S. Game Warden, 252 U.S. 416 (1920).

85. *Id.* at 430-33.

86. *See* Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 169 (1979).

Congress and treaties under the Supremacy Clause of the United States Constitution.[87] If, however, a particular treaty is not deemed to be self-executing, it requires an Act of Congress to become effective within United States jurisdiction.[88] That is usually the case if, for example, a treaty requires the appropriation of money, commits the government to a contractual obligation, or imposes new human rights standards.[89]

Examples of substantive contributions for which international environmental law can take partial credit include the gradual improvement of the ozone layer, the amelioration of water resource problems in the Zambezi River Basin, better controls over trafficking in endangered birds, wetlands recovery in parts of the United Kingdom, and the avoidance of environmentally risky activities in Antarctica. Procedural contributions of international environmental law include detailed processes of consultation, reporting, planning, and negotiation under such instruments as the Vienna Convention on the Ozone Layer,[90] as well as a reliance on non-governmental advocacy groups for mobilizing public opinion and pressures in support of environmental standards and requirements. The WTO's shrimp-turtle decision,[91] for example, specifically acknowledged the status of NGOs as stakeholders in decision-making.[92]

The challenges ahead are daunting, from the nagging issue of global warming to the appearance offshore of oxygen-starved hypoxic zones. Difficult conundrums of law and policy loom ahead, too, such as those at the intersections of the environment with trade and economic development. For example, the exportability of valuable timber from tropical rain forests has raised critical issues of trade, economic development, and the environment, particularly in the Amazon Basin. Creating or refining institutions and institutional policies to help avoid and resolve complex controversies of this sort will tax the ingenuity, good will and good-faith commitments of private interests and public authorities alike. It seems clear, however, that international environmental law has taken its place, among other influences, in shaping and giving effect to institutional policies that affect natural resources so as to minimize potential harm to the environment.

87. *See* The Paquete Habana, The Lola, 175 U.S. 677 (1900).

88. Medellin v. Texas, 552 U.S. 491 (2008).

89. *See, e.g.*, James A.R. Nafziger, *Treaties*, *in* THE OXFORD COMPANION TO AMERICAN LAW 809, 809-11 (Kermit L. Hall ed., 2002).

90. Vienna Convention for the Protection of the Ozone Layer, *supra* note 43.

91. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

92. *Id.* ¶¶ 83-86, 91.

INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT– TOOLS FOR ADDRESSING CLIMATE CHANGE

ANITA M. HALVORSSEN*

We are all in the same boat and we must learn to live responsibly - or we will sink together.

Muhammad Yunus[1]

I. INTRODUCTION

Climate change and the more recent threats to the natural life-support systems have heightened the focus on international cooperation, sustainable development, and further limits to State sovereignty in order to solve these global problems. Climate change is one of the biggest sustainable development challenges. Much of the progress made toward the goal of sustainable development will very likely be destroyed by climate change. In the context of the recent flooding in Pakistan, experts project that it will take years, maybe even decades, to replace the lost infrastructure.[2]

Only by integrating the paradigm of sustainable development in a more effective way into international and domestic law can certain irreversible climate change impacts be avoided. Despite recent set-backs in international negotiations, such as occurred in Copenhagen, international law has an important role to play by offering the legal framework which can promote a move toward sustainable development. The sustainable development principles, though most of them are not legally binding, are central to the interpretation, implementation, and further development of the climate change regime. Addressing climate change requires a paradigm shift towards "a low-carbon development strategy [which] is indispensable to sustainable development."[3]

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1. MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM 217 (2007).

2. Carlotta Gall, *Pakistan Flood Sets Back Infrastructure by Years*, N. Y. TIMES, Aug. 27, 2010, at A1, *available at* http://www.nytimes.com/2010/08/27/world/asia/27flood.html?hp.

3. U.N. Framework Convention on Climate Change [UNFCCC], Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, 16th Sess., Cancun, Mex., Nov. 29 Dec. 10, 2010, U.N. Doc. FCCC/CP/2010/7/Add.1 (15 March 2011) http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2 [hereinafter Cancun Agreements].

The tension between developing and industrialized countries regarding economic development and protection of the environment has been on-going since the Stockholm Conference in 1972. However, in the context of climate change, the problem becomes critical. The anthropogenic effect on the climate system demands that strong action be taken now by all States to implement sustainable development to avoid the worst impacts.[4] The tipping point before the onset of catastrophe is no longer decades away.[5] It is in the mutual self-interest of nation states to acknowledge the seriousness of climate change and implement sustainable development principles.

Climate change is a global problem that calls for international cooperation. Sustainable development implies the need for industrialized countries to reduce their greenhouse gas (GHG) emissions to address climate change, but also, I argue, to give room for developing countries to develop.[6] Developing countries will continue developing in order to eradicate poverty and, hence, they will require more of the polluting space in the atmosphere.[7] If we are to effectively tackle climate change, development in developing countries needs to be sustainable, enabling developing countries also to reduce their emissions. I will argue that providing technology, capacity-building, and financial assistance to developing countries through funds established under the climate change regime and other institutions will be the most urgent element to facilitate developing countries' participation in addressing climate change by taking "mitigation actions" alongside industrialized countries complying with their emission reduction commitments. Requiring funding as a condition for action by developing countries to address climate change, needs to be recognized as one of the core elements in the climate regime based on the principle of common, but differentiated responsibility. However, it is paramount that these funds are managed in a transparent and accountable manner and that there is a balanced representation of developed and developing countries in the decision-making bodies.

This paper will examine the concept of sustainable development in the context of climate change. In this process, I will first briefly describe its origin and development. Second, I will focus on the definition, core elements, and principles

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4. NICHOLAS STERN, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE, at vi (2007), *available at* http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf [hereinafter STERN REVIEW].

5. *See* Jeremy Lovell, *Interview – The World Has Under Decade to Act on Climate Crisis*, PLANETARK.COM (Nov. 22, 2006), http://www.planetark.com/dailynewsstory.cfm/newsid/39096/story.htm; *see also* Juliet Eilperin, *Debate on Climate Shifts to Issue of Irreparable Change*, WASH. POST, Jan. 29, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/28/AR2006012801021_2.html; Ian Sample, *Warming hits 'tipping point'*, THE GUARDIAN (Aug. 11, 2005, 12:36 PM), http://www.guardian.co.uk/climatechange/story/0,12374,1546824,00.html.

6. *See* INT'L LAW ASS'N (ILA), COMM. ON THE LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE, THE HAGUE CONFERENCE 26 (2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1029 [hereinafter HAGUE CONFERENCE].

7. *Id.*

of sustainable development. Third, I will analyze the legal status of the sustainable development in international law, and finally, I will examine which of its principles apply to climate change and what implications this has for the design of current and future climate change agreements, with a particular focus on the transfer of technical and financial assistance.

II. ORIGIN AND DEVELOPMENT

A. Stockholm Conference and the Brundtland Commission

Historically, sustainable development originated from efforts made for the conservation of nature which evolved into international environmental law.[8] The concern for the extinction of certain species began in the late 19th century leading to cases surrounding fur seals[9] and oysters.[10] Yet, the environment as the whole biosphere, consisting of interdependent ecosystems, was first introduced as a matter of concern on the international scene from both a scientific and political perspective at the Stockholm Conference on the Human Environment in 1972.[11]

Stockholm represented a turning point in the way environmental issues were addressed at the international level. Whereas earlier international efforts focused on the environmental problems of the industrialized countries, developing countries actively participated at Stockholm, insisting that the environment had to be examined in the context of development issues.[12] The following remark by the Sri Lankan ambassador to the U.N. in 1970 illustrates the outlook of most developing countries at the time:

> [D]eveloping countries have of late been warned of the price that has to be paid in the form of environmental pollution for industrial development. All developing countries are aware of the risks, but they

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8. PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS, AND IMPLEMENTATION 9 (Vaughan Lowe & Dominic McGoldrick eds., 1995).

9. *Id.*; *See also Bering Sea Arbitration,* N.Y. TIMES, Mar. 2, 1892, *available at* http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9500E3D81631E033A25751C0A9659C94639ED7CF. The 1893 Behring Fur Seal Arbitration between the U.S. and Great Britain was an early example of a natural resource, the fur seal being exploited to the point of near extinction, forcing international cooperation. After an unsuccessful attempt to agree on international rules to protect the fur seal fisheries, the U.S. seized British Columbian and British fur sealing vessels. The United States alleged that Great Britain was over-exploiting fur seals by pelagic sealing in the North Pacific Ocean. The parties to the dispute agreed to establish a tribunal to decide the case, and arbitrators granted an award in favor of Great Britain, adopting specific regulations to protect fur seals in the global commons.

10. Convention between France and Great Britain, relative to Fisheries in the Seas between France and Great Britain, Fr.-Gr. Brit., art. XI, Nov. 11, 1867, *reprinted in* 21 INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS 1 (Bernd Rüster & Bruno Simma, eds., 1981). France and Britain agreed to a treaty for the protection of oysters by outlawing fishing outside certain dates.

11. *See* United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/rev. 1 (June 16, 1972) [hereafter *Stockholm Declaration*].

12. DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 29-30 (2010).

> would be quite prepared to accept from the developed countries even 100 percent of their gross national pollution if thereby they could diversify their economies through industrialization.[13]

However, the attitude among developing countries began to change as the international community realized it faced a common threat: the degradation of the global environment. On the international plane, "[n]ations cooperate when convinced that their interests will be served by cooperation."[14] This cooperation is evidenced by the hundreds of environmental treaties that have been adopted since Stockholm. By entering into these treaties the States voluntarily relinquished some of their sovereignty, allowing international law to dictate how they were to address some of their domestic environmental issues; this would have been unthinkable just a few years earlier.[15] Most States eventually established environmental ministries and adopted environmental regulations domestically, thereby implementing their international obligations.[16]

The Stockholm Conference emphasized how human actions can irreversibly harm the environment and staked out a course: the human environment needs to be protected and enhanced through common efforts at the local, national, and international levels.[17] At the Stockholm Conference, States did not adopt any treaties, yet they did agree on two important documents: the Declaration of Principles for the Preservation and Enhancement of the Human Environment (Stockholm Declaration) and an Action Plan, making suggestions for environmental management.[18]

The Stockholm Declaration, unlike a convention, is a non-binding "soft law" document consisting of 26 principles, which form the precursor to the Rio Declaration of 1992.[19]

While the Stockholm Declaration was the first of its kind and for the most part was merely reiterated in the Rio Declaration, it is the latter document that is most often referred to.[20] However, the Stockholm Declaration is credited as

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13. H. Jeffrey Leonard & David Morrell, *Emergence of Environmental Concern in Developing Countries: A Political Perspective*, 17 STAN. J. INT'L L. 281, 282 n.2 (1981) (quoting M. Taghi Farvar, Margaret L. Thomas, Howard Boksenbaum & Theodore N. Soule, *The Pollution of Asia*, 13.8 ENV'T 10, 10 (1971)). Sri Lanka was known as Ceylon until 1972.

14. LYNTON KEITH CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS 5 (1984).

15. *Id.* at 19.

16. *Id.* at 78.

17. *Id.* at 19.

18. *See Stockholm Declaration*, *supra* note 11; United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Action Plan for the Human Environment*, UN Doc. A/CONF.48/5 (June 16, 1972).

19. United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

20. *See, e.g.*, Daniel Barstow Magraw & Janice Gorin, *Laws and Regulations, International*, POLLUTION ISSUES, http://www.pollutionissues.com/Ho-Li/Laws-and-Regulations-International.html

introducing the most ambitious and forward-looking set of environmental principles of the international community of the time.[21]

In 1983, Gro Harlem Brundtland, the former Prime Minister of Norway, was appointed chair of the World Commission on Environment and Development by the UN Secretary General.[22] The Brundtland Commission's mandate was to examine the divergence between continued economic growth and an environment that was steadily deteriorating.[23] Synthesizing earlier aims enunciated in instruments such as the World Charter for Nature, the Brundtland Commission introduced the concept of sustainable development to the broader international community and defined it as "[development that] meets the needs of the present without compromising the ability of future generations to meet their own needs."[24]

The Brundtland Commission intended to demonstrate how human survival might depend on the international community's ability to elevate "sustainable development to a global ethic."[25] In its report, "Our Common Future," it set forth the main challenges to the world community: achieving sustainable development by the year 2000 and beyond by agreeing on multilateral solutions and a restructured economic system.[26] The Commission called for greater cooperation to eradicate international poverty, manage the global commons, and maintain peace and security worldwide.[27] In order to broaden the spectrum of issues addressed, it defined the "environment" as "where we all live," not a sphere separate from human actions and needs, and it defined "development" as "what we do in attempting to improve our lot within that abode," not the limited focus of development assistance for poor nations.[28] Hence, the Commission stated that the environment and development are inseparable, recognizing the growing interdependence among nations in dealing with economic and environmental problems.[29]

(last visited Feb. 25, 2011).

21. VED P. NANDA & GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY 83 (2003).

22. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE, at ix (1987). The Commission also submitted its findings to the U.N. General Assembly with the same title in December 1987 as U.N. Doc. A/Res/42/427 [hereinafter OUR COMMON FUTURE].

23. *Id.* at 3-4.

24. *Id.* at 8.; *see also* World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) (the World Charter for Nature is a set of ecological principles adopted by the UN General Assembly in 1982); PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 3-4 (2d ed. 2002).

25. OUR COMMON FUTURE, *supra* note 22, at 308.

26. *Id.* at ix.

27. *Id.* at 308.

28. *The History of Sustainable Development in the United Nations*, UNITED NATIONS CONFERENCE ON SUSTAINABLE DEVELOPMENT 2012 (Aug. 26, 2010, 09:37) http:/ www uncsd2012.org/index.php?option=com_content&view=article&id=91:the-history-of-sustainable-development-in-the-united-nations&catid=55&Itemid=99.

29. *Id.*; OUR COMMON FUTURE, *supra* note 22, at xi-xii.

B. Rio Conference

In 1992, on the 20th anniversary of the Stockholm Conference, the international community gathered in Rio de Janeiro, Brazil for the UN Conference on Environment and Development (UNCED or "Earth Summit"). In addition to the 176 States that sent representatives to the conference, over 50 intergovernmental organizations and thousands of non-governmental organizations (NGOs) were present.[30] Essentially, the legal principles regarding sustainable development presented by the Brundtland Commission were confirmed when the nations gathered at Rio and formally adopted the concept of sustainable development as the new paradigm for international environmental law.[31] Economic development, it was agreed, must simultaneously seek to protect and preserve the environment.[32] The Rio Conference represents a watershed in the efforts to integrate environment and development issues.[33]

Five legal instruments were adopted at Rio: the UN Framework Convention on Climate Change (UNFCCC),[34] the Convention on Biodiversity,[35] the Rio Declaration on Environment and Development, Agenda 21,[36] and the Non-Legally Binding Principles on Forests.[37] The Rio Declaration, Agenda 21 and the Forest Principles were all adopted by consensus.[38] The Rio Declaration's 27 principles seek to provide a framework for the achievement of sustainable development and evidence a compromise between the interests of developed and developing countries.[39]

Agenda 21 is a comprehensive but non-binding action program for governments, development agencies, UN organizations, and independent sectors which addresses the major areas affecting the relationship between the

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30. SANDS, *supra* note 8, at 52.

31. *Id.* at 54.

32. *Id.* at 55-56.

33. ANITA HALVORSSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES 25 (1999).

34. United Nations Framework Convention on Climate Change, art. 4, May 9, 1992, 31 I.L.M. 849 [hereinafter UNFCCC].

35. Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818, 818 (1992) [hereinafter Biodiversity Convention].

36. *Rio Declaration*, *supra* note 19, (Vol. 1), Annex 2. The Rio Declaration on Environment and Development and section I of Agenda 21 are in volume I; section II (Conservation and management of resources for development) of Agenda 21 is in volume II; and sections III (Strengthening the role of major groups) and IV (Means of implementation) of Agenda 21 are in volume III.

37. *Id.* (vol. III), Annex 3. This part of the *Rio Declaration* is also reprinted in United Nations Conference on Environment and Development: Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, June 13, 1992, 31 I.L.M. 881.

38. *Rio Declaration*, *supra* note 19, (Vol. 4), ch. IV, ¶¶ 13-14. For chapter I (resolutions adopted by the Conference), see volumes I-III of the *Rio Declaration*. For the rest of the chapters, see Volume IV.

39. *See* SANDS, *supra* note 8, at 38.

environment and the economy.[40] It is designed to merge the goals of continued economic development and environmental protection. In essence, Agenda 21 is a plan of action needed in order for States to achieve sustainable development.[41] In chapter 2, the text outlines the four components necessary for achieving development and environment goals: "(a) [p]romoting sustainable development through trade liberalization; (b) [m]aking trade and environment mutually supportive; (c) [p]roviding adequate financial resources to developing countries and dealing with international debt; [and] (d) [e]ncouraging macroeconomic policies conducive to environment and development."[42]

In the year 2000, the international community gathered in New York for the Millennium Summit. There, 192 world leaders unanimously adopted the U.N. Millennium Declaration, which is a statement of values, principles and common objectives in areas such as peace and security, poverty eradication, environmental protection, and good governance for the international community for the twenty-first century.[43] The Millennium Development Goals (MDGs) emerged from this Declaration, focusing on poverty eradication, child mortality, maternal health, disease control, a global partnership for development, and environmental sustainability.[44] The MDGs were remarkable in that they were universally accepted as a benchmark for measuring sustainable development progress.[45]

C. Johannesburg

The international community gathered again in 2002 for the World Summit on Sustainable Development (WSSD) on the tenth anniversary of the Rio Conference, this time in Johannesburg, South Africa.[46] Since Rio, poverty had been deepening, environmental degradation worsening, and unsustainable patterns of development continued.[47] The goal of Johannesburg was for the world leaders to "adopt concrete steps and identify quantifiable targets for better implementing Agenda 21."[48]Kofi Annan, the former UN Secretary General, stated it as an "opportunity to rejuvenate the quest to build a more sustainable future."[49]

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40. *See Rio Declaration, supra* note 19, (Vol. 1).

41. *See* John Dernbach & Widener University Law School Seminar on Law and Sustainability, *U.S. Adherence to Its Agenda 21 Commitments: A Five-Year Review,* 27 ENVTL. L. REP. 10504, 10504 (1997).

42. *Rio Declaration, supra* note 19, (Vol. 1), ¶ 2.3.

43. U.N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

44. *Id.*; *see also U. N. Millennium Development Goals*, UN.ORG, http://www.un.org/millennium goals/poverty.shtml (last visited Feb. 11, 2011).

45. MOHAN MUNASINGHE, SUSTAINABLE DEVELOPMENT IN PRACTICE 17 (2009).

46. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Rep. of the World Summit on Sustainable Development*, U.N. Doc A/CONF.199/20/Corr.1 (Jan. 8, 2003) [hereinafter WSSD].

47. International Fund for Agricultural Development, *The Rural Poor: Survival or a Better Life?*, at 1 (Aug. 2002), http://www.ifad.org/events/wssd/e/wssd_e.pdf.

48. *Outcomes on Sustainable Development*, UN.ORG, http://www.un.org/en/development/ devagenda/sustainable.shtml (last visited Feb. 12, 2011).

49. U.N. Secretary-General, *Johannesburg Summit 2002: World Summit on Sustainable*

Johannesburg was to go beyond debate and move to action and results, unlike Agenda 21, by instituting targets and timetables. The Summit reaffirmed the Rio Declaration and Agenda 21 and produced two new goal-oriented documents: the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation, both non-legally-binding soft law instruments.[50] Rather than presenting new principles, the Johannesburg Declaration represented simply a political commitment by heads of State to sustainable development.[51] The Plan of Implementation, on the other hand, presented a framework with targets and timetables for and reiteration of action already called for at UNCED.[52]

As a whole, the WSSD created a new emphasis on sustainable development consisting of three elements: economic development, social development, and environmental protection.[53] The summit's overarching focus was more on the issues central to developing countries, such as poverty eradication and clean drinking water, rather than on stringent environmental commitments.[54] Five years later, the world leaders came together in New York to review progress since the 2000 Millennium Declaration.[55] The result of this World Summit was a document titled *In Larger Freedom: Towards Development, Security and Human Rights for All*.[56] This report was presented by Secretary-General Kofi Annan and reiterated, among other issues, the need for protection of the environment, "[o]ur efforts to defeat poverty and pursue sustainable development will be in vain if environmental degradation and natural resource depletion continue unabated. At the country level, national strategies must include investments in improved environmental management and make the structural changes required for environmental sustainability."[57] Annan further identified the three most pressing environmental challenges as desertification, loss of biodiversity, and climate change.[58]

Marking another five year passage since the 2005 World Summit, current UN Secretary-General Ban Ki-Moon called world leaders to meet in New York before the start of the regular UN General Assembly meeting. With only five years remaining until the 2015 deadline to reach the MDGs, the goal of this summit was to accelerate progress towards the MDGs.[59] Some progress on moving toward

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Development Aug. 26-Sept. 4, 2002, at 1 (Oct. 2001), http://un.org/jsummit/html/brochure/brochure12.pdf.

50. WSSD, *supra* note 46.

51. Marie-Claire Cordonier Segger, *Sustainable Development in International Law, in* SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 87, 108 (Hans Christian Bugge & Christina Voigt eds., 2008).

52. *Id.*

53. WSSD, *supra* note 46, at 1.

54. *Id.* at 2-4.

55. U.N. Fact Sheet, 2005 World Summit Outcome (Sept. 14-16, 2005), http://www.un.org/summit2005/presskit/fact_sheet.pdf.

56. U.N. Secretary- General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

57. *Id.*¶ 57.

58. *Id.* ¶¶ 58-60.

59. U.N. Secretary-General, *Keeping the Promise: A Forward-Looking Review to Promote an*

these goals has been made, evidenced by poverty eradication in several parts of the world. However, much work remains to be done, for instance, addressing alarming global levels of maternal and child mortality.[60]

In 2012, twenty years after the first Rio Conference, the United Nations Conference on Sustainable Development (UNSCD, or "Rio+20") will take place again in Rio de Janeiro, Brazil.[61] This Summit aims to "secure renewed political commitment for sustainable development, assessing the progress [towards internationally agreed goals on] sustainable development and addressing new and emerging challenges" and will focus on developing two distinct ideas: "green economy in the context of sustainable development and poverty eradication and the institutional framework for sustainable development."[62]

III. DEFINITION, CORE CONTENT, AND PRINCIPLES

Sustainable development has been categorized as an ambiguous concept, yet it has afforded the flexibility needed for it to be incorporated into legal instruments in both hard law and soft law form at the international, regional, national, and local levels.[63] The quasi-official definition of sustainable development that is recognized by the international community is the one used in the Brundtland Report: development that meets the needs of the present without compromising the need of future generations.[64] The Brundtland Commission emphasized that the term "need" must be applied particularly to the needs of the poor.[65] Sustainable development requires meeting the needs of all because a world with widespread poverty will be prone to ecological and other catastrophes.[66] In addition, the Brundtland Commission's report emphasized that there were limits involved, dictated by the carrying capacity of the biosphere.[67] This carrying capacity is the extent to which the biosphere or natural environment can absorb the effects of human activities.

Agreed Action Agenda to Achieve the Millennium Development Goals by 2015, ¶ 61, U.N. Doc. A/64/665 (Feb. 12, 2010).

60. *Id.* ¶¶ 24, 30 (providing statistics on the less than marginal improvements in child and maternal mortality rates).

61. G.A Res. 64/236, ¶ 20, U.N. Doc. A/RES/64/236 (Mar. 31, 2010) (endorsing the conference on sustainable development and accepting Brazil's invitation to be the host in 2012).

62. *Id.* ¶ 20(a); *see also* EARTH SUMMIT 2012, http://www.earthsummit2012.org (last visited Feb. 8, 2011).

63. Daniel Barstow Magraw & Lisa D. Hawke, *Sustainable Development*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 614, 620-21 (Daniel Bodansky et al. eds., 2007).

64. Report of the World Commission on Environment and Development, G.A Res. 42/187, ¶ 2, U.N. Doc. A/RES/42/187 (Dec.11, 1987); *see also* Magraw & Hawke, *supra* note 63, at 618.

65. Magraw & Hawke, *supra* note 63, at 618.

66. *Id.* at 619; HALVORSSEN, *supra* note 33, at 42 (emphasizing that sustainable development involves ensuring economic opportunities for all, else poverty will coexist with development and jeopardize the environment).

67. *See* Magraw & Hawke, *supra* note 63, at 621.

The Rio Declaration sets out the guiding principles necessary to achieve sustainable development. These include substantive and procedural principles. This paper will focus on five of the Rio Principles that promote sustainable development: the principle of sustainable utilization of the natural resources, the principle of integration, the principle of equity for present and future generations (the principles of inter- and intra-generational equity), and the principle of common but differentiated responsibilities, which includes the duty to cooperate.

The overarching objective of sustainable development is to protect and manage the natural resource base of economic and social development, also called sustainable utilization.[68] The importance of protecting the environment as an aspect of sustainable development, has also been expressed in terms of natural capital, defined as the natural resources and living ecosystems.[69] An important aspect of natural capital is its *ecosystem services,* such as the atmosphere, forests, and oceans, which function as sinks for societies' pollution.[70] These ecosystem services have only recently begun to gain attention because of their dwindling absorptive capacity due to human activities.[71] For the most part, societies have not placed a value on these services and have disregarded their inherent limits.[72]

The Rio Declaration addresses activities carried out within States affecting the environment and natural resources beyond States' territories in the second part of Principle 2, which stipulates that States have the responsibility to ensure that such activities do not cause damage to the environment of other States or of areas beyond the limits of jurisdiction, also known as the no-harm rule.[73] States have a duty to respect the environment of other States, and, hence, prevent harm as recognized in the advisory opinion in the Legality of the Use of Nuclear Weapons.[74] This obligation is the corollary to the States' sovereign right to exploit their natural resources stipulated in the first part of the Principle 2.[75] Effectively, State sovereignty is thus limited, and how a State manages its own domestic resources has now become a matter of international concern in a more systematic way.[76] Principle 2 is one of two principles in the Rio Declaration to be considered legally binding, reflecting customary international law.[77]

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68. *Id.* at 617; *see also* ALAN BOYLE & DAVID FREESTONE, *Introduction* to INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 9 (Alan Boyle & David Freestone eds., 1999).

69. L. Hunter Lovins, *Natural Capitalism: Path to Sustainability?*, 19 NAT. RESOURCES & ENV'T 3, 3 (2004); *see also* Magraw & Hawke, *supra* note 63, at 620.

70. Lovins, *supra* note 69, at 3.

71. *Id.*

72. *Id.*

73. *Rio Declaration*, *supra* note 19, princ. 2, (Vol. 1), Annex 1.

74. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 27, 29-30 (July 8).

75. *Id.* ¶¶ 27, 29-30.

76. BOYLE & FREESTONE, *supra* note 68, at 6.

77. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 251 (Routledge, 7th ed. 1997) (1970). Environmental impact assessments (EIAs), as stipulated in Rio

Furthermore, in order to achieve sustainable development and a higher quality of life for all, Principle 8 of the Rio Declaration requires States to reduce and eliminate unsustainable patterns of production and consumption.[78] This principle focuses on the need to avoid the overconsumption of natural resources, mostly a problem in the industrialized countries, and is also considered part of the "sustainable utilization" principle.[79]

Sustainable development is also described as an integrative concept, particularly in relation to human rights and social, economic, and environmental objectives.[80] This was reconfirmed at the Johannesburg Conference which emphasized the three reinforcing pillars of sustainable development: economic development, social development, and environmental protection.[81] The only way to successfully achieve economic and social progress is to link them with environmental protection. Principle 4 reiterates the intertwining of development and environmental protection, "[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."[82]

The International Court of Justice in the Gabcikovo-Nagymaros Case stated that the "need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[83] Together, these two principles reflect the core of the principle of sustainable development and articulate the shared expectations of developed and developing countries.[84] However, despite the international community's commitment to adopt and implement national strategies for sustainable development, there is no lack of evidence of widespread unsustainable development in the world.[85] The world's ecosystems, which form the basis of economic development and on which life in general depends, are worsening.[86] Poverty, though reduced dramatically in some places, such as in China, is still a towering problem.[87] The central factual premise

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Principle 17, can now be considered a binding principle under customary international law, see *supra* note 116.

78. *Rio Declaration*, *supra* note 19, (Vol. 1), Annex 1, princ. 8.

79. BOYLE & FREESTONE, *supra* note 68, at 9.

80. NICO SCHRIJVER & FRIEDL WEISS, *Introduction* to INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICES xii-xiii (Nico Schrijver & Friedl Weiss eds., 2004).

81. World Summit on Sustainable Development, Aug. 26–Sept. 4, 2002, *Plan of Implementation of the World Summit on Sustainable Development*, ¶ 2, U.N. Doc. A/CONF.199/20 Annex [hereinafter *Johannesburg Plan of Implementation*].

82. *Rio Declaration*, *supra* note 19, (Vol. 1), Annex 1, princ. 4.

83. Gabcikovo-Nagymmoros Project (Hung./Slovk.), 1997 I.C.J. 7, ¶ 140 (Sept. 27).

84. BOYLE & FREESTONE, *supra* note 68, at 4.

85. John C. Dernbach, *Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools*, 44 TULSA L. REV. 93, 95 (2008).

86. *Id.* at 96.

87. United Nations Dev. Programme, *Millennium Development Goals: Tracking Country Progress*, UNDP, 16-17 http://www.undp.org/mdg/countries.shtml (follow "China" hyperlink) (last visited Feb. 11, 2011); United Nations Dev. Programme, *Millennium Development Goals: Global Progress*, UNDP, http://www.undp.org/mdg/progress/shtml (last visited Feb. 11, 2011).

of sustainable development is, as Dernbach explains, that "environmental degradation undermines or limits economic development, social well-being, and security" [88] However, protecting and improving environmental quality should go hand in hand with economic development and can produce more growth together with social development, peace, and security.[89]

Sustainable development, in addition to promoting protection of the environment and integrating it with economic development, also addresses the needs of present and future generations (intergenerational equity) and the needs of the world's poor (intra-generational equity).[90] Principle 3 of the Rio Declarations states that, "the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations."[91] It's a tall order to focus on future generations when, in many developing countries, people are still living on under $1 per day.[92] Intra-generational equity does, however, address the needs of *today's* poor.[93] The international community needs to assist developing nations, and thus, the poor people within developing countries, by providing funding and technology to move toward sustainable development. The Rio Declarations refer to cooperation to eradicate poverty in Principle 5 and focuses on the special needs of developing countries in Principle 6.[94]

The Rio Declaration's Principle 7, common but differentiated responsibility (CBDR), introduces the principle of equity into the relationship between developed and developing countries in their joint approach in addressing global environmental problems.[95] Treaties addressing such issues require near universal participation for them to be effective.[96] CBDR recognizes that the different circumstances of developing countries need to be considered if they are to be encouraged to become parties to international environmental agreements.[97] Principle 7 of the Rio Declaration defines the principle as follows:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the *different contributions* to global environmental *degradation*, States have common but differentiated responsibilities. The *developed* countries acknowledge the responsibility that they bear in the

88. Dernbach, *supra* note 85, at 96.

89. *Id.*

90. Magraw & Hawke, *supra* note 63, at 619.

91. *Rio Declaration*, *supra* note 19, (Vol. 1), Annex 1, princ. 3.

92. Ibrahim J. Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE & L. 133, 133 (1999) ("[m]ore than 1.3 billion people in the developing world still struggle to survive on less than a dollar a day, and the number continues to increase.").

93. Albert Mumma & David Hodas, *Designing a Global Post-Kyoto Climate Change Protocol that Advances Human Development*, 20 GEO. INT'L ENVTL. L. REV. 619, 639 (2008).

94. *Rio Declaration*, *supra* note 19, (Vol. 1), Annex 1, princs. 5, 6.

95. *Id.* princ. 7.

96. HALVORSSEN, *supra* note 33.

97. *Id.*

> international pursuit of sustainable development in view of the *pressures their societies place on the global environment* and of the *technologies and financial resources they command.*[98]

There are two elements included in the principle: the first stipulates the duty of all States to cooperate in protecting the environment and address environmental problems, while the second requires that differing situations in different States are to be taken into account in order to achieve equity. Hence, CBDR leads to different standards or commitments for developing countries compared to those developed countries that have historically put more pressures on the environment and have the technology and financial resources to better address the environmental consequences of human activities.[99] The differentiated norms can also take the form of a delayed compliance schedule for developing countries or commitments by developed countries to transfer technology or financial assistance to developing countries.[100] Currently, CBDR is not considered a binding principle in international law, yet it is used in many treaties addressing environmental, development, and social issues.[101]

IV. LEGAL STATUS OF SUSTAINABLE DEVELOPMENT

There is still much debate about whether sustainable development is an emerging principle of customary international law binding on all States, or just binding on some States that are party to treaties that include the principle, or whether it is a non-binding principle, merely a general policy objective of international law.[102] Several treaties mention the importance of sustainable development in their Preambles, such as the Agreement Establishing the World Trade Organization (WTO),[103] yet recognize that it is not a binding principle of law.[104] The UN Framework Convention on Climate Change (UNFCCC)[105] includes sustainable development as part of its objective in its Preamble, and lists it as one of its principles in Article 3 of the operative text, but states specifically at the outset of this section that these principles are only to function as guidelines for the Parties to the treaty.[106]

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98. *Rio Declaration*, *supra* note 19, (Vol. 1), Annex 1, princ. 7 (italics added for emphasis).

99. HALVORSSEN, *supra* note 33, at 4.

100. *Id.* at 73, 76-77.

101. Anita M. Halvorssen, *Common, But Differentiated Commitments in the Future Climate Change Regime - Amending the Kyoto Protocol to include Annex C and the Annex C Mitigation Fund*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 247, 254 (2007).

102. Segger, *supra* note 51, at 117.

103. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. In international law, preambles are not considered binding, yet they are part of the context in which the treaty is to be interpreted. *See* Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331; *see also* MARKUS GEHRING, *Sustainable Development in World Trade Law*, *in* SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 281 (Hans Christian Bugge & Christina Voigt eds., 2008).

104. *See* Marrakesh Agreement, *supra* note 103, pmbl.

105. UNFCCC, *supra* note 34.

106. *See id.*, pmbl., art. 3, ¶ 4.

Sustainable development has, however, become an established goal of the international community and a concept with some degree of normative status in international law.[107] Boyle and Freestone posit that there is no international legal obligation that development must be sustainable and that the decision on what is sustainable is left to individual governments.[108] Yet, they argue that development decisions are required to be the outcome of a process which promotes sustainable development.[109]

States which commit to sustainable development through treaties or other international legal instruments have an obligation to balance economic, social, and environmental priorities in their development process, in the interest of future generations.[110] Procedures and substantive obligations differing according to the treaties where they appear can be used to achieve this balance.[111] Some States have operationalized the concept of sustainable development through new domestic policies and laws, using environmental impact assessments (EIAs), for instance, to ensure more sustainable use or management of a particular natural resource.[112] However, if States do not integrate development and environmental considerations into their policies, carry out EIAs, or encourage public participation, then they have failed to implement the main elements of the Rio Declaration and other international legal instruments for the purpose of enabling sustainable development.[113] This is implicitly supported in the Gabcikovo-Nagymoros case where the parties were directed in the interest of sustainable development to review the environmental consequences of the project according to international law standards.[114] In the recent Pulp Mills case, Argentina won the claim that Uruguay had not followed its obligation to carry out an EIA for the project. [115] For the first time, the International Court of Justice (ICJ) recognized the EIA as being part of customary international law.[116]

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107. *See* Int'l Law Ass'n, New Dehli Conference, Apr. 2-6, 2002, *Legal Aspects of Sustainable Development*, Res. 3/2002 (Apr. 6, 2002) *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/25.

108. BOYLE & FREESTONE, *supra* note 68, at 16.

109. *Id.*

110. Segger, *supra* note 51, at 182.

111. *Id.*

112. *Id.*

113. BOYLE & FREESTONE, *supra* note 68, at 17.

114. *Id.*; *see* Gabcikovo-Nagymaraos Project, *supra* note 83, ¶ 140.

115. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, ¶ 131 (April 20, 2010), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf; *see also* Cymie R. Payne, *Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law,* ASIL INSIGHTS (Am. Soc'y. of Int'l. L., Washington, D.C.), April 22, 2010, at 1, *available at* http://www.asil.org/insights100422.cfm.

116. Pulp Mills on the River Uruguay, ¶ 204.

V. APPLYING SUSTAINABLE DEVELOPMENT PRINCIPLES TO CLIMATE CHANGE

A. The Climate Change Regime

One of the two legally-binding instruments resulting from the Rio Conference was the 1992 United Nations Framework Convention on Climate Change (UNFCCC).[117] The adoption of the UNFCCC was the beginning of a long and on-going process of addressing climate change on the international level. The Convention, which entered into force in 1994, recognizes the environment as a shared resource whose integrity and stability relies on the actions of all international players.[118] Therefore, it calls for intergovernmental cooperation to mitigate climate change and reduce emissions.[119] The Kyoto Protocol to the UNFCCC was adopted in 1997 and entered into force in 2005.[120] While the UNFCCC only encouraged industrialized countries to reduce emissions, the Kyoto Protocol sets binding emissions reductions targets, committing Annex I Parties (the industrialized countries) to a five percent reduction compared to 1990 levels in the first commitment period extending from 2008 to 2012. [121] The UNFCCC has near universal participation, Afghanistan and the United States are the only States that are not parties to the Kyoto Protocol.[122]

The fifteenth Conference of the Parties to the UNFCCC (COP-15) met in Copenhagen in 2009. Following up on their mandate from the Bali Conference of 2007 (COP-13), two working groups, the ad hoc Working Group the Long-term Cooperative Action (LCA) and the ad hoc Working Group on Further Action in the Kyoto Protocol (KP), produced their reports with draft texts for further negotiations that were adopted by the COP-15.[123]On the side-lines of the official UNFCCC meetings, twenty-six political leaders, convened by the Danish Presidency of the Conference, held separate meetings which were headed for failure, but a last-minute understanding was reached by the leaders of the U.S. and four developing countries, the BASIC countries (China, India, Brazil, South Africa) resulting in the Copenhagen Accord.[124] On the last day of COP-15, the

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117. UNFCCC, *supra* note 34.

118. *Convention*, UNFCCC ESSENTIAL BACKGROUND, http://unfccc.int/essential_background/convention/items/2627.php (last visited Feb. 3, 2011).

119. *Id.*

120. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/essential_background/kyoto_protocol/items/1678.php [hereinafter Kyoto Protocol].

121. *Id.* art. 3.

122. Andorra is not a Party to the UNFCCC or the Kyoto Protocol. *See, e.g.*, Kyoto Protocol, *supra* note 120, at Annex B. Niue and Cook Islands are Parties to both treaties even they are not sovereign States. They are States in free association with New Zealand. COOK ISLANDS GOVERNMENT ONLINE, http://www.cook-islands.gov.ck/parliament.php (last visited Feb. 7, 2011); GOVERNMENT OF NIUE, http://www.gov.nu/wb/ (last visited Feb. 7, 2011).

123. UNFCCC, Conference of the Parties, 15th Sess., Copenhagen, Den., Dec. 7-18, 2009, *Draft Decision, Copenhagen Accord*, pmbl., U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter COP-15 Report].

124. Martin Khor, *After Copenhagen, the Way Forward*, 43 SOUTH BULLETIN 1 (2010), *available at* http://www.southcentre.org/index.php?option=com_content&task=view&id=1233&Itemid=289.

plenary meeting took 'note of' the Copenhagen Accord,[125] rather than 'adopting' it, thereby producing only a non-binding, political agreement.[126] Although this document represents progress in that it was the first time that all States agreed to emission reduction cuts or mitigation action, [127] the Accord's lack of legal standing within the UNFCCC process means that countries have no binding responsibility to fulfill their emissions reduction or mitigation action commitments.[128] The Copenhagen Accord also introduced specific new and additional monies to be provided for developing countries for adaptation and mitigation, which has never been stipulated in earlier documents in the UNFCCC process, as described below.[129]

B. Implication of the Sustainable Development Principles on the Climate Change Regime

The sustainable development principles can provide guidance for the further development of the climate change regime. One of the most critical questions regarding sustainable development is what the need to achieve equity requires the industrialized countries to do in order to facilitate developing countries' move toward sustainable development – in terms of offering funding, technology, and capacity-building.[130] This is a question of burden sharing. In the context of climate change, if developed countries want to effectively address the problem, they have to accept the burden of making it more feasible for developing countries to do their part in addressing climate change. I will focus specifically on the principle of CBDR and what this means in the context of the climate change regime.

Looking at the two elements of the CBDR principle there is general consensus that there is a common responsibility to address climate change through cooperation, due to the common concern for the climate system and its adverse effects.[131] There is also agreement in the international community that the responsibilities of the developed and developing States must be differentiated as far as commitments under climate regime, including the UNFCCC, Kyoto Protocol, and the non-legally binding Copenhagen Accord.[132] In the UNFCCC and later agreements, there has also been consensus that industrialized countries are to take the lead in addressing climate change.[133]

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125. COP-15 Report, *supra* note 123, pmbl.

126. Daniel Bodansky, *The Copenhagen Climate Change Conference: A Post-Mortem*, 104 AM. J. INT'L L. 230, 230-31 (2010).

127. COP-15 Report, *supra* note 123, ¶¶ 4-5.

128. Khor, *supra* note 124, at 2.

129. COP-15 Report, *supra* note 123, ¶ 8.

130. Magraw & Hawke, *supra* note 63, at 620.

131. UNFCCC, *supra* note 34, pmbl., art. 3(1); *Rio Declaration*, *supra* note 19, ch. 7, (Vol. I); *see also* HAGUE CONFERENCE, *supra* note 6.

132. UNFCCC, supra note 34, art. 4(2)(a)-(b); Kyoto Protocol, *supra* note 120, art.10; HAGUE CONFERENCE, *supra* note 6, § IV(2)(i).

133. UNFCCC, *supra* note 34, art. 3(1).

The crux of the problem is deciding what criteria to use to differentiate standards for developed and developing countries.[134] An example of such a criterion was used in another multilateral environmental agreement, the Montreal Protocol on Substances that Deplete the Ozone Layer.[135] In this treaty the developing countries were entitled to delay compliance with the Protocol's control measures by ten years based on their consumption and production of specified ozone-depleting substances.[136]

The Kyoto Protocol, on the other hand, mandates emission cuts by Annex I Parties (industrialized countries), yet it has no emission reduction commitments for developing countries.[137] Based on the historical contribution toward the current high levels of GHGs in the atmosphere, the Kyoto Protocol places a heavier burden on developed nations, by assigning them binding emission cuts, while the developing countries have no reduction commitments.[138]

However, as mentioned, this approach was adopted with the overall understanding that industrialized countries would take the lead in reducing their emissions. Logically, when certain parties are assigned a leadership role, those not leading will be the followers. This would indicate that developing countries were meant to take on commitments at some later, unspecified date. This was implied in the UNFCCC and the Berlin Mandate which set the stage for the Kyoto Protocol.[139] Already in 1992, at the Rio Conference, it was clear that climate change would have to be addressed by all States if we were to solve the problem.[140] It was never the intent that developing countries would indefinitely be exempt from any commitments.[141]

It is problematic that the United States, being a Party to the UNFCCC and having agreed to the Berlin Mandate which required industrialized countries to take the lead in reducing emissions, signed but never ratified the Kyoto Protocol. In 1997, the U.S. Senate voted 95 to 0 on a resolution expressing that it would not approve of what became the Kyoto Protocol, unless commitments were included requiring developing countries to limit their GHGs.[142] The Bush administration

134. HALVORSSEN, *supra* note 33, at 86.

135. Montreal Protocol on Substances that Deplete the Ozone Layer, pmbl., ¶ 4, art. 5(1), Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

136. *Id.* art. 5(1).

137. Kyoto Protocol, *supra* note 120, art. 3(1), art. 10.

138. *Id.*

139. UNFCCC, Report on the Conference of the Parties, 1st Sess., Berlin, Ger., Mar. 28 - Apr. 7, 1995, *Decisions Adopted by the Conference of the Parties*, Decision 1/CP.1, art. I(1)(c), U.N. Doc. FCCC/CP/1995/7/Add.1 (Jun. 6, 1995).

140. *Rio Declaration*, *supra* note 19, art. 7 (Vol. 1); *Stockholm Declaration*, *supra* note 11, arts. 2, 7.

141. *Rio Declaration*, *supra* note 19, princs. 2, 4, 6, 7, 11, (Vol. 1), Annex 1.

142. *Id.; See* Expressing Sense of Senate Regarding U.N. Framework Convention on Climate Change (Byrd-Hagel), S. Res. 98, 105th Cong. (1997). This resolution also includes the requirement that the protocol would not result in serious economic harm to the U.S. economy, and that the Administration give an economic analysis of the treaty's impact.

then proceeded to "revoke" the signature the U.S. placed on the Kyoto Protocol, stating that it had no intention of ratifying the Protocol.[143]

Unfortunately, there has been a constant circular argument every time climate change negotiations have resumed. The standard argument by the developing countries was: if the U.S. is not a party to Kyoto Protocol, why should India or China have any commitments? As explained by Su Wei, the head of the climate change office at the National Development and Reform Commission, the debate is still centered on the core Kyoto Protocol principle of CBDR.[144] This principle, first stipulated in the UNFCCC, as mentioned above, calls for the industrialized nations to take the lead in cutting greenhouse gases, and in the Kyoto Protocol they are the only Parties that have emission reduction commitments. Su states that industrialized nations are still seeking to "water down" the principle by asking large developing countries such as China and India to commit to quantifiable cuts in emissions,[145] rather than just mitigation actions. The two sides still disagree on how to distribute the burden of cutting emissions and also on the provision of funds and the transfer of key technologies.[146]

With the Copenhagen Accords, a tentative move has been made to break the deadlock, since the developing countries have made voluntary pledges to take on mitigation actions. Yet the Copenhagen Accord is not legally binding and did not become binding at the 2010 Conference of the Parties (COP-16) in Cancun, Mexico, mainly due to the disagreements on burden-sharing. However, by adopting the Cancun Agreements in 2010 through a decision by the plenary at COP-16, the Copenhagen Accord was brought into the realm of the UNFCCC process. Yet a COP decision does not confer binding commitments on the Parties. For that to occur, the Cancun Agreements need to be adopted into a treaty text. This may still take place in Durban, South Africa at COP-17 in December, 2012.[147] It is now up to the industrialized countries to live up to their commitments under the Kyoto Protocol and Cancun Agreements, with the first commitment period under Kyoto running out in less than two years. In addition, showing good faith also means actually fulfilling the pledges stipulated in the Cancun Agreements regarding funding and the transfer of technology.

The criteria used for differentiation in the Kyoto Protocol is, arguably, the historic contribution to the environmental degradation, specifically, earlier emissions of GHGs.[148] Another criteria used to differentiate responsibilities under the CBDR principle is the capacity to address climate change. Having benefitted

143. *Q&A: The Kyoto Protocol*, BBC NEWS, Feb. 16, 2005, http://news.bbc.co.uk/2/hi/science/nature/4269921.stm.

144. David Stanway, *China Says Rich-Poor Divide Still Dogs Climate Pact Talks*, PLANET ARK, Sept. 14, 2010, http://planetark.org/enviro-news/item/59506.

145. *Id.*

146. *Id.* Yet the Cancun Agreements did bring the Copenhagen Accord into the realm of the UNFCCC process through a decision by COP-16, see supra text accompanying note 147.

147 Cancun Agreements, *supra* note 3.

148. HAGUE CONFERENCE, *supra* note 6, at 13.

from the environmental ecosystem services makes developed countries disproportionately responsible and has given them the greatest capacity to deal with climate change. Furthermore, the special needs of developing countries (Rio Principle 6), specifically the need to develop in order to meet their economic and social needs, will result in increased environmental degradation in those countries. Based on the equity element of sustainable development and the principle of CBDR, developing countries have good reason to argue that due to disproportionate share of past emission, developed countries must now allow developing countries more rights to pollute.[149]

CBDR has become a cornerstone of the burden sharing systems adopted in the international environmental treaties.[150] Both of the criteria mentioned above, historic contribution and capacity to deal with climate change, resonate with the CBDR principle. In regards to climate change, industrialized countries have the capacity to address the problem, whereas developing countries are more vulnerable to its effects.[151]

The CBRD principle can also be seen as having affected the nature of the obligation to cooperate in international environmental law, the climate regime in particular.[152] Developing countries are expected to cooperate to the extent that they receive funding and technology transfer from developed countries, whereas industrialized countries are expected to cooperate by also assisting developing countries with financial and technological assistance.[153] This theory entails that developing countries make the implementation of their commitments under the climate regime conditional on the receipt of assistance from industrialized States as stipulated in the UNFCCC, Art. 4(7): "[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology..."[154]

The limits to the CBDR principle relates to the purpose of the treaty. If the CBDR principle defeats the object and purpose of the treaty it is not being applied correctly. Clearly, the CBDR principle must be applied using the same limits that apply in regards to sustainable development. In the case of climate change, if the developing countries' emissions of GHGs continue to grow to meet their development needs as allowed for under the UNFCCC, but lead to dangerous anthropogenic interference with the climate system, then the UNFCCC's goal of preventing this interference would be defeated.[155] In that case the CBDR principle

149. MUNASINGHE, *supra* note 45, at 159.

150. HAGUE CONFERENCE, *supra* note 6, at 12.

151. UNFCCC, *supra* note 34, pmbl.

152. Magraw & Hawke, *supra* note 63, at 631.

153. *Id.*

154. UNFCCC, *supra* note 34, art. 4(7).

155. *Feeling the Heat*, UNFCCC ESSENTIAL BACKGROUND, http://unfccc.int/essential_background/ feeling_the_heat/items/2914.php (last visited Feb. 15, 2011).

would have gone beyond its limits because such a development would be unsustainable. There needs to be a balance and developing countries need to make the shift to sustainable development. The balance would be adjusted depending upon how much funding and technology transfer was offered by industrialized countries.

In sum, using the criteria of historic contribution and the situation of developing countries, being less developed, resulting in a limited capacity to deal with climate change leads to the same result: industrialized countries have a duty to carry a heavier burden and assist developing countries in addressing climate change with funding and technology in order for developing countries to take mitigation actions and adaptation measures.

C. Funding

Recognizing the CBDR principle as the basis for the burden sharing in addressing climate change, it is clear that the onus is on the industrialized countries to addressing climate change. The new framework on climate change needs to provide the required funding for developing nations to transition to a clean energy economy and adapt to the impending negative effects of climate change, like floods and droughts. As mentioned above, financial assistance and transfer of technology is essential to facilitating the developing countries in implementing their mitigation actions. As mentioned in the Cancun Agreements , "... developing country Parties are already contributing and will continue to contribute to a global mitigation effort... and could enhance their mitigation actions depending on the provision of means of implementation by developed country Parties."[156]

Ever since the adoption of the UNFCCC, funding instruments and measures has been a constant topic of debate at the treaty negotiations. The main source of development assistance used to come from Official Development Assistance (ODA), yet rather than all States increasing their contribution to reach the goal of 0.7% of their GDP as agreed to in 1970 UN Resolution and in countless instruments after that, this source of funding has shrunk.[157] Some of this has been replaced by other bilateral and multilateral funding sources, such as the Global Environment Facility (GEF), addressed below. Other entities have also been established to provide developing countries with funding for mitigation and adaptation.[158] A much larger factor is private financing through foreign direct investment (FDI) and other investment opportunities, in addition to the carbon market.

The funding mechanism under the UNFCCC is operated by the GEF. The GEF, established in 1991, is run jointly by the UN Environment Programme, the

156. Canun Agreements, *supra* note 3, at III(B), para. 1.

157. International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626 (XXV), ¶ 43, U.N. Doc. A/8124 (Oct. 24, 1970).

158. G-24 Discussion Paper Series, *Financing and the Climate Mitigation and Adaptation Measures in Developing Countries*, UNCTAD, vii, U.N. Doc. UNCTAD/GDS/MDP/G24/2009/4 (Dec. 2009) (by Frank Ackerman).

UN Development Programme, and the World Bank.[159] The funding mechanism under UNFCCC was established in order that developed countries, specifically the richer OECD countries (Annex II Parties), could provide funds to developing country parties to assist them in implementing the Convention.[160] GEF is accountable to the UNFCCC for its management of the funding mechanism.[161] GEF manages several of the funds established by decisions of the Conference of the Parties to the UNFCCC (COPs).[162] Among them are the Least Developed Countries Fund (LDCF) and the Special Climate Change Fund (SCCF) which were established by the COP-7 meeting in Marrakesh in 2001.[163]

The Kyoto Protocol uses the same funding mechanism as the UNFCCC. The Kyoto Protocol stipulates that developed countries should:

> (a) provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing commitments... (b) provide such financial resources, including the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of existing commitments . . .[164]

In addition, the parties may avail themselves of funds through "bilateral, regional and other multilateral channels."[165]

The Adaptation Fund was established under the Kyoto Protocol "to finance concrete adaptation projects and programmes in developing country Parties to the Kyoto Protocol that are particularly vulnerable to the adverse effects of climate change."[166] It is financed from a share of the proceeds (2%) from the clean development mechanism (CDM)project activities and other sources of funding.[167]

The Copenhagen Accord gives a more detailed framework for the funding for developing countries to enable enhanced mitigation actions:

> Scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided to developing countries, in accordance with the relevant provisions of the Convention, to enable and support enhanced action on mitigation, including substantial finance to reduce emissions from deforestation and forest degradation (REDD-

159. *What is the GEF*, GLOBAL ENVIRONMENT FACILITY, http://www.thegef.org/gef/whatisgef (last visited Feb. 15, 2011).

160. UNFCCC, *supra* note 34, art. 4(3).

161. *Id.* art. 21(3).

162. *Id.*

163. UNFCCC, Conference of the Parties, 7th Sess., Marakkesh, Morocco, Oct. 29–Nov. 10, 2001, *Marakkesh Accords*, Dec. 7/CP.7, paras. 2, 6, U.N. Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002).

164. Kyoto Protocol, *supra* note 120, arts. 11(2)(a) and (b).

165. *Id.* art. 11(3).

166. Adaptation Fund Board, *Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund*, http://www.adaptation-fund.org/system/files/AFB.Operational_Policies_and_ Guidelines.pdf (last visited Feb. 21, 2011).

167. *Id.*

> plus), adaptation, technology development and transfer and capacity-building . [168]

Furthermore, the Accord stipulates that the developed countries are to provide new and additional funds "approaching US $30 billion for the period 2010-2012 with balanced allocation between adaptation and mitigation."[169] "The objective of the funds, referred to as 'fast start finance' is to help developing countries adapt to the impact of climate change" and to pursue mitigation actions that put them on a low-carbon development pathway.[170] In the context of mitigation actions, developed countries "commit to a goal of mobilizing jointly US $100 billion dollars a year by 2020 to address the needs of developing countries."[171] This financial assistance will come from "a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance."[172] "New multilateral funding for adaptation," the Accord states, "will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries."[173] In addition, a significant portion of such funding should flow through the Copenhagen Green Climate Fund.[174] The Copenhagen Accord expressly states that such a fund "shall be established."[175] The Cancun Agreements reiterated and expanded on all the funding provisions of the Copenhagen Accord.[176]

The UN Secretary-General has already established a High-Level Advisory Group on Climate Change Financing, as called for by the Copenhagen Accord,[177] to study the potential sources of revenue for financing mitigation and adaption activities in developing countries to make progress on the key issue of finance in the course of 2010. Raising US $100 billion by 2020 is a huge challenge, but one that can be achieved. Many developing countries still call for six times that sum, equaling 1.5 % of the developed countries' GDP.[178] Financing the investment of a new industrial revolution with the goal of moving toward a low-carbon economy is a major development paradigm shift.[179] As Nicholas Stern put it: "[h]igh carbon

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168. COP-15 Report, *supra* note 123, ¶ 8.

169. *Id*

170. *Fast Start Finance*, CLIMATEFUNDSUPDATE.ORG, http://www.climatefundsupdate.org/fast-start-finance (last visited Feb. 4, 2011).

171. COP-15 Report, *supra* note 123, ¶ 8.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* ¶ 10.

176 Canun Agreements, *supra* note 3, at IV.

177. *Id.* ¶ 9.

178. *AWG-LCA discusses Finance Board, quantum, links between Fund and thematic issues, etc...*, THIRD WORLD NETWORK, 1 (June 3, 2010), http://www.twnside.org.sg/title2/climate/news/Bonn06/TWN_bonn6.up06.pdf.

179. *The UN Secretary-General's High-Level Advisory Group on Climate Change Financing - A Briefing to UNFCCC Parties*, UNFCCC WEBCAST (Aug. 5, 2010, 22:30), http://unfccc2.meta-fusion.com/kongresse/100802_AWG/templ/play.php?id_kongresssession=2946&theme=unfccc (statement of Nicholas Stern).

growth is before very long a contradiction in terms."[180] "It will kill itself," he said.[181] Stern explained that when millions of people need to move due to drought and sea level rise, there will be conflict and that will not be growth.[182]

The reduction of emissions from deforestation and forest degradation, the REDD-plus program was launched in September 2008 as called for under the Bali Action Plan at COP-13.[183] This program was created after the realization that paying developing countries not to cut down their trees would reduce a substantial amount of CO2 because forests serve as sinks for CO2.[184] The difficult part is designing a program that works for all the stakeholders, including indigenous peoples and local communities. The program now supports REDD readiness activities in twelve countries, including Bolivia, Cambodia, Democratic Republic ofCongo (DRC), Indonesia, Panama, Papua New Guinea, Paraguay, the Philippines, the Solomon Islands, United Republic of Tanzania, Viet Nam, and Zambia.[185] To date, US $51.4 million has been approved by the UN-REDD Program's Policy Board for eight of those pilot countries.[186] This money helps to support the development and implementation of national REDD+ strategies. The largest donors are, in order, Norway (US $52.2 million committed for 2008-2009, another US $32.1 million committed for 2010), Denmark ($2 million committed in June 2009), and Spain (announced US $20.2 million over 3 years).[187] The REDD program is still seeking more donors, given that donations are completely voluntary.[188] The Cancun Agreements essentially operationalized the REDD plus program outlined in the Copenhagen Accord.[189]

Complimenting other multilateral financial mechanisms, developed and developing countries designed the Climate Investment Funds (CIF) promotes "scaled-up financing for demonstration, deployment and transfer of low-carbon technologies with significant potential for long-term greenhouse gas emissions savings."[190] Under the CIF, the World Bank (WB) established the Clean

180. *Id.* at 23:29.

181. *Id.* at 23:31.

182. STERN REVIEW, *supra* note 4, at 129-30 (2007).

183. *About the UN-REDD Programme*, UN REDD PROGRAMME, http://www.un-redd.org/AboutUNREDDProgramme/tabid/583/Default.aspx (last visited Feb. 11, 2011); Fisheries & Agriculture Organization of the United Nations [FAO], United Nations Development Programme [UNDP] & United Nations Environment Programme [UNEP], *UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD)*, 2 (June 20, 2008), http://www.unredd.net/index.php?option=com_docman&task=doc_download &gid=4&Itemid=53 [hereinafter *UN-REDD*].

184. *UN-REDD*, *supra* note 183, at 1-2.

185. *About the UN-REDD Programme*, *supra* note 183.

186. *Id.*

187. *Id.*

188. *Id.*

189 Canun Agreements, *supra* note 3, at III(c).

190. *Clean Technology Fund*, CLIMATE INVESTMENT FUNDS, http://www.climateinvestment funds.org/ cif/node/2 (last visited Feb. 21, 2011).

Technology Fund and the Strategic Climate Fund.[191] These funds are governed by a Trust Fund Committee, a Partnership Forum, a Multilateral Developing Banks Committee, an Administrative Unit and a Trustee (the WB).[192] The Strategic Climate Fund serves as a framework for the implementation of three programs: The Forest Investment Program, the Pilot Program for Climate Resilience, and the Program for Scaling-Up Renewable Energy in Low Income Countries. [193] As of April 17, 2011, 14 donor countries had pledged US $6.5 billion to the Climate Investment Funds, with the United States, the United Kingdom, and Japan being the biggest donors.[194] The funds are distributed to 45 developing countries in the form of grants and loans through Multilateral Development Banks and the Copenhagen Green Fund to be replaced by the Green Climate Fund.[195] In addition, there are plans in place to mobilize some US $40 billion for country-led low carbon growth.[196]

Considering funding, transfer of technology, and capacity-building as decisive components in addressing climate change, it is important that the multilateral funding mechanisms have a balanced representation (by developed and developing countries) in the decision-making bodies, and that there is transparency and accountability. Examining some of the different funding mechanisms, it can seem overwhelming to track them all, especially for developing countries that may not have the capacity to digest all the information. However, there are NGOs doing just that, such as the Climate Funding Update which has a very clear presentation of the different international funding initiatives.[197] These civil society actors will become more and more important as the money starts flowing in substantial amounts, and tracking it to serve as an extra check on accountability will become vital.

VI. CONCLUSION

Developing countries will continue developing in their efforts to eradicate poverty, however, if it is to be sustainable development, especially at a time when it is clear that climate change is having and will continue to have major impacts in the not so distant future, developed countries will need to provide them with

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191. *Trust Fund Committees*, CLIMATE INVESTMENT FUNDS, http://www.climateinvestmentfunds.org/cif/Trust_Fund_Committees (last visited Feb. 21, 2011) [hereinafter *Trust Fund Committees*].

192. *Governance*, CLIMATE INVESTMENT FUNDS, http://www.climateinvestmentfunds.org/cif/governance (last visited Feb. 21, 2011).

193. *Trust Fund Committees*, *supra* note 191.

194. *Funding*, CLIMATE INVESTMENT FUNDS, http://www.climateinvestmentfunds.org/cif/funding-basics (last visited Feb. 21, 2011).

195. Cancun Agreements, *supra* note 3 at para.102. Press Release, The World Bank, Donor Nations Pledge Over $6.1 Billion to Climate Investment Funds (Sept. 26, 2008), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21916602~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

196. Press Release, Climate Investment Funds, Climate Investment Funds set to Mobilize US$40 Billion for Country-Led Low Carbon Growth (March 19, 2010), *available at* http://www.climateinvestmentfunds.org/cif/pf_2010_pressrelease_03_19.

197. CLIMATE FUNDS UPDATE, http://www.climatefundsupdate.org/ (last visited Feb. 21, 2011).

technical and financial assistance. The sustainable development principles call for providing technical and financial assistance in the climate change regime, particularly the principle of common but differentiated responsibility. This principle, though not legally binding, is having an increased influence on the climate negotiations. Examining some of the funds that have been established, it is clear that a large effort is being made to enable developing countries to move to a sustainable pathway, specifically taking mitigation actions in order to address climate change alongside the emission reduction commitments by the developed countries. As more and more funds are created, the focus will constantly need to be on a balanced representation (by developed and developing countries) in decision-making bodies, and on transparency and accountability to make sure the funds actually facilitate a shift to a low carbon economy, enabling us to avoid the worst impacts of climate change.

HOW TO VALUE ENVIRONMENTAL AND NON-MARKET GOODS: A GUIDE FOR LEGAL PROFESSIONALS

CATHERINE M. H. KESKE*

Putting a price on environmental goods may seem impossible. Without a market, how does anyone determine the value of a good? Complicating matters, some environmental "non-market" goods such as pristine wilderness or endangered species may at first seem "priceless." Nevertheless, people will have conflicts that involve environmental goods without markets. Imputing no value at all for environmental goods or declaring them priceless does not allow for negotiation. However, valuing environmental goods is routine for environmental economists, who are equipped with a "toolbox" of valuation and statistical approaches. While damage compensation awards often reflect loss of use, for legal purposes, a complete economic valuation may also include a good's "indirect use," "nonuse," and "existence" values.

This article serves to inform legal professionals about methods that can be used to value the environment, including non-market goods. An in-depth discussion about how to use "stated preference" valuation methodology, is also provided. The take-home message is that accounting stance (that is, who is viewing the problem) matters. For full accounting of an environmental or non-market good, both use and non-use values should be considered. However, each case is different, and it is up to the legal professional to decide what additions and subtractions to make to the ledger and to which side the adjustment should be made.

Use, Nonuse, and Option Values

Environmental goods consist of "use" and "nonuse" values. There are a variety of different methods that can be used to measure each of these dimensions. General examples are provided in Figure 1. Figure 1 is further described in the text that follows, and the concepts described in Figure 1 are provided in a threaded example using petroleum.

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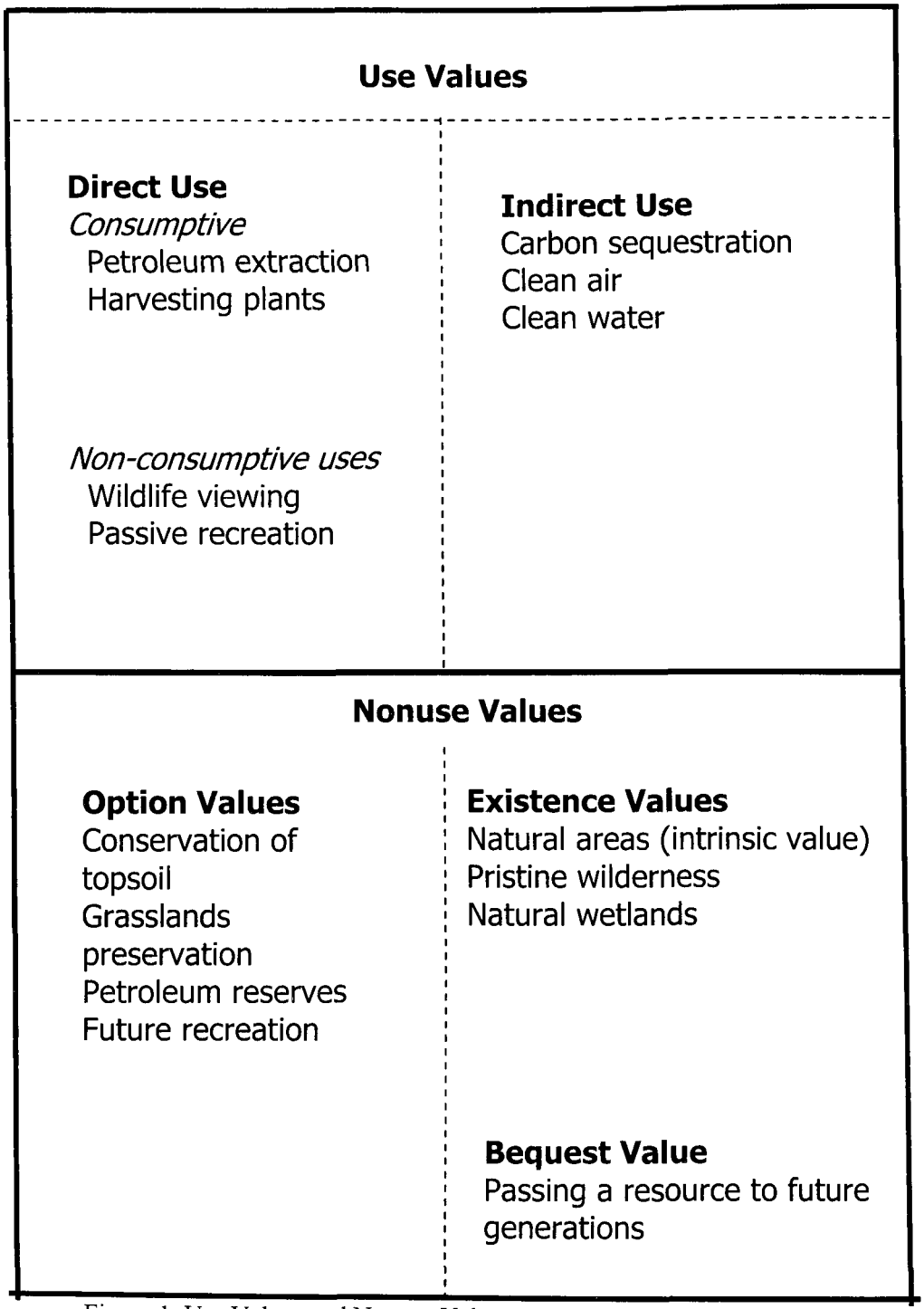

Figure 1. Use Values and Nonuse Values.

Use Values

Use values reflect the most intuitive measure of an environmental good. As shown in Figure 1, the use dimension is divided into two classes: direct use and indirect use. It is critical to recognize that environmental economists use the terms direct and indirect slightly differently when they are dealing with an ecosystem, rather than a regional or national economy.[1] This article refers to "use value" the way it is presented in Figure 1, and in a manner that is consistent with the environmental economics literature.

Direct use in environmental economics occurs when humans utilize a resource. Direct use can be either consumptive or non-consumptive. Economists value direct uses when raw materials are extracted, developed, or cultivated for human ends.[2] Use value is measured as the quantity of the good produced multiplied by the price of the good.[3] A simple example is a forest, where the value of the property is reflected in the number of trees that are harvested multiplied by the price per tree. Determining a good's direct use value is relatively straight forward when there are prices and quantities that are associated with the resource.

The concept of direct use should be relatively intuitive to legal practitioners, who often use this method to determine lost income or wages in damage claims. In the BP oil leak in the Gulf of Mexico, environmental damages could be calculated by lost revenues to BP, whose commodity skimmed the Gulf's shores rather than filling fuel tanks. Likewise, lost income to shrimpers who are no longer able to catch shrimp could also be calculated as damages. With direct use values, the circle of those who experience a loss of use can be greatly expanded. But how big should that circle be? Tongue in cheek, it is only limited by the number of attorneys willing to become involved, which relates to the concept of *transaction costs*. If the value of the lost use is less than the cost of pursuing compensation (which includes costs associated with retaining counsel), then the transaction costs are greater than the amount of the damages and damage claims won't be pursued. Realistically, in the case of large, catastrophic environmental damage, it is likely that a number of legal practitioners will argue that their clients should be included in those who have experienced a direct loss of "use value," because the transactions costs are relatively lower than non-catastrophic events.[4] However,

1. Traditional regional economic valuation studies further break down categories of "use" into direct, indirect and induced values, in order to reflect various economic sectors. In traditional economic studies, direct values stem from the production of a good, such as corn. Indirect values refer to the associate industries, like fertilizer and farm equipment companies. Induced values reflect overall economic health related to the direct and indirect effects, such as an increase in overall household income in a region.

2. *See* JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD & DAN H. COLE, NATURAL RESOURCES LAW 729-31, 839-41, 922-25 (2006).

3. *See* Valuation of Ecosystem Services, ECOSYSTEMVALUATION.ORG, http://www.ecosystemvaluation.org/1-02.htm (last visited Feb. 17, 2011).

4. FRANKLIN J. STERMOLE & JOHN M. STERMOLE, ECONOMIC EVALUATION AND INVESTMENT

when other economic values are considered, the total economic value may rise significantly higher than the transactions costs.

"*Non-consumptive uses*" are a sub-category of direct uses. These values typically reflect aesthetic quality and recreation. Non-consumptive uses can be quantified, and these values can be considered in addition to direct use values.[5] "Non-consumptive uses such as recreation are generally thought not to be outwardly destructive, but at large enough levels of use, environmental damage may occur."[6] To expand upon the Gulf of Mexico example, non-consumptive uses might include visits to the beach. Valuation of non-consumptive uses consists of two elements:[7] visitor expenditures and local income generated (also known as "value added").

> *Visitor expenditures* include things like food, gas, lodging, and other costs. Most recreation studies calculate expenditures made for that particular trip. Often times the researcher will distinguish whether the expenditures were made close to the recreation site (20-30 mile radius) or in a larger geographical space. It is generally accepted that the further people live from the attraction, the more money people will spend on the activity.
>
> *Local income generated, or "value added"* is a bit more complex, but it is an important measure of economic activity. The purchase of an energy bar at a local convenience store before heading out to the beach adds value to the economy in several different sectors. The purchase has helped pay for the convenience store clerk's wages. This is a gain to the local economy. The transport of the food to the convenience store, the production of the energy bar and the growing of the raw ingredients used to make the sports bar are contributions to the state economy where the energy bar is produced. In other words, almost every purchase that is made is part of a "domino effect" or "multiplier effect" The multiplier effect can be measured on the local, state or national level.[8]

DECISION METHODS 6-7 (12th ed. 2009) (explaining that when use values are considered over time, the time value of money should also be considered. In other words, the loss of $1000 today has a greater impact than the loss of $1000 next year, because of the opportunity cost of the money. For example, one could invest the $1000 today and at a 10% rate of interest, earn $1100. Likewise, a $1000 loss next year is worth less than a $1000 loss this year. Methods such as discounted cash flow can help to determine the time value of money).

5. Catherine M.H. Keske, *High Mountain Ecosystems: How Much Love Can They Sustain?*, *in* ENVIRONMENTAL MANAGEMENT 189, 191 (Santosh Kuman Sarkar ed., 2010), *available at* http://www.intechopen.com/books/show/title/environmental-management.

6. *Id.* at 192.

7. *See* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 41 (Gretchen C. Daily ed., 1997).

8. J. B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, The LAW AND POLICY OF ECOSYSTEM SERVICES 27-32 (2007). In contrast to regional economic studies, environmental economists don't refer to indirect uses as supporting economic sectors.

Resource use also encompasses "*indirect uses*" derived from an ecosystem, such as carbon sequestration, clear air, or clean water. Indirect use refers to supporting ecosystem functions that are only indirectly related to output. For example, ecosystem services such as the capacity of the Gulf of Mexico to assimilate an oil spill, or a forest to sequester carbon, can provide life-giving services and functions even when humans do not directly use the resource.[9] It would be ideal to know the indirect value of an ecosystem function itself, but this is often not possible.[10] Instead, indirect values are often measured by their affect on direct values.[11] For example, the ability of the Gulf of Mexico to assimilate the 2010 BP oil spill affects direct values that can be measured, such as beach visits, ocean front home prices and shrimp harvests. New and emerging environmental markets, such as the carbon market or conservation easement market, can help with environmental valuation, but they may yield inconsistent price data, making it very difficult to analyze the statistical effect of an environmental good.[12] Therefore, economic valuation of indirect uses often requires supplemental techniques, such as stated preference surveys.[13]

Nonuse values

In contrast to use values, nonuse values arise when humans want to maintain the option of using a resource in the future (otherwise known as "*option value*"), or preserve a resource for the sake of its existence, otherwise known as "*existence value.*"[14] Resource nonuse generates the indirect resources that are received and enjoyed by humans,[15] now or in the future.

Option value refers to the future use value of a resource, whether or not that resource is actually used by humans.[16] For the sake of example, consider Alaska's Arctic National Wildlife Refuge (ANWR). The use value of the petroleum reflects the present price and quantity of petroleum in that reserve.[17] If the petroleum reserve were to be declared off-limits to extraction, the value of ANWR could be measured by the petroleum that could be (but is not) extracted and sold. In the ANWR case, the option value is determined by multiplying the estimated price per

9. *Id.*

10. V. Kerry Smith & Ju Chin Huang, *Hedonic Models and Air Pollution: Twenty-Five Years and Counting*, 3 ENVTL. & RESOURCE ECON. 381, 381-394 (1993).

11. *See, e.g.*, *id.*

12. Catherine M. Keske, Dana L. Hoag & Christopher T. Bastian, *Can the Conservation Easements Market Evolve from Emerging to Efficient?*, 8 W. ECON. F. 10, 10-17 (2009).

13. *Id.* at 13.

14. John V. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 779-81 (1967).

15. NATURE'S SERVICES, *supra* note 7, at 34-35.

16. There are differences in opinion among economists as to whether "option value" is a sub-category of nonuse or whether it should comprise a third category by itself. *See* NATURE'S SERVICES, *supra* note 7, at 297.

17. The quantity of petroleum available in that reserve may increase over time, as new technology develops to extract marginal petroleum reserves. Likewise, quantity may decrease over time as petroleum is extracted. Price also factors into the supply and demand for petroleum, and hence the value of the oil reserve. *See* STERMOLE & STERMOLE, *supra* note 4, at 133-141.

barrel by the number of barrels that are no longer available in the protected area, and then adjusting for the value of money across time[18] and for risk.[19]

Two other nonuse values are *existence value* and *bequest value*. Existence value refers to the intrinsic value that an environmental good offers a human. This is a challenging, but feasible, measurement. For example, people who donate money to protect wildlife in ANWR or water in the Gulf of Mexico can provide a measure of value for something that they want to have the option to see later, or perhaps will never have a chance to see. Likewise, individuals may state what they are willing to pay to protect environmental quality. In the case of a bequest value, an individual places value on a resource with the intention that the resource will be enjoyed by future generations. Like existence value, measurement of bequest values may be obtained through revealed behavior (such as a donation) or stated behavior (willingness to pay). The U.S. National Park system is an example of a bequest value from previous generations.[20]

Using Stated and Revealed Preference Techniques to Measure Environmental Values: The Case of Colorado Fourteeners

This next section provides an example of how to value non-market, environmental goods using stated and revealed preference techniques. Stated preference approaches consist of methodical, scientifically developed surveys used to extract the choices that individuals make for selecting a good. In contrast, revealed preference methodology illustrates the actual choices that individuals make when spending money. A revealed preference study might use hedonic statistical techniques to measure how much people have paid for an environmental attribute, the same way appraisers put a value on the fireplace of a home.[21] Travel cost models, which measure the value of the time and money visitors spend at a recreation site, are another example of a revealed preference approach.[22] In the case study that is presented below, visitor expenditure data is collected—an example of a revealed preference approach. With stated preference methodology, individuals state how they would spend their money. In the case example, a contingent valuation question is presented in a stated preference approach. When properly implemented, both methods are regarded as possessing high scientific integrity.[23]

Both stated and revealed preference methodologies have limitations. One advantage of stated preference methodology is that the choices may be better controlled by the scientist. Revealed preference methodology may introduce "noise" due to macroeconomic disruptions like a relatively short-lived change in

18. Graham Davis, *A Review of Option Valuation*, *in* EVALUATING MINERAL PROJECTS: APPLICATIONS AND MISCONCEPTIONS 117, 117-123 (1998).

19. Id.

20. *See* NATURE'S SERVICES, *supra* note 7, at 297.

21. *See, e.g.*, Smith & Huang, *supra* note 10.

22. *See* NATURE'S SERVICES, *supra* note 7, at 33.

23. *See* IAN J. BATEMAN ET AL., ECONOMIC VALUATION WITH STATED PREFERENCE TECHNIQUES: A MANUAL 20-21 (2002).

interest rates, rather than focusing on the decision-making process. However, because stated preference methodology tests hypothetical, rather than actual, decisions, there is also room for bias. Many environmental economists believe that a combination of revealed and stated preference studies is an effective approach to environmental valuation.[24]

Decision making processes can be implemented using various sophisticated stated preference designs and statistical analyses.[25] Contingent valuation is one example of a stated preference technique that can be used to determine the economic value of a non-market good. Contingent valuation methodology enables researchers to determine the value that individuals would be willing to pay to protect (or access) a resource in addition to the amount of money that the individual has already paid.[26] This willingness to pay (WTP) is defined by economists as "consumer surplus."[27] When a proper sample size is obtained, economists can determine the average WTP, or average consumer surplus for that particular resource, and use this information as a measure of "economic value."[28] Like all methods, contingent valuation has its limitations. For example, contingent valuation measures what an individual states that he or she is willing to pay rather than what he or she actually does pay. However, contingent valuation is a generally accepted method for valuing environmental goods, particularly when there is not a market for that good.[29]

Contingent valuation lends itself well to example. The case of Colorado Fourteeners (peaks above 14,000 feet) reflects use of both stated and revealed preference techniques. Although the following example measures indirect environmental use, the survey could have been adapted to reflect nonuse values such as existence value or bequest value. Values obtained from this contingent valuation study of high mountain peaks reflect the value that hikers and recreators place on their mountain experience, in addition to what they already spent (revealed preference survey).[30]

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24. W. Adamowicz, J. Louviere, & M. Williams, *Combining Revealed and Stated Preference Methods for Valuing Environmental Amenities*, 26 JOURNAL OF ENVTL. ECONS. & MGMT. 271, 273-74 (1994).

25. JORDAN J. LOUVIERE, DAVID A. HENSHER, & JOFFRE D. SWAIT, STATED CHOICE METHODS: ANALYSIS AND APPLICATION 2 (2000).

26. Nelson Goodell, *Making the "Intangibles" Tangible: The Need to Use Contingent Valuation Methodology in Environmental Impact Statements*, 22 TUL. ENVTL. L. J. 441, 442-43 (2009).

27. *See* Adrian Mihalache, *To Tax or Not to Tax? What is it Worth?*, 3 MASARYK U. J.L & TECH. 335, 339 (2009).

28. *See* Pete Morton, *The Economic Benefits of Wilderness: Theory and Practice*, 76 DENV. U. L. REV. 465, 496 (1999).

29. *See id.* at 471.

30. Keske, *supra* note 5, at 193.

Economic Valuation of Colorado Fourteeners Using Stated and Revealed Preference Methodology:

Sampling for both 2006 and 2009 was conducted at Quandary Peak, a recreation area that is southwest of Denver, Colorado. Quandary Peak is approximately 15 kilometers directly south of the resort town of Breckenridge, and 10 kilometers north of Alma.[31] In 2006, surveys were distributed over three days, on two separate non-holiday weekends during August and September 2006. The mail back survey booklet was designed in accordance with Dillman's Tailored Design Method.[32] The 2006 mail back surveys were distributed by two volunteers trained on survey distribution procedures. Hikers were approached at trailheads and in parking lots at the conclusion of their recreation activity. There were no refusals to take the survey in 2006. After providing the visitors with the survey and a postage paid return envelope, names and addresses were also collected so that a second survey could be mailed to non-respondents. Of the 199 mail back surveys handed out, 129 surveys were returned, for a response rate of 65%. Based on a comparison of group sizes from our survey data collected during these three weekend days to group sizes from U.S. Forest Service data collected by a non-government organization during the majority of weekends, it appears as though the 2006 data was representative of the summer season.

The 2009 data collection process, including trailhead location and survey distribution procedures, mirrored the 2006 data collection process. In 2009, two individuals were trained in the distribution of surveys: a graduate student, and one of the same volunteers instrumental in the distribution of the surveys in the 2006 study. As with the 2006 study, visitors were provided with the mail back survey and a postage paid return envelope. Three weeks later, replacement surveys were mailed to non-respondents. A total of 345 surveys were distributed over five weekend days during July and August 2009. A total of 248 surveys were returned for a response rate of 72%.

Visitors were asked their actual expenditures (revealed preference approach), as well as willingness to pay for their future experience (stated preference approach). The dichotomous choice (WTP) contingent valuation question was:

> *As you know, some of the costs of travel such as gasoline, campgrounds, and hotels often increase. If the **total cost** of this most recent trip to the recreation area where you were contacted had been $X **higher**, would you have made this trip to **this** Fourteener? Circle one: YES / NO*

The $X bid amount had values ranging from $2 to $950, randomly varied across all surveys distributed. This data was aggregated and statistically analyzed to determine the average per person WTP.

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31. *Quandary Peak*, 14ERS.COM, http://www/14ers.com/photos/peakmain.php?peak=Quandary+Peak (last visited Mar. 1, 2011).

32. DON A. DILLMAN, MAIL AND INTERNET SURVEYS: THE TAILORED DESIGN METHOD 9 (2d ed. 2000).

There was no statistical difference between visitor expenditures in 2006 and 2009 at the 5% level of significance, with the exception of gasoline purchases, which is significantly different at the 10% level. The decreased expenditures on gasoline may be attributable to the fact that visitors, on average, traveled fewer miles to the recreation site in 2009 compared to 2006. Therefore, Fourteener recreation was unaffected by the recession. This is summarized in Figure 3, and presented in 2007 dollars to correct for inflation.

Category	2006 Mean	2009 Mean	T-Statistic (P-value)
Miles Driven	264	214	1.12 (.267)
Gasoline Purchases	$61.04	$42.00	1.69 (.092)
Retail Supplies	$13.24	$15.85	-.363 (.717)
Equipment Purchases	$25.14	$28.28	-.441 (.659)
Hotel	$81.62	$129.40	-1.29 (.196)
Food in Restaurants	$78.32	$80.48	-.401 (.689)

Figure 3. Comparison of 2006 and 2009 Per Trip Hiker Expenditures in Colorado ($2007).

Figure 4 presents the WTP estimates obtained from the 2006 data and the 2009 data to calculate mean WTP and the associated 90% confidence intervals. In 2006 dollars, the mean WTP per person per trip in 2009 is $139 which is 9% below the WTP per person in 2006 of $152. However, as shown in Table 4, the 90% confidence intervals in 2006 overlap the mean WTP in 2009 and vice versa. This indicates there is no statistical difference between the WTP per person per trip in 2006 and 2009. This is further illustrated in Figure 5, which demonstrates no significant difference in the mean willingness to pay, and the overlapping confidence intervals. Thus, we fail to reject the hypothesis of no difference in mean WTP between the two time periods. This implies that visitors place the same value on their recreation experience when the economy is struggling, in general, compared to times when the economy is doing well.

	Mean WTP	90% Lower CI	90% Upper CI
2006 data	$152	$123	$190
2009 data	$139	$119	$167

Figure 4. Mean Willingness To Pay, Per Person Per Trip, and 90% Confidence Intervals.

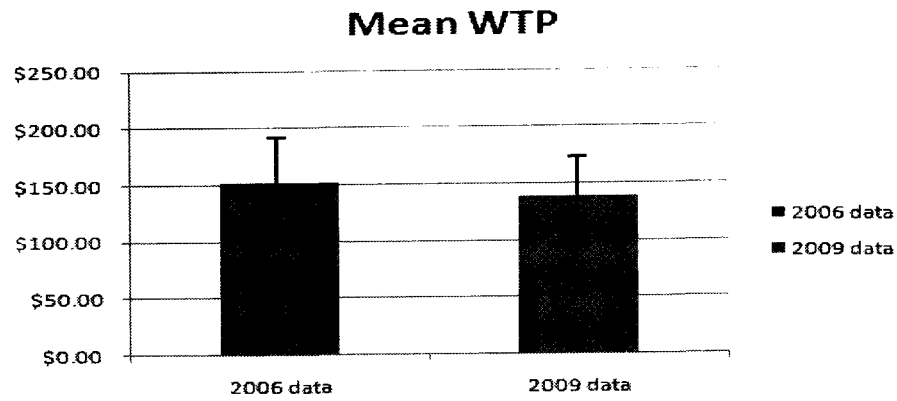

Figure 5. Results of the contingent valuation model, with non-overlapping confidence intervals between 2006 and 2009. Results indicate that recreators have a similar consumer surplus between 2006 and 2009.

The seemingly "recession proof" nature of high mountain recreation reveals that visitors spend a great deal of money to climb Fourteeners, regardless of whether the economy is rocky or vibrant, and they are willing to spend even more. The values that recreators place on high alpine recreation, by comparison, is more than that of other hiking and rock climbing studies. Several rock climbing studies serve as comparison, including one in Colorado by Ekstrand.[33] He asked rock climbers at Eldorado Canyon outside of Boulder, Colorado what they would pay to do similar climbs but at remote wilderness locations.[34] His value of $27.95 per day in 1991 is equivalent to $40 when adjusting for inflation to 2006.[35] Grijalva and Berrens[36] estimated a value of rock climbing in Texas at between $47 and $56 per day trip. More comparable is a 2002 study by Grijalva, et al.[37] that involves climbing in USDA U.S. Forest Service designated wilderness areas. These authors found a WTP of only $18 to $26 per person to avoid closing climbing sites in several National Forest, National Park and BLM Wilderness areas, depending on the travel cost variable.[38]

It is believed that the remarkably high consumer surplus can be attributed to the fact that Fourteeners are considered "special" environmental icons that provide place attachment to Colorado residents and tourists alike.[39] There are no

33. Earl R. Ekstrand, Economic Benefits of Resources Used for Rock Climbing at Eldorado Canyon State Park, Colorado (1994) (unpublished Ph.D. dissertation, Colorado State University).

34. *Id.* at 16-17, 126.

35. *See id.* at 107-08.

36. Therese Grijalva & Robert P. Berrens, *Valuing Rock Climbing and Bouldering Access*, *in* THE NEW ECONOMICS OF OUTDOOR RECREATION 21, 35 (Nick Hanley et al. eds., 2003).

37. Therese C. Grijalva et al., *Valuing the Loss of Rock Climbing Access in Wilderness Areas: A National-Level, Random-Utility Model*, 78 Land Economics 103 (2002).

38. *Id.* at 117.

39. John B. Loomis & Catherine M. Keske, *Mountain Substitutability and Peak Load Pricing of High Alpine Peaks as a Management Tool to Reduce Environmental Damage: A Contingent Valuation Study*, 90 J. ENVTL. MGMT. 1751, 1757 (2009).

close substitutes. Place attachment theory, developed in sociology,[40] environmental psychology,[41] and geography,[42] postulates that there can be a psychological connection between a community and a natural resource. Research by Blake[43] (1999, 2002, 2008) suggests that Fourteeners are synonymous with Colorado's identity, and that Fourteener references are ubiquitous—appearing on everything from Chamber of Commerce information and local festivals to print advertisements and postcards. Blake's research indicates that more easily recognizable Fourteeners such as Long's Peak in Rocky Mountain National Park and Pikes Peak in Colorado Springs also provide a state identity.[44] Thus, the economic findings are consistent with other disciplines that have recognized that there is something unique about Fourteeners. This study attaches economic value to the Fourteeners, to reflect the uniqueness of the experience, and the study may serve as an example for how stated preference surveys may be used to measure an environmental good.

Discussion and Legal Applications for Environmental Valuation

In the case of Colorado Fourteeners, recreators demonstrated a higher WTP for their recreation experience than what they already spent. In other words, this study calculated the non-consumptive use value of the recreation using both a revealed preference and a stated preference approach. If the question is phrased appropriately, stated preference methodology may also be used to determine the existence or bequest value of an environmental good. In fact, contingent valuation was applied to determine the value of indirect and nonuse damage claims in the 1989 Exxon Valdez oil spill off the shore of Prince William Sound.[45] Although most legal and economic practitioners agree that the values determined in the Exxon Valdez case were far from perfect, courts have consistently validated the merit of contingent valuation methodology in environmental damage cases.[46] The

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40. *See, e.g.*, Jennifer E. Cross, Private Property Rights Versus Scenic Views: A Battle Over Place Attachments (Oct. 2001) (presented at Human Dimensions of Natural Resources in Western U.S., Regional Conference), *available at* http://lamar.colostate.edu/~jecross/research/conference.html. Jennifer E. Cross et al., *Adoption of Conservation Easements Among Agricultural Landowners in Colorado and Wyoming: The Role of Economic Dependence and Sense of Place* 101 LANDSCAPE AND URBAN PLANNING 1, 1 (2011) *available at* http://dx.doi.org/10.1016/j.landurbplan.2011.01.005.

41. *See, e.g.*, Gerard Kyle et al., *Effects of Place Attachment on Users' Perceptions of Social and Environmental Conditions in a Natural Setting*, 24 J. OF ENVTL PSYCHOL. 213 (2004).

42. *See, e.g.*, Lynne C. Manzo & David D. Perkins, *Finding Common Ground: The Importance of Place Attachment to Community Participation and Planning*, 20 J. PLAN. LIT. 335 (2006).

43. Kevin Blake, *Peaks of Identity in Colorado's San Juan Mountains*, 18 J. CULTURAL GEOGRAPHY, no. 2, 1999 at 29; Kevin Blake, *Colorado Fourteeners and the Nature of Place Identity*, 92 GEOGRAPHICAL REV. 155 (2002)[hereinafter *Nature of Place Identity*]; Kevin Blake, *Imagining Heaven and Earth at Mount of the Holy Cross, Colorado*, 25 J. CULTURAL GEOGRAPHY 1 (2008).

44. *See Nature of Place Identity*, *supra* note 43, at 174.

45. Report of the NOAA Panel on Contingent Valuation, 58 Fed. Reg. 4601, 4612 (Jan. 15, 1993) [hereinafter NOAA Report].

46. Carol Adaire Jones, *Use of Non-Market Valuation Methods in the Courtroom: Recent Affirmative Precedents in Natural Resource Damage Assessments*, 109 WATER RESOURCES UPDATE, no. 109, 1997 at 10, 16, *available at* http://www.ecy.wa.gov/PROGRAMS/wr/hq/pdf/nmvm_jones.pdf; Paul R. Portney, *The Contingent Valuation Debate: Why Economists Should Care*, 8 J. ECON. PERSP., no. 4, 1994 at 3, 11.

federal government also uses contingent valuation in determining the value of environmental goods and non-market goods on public lands.[47] Further publications from the Exxon Valdez resulted in standardized guidelines for contingent valuation methodology.[48] It is likely that contingent valuation will be utilized in the valuation of damages stemming from the 2010 BP oil spill in the Gulf of Mexico using updated techniques, compared to 20 years earlier.

Stated preference techniques such as contingent valuation can provide a measure of direct use, indirect use, existence values, and bequest values. However, whether or not these approaches are appropriate for the case is up to the legal practitioner. A properly implemented stated preference survey will cost a minimum of $25,000 in 2010 U.S. dollars. Furthermore, a stated preference study may not be in the practitioner's best interest, depending upon the industry that the practitioner is representing. The following is a summary of five items for legal practitioners to consider when conducting a stated preference study:

1) *Hire an expert who has experience conducting stated choice studies.* Given the high stakes in environmental cases, a well-trained professional is critical to conduct a valid study that minimizes error. The lead economist who valued the Exxon Valdez oil spill, Kenneth J. Arrow, won the Nobel Prize in economics in 1972. Although a Nobel Laureate is not a pre-requisite for a valuation study, it is important to ensure that the expert has a background in stated choice methodology, including a record of publishing in peer reviewed journals.

2) *Determine precisely what it is being measured.* Contingent valuation can be used to measure direct use, indirect use and nonuse; however, these are separate items in the accounting ledger. If the existence value of a good is being measured (e.g. prohibiting drilling in ANWR permanently), it needs to be stated as such.

3) *Minimize bias.* An experienced economist understands how to minimize bias with a well-executed survey. However, legal practitioners must always be aware that bias is a vulnerability of any stated preference technique. Ensuring the use of appropriate language, an adequate response rate (a good benchmark is 50%), and that the "proper" audience is being surveyed are all considerations for the legal practitioner.

4) *Use secondary data rather than collection of primary data.* Primary data collection using a dedicated survey is the ideal approach, for reasons described throughout the article. However, given the price tag and room for potential bias, sometimes primary data collection is not feasible. Secondary data collection, consisting of a meta-analysis of previously conducted and relevant studies may be a good alternative. This may be particularly

47. JOHN B. LOOMIS, INTEGRATED PUBLIC LANDS MANAGEMENT 212 (2d ed. 2002).

48. NOAA Report, *supra* note 48, at 4608; Richard T. Carson et al., *Contingent Valuation and Lost Passive Use: Damages from the Exxon Valdez Oil Spill*, 25 ENVTL. & RESOURCE ECON. 257, 259 (2003).

appropriate if the previously published studies are in the same geographical region as the environmental good in question. For example, one recent study showed that secondary data of wildlife damage in the western United States effectively reflected both use and nonuse values of Colorado agricultural lands that support wildlife.[49]

5) *Consider all aspects of environmental valuation.* A practitioner representing a client with an interest in the environment may push for a stated preference study. However, when the practitioner represents a client accused of causing environmental damage, it may not be in the practitioner's best interest to conduct a full valuation of the environmental benefits. Regardless of the situation, it is in the practitioner's best interest to be informed of all components that could potentially be included in an environmental valuation study. A knowledgeable expert will understand the strengths and weaknesses of each technique, better enabling legal counsel to defend or dismantle a particular study.

In summary, valuation of non-market goods is both feasible and worthy of scientific merit. A complete valuation of environmental goods should consist of use, nonuse, and option values. Environmental economists employ a number of different scientifically sound methods that can be used to measure each of these dimensions. This article provides legal practitioners with options for determining the value of an environmental good, although the accounting stance taken by the legal practitioner will vary on a case-by-case basis.

49. Dana Hoag, The Agricultural Cost to Support Wildlife in Colorado (Sept. 2009), *available at* http://www.wcirm.colostate.edu/pub_outreach/Hoag_Wildlife%20and%20Ag_Final.pdf. Dana Hoag, Randall Boone & Catharine M. H. Keske, 16 *The Agricultural Cost to Coexist with Wildlife in Colorado Human Dimensions of Wildlife* (forthcoming 2011).

MEDIA PRODUCTS AS LAW: THE MASS MEDIA AS ENFORCERS AND SOURCES OF LAW IN CHINA*

TAHIRIH V. LEE**

INTRODUCTION

Government propaganda so permeates Chinese society, it is impossible to escape its reach. Given this fact, the relationship between law and propaganda is an important subject for study. To my knowledge, it has not been studied before now, except in my previous examination of the relationship between the media and China's legal bureaucracy. In that study, I found that the legal bureaucracy is closely aligned with the state-run media, and that the commercialization of the last two decades of the twentieth century did not loosen this connection, at least with respect to laws that fall into a realm labeled "political."[1] In this study, I probe more deeply the problem of how closely bound propaganda and law are in China.

"In the People's Republic of China ("PRC"), the texts of major national statutes (*falu*) and regulations (*guiding*) are published in the primary Chinese Communist Party newspaper, *The People's Daily* (*Renmin ribao*)."[2] Clearly these publications are "law" in the sense that they are officially enacted as laws, but what about other media transmissions? Print and broadcast media operated by the state also contain reports of official interpretations of the law, and reports about the implementation of law and about matters that are regulated by PRC law. Can these media transmissions also be considered law?

This study attempts to determine whether and how the print and television media in the PRC function as law. In Part I, I survey law and media in the PRC to determine whether, as a historical and institutional matter, products of PRC media might be considered part of China's "legal system" or "sources of law." It is not difficult to make the case that state-run media are part of the legal system of China, particularly when the current apparatus is placed in historical context. It is more of a stretch, however, to argue that media transmissions are authoritative sources of law. Courts in China do not cite them in published opinions, nor do China's legal

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* The Denver Journal of International Law and Policy expresses no opinion as to the accuracy of this article's Chinese language sources, with regard to citations, references, and translation.

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1. *See* Tahirih V. Lee, *The Media and the Legal Bureaucracy of the People's Republic of China, in* POWER, MONEY, AND MEDIA: COMMUNICATION PATTERNS AND BUREAUCRATIC CONTROL IN CULTURAL CHINA 208, 211 (Chin-Chuan Lee ed., 2000).

2. *Id.* at 208.

experts view them as authoritative in a formal sense. When Chinese law is viewed in its historical and social context, however, it becomes clear that media transmissions about law carry a great deal of authoritative weight. Mass media in China have been disseminating central policy since the Ming Dynasty.[3]

Though no one else has published the argument that connects media to law in this way, the theories of several sociologists provide support for the general notion that law achieves its power by the way that it is communicated in society to individuals. Emile Durkheim, Michel Foucault, Edward Epstein, and Carole Nagengast define the phenomenon of law as something that is broadcast to shape behavior.[4] This view helps to situate law within Chinese society and makes it easier for us to understand the authoritativeness of any type of official communication about law in China.

I use a case study to examine the hypothesis—that the mass media in China both enforce the law and provide authoritative sources of law—produced by this historical and theoretical survey of the legal role of the media in the PRC. The study is comprised of a discursive analysis of transmissions of the state-run news agency Xinhua, two major legal newspapers ran by branches of the Ministry of Justice, and other official materials. Two samples of transmissions are used, each of which include popular and internal Party treatises, all of which touch on the regulation of procreation, marriage, divorce, and care of the elderly. Drawn randomly from several of the newspapers with the widest circulation in China, one sample was collected from 1984, and the other sample was collected from 1995 through the first half of 1996. Excluded are the exclusively electronic transmissions by the government that have become a part of its communication with the people of China, such as descriptions of events that appear unsolicited on cell phones. Although such transmissions use different means other than print media, their message and goal remain the same.[5]

The media transmissions in the second sample differed from the first sample in primarily one way. The references and language pointed to concerns of a more commercial or materialistic nature. Yet, the purpose of the transmissions did not appear to change from the period of the first sample to the second, eleven to twelve years later, suggesting that the role of media as a source of law in China is enduring and strong.

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3. *See* EDWARD L. FARMER, ZHU YUANZHANG AND EARLY MING LEGISLATION: THE REORDERING OF CHINESE SOCIETY FOLLOWING THE ERA OF MONGOL RULE 9-17 (1995).

4. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 33 (1984); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 8-10 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); Edward J. Epstein, *Instrumental and Ideological Forms of Law: Implications for China's Transplant of Hong Kong Law*, *in* HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 211, 214 (Raymond Wacks ed., 1997); Carole Nagengast, *Violence, Terror, and the Crisis of the State*, 23 ANN. REV. ANTHROPOLOGY 109, 116 (1994).

5. *See, e.g.*, Michael Wines, *Beijing Uses New Means in its Efforts to Spin Story*, INT'L HERALD TRIB., July 8, 2009 at 5.

In both samples, the media transmissions interpreted and amplified the relevant law in ways that signaled the mid-1990s tight control of the PRC central government over "political" matters, and a new sharing of control over "economic" matters by both the PRC central government and local entities officially recognized by the government. This pattern remained consistent through the changes in format of the media transmissions heralded by the commercialization of the mass media by 1995 and 1996.[6]

Whether the relationship between media and law in the PRC is unique is beyond the scope of this paper. Although media in Russia and Taiwan may play a similar function, detailed evidence of this awaits future research.[7] In the following section I draw some basic distinctions between the United States and the PRC in this regard, but in doing so, do not rule out the legal significance of American film and televised broadcasts of trials and other media transmissions related to law.

I. LAW AND THE PRC STATE-RUN MEDIA

When looking for law, it helps to know what to look for. In the fields of comparative law and legal history in the United States and Europe, scholars routinely struggle with this problem. Two fruits of their efforts are the concept of law as a "legal system," and the concept of "sources of law."

A. Law as Legal System

The concept of "legal system" is probably a product of a passion for systems that took root in German Neo-Scholasticism in the sixteenth century, was revived by German proponents of natural law in the eighteenth century, and dominated the efforts of German jurists through the nineteenth century.[8] It is so ingrained in both the American and the Chinese way of thinking, that in the latter part of the twentieth century, lawyers and scholars of law do not bother to define it.[9] The

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6. *See infra* Part II.

7. To my knowledge, no other studies are devoted to analyzing this question. A few scholars have studied the role of the media and technology in transitions toward democracy or market economies in places other than the PRC. Frances H. Foster's groundbreaking work on post-Soviet Russia, in which she examines the role that its press plays in the emergence of democracy there, and Daniel Katzel Berman's study of a similar development in Taiwan, are the preeminent examples. *See* Frances H. Foster, *Freedom With Problems: The Russian Judicial Chamber on Mass Media*, 3 PARKER SCH. J. E. EUR L. 141, 146 (1996); Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT'L L. 675 (1993); DANIEL KATZEL BERMAN, WORDS LIKE COLORED GLASS: THE ROLE OF THE PRESS IN TAIWAN'S DEMOCRATIZATION PROCESS 82 (1992); Thomas Heller, *World Trends*, STANFORD LAWYER 13 (1990).

8. JAMES Q.WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 37, 48-49, 80 (1990).

9. *See, e.g.*, Barry Weisberg, *Cure for A System In Chaos*, NAT'L L. J., Oct. 19, 1992 at 13 (decrying "[t]he chaos of our legal system" in a journalistic fashion, but not defining "legal systems" as such); *see generally, e.g.*, Jan-Reinard Sieckmann, *Legal System and Practical Reason: On the Structure of a Normative Theory of Law*, 5 RATIO JURIS 288 (1992) (providing a more erudite example without defining the concept of a "legal system"); Jose Juan Moreso and Pablo Eugenio Navarro, *Some Remarks on the Notions of Legal Order and Legal System*, 6 RATIO JURIS 48, 49 (1993) (purporting to "clarif[y] the systemic nature of law," but not defining the term "legal system"); *but see* Thomas D.

term connotes a sense of comprehensiveness, internal cohesion, and national boundary. In other words, the legal system contains all that pertains to law within a nation state, and all that pertains to law within a nation state operates in coordination with everything else that pertains to law in the nation state.

A methodological problem arises, which is how do you know what pertains to law and what does not? The "formalists" among these jurists solve this problem by focusing on a narrow band of enacted law, principally statutes, constitutions, and judicial opinions that are officially recognized as legal authority.[10] The "functionalists" among these jurists developed another widely accepted method in the field of comparative law for determining what comprises a legal system. They look at the functions of law and which societal needs or demands it fills and which it does not.[11] Unfortunately, functionalism also leaves unanswered the question of how we know law when we see it, because the method neither embraces the possibility that law can take infinitely various forms, nor does it identify a set of attributes of law in all cultures and all times. The method has been successful, however, in broadening the narrow, positivistic view of law that gained sway in the nineteenth century in Europe and the United States to include institutions and society.

Applying a functionalist conception of a legal system to China's media, one role of the media is readily apparent, that is the role of media as educator of the public about the law.

1. Media as Legal Educator

Since at least the fourteenth century, mass media has functioned as a channel of communication between the state and society in China. China's rulers developed devices for disseminating central policy to the populace without personal contact with them. Emperor Zhu Yuanzhang, the founder of the Ming Dynasty, used "Placards of People's Instructions" and "Grand Pronouncements" to communicate the law *en masse* to his subjects.[12] The Placards were imperial decrees that contained references to the Ming Code and to the Grand

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Barton, *The Structure of Legal Systems*, 37 AM. J. JURIS. 291, 292-93 (1992) (attempting to define "legal system"); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992) (attempting to define "legal system").

10. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decises, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 169-70 (2006).

11. Functionalism as a method used to research in the field of comparative law is superbly described and analyzed in Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61-65 (1984) (describing and analyzing functionalism as a method used to research in the field of comparative law); Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspective*, *in* LAWYERS IN SOCIETY: COMPARATIVE THEORIES 1, 2-4 (Richard L. Abel & Philip S.C. Lewis, eds., 1988) (describing and analyzing functionalism as a method used to research in the field of comparative law); Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293, 293-294, 330-32 (1991) (describing and analyzing functionalism as a method used to research in the field of comparative law).

12. FARMER, *supra* note 3, at 15-17.

Pronouncements, and also added to the codified law.[13] For example, one Placard exhorted people to pay taxes and perform their corvee labor duties, both as provided in the Ming Code.[14] Other provisions of the Placard added to the codified law by making certain codified provisions applicable explicitly to the *lijia*[15] elders, and making them responsible for enforcing the law at the local level.[16] The Grand Pronouncements were four groups of 236 imperial instructions promulgated between 1385 and 1387.[17] Zhu disseminated the Placards and Pronouncements through a variety of methods. The Ministry of Revenue was responsible for "clearly publish[ing] . [the Placards] throughout the realm," and students memorized the Pronouncements as assignments in school and investigated their enforcement while traveling in teams.[18]

Imperial programs during the period of Qing rule sent teachers and books around China to educate the peasantry about Confucian morals.[19] Chiang Kaishek conducted a similar program with newspapers during the Republican period, which was named optimistically "The New Life" movement,[20] and publicized its cultural policy and its Anti-Japan policy during the 1930s and 1940s through the press and film.[21]

Perhaps using the media to model Zhu Yuanzhang,[22] Mao Zedong and the central leadership of the CCP depended on film, radio, and print mass media during the Party's first several decades to channel official policy both to Party loyalists at the grass-roots level and to those who had not yet allied themselves with the Party.[23] With the national legislature and the judicial bureaucracy disbanded, when the media transmitted Party policy to those responsible for its implementation, it functioned as the only legal system of its time. Yet, the central government characterized as "education" both the media transmissions and the personal instruction of the public by cadres, who received their instructions through the media, perhaps because Mao Zedong promoted a negative view of

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13. *See id.* at 9-17.

14. *Id.* at 95.

15. *Lijia* were community structures for surveillance, security, and tax collection. Sarah Schneewind, *Visions and Revisions: Village Policies of the Ming Founder in Seven Phases*, 87 T'OUNG PAO 317, 332 (2001).

16. FARMER, *supra* note 3, at 98.

17. *Id.* at 53-54.

18. *Id.* at 102, Appendix Three (Jiao Min Bang Wen, *The Placard of People's Instructions* (originally found in *Ming Studies* 7:63-72 (George Jerlang Chang trans., 1978) and revised by Edward L. Farmer and Jiang Yonglin)).

19. FARMER, *supra* note 3, at 35-36.

20. JONATHAN T. SPENCE, THE SEARCH FOR MODERN CHINA 414-15 (1990).

21. *See* Stephen R. MacKinnon, *Toward a History of the Chinese Press in the Republican Period*, 23 MODERN CHINA 16 (1997).

22. FARMER, *supra* note 3, at 105.

23. Personal contact with "the masses" was the path to membership in the Party for youthful recruits, and Mao Zedong relied on young activists to carry out the purges of 1966-1968. The official media sent signals about whom the activists should target. *See* EZRA F. VOGEL, CANTON UNDER COMMUNISM 55, 322 (2d ed. 1969).

law.[24] When legal institutions and statutes reappeared in the late 1970s, the government portrayed them as part of the government's broader effort to guide the general population morally, politically, and economically.[25] Legal scholars of China identify an educative role of law in the 1980s. Michael Palmer, for example, contends that the PRC central government enacted the 1980 Marriage Law with the intention to educate the public about a new purpose for adoption with its provision on adoption.[26]

In its function of educating the population about law, the media is a vehicle, but an indispensable one, and one that exerts its own impact upon the legal system. According to Victor Li, the Party leaders used the media to publicize the law because China did not have lawyers or other legal professionals to serve as intermediaries between the central leadership and the masses.[27] While the capabilities of media allowed them to disseminate the law widely, the limitations of media simplified the message about law that was transmitted. As Li concluded,

> the law speaks directly to the general public through the mass media. The use of this channel affects the language of the law, which must be stated in simple colloquial terms rather than technical jargon. The specific rules cannot be very detailed or complicated, since the mass media can convey only broad ideas By using the mass media to communicate legal norms directly to the public, China in effect has taken a path to overcoming the public's ignorance of the law that we [in the United States] have rejected. China does not subscribe to the legal fiction that everyone knows the law, but instead has carried out a massive program of public education about the law. The scope of this program is as overwhelming in Chinese terms as the number of lawyers is astounding in American terms.[28]

Even after the number of lawyers in the PRC grew to exceed 100,000 at the end of the twentieth century,[29] the central government's program to educate the masses about law showed no signs of abating. In October of 1995, attorney Zhang Yong, Deputy Division Chief of the Publicity Department of the Beijing Bureau of the Ministry of Justice, described his job as helping to formulate a five-year plan for the education of ordinary people (the *laobaixing*) about the 152 laws that will be enacted in the PRC in the next five years.[30] That job entailed organizing

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24. *See* VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES 42 (1978).

25. *See id.*

26. Michael Palmer, *Adoption Law in the People's Republic of China, in* YEARBOOK ON SOCIALIST LEGAL SYSTEMS 9 (W.E. Butler ed., 1986).

27. LI, *supra* note 24, at 42.

28. *Id.* Li depicts in universal terms the need to educate the public about the law that governs it, and credits the PRC with doing a better job of this than the United States. *See id.* at 35-42.

29. *Number of Lawyers Rapidly Rising in China*, RENMIN RIBAO [PEOPLE'S DAILY], July 8, 2002, *available at* http://www.china.org.cn/english/Life/36430.htm.

30. Zhang Yong, Deputy Division Chief of the Publicity Dept. of the Beijing Bureau of the Ministry of Justice, Speech in Minneapolis, MN (Oct. 1995) (on file with author); Zhang Yong, Resume

"special legal lectures for top Chinese leaders," "[e]xamining and approving textbooks of specialized law which are edited by other government branches," and "supervising the production of 'Communication of Promotion of Mass Legal Education Magazine.'"[31] From Zhang's career path thus far, propaganda work appears to be plentiful enough to offer the loyal and energetic a fast track to prominence in the PRC government. At the tender age of 30, he had already obtained a Master of Law degree, interned in a law firm, interned as a judge, worked his way up through three positions in the Ministry of Justice, and published eight articles—one entitled "Mass Legal Education: A Tough Job in China," and another entitled "The Key to Public Legal Education Lies in Persistence and Implementation."[32]

As active as the legal education program continued to be, by 1995 it had changed to become more high-tech and more oriented toward entertainment than in 1980. The Ministry of Justice assigned four of its five bureaus jurisdiction over a different medium or media industry: 1) legal publications (newspapers and books); 2) audio-visual productions; 3) entertainment programs; and 4) companies that produce publications and videos for both domestic sale and for export.[33]

One example of an audio-visual production aiming to educate the public about law was a television program in Shanghai in 1993 called "Society's Classics."[34] It featured a segment called "Law's Letterbox" in which a lawyer from the Number 10 Law Firm of Shanghai answered questions about law that viewers wrote in to the program. One question was a reaction to a story the program had run earlier about a woman who abused her child, accompanied by gruesome photos. The viewer asked if there were any regulations prohibiting child abuse. The lawyer responded that there were some relevant Shanghai regulations that implemented the prohibitions in national criminal and marriage laws.[35]

Far from presenting the staff of the Ministry of Justice's propaganda departments with opportunities for developing maverick interpretations of the law, this legal education program is highly official and is linked to the top leadership by the oversight of the State Council. In addition to its need to conform to the dictates of the State Council, the Ministry of Justice coordinates its legal education work with the Party's Central Propaganda Department, as do other Ministries in Beijing.[36]

(Sept. 15, 1995) (on file with author). The Ministry of Justice is the central government executive agency in Beijing that oversees a nationwide effort to educate the public about central law and policy. Apart from operating law schools in major cities throughout the PRC, the Ministry sponsors a variety of less specialized legal education programs, such as lecture circuits into remote areas by junior law professors. Ministry of Justice: The People's Republic of China (2009), http://english.moj.gov.cn/.

31. Zhang Yong, *supra* note 30.

32. *Id.*

33. *Id.* A fifth bureau was responsible for investigating law enforcement. *Id.*

34. *Shehui jingzhuan--falu xinxiang*, (June 22, 1993) (viewed by the author).

35. *Id.*

36. *Carry Out In Still Better Way Activities That Enjoy Ardent Support of People*, RENMIN RIBAO

2. Media as Legitimizer and Enforcer of the Law

Do the media's transmissions related to law in the PRC perform functions other than an educative one? Yes; and these functions are even closer than an educative function is to what makes media part of the legal system of China. The media in China also legitimates the law of China and helps enforce it.

Scholars of Chinese law long have argued that law legitimizes the government that promulgates it and enforces it.[37] This notion, though a mainstream view in American scholarship on China, would appear to turn on its head the traditional Chinese doctrine of the Mandate of Heaven, where virtue and harmony in the realm signaled the legitimacy of the imperial regime, and the laws the desperate resort to, violent impositions of order used only by a usurper. The Chinese classics stressed the ruler's influence on morals throughout the realm by the sheer force of example.[38] Indeed, one counterargument to the legitimizing function of law in China is that law does not, and never has, legitimized its makers and enforcers in China because law must be backed up with force in order to be enforced.[39] This counterargument, in my view, however, has to be treated with caution. It is a relic of centuries of attempts to discredit the Chinese Legalist School of the fourth century B.C.,[40] and only partially reflects the way China has been ruled during the past six hundred years. The founder of the Ming Dynasty believed he was restoring the Mandate of Heaven and legitimacy to the throne by promulgating a law code.[41] Decades earlier, during the Yuan Dynasty, the prominent neo-Confucian group of *Jinhua* literati promoted law as a tool for

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[PEOPLE'S DAILY], Feb. 15, 1996, at 1 (*translated to English from PRC: Commentator Praises Two Mass Support Activities*, FBIS-CHI-96-039, Feb. 27, 1996) (on file with author). This Department does not appear to disseminate the most important economic regulations. Interview by the author with Shen Xiaohong, Director of the Council for Int'l Educ. Exchange Nanjing University Program, in New Haven, CT (Aug. 11, 1996) (on file with author).

37. Hilary K. Josephs, *Labor Law in a 'Socialist Market Economy': The Case of China*, 33 COLUM. J. TRANSNAT'L. L. 559, 560, 581 (1995); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325, 358 (1994) ("Efforts at legal reform . . . represent an attempt by the post-Mao regime to rest legitimacy in part on an ideology of formal law . . . . [T]he post-Mao regime's decision to ride the tiger of legal reform has created an interdependency between legal culture and political legitimacy for the first time in the PRC's history--leaving a lasting legacy that will influence the relationship between law and politics for some time to come.").

38. Benjamin Schwartz, *On Attitudes Toward Law in China*, *in* GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27, 31 (1957) (A good ruler and his ministers would, on the one hand, provide the people with an example of proper behavior according to *li* . . . , and on the other hand would educate the people in *li*.).

39. *See* ZHENGYUAN FU, CHINA'S LEGALISTS: THE EARLIEST TOTALITARIANS AND THEIR ART OF RULING 11-13 (1996). Epstein argues that in Europe, in contrast to China, "law functions as an ideology, that is, a system and structure of legal ideas which secure compliance without the need for legitimation outside the legal system . . . ." EPSTEIN, *supra* note 4, at 214.

40. For an accessible discussion of the tenets of the Legalist School, see ZHENGYUAN FU, CHINA'S LEGALISTS: THE EARLIEST TOTALITARIANS AND THEIR ART OF RULING (1996). Fu's portrayal of Chinese legalism itself builds a case against this tradition.

41. FARMER, *supra* note 3, at 81.

restoring order and morality.[42] Certainly, Comrade Deng Xiaoping and his successor President Jiang Zemin have portrayed the PRC legal system as a way to restore order and morality after the Cultural Revolution and the infiltration of foreign influences during the Open Door era.[43]

In the latter part of the twentieth century, legal comparativists and historians commonly viewed the enforcement of law as a part of a legal system. Comparativists Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe view the social context of the law in any country to hold important clues about how the law is enforced.[44] Leading scholars in the field of Chinese law build into some of the most influential studies in the field, the assumption that the implementation or enforcement of the law is an integral part of the PRC's legal system.[45]

It is not readily apparent how media transmissions about law might help either to legitimize the government or to enforce law. Political legitimacy seems to imply some agreement between ruler and ruled, whereas print and broadcast media permit only a one-way communication. Enforcement seems to imply some sort of coercion or threats backed up with violence, while the media simply convey messages and images. It is difficult to see how dispensing information, with its passive connotations, can enforce law, which is something with active connotations. Law enforcement also conjures up images of personal knowledge and contact, such as police officers arresting suspects, and prosecutors arguing for the conviction of criminal defendants, whereas media permit communication without personal contact. Yet both functions of the media in China's legal system are apparent in the use of various media by China's rulers since the fourteenth century. For at least six hundred years, the state-run media have attempted to legitimize the ruler by showing him to be in sync with the values of the Chinese population. The same media also attempted to enforce the ruler's values by inculcating in the public his models for behavior.

Zhu Yuanzhang's approach to governing was populist according to Edward Farmer, in the sense that the written instructions upon which Zhu's reform

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42. *Id.* at 27-28.

43. *See Deng Xiaoping*, CHINA DAILY, June 25, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-06/25/content_342508.htm; Zhaohui Hong & Yi Sun, *In Search of Re-ideologization and Social Order*, *in* DILEMMAS OF REFORM IN JIANG ZEMIN'S CHINA, 42-46 (Andrew James Nathan, Zhaohui Hong, & Steven Smith eds., 1999).

44. *See* MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 11 (2nd ed., 1994).

45. *See, e.g.*, William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 11-18 (1993); Donald C. Clarke, *What's Law Got To Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 30-36 (1991); Sharon Hom, *Female Infanticide in China: the Human Rights Spector and Thoughts Towards (an) other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 263-73 (1992); Pitman Potter, *Riding the Tiger: Legitimation and Legal Culture in Post-Mao China*, 138 CHINA Q., (June 1994).

programs depended were disseminated directly to the people.[46] Yet the messages in the "Placards of the People's Instruction" and "Grand Pronouncements" were populist in the additional sense that they were designed to restore widely admired Han Chinese ideology and customs after centuries of rule by foreigners; and thus, they showed Zhu's solidarity with his subjects.[47] For example, one placard provided that the *lijia* elders should discipline "rowdies" and urge the people "to do good" and endure minor conflicts without resort to litigation.[48] This last exhortation, in particular, rung with a sense of the Mandate of Heaven, which valued harmony over the airing of disputes. The placard further provided that six times a month, children were to guide blind, physically disabled, or old people through the village streets to ring a bell and shout "be filial to your parents, respect superiors, maintain harmony with neighbors, instruct and discipline sons and grandsons, live and work in peace and contentment, do no wrongful acts."[49]

Using these placards and pronouncements to exhort his subjects to follow traditional Chinese models of inter-generational behavior was also part of an authoritarian approach to governing, in that Zhu attempted to change his subjects by enforcing standards that he selected and formulated.[50] He delegated to the *lijia* elders the responsibility to supervise all the farming in their locality, and he exhorted each person, particularly those in Henan and Shandong Provinces, to produce more food and cloth of silk and cotton.[51]

Although the imperial governments during the Qing Dynasty, the regime of Yuan Shikai during the early Republic, and the republican government led by Chiang Kaishek's Guomindang were never able to take control of the most widely circulating newspapers in order to funnel their own messages through them, these governments censored newspapers with impunity and the Guomindang's Ministry of Central Propaganda dispensed central policy to the public through its own newspapers such as the "Central Daily."[52] The Guomindang censored even the "small newspapers," a term

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46. FARMER, *supra* note 3, at 105.

47. *Id.* at 104-06.

48. *Id.* at Appendix Three ¶¶ 14, 16, 18 (Jiao Min Bang Wen, *The Placard of People's Instructions* (originally found in *Ming Studies* 7:63-72 (George Jerlang Chang trans. 1978) and revised by Edward L. Farmer and Jiang Yonglin)).

49. *Id.* ¶ 19.

50. *See id.* at 13-17.

51. *Id.* at 195, 203-05; *see also id.* at 110-13 (discussing Zhu Yuanzhang's efforts to both reflect and to change Chinese social norms with the law he promulgated). The neo-Confucian doctrines that Zhu Yuanzhang made the foundation of his government were popular in the sense that private teachers and scholars during the Tang and Song dynasties propagated them before they were made part of the state's ideology. *See id.* at 25-32.

52. *See* QIN ZHAODE, A HISTORY OF SHANGHAI'S MODERN PRESS 59-100 (1993) (on file with author); DANIEL K. BERMAN, WORDS LIKE COLORED GLASS: THE ROLE OF THE PRESS IN TAIWAN'S DEMOCRATIZATION PROCESS 100-21 (1992); Stephen R. MacKinnon, *Toward a History of the Chinese Press in the Republican Period*, 23.1 MOD. CHINA 3, 15-17 (1997); Sophia Wang, *The Independent Press and Authoritarian Regimes: The Case of the Dagong bao in Republican China*, 67.2 PAC. AFF. 216, 221, 229, 233, 240 (1994); *see also* Zhiwei Xiao, Film Censorship in China, 1927-1937 134-170

coined as early as 1917 in Shanghai, where the genre was born. At that time, the term reflected both the short length of the pieces published and the amusing nature of their content.[53] Although many of the papers specialized in popular topics of particular interest to Shanghainese of the time, such as late Qing art, the Guomindang feared the potential of these papers for political resistance, and enacted regulations that limited their content to simple and trivial topics, such as celebrity gossip, and prohibited them from publishing on foreign or domestic affairs.[54]

The Chinese Communist Party [quickly] took advantage of the capabilities of the new electronic media of the 1920s and expanded the scope of both the legitimizing and enforcing functions of the state-run media. [In its early years,] the Party focused on solidifying its control of the press, radio, and film, and in sending messages through these media that showed its solidarity with the people. To these ends, in the 1930s, a vibrant period for both the press and Shanghai's film industry, the Chinese Communist Party ran its own newspapers[55] and organized China's first film society.[56] In the 1930s and 1940s, Communists produced films designed to show the Party's patriotism by emphasizing its anti-Japan stance.[57] By 1953, the Chinese Communist Party had banned foreign films and turned China's film industry into a mouthpiece for Soviet and Chinese communism.[58] At the same time, the Party closed or assumed control of the radio stations and of the hundreds of newspapers that had flourished in Shanghai, Canton, and other cities during the Republican era.[59] In the 1940s and early 1950s, these publications publicized the Party's widely heralded efforts to give land to poor farmers.[60]

During the important political movements of the 1950s and 1960s, the Party used the media under its control to attempt to influence public behavior. Mao Zedong and other top leaders sent signals through the

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(1994) (unpublished Ph.D. dissertation, University of California, San Diego) (on file with author).

53. Lee, *supra* note 1, at 239, citing ZHAODE, *supra* note 52.

54. *Id.* at 133-134.

55. *Id.* citing MacKinnon, *supra* note 52, at 3, 4-5, 7, 16; ALAN P. L. LIU, MIT CTR. FOR INT'L STUD., The Press and Journals in Communist China 8-12 (1966).

56. Lee, *supra* note 1 at 133. citing CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA 161 (Wimal Dissanayake ed., 1988).

57. *Id.* citing PAUL CLARK, *The Sinification of Cinema: The Foreignness of Film in China, in* CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA 177-80 (Wimal Dissanayake ed., 1988).

58. *Id.* citing CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA, *supra* note 57, at 161-63; *see also* VOGEL, *supra* note 23, at 83-84; MA QIANG, *Chinese Film in the 1980s: Art and Industry, in* CINEMA AND CULTURAL IDENTITY: REFLECTIONS ON FILMS FROM JAPAN, INDIA, AND CHINA 166-67 (Wimal Dissanayake ed., 1988); CLARK, *supra* note 57, at 177-80.

59. Lee, *supra* note 1, citing VOGEL, *supra* note 23, at 83-88.

60. *Id.* citing VOGEL, *supra* note 23, at 111, 152; *see* LIU, *supra* note 56, at 34-36.

> press and radio to political activists about whom to target, how vigorously to implement Party programs, and which sanctions to mete out to those who resisted.[61] Local-level cadres followed the instructions they received through the media to enforce central campaigns through personal contact with the people in their jurisdiction.[62] Personal contact with "the masses" was the path to membership in the Party for youthful recruits, and Mao Zedong relied on young activists to carry out his most radical programs, such as land reform and the purges of 1966-1968.[63] In official terms, the central leadership by the end of the 1970s, had a commitment to "mass participation and mass control," which it accomplished through "communication with the masses" directly by media or by way of cadres informed by media.[64]

Where the media communicates the law to those responsible for enforcing the law, the media plays a clear role in law enforcement. But how do media transmissions legitimatize the law-maker where the law-maker is not present to obtain the public's endorsement? And how do media transmissions sent directly to the public enforce the law that is being communicated? In other words, where no human being is present to enforce the acceptance of the message, how might the media achieve the kind of transformation in the viewer that would lead to voluntary compliance with the law? Two prominent sociological theories of law enforcement help to explain both of these processes. In one theory, Emile Durkheim maintained that the state reinforces society's values when it punishes criminals.[65] In the other, Michel Foucault argued that the state inculcates norms when it punishes criminals.[66]

Durkheim's theory of punishment emphasized its communitarian nature. When the state subjects an individual to its penal institutions, he asserted, the state expresses the outrage of the "collective conscience," with the result that society grows healthier and more unified.[67] As David Garland interprets Durkheim, punishment is a ritual, "directed less at the individual offender than at the audience of impassioned onlookers whose cherished values and security had been momentarily undermined by the offender's actions."[68]

Foucault demonstrated that the state valued its subjects' labor and physical submission, even when those punishments were done within the hidden confines of

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61. Lee, *supra* note 1, *supra* note 23, at 55-59.

62. *Id.* citing VOGEL, *supra* note 23, at 55-59, 200.

63. *Id.* citing VOGEL, *supra* note 23, at 55, 111, 152, 200, 202, 208, 211, 321-23 (documenting clear examples of path to membership in the Party).

64. *Id.* citing LI, *supra* note 24, at 42.

65. DURKHEIM, *supra* note 4, at 105-10.

66. FOUCAULT, *supra* note 4, at 92-101.

67. *See* DURKHEIM, *supra* note 4, at 80, 102-105, 108-109.

68. David Garland, *Sociological Perspectives on Punishment*, 14 CRIME & JUST. 115, 123 (1991) (referring to Durkheim's view of punishment).

a prison.[69] The rigorous discipline of timetables and work meted out onto the bodies of prisoners inside the prisons induced the self-discipline of work regimens and productivity among the middle classes by modeling something less offensive and closer to the daily lives of people than public corporal punishment would have. In this way, penal servitude "insert[ed] the power to punish more deeply into the social body" than did public punishment.[70] Sexual behaviors are regulated with a similar system. He observed that, in classical Greece and Rome, leading authorities wrote popular treaties that prescribed regimens for the body that helped instill self-discipline.[71] Spiritual or philosophical masters or directors helped people "train" their habits to avoid pleasure.[72]

Although they opened our eyes to the vital role played by communication from law-giver to subject, neither Durkheim nor Foucault specified the exact means of communication by the state to the populace. Needless to say, media do not figure into their visions of the relationship between legal enforcement and society, but their theories are consistent with media serving as the means of communicating the state's norms. In fact, each author so stresses the importance of this communication in the criminal justice systems of Europe, that the next question really is "by what means?" Durkheim does not explain whether the healing and unifying effects of official punishment can occur without society knowing about the act of punishment. It is possible that Durkheim had in mind a kind of invisible channeling that did not depend on actually informing society about the punishment. The church played a role, in Durkheim's view, in inculcating morals, and in so doing performed the communication about punishment that would otherwise been left to the state. In the absence of the church, however, the beneficial effects of punishment that Durkheim envisioned are felt when the state communicates to society the fact of its law enforcement. Thus, when the media disseminate information about retributive acts performed by the state, they provide a means for satisfying deeply felt needs of society.

By pointing us to the vindication felt by observers of criminal punishments, Durkheim's framework helps explain how the media helps to legitimize China's law. This dynamic can be seen by analyzing televised footage of criminal convicts being led to their execution, and of criminal trials that were broadcast on the evening news in the mid-1990s.[73] The convicts were rarely allowed to speak, were not allowed to sit, their heads were bowed, and their hands were bound with rope.[74]

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69. FOUCAULT, *supra* note 4, at 28, 104-112; *see also* Garland, *supra* note 68, at 138-39.

70. *Id.* at 82 (referring to 18th Century penal reforms).

71. *See* MICHEL FOUCAULT, THE CARE OF THE SELF: VOLUME 3 OF THE HISTORY OF SEXUALITY, 99-147 (Robert Hurley trans., 1986).

72. *See id.* at 39-45.

73. Shanghai Evening News (television broadcast in Mandarin June 25, 1993) (a criminal trial in the Pudong People's Court broadcast on the evening news in Mandarin in Shanghai) (viewed by the author).

74. *Id.* An American reporter observed that "Mass trials are a fixture on TV news, showing prisoners bound with rope, their heads bowed." George Wehrfritz, "*Crime: 'You Die, I Live,*'" NEWSWEEK, July 22, 1996, at 67. The footage of criminal convicts being led to their execution was

Footage of the capture of criminals in the act was also broadcast. On one news show, for example, a reporter in a live broadcast had staked out a brothel and surprised a prostitute and her client at some point during their transaction.[75] As the police restrained the hapless couple and hurried them into the police car, the reporter asked them what they were doing and how they arranged it.[76] Fictional stories depicted criminal behavior in a negative light, and the official response to it in a positive light. One television drama broadcast in Shanghai showed petty corruption by a cafe owner. Police, impervious to his little bribes, carefully investigated, nailed him in the act, and gave him a citation.[77] Privately, the cafe owner was unrepentant, and this portended future trouble for him.[78]

In appealing to the viewers' sense of social face and propriety, these broadcasts laid the foundation for the kind of communion between state and society envisioned by Durkheim.[79] It was a communion of mutual reinforcement. These broadcasts of criminal behavior and punishment appealed to the viewer's sense of social face and propriety by inviting the viewer to distance himself or herself from the actions portrayed as illegal and the punitive consequences of those actions, and by depicting the illegal behavior in a negative light and the official action in a positive light. Those who were charged with criminal offenses appeared to be ashamed, and were treated as though they had done something offensive and had to be separated from society. The enforcers of the law never appeared to act impetuously or violently, but instead led to punish only those who had done something flagrantly shameful; and so the state appeared to respond to wrongful acts with forbearance and good cause. The broadcasts also appealed to the viewer's sense of vulnerability and need for protection by portraying the purpose of government intervention as the protection of society from criminal deviance.

Durkheim does not shed light upon how vindicating the media consumer's sense of social face and propriety or stimulating his sense of need for state punishment of others might lead to the consumer's own voluntary compliance with the law, but Foucault's theory of the relationship between the state and society does shed light upon the law-enforcing function of state-run media in the PRC.[80] Just as he observes that the state communicates to society through the operation of prison discipline, the desirability of voluntary discipline, and backs it up with the

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broadcast in Hong Kong and recounted in an interview by the author with Professor Joseph Man Chan, of the Department of Journalism and Communication, Chinese University of Hong Kong. Interview with Professor Joseph Man Chan, Department of Journalism and Communication, Chinese University of Hong Kong, in Minneapolis, MN (June 29, 1996) (on file with author).

75. Shanghai Evening News (television broadcast in Mandarin June 25, 1993) (viewed by the author).

76. *Id.*

77. Shanghai Television Drama Series (television broadcast in Mandarin May 28,1993) (viewed by the author).

78. *Id.*

79. *See* DURKHEIM, *supra* note 4, at 105-10.

80. *See* FOUCAULT, *supra* note 4, at 23, 137-38, 195-228.

threat of forced compliance, the state may transmit through the media images to which the state attaches its approval, and thereby exhort the public to follow these as models.[81] The exhortation comes packaged with the threat that the state will force reeducation upon the individual who does not conform his behavior, on his own, to the model.

The television broadcasts described above aimed to instill in the viewer a kind of self-discipline, which was a part of the submission by the individual to the state envisioned by Foucault.[82] They implied that the viewer did not have a choice about whether to accept the message about these actions. They encouraged the audience to identify with those who were caught and punished because they embedded these messages in stock characters and in situations that were familiar to viewers. The broadcasts appealed to the viewer's sense of shame by exposing the plight of an offender who has been caught. They also appealed to the viewer's sense of fear by portraying the government's punishment of offenders as swift and strict, thereby conditioning the expectations of the viewer about the likelihood and the type of correction, if the viewer defied the official interpretation of the law. By showing people caught in the act, the broadcasts also undermined the viewer's sense of privacy and strengthened the suggestion of surveillance of the viewer.

Although Durkheim and Foucault supply conceptual frameworks that reveal how communication of the fact of law enforcement both legitimizes the law and attempts to enforce the law, Durkheim focuses on criminal punishments and Foucault on prisons. Can media transmissions play a role in areas of the legal system that do not deal with criminal law? The essential element of criminal law, upon which Durkheim and Foucault focus, is coercion. In Durkheim's model of criminal punishment, the state metes out coercive violence against the convict in order to appease the collective conscience.[83] To Foucault, the communication to society of legal punishments is itself coercive.[84] By communicating a model for behavior along with the threat of forced compliance if voluntary compliance is not forthcoming, the state co-opts the individual to, in essence, coerce himself or suffer the consequence of coerced restraint and retraining.

To grasp the scope with which media operates within China's legal system, then, it is necessary to understand whether coercion is limited to criminal sanctions. Legal scholar Edward Epstein argues that all law in the PRC is enforceable only with the threat of coercion,[85] and according to anthropologist

81. *See id.*

82. *See id.*

83. DURKHEIM, *supra* note 4, at 80-81, 102-05.

84. *See generally* FOUCAULT, *supra* note 4.

85. Epstein argues that in the PRC, coercion is necessary to make law constrain behavior. He goes so far as to identify coercion as the essential difference between the enforcement of Chinese law and of European law. Epstein, *supra* note 4, at 214. In Europe, he argues, law does not need coercion for its enforcement, because "law is accepted into consciousness because of its ideological impact," Edward J. Epstein, *Law and Legitimation in Post-Mao China*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 30 (Pitman B. Potter, ed., 1994). Under this theory, state-run media would have to

Carole Nagengast, coercion includes subtle forms of emotional manipulation, or threats of acts other than "direct violence."[86] She identifies various manifestations of coercive violence that go beyond the "practical, physical, visible, and personal," to include the "symbolic," the "emotional," the "invisible (as in witchcraft)," and "from the forces of society."[87] States can perpetrate all of these forms of violence, she argues, and they often use images of "work" to describe such violence in a way that mollifies concern about or wins support for it.[88]

In the PRC, there is abundant evidence that many norms, for many people, have been enforced with means other than physical violence. The government of the PRC in the 1950s and 1960s developed rituals symbolic of the state's control over the individual and methods of emotional persuasion, which were refined in millions of "mass criticism pronouncement meetings" and small group "struggle" or "education" sessions throughout the PRC.[89] The officials who conducted these events arranged the participants so that government officials were at the center, the representatives of the People's Liberation Army were in a ring around them, and the other participants were in a larger ring around them.[90] This pattern reinforced the message that the Chinese Communist Party was the primary surveyor of behavior, the People's Liberation Army provided the secondary ring of surveillance, and the masses formed the tertiary ring of surveillance. Rural cadres in the 1950s, 1960s, and early 1970s were instructed by the central government in the communication techniques and the terminology of the hour, so that the cadres could personally "educate" the masses.[91] This process turned the cadres into channels of communication not just of the current policy from the central leadership to the masses, but also of the behavior of the masses to the central leadership.[92]

Whether such efforts to enforce central policy went so far as to brainwash the public, at least in the cities, is debatable,[93] but it nonetheless aimed to instill values through time-honored Chinese techniques of rote memorization and recitation of pithy texts.[94] The PRC government has used a variety of devices to control

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serve as an instrument of coercion if it were to function as a part of the legal system of the PRC. Epstein does not identify what coercion is, however, and so does not illuminate how messages transmitted by media might coerce.

86. Carole Nagengast, *Violence, Terror, and the Crisis of the State*, 23 ANN. REV. OF ANTHROPOLOGY 109, 114 (1994).

87. *Id.* at 111.

88. *Id.* at 123-24.

89. MICHAEL R. DUTTON, POLICING AND PUNISHMENT IN CHINA: FROM PATRIARCHY TO "THE PEOPLE" 262-70 (1992); *see* Lung-Sheng Tao, *Politics and Law Enforcement in China: 1949-1970*, 22 AM. J. OF COMP. LAW 713, 744-45 (1974).

90. DUTTON, *supra* note 89, at 269.

91. *See id.* at 269-70.

92. *See* Lung-Sheng Tao, *supra* note 89, at 745.

93. Yuefeng Wang, *Informal Behaviour Control has Never Dominated in China*, 1 ASIA PAC. L. REV. 104, 107-08 (1992).

94. William Alford skillfully identifies this approach to education in his work on intellectual property law in China. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE:

individuals, including not just incarceration, where representatives of the state could exert physical control over individuals, but also neighborhood intelligence operations, which facilitated the socialization of individuals who lived in government-subsidized housing.[95]

In the PRC, then, disseminating messages from the center through centrally orchestrated media to broad swathes of the population is one method of communicating to the public central interpretations of law, but also a method that is designed to accomplish a variety of goals. These communications are delivered to educate the public about the correct interpretations of the law, to legitimate the law by portraying the lawmakers as reinforcing widely held public values, and to enforce the law by persuading about the merits of adhering to the correct interpretations of the law and threatening forced reeducation if these interpretations are not adhered to. While the personal application of social and psychological pressure helps to achieve all three goals, there can be little doubt that, given the PRC government's vast program to communicate central law to its subjects and to shape public behavior in conformity to that law, the media form an additional and important component of the Chinese government's legal system.

B. Media as Sources of Law

Though media transmissions function as an integral part of the PRC legal system, can they also be considered "sources of law"? In other words, can a lawyer discern the law in the PRC from media transmissions? This is more difficult to show than to show that media transmissions form a part of the legal system of the PRC because the concept of "sources of law" is narrower than the concept of "legal system."[96] The concept of "sources of law" was developed by law scholars in continental Europe, where law tends to be conceived in greater abstraction than it tends to be in the United States,[97] but it is a concept with practical implications because lawyers need to know where to look for the law in order to advise clients in an accurate and fully-informed fashion, and legal scholars too need to know which materials contain authoritative articulations of the law.[98]

There is no consensus about the meaning of the concept of "sources of law," but it is nonetheless an important concept in the field of comparative law and perhaps one of growing importance to the field of statutory interpretation. The major comparative law textbooks in the United States and Germany use "sources of law" as a basic, organizing concept.[99] On the question of what constitutes

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INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 22, 27-29 (1995).

95. *See* DUTTON, *supra* note 89, at 189-245.

96. JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 50-51 (1994).

97. *See* KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 70 (1992).

98. This point forcefully comes across in THOMAS O'MALLEY, THE ROUND HALL GUIDE TO THE SOURCES OF LAW 1-8 (1993); *see also* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 28 (1995).

99. *See* MERRYMAN ET. AL., *supra* note 96, at 937-944, 1276; RUDOLF B. SCHLESINGER, COMPARATIVE LAW xxviii-xxvix, 222, 494-653 (4th ed., 1980); ZWEIGERT & KOTZ, *supra* note 97, at

"sources of law," comparative legal scholars in the west divide into two camps, the formalists, and their counterpoints, the functionalists.[100] Formalists view enacted law as the predominant and primary source of law in "civil law countries," supplemented by custom and by judicial and academic interpretations of the law.[101] Almost as an afterthought, formalist comparativists classify constitutions as enacted law also.[102] Formalists would expand the concept of "primary sources of law" in the United States and other "common law countries" to include judicial opinions along with enacted law, but would add little else.[103] To the formalist, all of these sources of law wherever they appear, are written and publicly published, and contain precisely articulated rules, which constrain public behavior and eviscerate the discretion of judges.[104] To the formalist, the test of whether something qualifies as a source of law might be whether a judge would be influenced by the document.

The functionalist seems less interested in whether something is a source of law, but rather places emphasis on whether law solves a problem in society.[105] Still, it is fair to say that the functionalist looks to find and understand the sources of law, only he looks to society more broadly, to "politics, sociology, psychology" and elsewhere.[106] Legislative history—the record of the process of a statute's enactment—is a classic example of a source of law, which functionalists recognize more readily than do formalists.[107] Law, as a tool of the government to engineer

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71; GLENDON ET. AL., *supra* note 44, at xv, 192. For a comment about the lack of consensus about a definition of "source of law," and the importance of the concept, see CRUZ, *supra* note 98, 28-29 (1995).

100. The classic identification and explanation of the distinction between formalism and functionalism is in Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59-67 (1984).

101. *See* CRUZ, *supra* note 98, at 28.

102. *See id.*

103. *See id.* at 28, 44.

104. Comparative legal scholars Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe count "enacted law," "custom," and "general principles of law" (developed by judges in their published decisions), as the "primary sources of law" in civil law countries, and consider judicial and academic interpretation of the law as lesser sources of law. GLENDON ET. AL., *supra* note 44, at 193-214. A traditional legal authority in the United States defines sources of law as the origins from which particular positive laws derive their authority and coercive force.
See BLACK'S LAW DICTIONARY *Source of Law* (9th ed. 2009).

105. *See* Gordon, *supra*, note 100, at 64-71. A notable example of the functionalist focus on solving societal problems is the six-step method for comparative legal research outlined in Mauro Cappelletti, *Comparative Law Teaching and Scholarship: Method and Objectives*, ASIA PAC. L. REV. 1, 2-5 (1994).

106. The renowned legal comparativist Rene David epitomizes this approach. Rene David, *Sources of Law*, *in* THE LEGAL SYSTEMS OF THE WORLD: THEIR COMPARISON AND UNIFICATION 3 (Rene David ed., 1984). Comparativist Peter de Cruz draws generally on David's work, when he states, "Ideally, one would need to examine politics, sociology, psychology and many other areas to seek a definitive answer to the problem of defining a 'source of law.'" CRUZ, *supra* note 98, at 28.

107. For explanations of what constitutes legislative history and commonly used techniques for interpreting it, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 698-776 (1988). The authors mention that Justice Scalia does not view as helpful reports of legislative committees responsible for drafting or overseeing the passage of a bill. *Id.* at 715. By all accounts, Justice Scalia is a formalist, in that he

society or exert control over society, is an example of a functionalist conception of law.[108] Tests of a source of law for the functionalist would include whether it fits into the "legal landscape,"[109] is meant to shape behavior, or actually exerts an impact on society.

Although they may differ about how far beyond enacted law they are willing to look for sources of law, both formalists and functionalists view authoritative interpretations of the law as sources of law. Neither formalists nor functionalists, however, name media transmissions as authoritative interpretations of the law, or as any other type of "source of law." Instead, both take for granted that only judges and scholars publish authoritative interpretations of the law, with the possible addition of the legislators who enact the statutes.

Should the focus by legal comparativists on the interpretations of law published by judges and legal scholars, and the omission by comparativists of any mention of media transmissions, be taken as a definitive exclusion of media from what are considered sources of law? No, it should not be. The fact that European and American comparativists have not considered media transmissions sources of law is more a function of inattention to the question and to the underdevelopment in comparative legal discourse of the definition of sources of law than of a reasoned exclusion of them.

Inattention to the question among western comparativists may be explained by their assumptions about the scale and importance of the dissemination of official information. In the American paradigm of positive law, with its emphasis on transparency and the fiction that its subjects are on notice about what the law contains, law is a kind of information. Given the rarity of any mention of government in the work of social scientists that study the dissemination of information in the United States,[110] government in the United States appears to

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favors the strict construction of legislative texts. In Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago and United Steelworkers of Am. v. Weber, the formalists on the United States Supreme Court showed themselves more skeptical of the pertinent legislative history than was the more functionalist wing of the Court. *See id.* at 70-84, 676-86 (citing to *United Steel Workers of* Am. v. *Weber*, 443 U.S. 193 (1979) and *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)). Judges known as legal realists or "legal process scholars" favor the use of legislative history. *See id.* at 593-94 (citing Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195, 199 (1982)).

108. *See* Gordon, *supra* note 100, at 74-75 (1984); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 814 (Richard Terdiman trans., 1987).

109. *See* ESKRIDGE, JR. & FRICKEY, *supra* note 107.

110. For prominent examples of studies of the dissemination of information and knowledge in the United States that contain virtually no mention of government, see RONALD G. HAVELOCK ET AL, PLANNING FOR INNOVATION THROUGH DISSEMINATION AND UTILIZATION OF KNOWLEDGE (1971) (especially Chapters 3 and 9); EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 293-309, 364-70 (4th ed.1995); ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920 (Alexandra Oleson & John Voss, eds., 1979); RONALD G. HAVELOCK, THE CHANGE AGENT'S GUIDE TO INNOVATION IN EDUCATION 210-211 (1973); DIANA CRANE, INVISIBLE COLLEGES: DIFFUSION OF KNOWLEDGE IN SCIENTIFIC COMMUNITIES (1972). *See also* Nathan Reingold, *National Science Policy in a Private Foundation: The Carnegie Institution of Washington, in* ORGANIZATION OF KNOWLEDGE IN MODERN

play a relatively minor role in the dissemination of information. The United States government does not even publish its own statutes and judicial opinions, but rather contracts with private companies to handle this job.[111]

Comparative legal study at its best endeavors to uncover the special features of the subject of study,[112] but this approach generally has not been applied to the question of sources of law. On the contrary, the predominant comparative treatments of sources of law have used the characteristics of the "production of law"[113] in Europe to develop models for all of the world's legal systems. Thus, all legal systems are either code-based systems or case law systems, which are called respectively, "Civil Law" or "Common Law" systems, terms that are historically and geographically specific to Europe.[114] Where deviations from the two types are recognized, the degree of deviation is the measure of the immaturity or the "lack of penetration" by one of the European legal systems of the legal system in question.[115]

In the true spirit of comparative analysis, China's methods of producing law should be examined *tabula rasa*, free from preconceptions about what a source of law looks like. At least two characteristics of law in China call for the inclusion of media transmissions in the sources of law. One characteristic is the close connection between positive law and central policy, which makes formal enactments only one of many emanations of state authority. The other characteristic, a lack of transparency of legal regulations, is a symptom of a system in which official interpretations of the regulations may be publicized in lieu of their texts.

Under the formalist approach, where sources of law are defined as that which binds judicial decisions, media transmissions in China serve as a source of law in

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AMERICA, 1860-1920, 313-41 (Alexandra Oleson & John Voss eds. 1979) (discussing the role of government and the founding of the Carnegie Institution of Washington); A. Hunter Dupree, *The National Academy of Sciences and the American Definition of Science*, *in* ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920, 342-63 (Alexandra Oleson & John Voss, eds. 1979) (discussing the role of government and the founding of the National Academy of Sciences).

111. Noel Cox, *Copyright in Statutes, Regulations, and Judicial Decisions in Common Law Jurisdictions: Public Ownership or Commercial Enterprise*, 27 STAT. L. REV. 185, 185 (2006).

112. This approach is advocated in the most learned assessments of the methods for researching Chinese Law. *See* William P. Alford, *On The Limits of 'Grand Theory' In Comparative Law*, 61 WASH. L. REV. 945, 947 (1986); Sharon Hom, *Engendering Chinese Legal Studies: Gatekeeping, Master Discourses, and other Challenges*, 19 SIGNS 1020, 1023 (1994); Stanley Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293, 293-95, 339-40 (1991).

113. This is the English translation of a phrase used by the French sociologist Pierre Bourdieu. Bourdieu, *supra* note 108, at 806; *see also* Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1155-59 (2008) (discussing Pierre Bourdieu's work).

114. *See* GLENDON ET. AL., *supra* note 44, at 44-64, 438-454 (discussing the history, culture, and distribution of civil and common law).

115. For discussions relating to this topic, *see* ZWEIGERT & KOTZ, *supra* note 97, at 63-73; Kensie Kim, *Mixed Systems in Legal Origins Analysis*, 83 S. CAL. L. REV. 693 (2010).

several ways. The *People's Daily* publishes "the full texts of statutes enacted by the National People's Congress," which bind all judges in the PRC.[116] The *People's Daily* also publishes "official versions of legislative history, official interpretations of the statutes, reports of current bills under consideration by the National People's Congress and by congresses below it, and notices of new policies of central administrative agencies," as do the official legal newspapers, namely the national *Legal System Daily*, and the regional versions, such as the *Shanghai Legal System News*.[117] These legislative histories, interpretations of statutes, reports of bills, and notices of administrative policies are "either not published elsewhere, and therefore [are] the only [authoritative] versions of these [authoritative] statements available to judges, or [are] replicas of the documents that the Chinese Communist Party sends all judges in the PRC for study in Tuesday afternoon "political study" (*zhengzhi xue*) sessions."[118]

The overlap between the publishers of these journals and those who decide on promotions of judges is nearly complete. Both of these legal newspapers are published by entities that are responsible for educating judges about Party policy. "The Ministry of Justice and the Chinese Communist Party's Central Politics and Law Commission supervise the publication of the *Legal System Daily*."[119] The Ministry of Justice is in charge of educating judges, and the Commission is now headed by Ren Jianxin, the President of the Supreme People's Court, which is in charge of disseminating to all judges presumably binding advisory opinions.[120] The *Shanghai Legal System News* is published by the Shanghai Bureau of Justice, which is a local arm of the Ministry of Justice and is overseen by the Chinese Communist Party's important body, the Shanghai Politics and Law Committee. Both are entities that supervise the conformity of judicial opinions to Party policy.[121]

Serving another function as a source of law,

> the legal newspapers communicate official delegations of legislative authority by notifying local governments about their authority to enact implementing regulations for specific statutes or policies. When the *Legal System Daily* published a notice of a new policy by two central

116. Wei Luo, *How to Find the Law of the People's Republic of China: A Research Guide and Selective Annotated Bibliography*, 88 L. LIBR. J. 402, 406-08, 423 (1996); Lee, *supra* note 1, at 210.

117. Lee, *supra* note 1, at 210.

118. *Id.*

119. Lee, *supra* note 1, at 212; Margaret Y. K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95, 110 n.87 (1991).

120. Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHIN. L. 145, 150, 171 (1993).

121. *See* Lee, *supra* note 1, at 210; *see also* Timothy A. Gelatt, *Legal and Extra-legal Issues in Joint Venture Negotiations*, 1 J. CHIN. L. 217, 230-31 (1987); SHANGHAI FAZHI BAO [SHANGHAI LEGAL SYSTEM NEWSPAPER], Mar. 25, 1996, at 1 (China) (on file with author) (providing an example of a report about a bill concerning two national real estate laws under consideration by the Shanghai People's Congress; Philip Baker, *Party and Law in China*, *in* STATE AND LAW IN EASTERN ASIA 17, 17-19 (Leslie Palmier ed., 1996) (providing a brief description of the Political-Legal Commission.

> departments, for example, it authorized all local governments to draft implementing measures for it.[122]

The close connection between law and policy in the PRC makes it difficult to argue that sources of law in the PRC include only legal interpretations published by judges, scholars, or legislators.

> Judges and bureaucrats throughout China rely on and are dependent on frequent communications of uncodified policy from the central leadership, who occupy the top Party positions and the top executive positions of President, Premier, and Vice Premier, or head the sixty-some administrative ministries and agencies headquartered in Beijing.[123] Each court in the four-tiered court system of the PRC is [officially] linked to the Chinese Communist Party [by the] practice of recruiting judges from the ranks of the Party and the People's Liberation Army, [and by] a procedure called "adjudication supervision" or "trial supervision" (*shenpan jiandu*), which permits certain officials to reopen an otherwise final civil or criminal judgment.[124] Each court must work with these officials, who are designated by the Party through the Standing Committee of the People's Congress at the same level as the court, [a procedure that] subjects judges to pressures to implement central policies in their decisions.[125] In a comprehensive examination of the Supreme People's Court since the legalization campaign began in 1979, Susan Finder concludes that in all of its work, the Court is 'still subject to Party leadership. The Court implements Central Political-Legal Committee and other Party initiatives and clears important policy decisions and other critical decisions with the Party leadership.'[126]

Where the power to appoint judges resides undermines the ability of judges to make law in China. That appointment process is as follows:

> the Party leaders at each administrative level, not the courts, appoint the most powerful judges in China, [the president of each court, who] in turn, nominate for appointment all the judges in [his] court, [and] the People's Congress at each level approves the appointments.[127] This makes courts beholden to local political interests and lessens their interest in following judicial precedent. Even the Supreme People's Court, which sits atop the national court system, does not appoint judges

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122. Lee, *supra* note 1, at 213; *see Junren chengche goupiao youxian de tongzhi* [*Notice About Military Personnel's Priority for Purchasing Train Tickets*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Oct. 4, 1995, at 3 (China) (on file with author).

123. Lee, *supra* note 1, at 214; *see* Finder, *supra* note 120, at 148, 151; Woo, *supra* note 119, at 107, 115.

124. Lee, *supra* note 1, at 214; *see* Woo, *supra* note 120, at 97.

125. Lee, *supra* note 1, at 214; Woo, *supra* note 120, at 102, 116-117, 119.

126. Lee, *supra* note 1, at 214; Finder, *supra* note 121, at 222.

127. Lee, *supra* note 1, at 215; Finder, *supra* note 121, at 149.

> and has been relatively powerless to change the appointment process.[128] The Court came closest to influencing appointments when it submitted to the National People's Congress draft legislation for upgrading the professional standards of the judiciary, one of the provisions of which attempted to shift the power of appointment to the court system.[129] The NPC passed the law in 1995 after dropping the provision.[130]
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> The relatively low status of legal scholars in the PRC further undermines their ability to contribute authoritative interpretations of the law. Courts take cognizance of academic articles on relevant legal issues, but they do not accord them as much weight as Supreme Court opinions or Party documents.[131]

PRC officials and China law scholars advance views about policy that are consistent with its status as a source of law. Some view policy as the driving force behind the law, with law functioning to cloth policy in a legitimate form.[132] Others depict policy as a supplement to enacted law, particularly where enacted law leaves gaps to be filled.[133] Another sees law as an expression of policy, but stresses that the power to turn this policy into law "is fragmented among numerous individuals and organizations."[134] The official position of the PRC central government is that policy is a source of authority, and that law is closely related to policy.[135] A popular legal treatise specifies that "where the legal structure is incomplete, policy must function as law,"[136] while two articles of the Organic Law of the Local People's Congresses and Local People's Governments of the PRC rank policy as co-equal with law as a source of authority.[137]

Although law reflects policy, the articulations of policy are not limited to formal legal enactments. Policy is expressed in the words of the top leadership, even those words that lack formal enactment. The dispensability of formal enactment derives from the concentration of authority at the center of the PRC

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128. Lee, *supra* note 1, at 215; *see* Finder, *supra* note 121, at 224.

129. Lee, *supra* note 1, at 215; Finder, *supra* note 121, at 224.

130. Lee, *supra* note 1, at 215.

131. Lee, *supra* note 1, at 214; *see* Interview with a PRC law professor (Nov. 1996) (on file with author).

132. For a path breaking study, see Frances Hoar Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L., 395, 413-14 (1982).

133. For Proponents of this view, see Tao-tai Hsia & Constance Johnson, *Lawmaking In China, Part IV*, E. ASIAN EXECUTIVE REP., Aug. 15, 1987, text at notes 57-58.

134. A proponent of this view is Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 87, (Pitman B. Potter ed. 56, 87 (1993).

135. *See* Hsia & Johnson, *supra* note 133.

136. *Id.*

137. Article 8 requires the local people's congresses to enforce "policies" along with "the Constitution, laws, . . . decrees, and orders of the state . . . ." while Article 27 prohibits municipal law that contradicts "policies" or "the Constitution, laws, . . . decrees, or administrative orders of the state . . " Quoted and cited in Tao-tai Hsia and Constance Johnson, "Lawmaking In China, Part IV," 1987 EAST ASIAN EXECUTIVE REPORTS, Aug. 15, 1987, text at notes 64-65.

government, where it resides in the paramount leader, and then in descending degrees to the individuals who occupy key posts in the Chinese Communist Party and in the Executive Branch of the government headed by the State Council. Power resides in the person of the ruler, and therefore, as a popular saying goes "whatever Deng Xiaoping says is the law."

The point that law in the PRC is not limited to formal enactments can perhaps be grasped more easily by considering that the enactment of words of authority may have less to do with their enforcement than would the publicity of those words. As a lover of classical Greek poetry puts it, Agamemnon's "communications officer said, 'Sorry, King, but the world will forget [the lesson you taught Paris in the Trojan War] overnight unless you let me sign up the blind poet Homer to write the authorized version.'"[138] A modern Chinese equivalent is Deng Xiaoping's trip to Shenzhen during his southern tour in 1992, the home of one of China's two stock markets.[139] These stock markets had been operating in China in some form since the early 1980s, and centrally approved local legal regulations had been enacted to govern them, but the stock markets languished in a dearth of confidence by potential investors.[140] On the force of Deng's statements about opening the economy, publicized in the press and studied throughout China in Tuesday afternoon "political study" sessions, the value of many stocks on the Shenzhen stock market doubled and tripled within a few weeks, and lawyers opened private law firms pursuant to a heretofore little-used regulation.[141]

Law is also articulated

> without formal enactment in the 'documents' (*wenjian*) issued by party organs and the central ministries and agencies of the PRC government.[142] Those internal documents (*neibu wenjian*) that are 'secret' are not released to anyone outside the party, while others which are for public consumption (*zhongyao wenjian*) are released directly to all judges and law professors, to a selected group of law firms and consulting firms, and to the public through the print and broadcast media.[143]

Judges are more likely to study the public documents than the published regulations.[144]

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138. Russell Baker, *Homer's First Yuppie*, N.Y. TIMES, Aug. 15, 1996, at A17.

139. *See* Andrew Xuefeng Qian, *Riding Two Horses: Corporatizing Enterprises and the Emerging Securities Regulatory Regime in China*, 12 UCLA PAC. BASIN L. J. 62, 66-68, 84 (1993) [hereinafter Qian, *Riding Two Horses*].

140. *See id.* at 66-69; *see also* Andrew Xuefeng Qian, *Why Does Not The Rising Water Lift the Boat? Internationalization of the Stock Markets and the Securities Regulatory Regime in China*, 29 INT'L LAW. 615, 615-18 (1995) [hereinafter Qian, *Internationalization of the Stock Markets*].

141. *See* Qian, *Riding Two Horses*, *supra* note 139, at 84, 94; Qian, *Internationalization of the Stock Markets*, *supra* note 140, at 617-18.

142. Lee, *supra* note 1, at 212.

143. *Id.*

144. As do all government officials and teachers at every level, judges and law professors study the

The variety of channels through which law is disseminated in the PRC suggests, on the one hand, the irrelevance of formal enactment to authoritativeness, and on the other hand, a spectrum of transparency.[145]

> The variety of channels allows the Party to target different audiences, both within and without Chinese officialdom, in part to tailor its interpretations of the law to the intended audience, and also in part to withhold information successively from larger segments of the population. The interpretations intended for high-level Party members are enacted and published in the media less frequently than are the interpretations destined for low-level Party members, which in turn are published in the media less frequently than are the interpretations destined also for groups within the public at large. [T]he legal interpretations intended for Chinese audiences outside of China and foreign audiences are published in overseas arms of the party press agency and by the Foreign Languages Press in Beijing.[146]

The policy articulations and official legal interpretations which pass through print or broadcast media do so by virtue of the central government's control over the output of print and broadcast media, a control that extends beyond censorship to orchestration.[147] In such a context, virtually whatever the state-controlled media transmits carries authoritative weight, from written or oral pronouncements of the top leaders, which are printed in the *People's Daily* but not formally enacted into law, to statements on television by an official of the Supreme People's Procuracy,[148] to a speech of the Vice-President of the Supreme People's Court published by the Court,[149] to anecdotes in a legal newspaper about children failing to care for their elderly parents.[150]

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important neibu wenjian during some of their weekly staff meetings every Tuesday afternoon. Interview by the author with Professor Zhao Jianzhuang, Professor, Henan Cadre College of Politics and Law, (Nov. 1996) (on file with author). Meanwhile, filing cabinets full of published regulations in the chambers of the Shanghai Intermediate Court collect dust. Remarks by Pitman Potter at the Association for Asian Studies, (March 1994) (on file with author). The most important policy documents on economic affairs issued by the central government now emanate from such institutions as the People's Bank, the Ministry of Foreign Trade and Economic Cooperation [MOFTEC], and the Economic Planning Commission. The Central Propaganda Department is losing influence within the central government, however, particularly over matters deemed to be economic. Interview by the author with Shen Xiaohong, Director of the Council for International Educational Exchange Nanjing University Program, in New Haven, Conn. (Aug. 11, 1996) (on file with author).

145. The lack of transparency of Chinese law is widely acknowledged. *See, e.g.*, Hsia & Johnson, *supra* note 136, at 134, n.56, n.57; Timothy A. Gelatt, *supra* note 118, at 231.

146. Lee, *supra* note 1, at 212-13.

147. *See* Judy Polumbaum, *Striving for Predictability: The Bureaucratization of Media Management in China*, *in* CHINA'S MEDIA, MEDIA'S CHINA 113, 119-21 (Chin-Chuan Lee ed., 1994).

148. For an example, an official of the Supreme People's Procuracy staff spoke to a television broadcast in Beijing. Susan V. Lawrence, *Speaking Up For Their Rights,* U.S. NEWS & WORLD REP., June 10, 1996, at 50, 52.

149. In a speech at a press conference in 1988, Vice President Ma Yuan articulated the Supreme People's Court's position on civil matters arising between parties of PRC citizenship, on the one hand,

It is not surprising, then, that the most powerful people in the PRC are directly linked to those in charge of the state-run media.

> The vice-president of the central ministry of foreign affairs, Zhou Nan, is also the chief of the Hong Kong bureau of the Xinhua News Agency, the official mouthpiece of the Party in Hong Kong, and the PRC government's premier representative there before the selection of Tung Chee-hua as chief executive of the Hong Kong Special Administrative Region (SAR) in 1996. [U]ntil then , . the Chinese equivalent of Governor Christopher Patten, [Zhou Nan] agreed in 1996 to remain in this post until 1999 in a bid to help minimize the disruption attending Hong Kong's transition to Chinese sovereignty.[151]

On the Mainland,

> the party permits and encourages the public to contact the press in order to give the party feedback about its policies and to report transgressions of the law.[152] The editors of the *People's Daily* are known to be among the conduits to government for support of local causes [in 1996]. An American journalist reported the story of a forty-six-year-old local party boss and farmer from northeastern China, near the Russian border, whose village employs him as a full-time lobbyist in Beijing.[153] As part of his lobbying efforts, Tian Chunshan visited editors of the *People's Daily*.[154]

Given that un-codified versions of CCP policy and official interpretations of law are sources of law in the PRC and are regularly disseminated through the media, media transmissions function as sources of law. Such transmissions fit within even the narrowest conception of "sources of law" because, in some form, they influence judicial decisions. Although the dissemination of Party policy flows

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and of Taiwanese citizenship on the other. The Supreme People's Court published the speech in a collection of "guiding instructions." Ma Yuan, Vice President of the Supreme People's Court, First News Conference Held by the Supreme People's Court: Some Legal Issues of the People's Court Dealing With Civil Cases Relating to Taiwan (Aug. 9, 1988), *reprinted in* COLLECTION OF THE LAWS OF THE PRC 369 (Wang Huaian, Gu Min, Lin Zhun & Sun Wanzhong eds., 1989) *as cited in* Tung-Pi Chen, *Bridge Across the Formosa Strait: Private Law Relations Between Taiwan and Mainland China*, 4 J. CHINESE L. 101, 115 n. 65 (1990). Chinese law scholar Tung-Pi Chen maintains that "the policy statement may safely be regarded as quasi-law because it came from such a senior official." *Id.* at 115.

150. Tangji Yue, *Fayu jiating: jiehunfa 'xi' le* sanjia 'huo' [*Marriage Law 'Extinguishes' the Three Families 'Fire'*] FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 10, 1995, at 3 (China) (on file with author).

151. Lee, *supra* note 1, at 238-39 n.3 (citing Interview by the author with Shen Xiaohong, *supra* note 142 (on file with author)).

152. *Id.* at 214 (citing Judy Polumbaum, *To Protect or Restrict? Points of Contention in China's Draft Press Law*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 247, 256-57 (Pitman B. Potter ed., 1994).

153. *Id.* (citing Lawrence, *supra* note 148, at 52).

154. *Id.*

directly to courts through their adjudication, supervision committees[155] receive their guidance from the same body that directs the nationwide legal education campaign, the Ministry of Justice. At the same time, the Ministry of Justice falls under the authority of the State Council, which oversees the issuance of ministerial and agency "documents." The interpretations and policies broadly disseminated through the media from the Ministry of Justice's legal education program and from the ministerial "documents" may also satisfy a broader, societal conception of "sources of law," although it is beyond the scope of this paper to determine whether any of these interpretations actually succeed in changing people's behavior.[156] To exclude from what are considered the sources of law, un-codified official interpretations of the law, and the written or oral pronouncements of a leadership whose words, gestures, and symbols carry a great deal of weight in the courtroom, in administrative offices, and in society at large, simply because in some form they are made known to the public through media, is to ignore a major source of legal authority simply for the sake of sounding correct according to the paradigms of American or European jurisprudence.

II. FAMILY LAW: A CLOSER LOOK AT THE MEDIA'S ROLE IN THE PRC LEGAL SYSTEM

A discursive study of two samples of newspaper articles and official broadcasts reveals that media in the PRC channel to the public official messages about legally correct behavior in the ways described by Durkheim and Foucault-Nagengast.[157] As Victor Li found in his study of Chinese law, the media used simple language and avoided elaborate explanations.[158] In these samples too, simple paraphrases of statutes screened out technical legal terms, such as a summary in a legal newspaper by a mediator of the Marriage Law provision governing the care of the elderly. The images of women mentioned in the legal newspapers, who were involved in financial scams, were one-dimensional. Despite this simplicity of language and character portrayal, however, the messages throughout these samples also attempted to legitimize the government and to enforce the law in the complex, psychological ways theorized by Durkheim and Foucault-Nagengast. Thus, the messages appeared to try to assuage deeply felt societal needs and to project models for behavior coupled with the threat of coerced enforcement. The transmissions functioned as sources of law in the formalist sense by being all that was available to the public by way of authoritative elaborations of the lightly codified family planning program and the Marriage

155. *See* Margaret Y.K. Woo, *Adjudication Supervison and Judicial Independence in the P.R.C*, 39 AM. J. COMP. L. 95, 96 (1991).

156. Certainly it is plausible that media transmissions do not always have their intended effect. Frances Foster, in her impressive study of theories of information in the Russian media in the 1990s, uncovers a wealth of examples of this in Russia. Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 289-90 (1996).

157. *See* DURKHEIM, *supra* note 4, at 80-81, 90, 109; FOUCAULT, *supra* note 4; Nagengast, *supra* note 4, at 116.

158. VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES 42 (1978).

Law. The transmissions in the sample also served as sources of law in the functionalist sense of aiming to exert an impact on society.

The two samples of transmissions are drawn from the Xinhua news agency publications in Chinese and English; the premier national legal newspaper, the *Legal System Daily*; and a major regional legal newspaper, the *Shanghai Legal System News*, whose purpose is to inform city dwellers about the Party's position on topics related to law; and official treatises.[159] The two samples are related to family law, an area of law that is useful for examining the role of media in the legal system and their function as sources of law, in part because the media is governed by broadly-worded legal enactments, and yet, as a centerpiece of the government's vision for China's prosperity at the dawn of the twenty-first century, is subject to intensive government regulation. Therefore, if the media transmit and supplement enacted law, they would do it in this area. Furthermore, the great importance of this area of law ensures a rich sample of material that is likely to be aimed at strengthening the legitimacy of the government. In Deng Xiaoping's regime and after, family law is the rubric for decreasing the growth of China's population, a cornerstone of the regime's effort to promote prosperity.[160] Yet another advantage is that family law is not a part of China's criminal law, and thus, it will help to gauge whether the media help the state carry out retribution and project behavioral models outside the criminal contexts to which Durkheim and Foucault described.

Why two samples for each area of law? The two samples from each legal topic were published about twelve years apart. This time gap strengthens conclusions about the role of media transmissions in China's legal system because it rules out some of the risk of idiosyncrasies that arises when a single snapshot is taken.

Family law in the PRC is comprised largely of the 1980 Marriage Law (*Hunyin fa*), related regulations, and a lightly codified family planning program.[161] Michael Palmer has persuasively argued that newspapers play an important role in the formation and dissemination of family law in the PRC.[162] It is important to stress, however, that newspapers and other media transcend the function of vehicles for the texts of enacted law.

The Xinhua news agency publishes articles in the "big newspapers" about marriage, single life, and family planning. [163] Media transmissions about family in the PRC project images of family relationships and relations between the state and

159. *See* Lee, *supra* note 1, at 208-212.

160. *See* Michael Palmer, *The Re-Emergence of Family law in Post-Mao China: Marriage, Divorce and Reproduction*, 1995 CHINA Q. 110, 125 (1995).

161. *Id.* at 111-13 (1995); Michael Palmer, *The People's Republic of China: More Rules But Less Law*, 29 J. FAM. L. 325, 327 (1990-1991).

162. Michael Palmer, *The People's Republic of China: More Rules But Less Law*, 29 J. FAM. L. 325, 325, 328, 334 n.40, 337 (1990-1991).

163. For example, F.B.I.S. Reports in June and July of 1984 included a few press stories on singles over 30 years old and marriage.

families that illustrate good behavior and bad behavior in situations that are regulated by central law and policy. These images are as important a part of the government's message to the subjects of the law as are the texts of the laws themselves, many of which are not published, particularly in the case of family planning directives.

A. Family Planning

From January through July of 1984, by far the majority of the articles on family matters collected by the Foreign Broadcast Information Service focused on family planning. These articles often used a government meeting or speech, or the issuance of a Party circular as the pretext for a fervent pitch to both government officials and "the masses" to add more energy to their implementation of birth quotas. The language was the familiar vocabulary developed by the Party in the days of civil war campaigns, one that mixed military concepts with Soviet-style teleology: the "masses" had to be "mobilized," "family planning work" in the provinces was "arduous" though "progressing," the provinces and "departments at all levels" were "called" to "add to achievements . . . and make new contributions to continuous, vigorous, and better fulfillment" of the family planning program.[164] Assessments of the program did not mention the already noticeable worsening of China's traditional phenomenon of widespread killing of female fetuses and infants.[165]

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164. *See, e.g., National Family Planning Meeting Ends 7 Mar*, F.B.I.S., Mar. 12, 1984, at K20 (translation into English of Xinhua Domestic Service report, Mar. 7, 1984 (China)) (on file with author); *Family Planning Commission Notes Fewer Births*, F.B.I.S., Mar. 8, 1984, at K19, transcription of Xinhua report in English, Mar. 7, 1984 (on file with author); *Qinghai Reports Success in Family Planning*, F.B.I.S. (translation into English, Mar. 5, 1984, at T3, of Qinghai Provincial Service report, Mar. 3, 1984 (China)) (on file with author); *Hunan Reports Success in Family Planning*, F.B.I.S. (translation into English, Jan. 26, 1984, at P2, of Hunan Provincial Service report, Jan. 24, 1984 (China)) (on file with author); *Hebei Holds Conference on Family Planning Work*, F.B.I.S., Jan. 20, 1984 (on file with author); *Hainan Circular Stresses Family Planning*, F.B.I.S. (translation into English, Mar. 22, 1984, at 2, Hainan Island Service, Mar. 20, 1984 (China)) (on file with author); *Shanxi Holds Public Health, Family Planning Meet*, F.B.I.S. Jan. 3, 1984, at R3-R4 (translation into English of Shanxi Provincial Service report, Dec. 30, 1983 (China)) (on file with author); *Urumqi PLA Holds Family Planning Meeting*, F.B.I.S., Jan. 4, 1984, at T4 (translation into English of Urumqi Xinjiang Regional Service Report, Jan. 2, 1984 (China)) (on file with author); *Yunnan Family Planning Work Plan Announced*, F.B.I.S., Jan. 19, 1984, at Q1-Q3 (translation into English of Yunnan Provincial Service report, Jan. 19, 1984 (China)) (on file with author); *Shaanxi Holds Conference on Family Planning Work*, F.B.I.S., Jan. 24, 1984, at T2-T3 (translation into English of Shaanxi Provincial Service report. Jan. 17, 1984 (China)) (on file with author).

165. *See, e.g., National Family Planning Meeting Ends 7 Mar*, F.B.I.S., Mar. 12, 1984, at K20 (translation into English of Xinhua Domestic Service report, Mar. 7, 1984 (China)) (on file with author); *Family Planning Commission Notes Fewer Births*, F.B.I.S., Mar. 8, 1984, at K19, transcription of Xinhua report in English, Mar. 7, 1984 (on file with author); *Qinghai Reports Success in Family Planning*, F.B.I.S. (translation into English, Mar. 5, 1984, at T3, of Qinghai Provincial Service report, Mar. 3, 1984 (China)) (on file with author); *Hunan Reports Success in Family Planning*, F.B.I.S. (translation into English, Jan. 26, 1984, at P2, of Hunan Provincial Service report, Jan. 24, 1984 (China)) (on file with author); *Hebei Holds Conference on Family Planning Work*, F.B.I.S., Jan. 20, 1984 (on file with author); *Hainan Circular Stresses Family Planning*, F.B.I.S. (translation into

Twelve years later, the transmission of images of compliance with the family planning program continued to use official reports, rules, and announcements as the ostensible newsworthy item, from which flowed the vocabulary of military campaigns and Soviet-style production targets about the program in general.[166] One title of a *People's Daily* article discussing rates of population growth contained the stirring slogan "Carry Forward the Cause, Forge Ahead Into the Future, Perform Feats Again."[167] An event that generated a great deal of press coverage was the "Chinese Population Award," a sum of 20,000 yuan, a medal, and a certificate that the State Council awarded to ten "winners."[168] The recipients were government enforcers of the birth quotas who had achieved "success" in their "work."[169] First presented in 1993, this was "China's highest award in the field of population and family planning,"[170] and a commentator noted that at that time, they "had a very positive impact at home and abroad."[171] More statistics were reported, but in offering interpretations of the statistics, the side effects of the widespread preference for male offspring went unmentioned, as in 1984. Evaluations of the statistics were relatively simplistic, bespeaking either "success" or "failure."[172]

English, Mar. 22, 1984, at 2, Hainan Island Service, Mar. 20, 1984 (China)) (on file with author); *Shanxi Holds Public Health, Family Planning Meet*, F.B.I.S. Jan. 3, 1984, at R3-R4 (translation into English of Shanxi Provincial Service report, Dec. 30, 1983 (China)) (on file with author); *Urumqi PLA Holds Family Planning Meeting*, F.B.I.S., Jan. 4, 1984, at T4 (translation into English of Urumqi Xinjiang Regional Service Report, Jan. 2, 1984 (China)) (on file with author); *Yunnan Family Planning Work Plan Announced*, F.B.I.S., Jan. 19, 1984, at Q1-Q3 (translation into English of Yunnan Provincial Service report, Jan. 19, 1984 (China)) (on file with author); *Shaanxi Holds Conference on Family Planning Work*, F.B.I.S., Jan. 24, 1984, at T2-T3 (translation into English of Shaanxi Provincial Service report, Jan. 17, 1984 (China)) (on file with author).

166. *See, e.g.*, Gu Yining, *Zhejiang Population Control Achievements Affirmed*, ZHEJIANG RIBAO [ZHEJIANG DAILY], Feb. 1, 1996, at 1 (China) (on file with author); *Hebei Issues Family Planning Regulations*, HEBEI RIBAO [HEBEI DAILY], Feb. 22, 1996 (China) (on file with author) [hereinafter *Hebei*]; *Qinghai Releases 1995 Statistical Communique*, QINGHAI RIBAO [QUINGHAI DAILY], Feb. 16, 1996 (China) (on file with author) [hereinafter *Qinghai*]; Yang Ximing & Song Youping, *Wang Maolin Addresses Family Planning Meeting*, HUNAN RIBAO [HUNAN DAILY], Dec. 31, 1996, at 1 (China) (on file with author) [hereinafter *Wang Maolin*]; *Family Planning Long-Term State Policy* (Xinhua broadcast Feb. 9, 1996) (on file with author) [hereinafter *Family Planning*]; *Li Peng on Population Control, Environmental Protection* (Xinhua broadcast Mar. 5, 1996) (on file with author) [hereinafter *Li Peng*].

167. *Commentator Hails 'Chinese Population Awards'*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) [hereinafter *Awards*] (reporting a discussed proposal for formulating the 9th Five-Year Plan and the long-term targets for the year 2010 where the goal is to bring the population below 1.3 billion in the year 2000 and below 1.4 billion in 2010) (on file with author).

168. Ai Xiao, *'Chinese Population Awards' Ceremony Reported*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author); *Family Planning*, *supra* note 166.

169. *See* Ai Xiao, *supra* note 168; *Family Planning*, *supra* note 166.

170. Ai Xiao, *supra* note 168.

171. *Id.*

172. For reports of "successes" at the provincial level, see Gu Yining, *supra* note 166 (discussing Zhejiang's successes in population control during the Eighth Five-Year Plan); *Wang Maolin*, *supra* note 166 (discussing Hunan Province's record during the Eighth Five-Year Plan: "[T]he number of babies born decreased by 1,635,000 and the range of decrease in the birth rate ranked at the forefront among other provinces and municipalities of the country.").

For example, family planning was viewed as successful because of the slowdown in the growth of population in Zhejiang, and because the percentage of planned births went up.[173]

For statistical reports which emphasize positive "achievements" at the national level, see Ai Xiao, *supra* note 168 ("Peng Peiyun was pleased to report on marked results achieved in population and family planning work during the Eighth-Five Year Plan: The population growth rate dropped from 14.39 percent in 1990 to a relatively low level in 1995, and the momentum of the entire country's overly rapid population growth rate has been effectively brought under control."); *Awards*, *supra* note 167 ("Over the past 20 years or more, China's population and family planning work has scored tremendous achievements which have been universally recognized. . [P]arty committees and governments at all levels and a vast number of cadres and the masses painstakingly attained marked results in population and family planning work; completed the population plan in a better way; achieved a steady decrease in birth rate "); *Census Indicates Population Growth Slowing* (Xinhua broadcast Feb. 14, 1996) (viewed by author) (reporting State Statistical Bureau data that the P.R.C.'s population growth slowed "to an annual rate of 1.21 percent during the past five years" which was "0.34 percentage points less than in the previous five years").

Ethnic minorities and migrants were linked to the major "failures of the one-child policy." A report made public by the State Statistical Bureau sounded a pessimistic note when it concluded that the population of ethnic minorities grew more quickly. For reports of the "failures," see *Urban Problems Created by Floating Population*, LIAOWANG [OUTLOOK], Nov. 27, 1995, at 20-23 (China) (on file with author) (discussing how the difficulties of monitoring changes in the size of families of migrants complicated the "work" of "administrative leaders" to "control" the growth of the "floating population" of migrants which and "impaired enforcement of the planned parenthood policy"); Xie Kang & Zhang Hongchang, *Shanxi Survey Shows One Child Policy Not Working*, RENKOU YANJIU [POPULATION RESEARCH], Sept. 29, 1995, at 72-73 (China) (on file with author) (discussing village survey in Shanxi province that revealed 72.3 percent of women between the ages of 20 and 40 had two or more children each and that the failure of the population program was related to peer pressure and fear of loss of security in old age discussing a survey conducted in February, 1995, which revealed a reproductive profile for women ages 20-40 in Xiejiaying village in Shanxi province. 72.3 percent had two or more children each. The report concluded that the failure of the population program was related to peer pressure and fear of loss of security in old age. There was no mention of a desire for sons as a cause of the failure.).

173. Gu Yining, *supra* note 166.

For reports of "successes" at the provincial level, see *PRC: Zhejiang Population Control Achievements Affirmed*, FBIS-CHI-96-037, Feb. 23, 1996, at 9 (translation into English of report by Gu Yining, ZHEJIANG RIBAO [ZHEJIANG DAILY], Feb. 1, 1996, at 1 (China)) (on file with author); *Wang Maolin Addresses Family Planning Meeting*, FBIS-CHI-96-015, Jan. 23, 1996, at 18, (translation into English of report by Yang Ximing & Song Youping, *Provincial Family Planning Meeting Puts Forward New Trend of Thought for the Ninth Five-Year Plan*, Dec. 31, 1995, at 1 (China)) (on file with author) (discussing Hunan Province's record during the Eighth Five-Year Plan: "[The] number of babies born decreased by 1,635,000 and the range of decrease in the birth rate ranked at the forefront among other provinces and municipalities in the country.").

For statistical reports, which emphasize positive "achievements" at the national level, see *Census Indicates Population Growth Slowing*, FBIS-CHI-96-032, Feb. 1, 1996 (translation of Xinhua report, Feb. 14, 1996 (China) (on file with author) (The national population growth of the PRC slowed to an annual rate of 1.21 percent during the previous five years. The rate held steady at 1.55 percent in the preceding five years)); *PRC: 'Chinese Population Awards' Ceremony Reported*, FBIS-CHI-96-037, Feb. 23, 1996, at 9 (translation into English of report by Ai Xiao, *The Second 'Chinese Population Awards' Presented*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author) ("Peng Peiyun was pleased to report on marked results achieved in population and family planning work during the Eighth Five-Year Plan: The population growth rate dropped from 14.39 percent in 1990 to a relatively low level in 1995, and the momentum of the entire country's overly rapid

Mixed in with the rhetoric of campaigns and statistical goals were new images that highlighted economic growth and the standard of living as reasons for complying with the family planning program.[174] One Xinhua report began with the

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population growth rate has been effectively brought under control."). *See also*, *PRC: Commentator Hails 'Chinese Population Awards'*, FBIS-CHI-96-037, Feb. 23, 1996, at 10 (translation into English of report entitled, *Carry Forward the Cause, Forge Ahead Into the Future, Perform Feats Again--Congratulating Presentation of Second 'Chinese Population Awards'*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author) ("Over the past 20 years or more, China's population and family planning has scored tremendous achievements which have been universally recognized . . . .[P]arty committees and governments at all levels and a vast number of cadres and the masses painstakingly attained marked results in population and family planning work; completed the population plan in a better way, achieved a steady decrease in the birth rate.").

Ethnic minorities and migrants were linked to the major "failures" of the one-child policy. A report made public by the State Statistical Bureau sounded a pessimistic note when it concluded that the population of ethnic minorities grew more quickly. *PRC: Shanxi Survey Shows One Child Policy Not Working*, FBIS-CHI-96-032, Feb. 15, 1996, at 14-15 (translation into English of report by Xie Kang of the Population and Employment Statistics Office of the State Statistics Bureau, with Zhang Hongchang of the Population Institute at China People's University, *One Child Policy Not Working in Two Villages*, RENKOU YANJIU [POPULATION RESEARCH], Sept. 29, 1994, at 72-73 (China) (on file with author) (discussing a survey conducted in February, 1995, which revealed a reproductive profile of women ages 20-40 in Xie Jiaying village in Shanxi province. 75 percent had 2 or more children each. The failure of the population program was related to peer pressure and fear of loss of security in old age, the report concluded. No mention of a desire for sons as a cause of the failure.)); *PRC: Urban Problems Created by Floating Population*, FBIS-CHI-96-029, Feb. 12, 1996, at 20, 23 (translation into English of report entitled *Thoughts That the Congregation of Migrants From Elsewhere in the Country Evoke*, LIAOWANG, Nov. 27, 1995, at 20 (China) (on file with author) (Difficulties of monitoring changes in the size of families of migrants complicated the "work" of "administrative leaders" to "control" the growth of the "floating population" and "impaired enforcement of the planned parenthood policy.").

174. *See e.g.*, *Awards*, *supra* note 167 ("The population problem is in essence a question of development. China has a big base population figure and high population growth rate, which results in relatively inadequate per-capita resources. . Contradictions among population, farmland, food, resources, and environment will be sharper. Without strict population control or improvement in population quality, it will be impossible to realize population growth in coordination with that of the economy, society, resources, and environment; still less can sustained, rapid, and healthy national economic development or social progress be achieved."); Bian Qingguo, *Declining Role of Village Committees in Population Control Work*, RENKOU YU JINGJI [POPULATION AND ECONOMICS], Sept. 25, 1995, at 33-35 (China) (on file with author) (stating that village committees should help convey and emphasize the economic reasons, for population control such as "per capita income" and "national consumption, for family planning"); *Family Planning*, *supra* note 168 ("The family planning program is intended . . . to enhance the quality of the nation's life and it should be integrated with work to improve living standards "); *PRC: Family Planning Long-Term State Policy*, FBIS-CHI-96-028, Feb. 9, 1996, at 37 (transcription of Xinhua report, Feb. 9, 1996 (China)) (on file with author) ("The family planning program is intended . . . to enhance the quality of the nation's life and it should be integrated with work to improve living standards . . . ."); *PRC: Commentator Hails 'Chinese Population Awards'*, FBIS-CHI-96-037, Feb. 23, 1996, at 10 (translation into English of article entitled *Carry Forward the Cause, Forge Ahead Into the Future, Perform Feats Again--Congratulating Presentation of Second 'Chinese Population Awards'*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China) (on file with author) ("The population problem is in essence a question of development. China has a big base population figure and high population growth rate, which results in relatively inadequate per-capita resources .Contradictions among population, farmland, food, resources, and environment will be sharper. Without strict population control or improvement in population quality, it will be impossible to realize population growth in coordination with that of the economy, society, resources, and

statement of a grocery store owner in Guangdong Province: "'I don't want to have a son as long as I can earn enough money.'"[175] The change in his attitude toward family planning was attributed to a new mechanism for implementing the one-child policy: the local and city family planning associations or committees provided capital and labor to families who abided by the local birth quotas so that the obedient families could start businesses, which would later become profitable enough for the families to buy pensions from the state. [176] The opportunity to purchase pensions alleviated a concern about security in old age, a major barrier to limiting births.[177] Xinhua reported that Peng Peiyun, a State Councilor and Minister of the State Family Planning Commission, made remarks in Beijing when she presented the second-ever "Chinese Population Awards."[178] She explained that the larger goals of the family planning program were to raise the status of women, meet economic targets, slow down population growth, and raise the quality of life—goals that incidentally provided positive incentives for people in every family in the PRC to comply with the program.[179] To emphasize the economic benefits of the program, Peng stated: "The final goal is to co-ordinate population development with sustainable development of economic, social and natural resources . . . ."[180] Furthermore,

> The purpose of instituting this award was to increase the entire society's awareness of population and the concept of developing population in coordination with economy and society; arouse a broad spectrum of actual workers and scientific workers in the field of population and family planning to have a sense of honor and mission and a spirit of dedication; and mobilize the initiative of all relevant departments and social organizations in tackling the population problem in a comprehensive way.[181]

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environment; still less can sustained, rapid, and healthy national economic development or social progress be achieved."); *PRC: Declining Role of Village Committee in Population Work*, FBIS-CHI-96-032, Feb. 15, 1996, at 15-17 (translation into English of report by Bian Qingguo of the Hangzhou City Family Planning Commission in Zhejiang Province, *Declining Role of Village Committees in Population Control Work*, RENKOU YU JINGJI [POPULATION AND ECONOMY], Sept. 25, 1995, at 33-35 (China) (on file with author) (Village committees should help convey and emphasize the economic reasons, such as "per capita income" and "national consumption," for family planning).

175. *Local PRC Family Planning Groups Seen Breaking Barriers* (Xinhua broadcast Jan. 18, 1996) (viewed by author).

176. *Id.*

177. *Id.*; *Local PRC Family Planning Groups Seen Breaking Barriers*, FBIS-CHI-96-014, Jan. 22, 1996, at 26 (transcription of Xinhua report in English, Jan. 18, 1996 (China)) (on file with author).

178. Ai Xiao, *supra* note 168; *Family Planning*, *supra* note 166.

179. *Family Planning*, *supra* note 166.

180. *Id.*; *PRC: Family Planning Longterm State Policy*, FBIS-CHI-96-028, Feb. 9, 1996, at 37 (transcription of Xinhua report in English, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996 (China)) (on file with author).

181. Ai Xiao, *supra* note 168; *PRC: 'Chinese Population Awards' Ceremony Reported*, FBIS-CHI-96-037, Feb. 23, 1996, at 9 (translation into English of report by Ai Xiao, *The Second 'Chinese Population Awards' Presented*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 9, 1996, at 5 (China)) (on file with author).

In the mid-1990s, the emphasis on economic incentives flowed from the central administration not just to the public, but also to all government officials through internal channels of the state-run media. The central government's State Family Planning Commission's Policy and Law Department publishes treatises for use by government officials only, as does the Family Planning Commission of the Party propaganda department of each provincial government. Such treatises in 1993 and 1995 contained major policy announcements and statistical reports by leading officials and recent cases of enforcement of birth quotas, each written by "reporters" from either the propaganda department or from Xinhua news agency.[182]

Of the nineteen articles from the legal newspapers in this sample, only two addressed the family-planning policy. In one, the statistics on the results of implementing district birth quotas were presented in the form of a travelogue through Sichuan province: on October 15 the reporter arrives at the "first stop" of his tour, a district whose demography, living standards, and history with family planning he describes.[183] In the afternoon of October 17, he arrives at another district that he describes in similar terms, and so on, until he has covered four districts. The article discussed the experimentation in selected places of the "Three Unities" policy, which was encapsulated in the slogan: "The party and the government are responsible for directing the path, one enterprise put first takes the first step, relevant departments take it by the hand and help, few births make for outstanding family planning, happiness, and prosperity" (*Dangzheng fuze zhilu, yiye weizhu qibu, bumen xieshou bangzhu, shaosheng youyu kuaifu*).[184] The slogan and the quotas associated with it in Sichuan were designed to combine the family planning policy with economic policy and with spiritual enrichment. The theme throughout the article was that through hard and persistent "work" on limiting births, the people of Sichuan were raising their living standards and ensuring a peaceful, happy, cultured, and prosperous future for themselves.[185] The other article described in greater depth the "Three Unities" policy.[186] The policy was described as "a new compass and a new path for family planning work," and as having been derived from a Marxist perspective that was holistic in its combined stress on "social life, government life, and spiritual life."[187]

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182. *See, e.g.*, SHAOSHENG KUAIFU XINGFU ZHILU [THE ROAD OF FEWER BIRTHS SPEED PROSPERITY AND HAPPINESS] (Beijing: State Family Planning Commission, Policy and Law Department, 1993) (on file with author); HAO XINWEN, 1991-1994 [GOOD NEWS, 1991-1994], (Zhengzhou: Chinese Communist Party Henan Province Propaganda Department, Henan Province Family Planning Commission, 1995) [hereinafter GOOD NEWS, 1991-1994].

183. Li Jia, *Zouxiang wenming fuyu zhilu--sichuansheng jihua shengyu gongzuo caifang zhaji* [*Walking the Road Toward Civilization and Prosperity--Notes From Covering the Family Planning Work in Sichuan Province*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 21, 1995, at 5 (China) (on file with author).

184. *Id.*

185. *Id.*

186. Li Chunmin, *Xiwang zhilou* [*The Wished For Path*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 21, 1995, at 5 (China) (on file with author).

187. *Id.*

How did these transmissions aim to facilitate the enforcement of the family planning policy? None of the transmissions on family planning depicted the punishment of a failure to comply with the policy, and thus did not invite its readers into a Durkheimian catharsis. Instead, the transmissions highlighted examples of compliance and held those up as models for the rest of society. The theme of coerced compliance sounded only obliquely evoked by the frequent use of the imagery of self-discipline and surveillance, incarnations of coercion according to Foucault, and of "work" and production targets, markers of state-sponsored violence, according to Nagengast. True to Foucault's framework of relations between state and society, the ideal promoted by the transmissions was one where top officials encourage low-level officials to discipline themselves to enforce the birth quotas with vigor, the low-level officials inspire the people to discipline themselves to comply with the birth quotas, and the people encourage their local leaders to remain vigilant in their surveillance of compliance with the birth quotas. "Failure" occurred when monitoring of migratory populations proved difficult. This is an ideal where everyone's procreation plans are watched, detected, and known. The emphasis on the positive incentive to improve one's standard of living played upon widespread fears of being left behind in the rush to amass wealth in the 1980s and 1990s and, therefore, contained an implicit threat of impoverishment for failure to limit the births in one's family.

B. The Marriage Law

In contrast to the family planning transmissions, a Durkheimian catharsis seemed to be the point of many of the transmissions pertaining to the 1980 Marriage Law. Several articles projected a Durkheimian vision of the state as the upholder of the values cherished by society. Four of the nineteen articles in the Legal System Daily focused on the statute, two of which appeared in a regular column entitled "Informal Discussions About the Marriage Law" (*Hunyin fa mantan*).[188] A message common to some of these articles was that the 1980 Marriage Law protects women, children, and the elderly from harm when they are most vulnerable. In some, the law is portrayed as protective without any resort to punishment. One article addressed the question of whether married couples could divorce while expecting a child.[189] The article followed a format that went from the general to the detailed. It began with the quotation of the text of the provision of the Marriage Law that prohibits divorce during pregnancy and the first year of the child's life, and a general explanation of that rule.[190] Following this were

188. Chen Fengzhi & Yan Fei, *Hunyinfa mantan: Zhei dui jing chengji jiehun de fugi weihe bei pan zhonghunzui? [Informal Discussions About the Marriage Law: Why Did the Judge Declare as Bigamists This Couple That Registered Their Marriage?]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 3, 1995, at 3 (China) (on file with author) [hereinafter *Bigamists*]; Zheng Jing, *Hunyinfa mantan: yunfu, chanfu de teshu falu, [Informal Discussions About the Marriage Law: Concerning the Special Legal Protection of Pregnant and Nursing Women]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 10, 1995, at 5 (China) (on file with author) [hereinafter *Pregnant and Nursing Women*].

189. *Pregnant and Nursing Women*, *supra* note 188 (discussing article 27 of the 1980 Marriage Law, which prohibits divorce when the wife is pregnant and during the year after she gives birth).

190. *Id.*

several hypotheticals that raised detailed and difficult questions about the judicial application of that rule.[191] This was not a discussion of the policy ramifications of the rule. For example, there was no mention about why judicial protection of women's financial support did not extend to single mothers or mothers of infants and young children. The message was that the law provides for benevolent interference by the state in marriages in situations where the wife is deemed to be especially vulnerable to harm. The law appears to care enough about these women to offer a judicial way out of divorces that they do not want.[192] Thus, the law embodies the values presumed to be cherished by society, and offers people a procedure for triggering interference by the state to uphold those values.

The Marriage Law is part of a larger policy of the PRC government to divert the purposes of marriage toward the strengthening of the government, the maximizing of the self-sufficiency, and the cohesiveness of the family, in order to minimize the government's welfare obligations.[193] Three of the legal newspaper articles in the sample that did not mention the Marriage Law lauded the merits of the state-sponsored matchmaking centers, one of the Party's programs for implementing its larger policy on families. Adopting the format of a report on the work of the centers, one such article highlighted the contrast between the matchmaking centers and the businesses springing up throughout China's major cities by describing the centers as "serving the masses."[194] The government thus

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191. *Id.*

192. Zheng Jing, *Hunyinfa mantan: yunfu, chanfu de teshu falu*, [*An Informal Discussion About the Marriage Law: Concerning the Special Legal Protection of Pregnant and Nursing Women*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 10, 1995, at 3 (China) (on file with author) (*discussing article 27 of the 1980 Marriage Law, which prohibits divorce when the wife is pregnant and during the year after she gives birth*).

193. *See* Michael Palmer, *The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce, and Reproduction*, 141 CHINA Q. 110, 110, 113, 115-16 (1995) [hereinafter *Re-emergence of Family Law*]. Palmer explains that the "rapid codification of family law" was due to Party "leadership's concern to ensure stability, order" and to place family as the "basic unit of social life." The various Marriage Law provisions shaped the Chinese family in order to make it more consistent with "new economic and social orders." The Marriage Law links sexual conduct with marriage, thus making marriage is the only legally permissible way to reproduce. Additionally, the Marriage Law makes the family the "primary agent of socialization" and parents are expected to "pass on appropriate social and culture values to their children . . . so that they become fully socialized members of Chinese society." The Marriage Law also obligates PRC families with responsibility to care for the "elderly and the infirm." *Id.* at 110-116; *see also* Michael Palmer, *The People's Republic of China: More Rules but Less Law*, 29 J. FAM. L. 325, 325-26 (1991) [hereinafter *More Rules*] (discussing the passage of new family and marriage disciplinary regulations "designed to remedy the deviant conduct of party members who violate norms of socialist morality" in light of Party attempts to urge the people to "emulate socialist heroes such as Lei Feng" who devoted himself to "China, work, the people and the Party."); Annelise Riles, *Spheres of Exchange and Spheres of Law: Identity and Power in Chinese Marriage Agreements*, 19 INT'L J. SOC. L. 501, 507 (1991) (explaining that the Marriage Law of 1950 was created to "abolish arranged marriages and attack the power of the lineages" and that the government "liberated the citizen from the lineage system so that he or she may dedicate him or herself to the state, not so that he or she may indulge in individualism").

194. Palmer argues that the matchmaking offices attempt to weaken the authority of the parents in finding spouses for their children. *More Rules*, *supra* note 193 at 325-242; *Re-emergence of Family*

stood for selfless service, a value which it assumed was cherished by society despite the trend toward unscrupulous profit-making alluded to in the article.

Despite the good intentions portrayed in the press behind the government's provision of matchmaking services, seeking marriage partners has become a risky affair in the PRC, according to two of the other articles in the sample.[195] One recounted a story about two women who ran a scam by asking for loans from people they met through the matchmaking centers and not repaying them.[196] One of the women got ten years in prison, the other got six and a half years.[197] Another article, written by a member of a village government in Henan province, described the dangers of answering personal ads for marriage partners.[198] Personal ads began to appear in 1981 with the advent of the advertizing industry in the PRC, and have proliferated since then.[199] In both articles, blame for the matchmaking scams is not placed on the government who runs the only officially-approved matchmaking program, but on greedy and unscrupulous women without an affiliation with the government. The government matchmaking services were portrayed as valuable and dependable if clients steered clear of women who rushed into financial arrangements before marriage.

The state's assumption of the role of defender of deeply felt values also appears in the articles that illustrate contraventions of the Marriage Law that brought decisive punishment by the state. The Marriage Law requires that marriages be registered with the local government where the couple lives.[200] One article sent the message that marriage registration was such a serious matter that even a delay in registering brought serious penal consequences. It described a harsh court judgment against a young couple that lived together before registering their marriage with the authorities, as required by the Marriage Law.[201] The article went through the facts of the case in order to explain why a six-month prison sentence was the correct punishment for this couple.[202] The couple fell in love and, following local customs in their village, held a marriage ceremony and set up house together.[203] Their failure to register was discovered by a mediator to whom they went for help in resolving a "contradiction" that developed in their

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Law, *supra* note 193 at 142.

195. Wang Yusong & Hu Guiming, *Zhenghun Pianhun Nu* [*The Woman Who Looks For Mates and Swindles Them*], FAZHI RIBAO ZHOUMO BAN [LEGAL SYSTEM DAILY, WEEKEND EDITION], Mar. 15, 1996, at 7 (China) (on file with author); Gong Si, *Liushen 'Zheng Hun'* [*Be Aware of Those Looking for Mates*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 23, 1996, at 7 (China) (on file with author).

196. Wang Yusong & Hu Guiming, *supra* note 195.

197. *Id.*

198. Gong Si, *supra* note 195.

199. *Id.*

200. *See* Marriage Law of the People's Republic. of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981), art. 8 (China).

201. *Bigamists*, *supra* note 188, at 3.

202. *Id.*

203. *Id.*

relationship.[204] About a month after they had resolved the problem, they registered their marriage in the local government office.[205] The authors of the article cited and quoted from three legal provisions that shed no light on the question of why their act should be deemed a serious criminal offense.[206] One of the provisions cited, however, did support a finding that their marriage had no effect.[207]

The author drew another conclusion from this provision, which was that the couple "did not love protecting the law."[208] The implication was that the man and woman should have desired, on their own, to uphold the law. This message places on the reader the responsibility of registering his or her own marriage, and even beyond this, of reporting failures to register out of a desire to see the law upheld. It is an exhortation to self-discipline and surveillance a la Foucault, appearing alongside the Durkheimian vision of the state as reinforcing society's values.

Other articles about the Marriage Law emphasized surveillance. Deviations from requirements in the Marriage Law were portrayed as serious and shameful and would be detected and addressed by a mediator from the local mediation committee, a grass-roots organ of the state with a pyramid structure set up to keep tabs on all family disputes, even those that families do not report. One such article told a story about a ninety-year-old woman who had three sons, each of whom had established a separate household.[209] For various reasons, the members of these households would not allow her to live with any of them. A mediator from the village mediation committee appeared while the family was gathered together and

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204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* *See also* Criminal Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Jul. 6, 1979, effective Jan. 1, 1980), art. 180 (China), *available at* http://www.novexcn.com/criminal_law.html. Article 180 in the Criminal Law merely provided for a maximum sentence of two years in prison for "serious marital offenses" committed with knowledge. An undated Supreme People's Court opinion interpreting the 1986 Marriage Registration Measures, merely stated the circular proposition that if a couple lives together without registering their marriage, and if the masses regard them as married, and if one member of the couple sues for a divorce in the People's Court, and if when they set up house both parties followed the marriage regulations, then the marriage is valid; but if one or both people fail to abide by the Marriage Law when they set up house, then they may be regarded as violating the Marriage Law. *Bigamists*, *supra* note 188, at 3.

208. *Bigamists*, *supra* note 188, at 3. *See also* Regulations on Control of Marriage Registration (promulgated by the Ministry of Civ. Affairs, Feb. 1, 1994), art. 24 (China). A 1994 regulation issued by the *Minzhengbu* provided that if a couple below the legal age for marriage sets up house together, or if an otherwise legally eligible couple sets up house without registering a marriage, their marriage has no effect and the couple "does not love protecting the law. *Id.*; Regulations on Control of Marriage Registration (promulgated by the Ministry of Civil Affairs, Feb. 1, 1994), art. 24 (China), *available at* http://www.gov.cn/english/2005-07/29/content_18376.htm; Chen Fengzhi and Yan Fei, *Hunyinfa mantan: Zhei dui jing chengji jiehun de fuqi weihe bei pan zhonghunzui? [Informal Discussions of the Marriage Law: Why did the judge declare as bigamists this couple that registered their marriage?]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 3, 1995, at 3. (China) (on file with author).

209. Yue Tangji, *Fayu jiating; jiehunfa 'xi' le sanjia 'huo,' [The Marriage Law 'Extinguishes' the Three Families 'Fire']*, FAZHI RIBAO [LEGAL SYSTEM DAILY] Dec. 10, 1995, at 10 (China) (on file with author) [hereinafter *Three Families Fire*].

paraphrased to them, in simple language (and did not cite), a provision of the Marriage Law which provided that children must care for their parents.[210] Then the mediator gently chastised them for failing to care for the woman, and all of them hung their heads in shame and vowed to carry out their duty.[211] Here the message was, if you do not support your elderly relatives, the state will intrude and shame you, but not punish you as a criminal if you restructure your household in conformance with the law.

Some of the articles set up models, both negative and positive, to illustrate central interpretations of provisions of the 1980 Marriage Law. The Marriage Law regulates divorce, and the nine articles in the sample that treated issues related to divorce relayed examples of unanticipated problems that plague divorcing couples. Underlying all of the articles was the message that divorce is a nasty business and raises lots of unanticipated problems. Only one of the articles attempted to put a positive spin on the climbing divorce rate by speculating that the rate would not prevent the typical Chinese family, in the twenty-first century, from having the following ideal attributes: limited to four grandparents, two parents, and one child; a stronger role for love in the selection of marriage partners; and higher quality marriages.[212]

Another type of article that used models to promote the government's policies about the family was the personal advice article. Without mentioning the Marriage Law, these models offered suggestions about how to deal with difficulties in family relationships, such as what to do if your spouse does not share any of your interests,[213] or what to do if you fall in love later in life.[214] These articles were lively and entertaining, and created a friendly image for the legal newspaper in which they appeared. At the same time, they sent messages that supported the policies that lay behind the Marriage Law. The preventative work and the repair to family relationships that these articles aimed to illustrate was the type that would help to keep three generations of a family together. Keeping this unit of a family from breaking apart is imperative in the PRC today, with a shrinking pension program, a shortage of housing space in the cities, and a shortage of arable land in the countryside, which puts a premium on the cost of expanding housing there.

Urban dwellers with a decent education read the official legal newspapers, but do media products with a broader distribution function differently? A sampling of

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210. *Id.*; *see also* Marriage Law of the People's Rep. of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981), art. 21 (China), *available at* http://www.lawinfochina.com/law/display.asp?db=1&id=1793&keyword=marriage%20law.

211. *Three Families Fire*, *supra* note 209, at 3.

212. Chen Hong, *Zhongguo jiating de zhoushi* [*Trends in Chinese Families*], FAZHI RIBAO [LEGAL SYSTEM DAILY] Dec. 31, 1995, at 3 (China) (on file with author).

213. Su Dianyuan, *Xingqu butong: Neng jiehe chengmei de kangli ma?* [*Different Interests: Can Married Couples Be United?*], FAZHI RIBAO [LEGAL SYSTEM DAILY] Dec. 10, 1995, at 3 (China) (on file with author) [hereinafter *Different Interests*].

214. Wu Ailing, *Wanlian: Bu dengyu xinli biantai* [*Falling In Love Late in Life: Doesn't Mean Mental Problems*], FAZHI RIBAO [LEGAL SYSTEM DAILY] Oct. 1, 1995, at 3 (China) (on file with author).

popular treatises on family law published between 1985 and 1992 suggests not. The treatises are published by a variety of popular presses run by the Ministry of Justice, one targeting the members of the PLA, one targeting the "masses," one for women, and another targeting rural villages. These treatises use models of positive behavior to promote the central government's policies. From the texts of all of these treatises, it is apparent that their purpose was to reinforce a sense of the sufficiency of the Marriage Law for solving routine problems related to inheritance, property, and marriage encountered by ordinary families. On the other hand, the statutory provisions that were cited never supplied the entire solution to the family problems that are illustrated. The recommendations offered in two of the treatises emphasized a common sense solution to each conflict recounted, with the statutory rule, or even just a reference to the constitution's protection of the freedom to marry or a simple invocation of the name of the Marriage Law, tacked on at the end.[215] Rather than offering a way to reason from the statutory provision that provides the solution to these problems, then, the treatises offered official models that needed to be internalized.[216]

Surveillance provided the subtext of some of the treatises. Another treatise was a collection of letters from people in the countryside who had questions about whether various activities of their neighbors complied with the law.[217] It was a sort of "Dear Abby" for rural busybodies or those who might watch and report on their neighbors in a modern-day incarnation of the *baojia* system. Although this book reveals much about the creative ways in which villagers must try to evade the positive family law enacted by the central government, the author presumes that neighbors have the responsibility to help each other internalize the official models.[218]

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215. *See* GAO YAYUN, XIANDAI SHENGHUO FALU [THE MODERN LIVING LAW] (Beijing: Rural Village Reading Materials Press eds., 1987) (on file with author); CHEN XINGBO, HUNVIN, JIATING, CAICHAN JICHENG JIEYI [EXPLAINING MARRIAGE, FAMILY, AND THE INHERITANCE OF PROPERTY] (Beijing: People's Liberation Army Press eds., 1985) (on file with author). *See also* HUNYIN JIATING JICHENG 90 WEN [90 QUESTIONS ON MARRIAGE, THE FAMILY, AND INHERITANCE] (China Women's Press eds., 1985); HUYIN JICHENG FA XINLUN [A NEW DISCUSSION OF THE MARRIAGE AND INHERITANCE LAWS] (Beijing: The Masses Press eds., 1992) (on file with author); ZHANG XIAN, HUNYIN JIATING FALU CHANGSHI [COMMON KNOWLEDGE ABOUT THE MARRIAGE AND INHERITANCE LAWS] (Shanghai: Xuelin Press eds., 1988) (on file with author).

216. *See* GAO YAYUN, XIANDAI SHENGHUO FALU [THE MODERN LIVING LAW] (Beijing: Rural Village Reading Materials Press eds., 1987) (on file with author); CHEN XINGBO, HUNVIN, JIATING, CAICHAN JICHENG JIEYI [EXPLAINING MARRIAGE, FAMILY, AND THE INHERITANCE OF PROPERTY] (Beijing: People's Liberation Army Press eds., 1985) (on file with author). *See also* HUNYIN JIATING JICHENG 90 WEN [90 QUESTIONS ON MARRIAGE, THE FAMILY, AND INHERITANCE] (China Women's Press eds., 1985); HUYIN JICHENG FA XINLUN [A NEW DISCUSSION OF THE MARRIAGE AND INHERITANCE LAWS] (Beijing: The Masses Press eds., 1992) (on file with author); ZHANG XIAN, HUNYIN JIATING FALU CHANGSHI [COMMON KNOWLEDGE ABOUT THE MARRIAGE AND INHERITANCE LAWS] (Shanghai: Xuelin Press eds., 1988) (on file with author).

217. CHEN XINGBO, HUNVIN, JIATING, CAICHAN JICHENG JIEYI, *supra* note 216.

218. *Id.*

C. The Continuing Role of Media in Family Law

Although people outside of the CCP are now permitted to create some media transmissions, the system of family law in the PRC still involves a concerted effort to disseminate through media channels officially acceptable interpretations of law in a way that might induce the public to conform their behavior to them. Commercialization appears to have enlivened and varied the formats of the "big newspaper" articles, but not weakened the force with which they convey official interpretations of family planning policy and the Marriage Law. From 1984 to 1996, the contents of the official press releases on family planning grew longer, a signal of greater emphasis, and more varied, a signal of greater commercialization and competition for readership. The samples from two legal newspapers from September of 1995 through May of 1996 also conformed to a commercializing trend. The articles that treated legal issues involving marriage, divorce, procreation, and family life generally appeared on pages dedicated to family issues and were made to look appealing with eye-grabbing headlines in varying fonts, photos, drawings, and bold markers that labeled the broad topics of many of the articles. Many of the pieces on these pages were soap-opera-like stories about the twists and turns of family relationships. The formats of the nine pieces on divorce were lively, most taking the form of stories[219] or advice columns,[220] and opening with a provocative quotation or question. The contents varied from legal advice about common issues that arose in divorce,[221] to threats of prison sentences for

219. *See, e.g.*, Xiao Min, *Meng, bing buzongshiyuan de – guanyu lihunzu de gushi* [*Dreams Are Not Always Plausible – Stories About Divorces*], FAZHI RIBAO [LEGAL SYSTEM DAILY] May 12, 1996, at 3 (China) (on file with author).

220. One example of an advice column is the "letter box of the barracks lawyer" [Junying lushi xinxiang] column written by Li Mianju of the Sanzhou Military District Legal Advice Office. *See, e.g.*, Li Mianju, *Xianyi junren yaoqiu lihun, xuyao banli naxie shouxu?* [*Active Service Personnel Who Need To Divorce, Which Procedures Do They Need to Follow?*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 21, 1995, at 6 (China) (on file with author). Another example is the "Law enforcement and supervision post", Zhifa jiandu gang column, which published a letter from a worker with the Beijing Municipal Machine Industry Elementary School. The paper entitled the letter, an answer from the newspaper's Masses Work Bureau, and an answer from the court involved in the person's story "Bugei 'zanzhu' bupan lihun," [If you don't give 'assistance,' you don't get a divorce decree]. *Bugei 'zanzhu' bupan lihun* [*If You Don't Give 'Assistance,' You Don't Get a Divorce Decree*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 25, 1996, at 8, (China) (on file with author) (describing how the president of the court in which the person sought a divorce told her lawyer to give U.S. $5,000 in "assistance" to the court in exchange for a divorce decree). For a third example, see *Lihunhou yifang de sicunkun zenmo chuli*? [*How To Manage One Side's Private Finances After Divorce*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 10, 1995, at 3 (China) (on file with author); Li Mianju, *Xianyi junren yaoqiu lihun, xuyao banli naxie shouxu?* [*Active Service Personnel Who Need to Divorce, Which Procedures Do They Need to Follow?*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 21, 1995, at 6 (China) (on file with author); *Bugei 'zanzhu' bupan lihun* [*If you don't give 'assistance,' you don't get a divorce decree*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 25, 1996, at 8 (China) (on file with author); *Lihunhou yifang de sicunkun zenmo chuli*? [*How To Manage One Side's Private Finances After Divorce*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 10, 1995, at 3 (China) (on file with author).

221. *See, e.g.*, Cheng Xiwei, *Lihunshi zhaiwu shifo geban fudan* [*Is Debt After Divorce to be Shouldered Equally?*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 31, 1995, at 3 (China) (on file with author) (giving advice about the legal obligation for debt after divorce, given in the form of a story

falsifying divorce papers.[222] Each legal newspaper article that discussed provisions of the Marriage Law treated one discrete legal issue, but the format used to treat each issue varied from article to article. The variations in format appear to be an attempt to offer a range of depth in the treatment of the issues. While the quality of legal analysis varied, the quality was independent from the format chosen. The textual and hypothetical treatment of a legal provision mentioned above was less lively than the articles that told stories.

This trend was not noticeable in the popular treatises on family law, but each used a format that helped to propagate state policies in as palatable a way as possible. One book contained 78 short fact patterns, each giving rise to a dispute or a lawsuit.[223] Each story was followed by an explanation of how the dispute or lawsuit should be settled, then the relevant statutory provisions were quoted. The format was straightforward, replicating a longstanding format for official court documents, and the tone was lively.[224] Another presented simple explanations to 90 questions about legal issues of marriage, family, and inheritance.[225] Yet another published reports of the questionable practices of neighbors in their villages, such as not getting marriage certificates, and answers that branded the practices illegal.[226]

Despite the growing attention to entertaining formats, the transmissions continued to send authoritative messages. The integration of economic incentives into its models for conforming to the family planning policy echoed a general trend in official policy to stress economics, and to separate economics from politics.[227] In fact, the role of the state-run media in disseminating official interpretations of family grew between 1984 and 1996. The Party directed those in charge of its media channels to vary the format in order to more effectively enforce the law. In

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about the couple "Little Su" and "Ahnan"); Zhao Zhongyuan and Xu Genhua, *Lihun hou: zinu xingshi zhizheng*, [*After Divorce: The Battle Over the Childrens' Surname*], SHANGHAI FAZHIBAO [SHANGHAI LEGAL NEWS], May 10, 1996, at 1 (China) (on file with author) (featuring two stories which gave rise to lawsuits and statistics about whether children keep their father's last name after their parents divorce (32% did not in "recent" years), and a brief discussion of Article 16 of the Marriage Law which permits the children to have the name of either parent after divorce); Hui Wen, *Zuigao renmin fayuan jiu lihun anjian zhonggong fang shiyong, chengzu deng wenti zuo zhuanmen jueda* [*Supreme People's Court Makes Use of State-Owned Housing in Divorce Case: Questions About Paying Rent, etc. Generate Specialized Answers*], SHANGHAI FAZHIBAO [SHANGHAI LEGAL SYSTEM NEWS], May 6, 1996, at 4 (China) (on file with author) (presenting ten questions posed to the Supreme Court and containing answers given by practicing judges based on "relevant regulations").

222. *See, e.g.*, Zhong Yang & Lin Fa, *Ta ziji panjue lihun*, [*He Gave Himself a Divorce Judgment*], FAZHI RIBAO, [LEGAL SYSTEM DAILY], Sept. 29, 1995, at 6 (China) (on file with author) (containing a story about a man in Shandong Province who received a three-year prison sentence for falsifying a court document in order to obtain a divorce).

223. GAO YAYUN, XIANDAI SHENGHUO FALU, *supra* note 216.

224. *See generally, id.*

225. HUNYIN JIATING JICHENG 90 WEN, *supra* note 215.

226. HUNVIN, JIATING, CAICHAN JICHENG JIEYI, *supra* note 216.

227. Tahirih V. Lee, *The Future of Federalism in China*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA 271, 294-95 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2000).

1995, the head of Henan Province's Propaganda Department wrote in an internal publication that a major change in the inculcation of a consciousness of the family planning policy to the masses was the use of multiple formats, including news dispatches, political opinions and commentaries, radio broadcasts of special visits and televised broadcasts of special topics, on-the-scene reporting, and short newsworthy stories.[228]

The proliferation of electronic formats for media transmissions in China does not change the role that such transmissions play in the legal system there. Government-run websites and blogs disseminate the laws and official interpretations of the laws. Just as the print and broadcast media aimed to attract readers by using lively formats, internet-based media use visually and aurally stimulating devices, such as cartoons, and interactivity to draw in readers.

CONCLUSION

In the PRC, media transmissions about matters that are regulated by law are an integral part of the legal system. The samples of media transmissions about family law functioned as a coordinated part of a central program to enforce a range of laws, from the largely un-codified one-child policy, to the codified and periodically amended Marriage Law. The official publicity surrounding the one-child policy and the 1980 Marriage Law steadily has worked to establish the acceptance of and compliance with these programs.

The frameworks offered by Durkheim and Foucault-Epstein-Nagengast help to explain how media transmissions function in the legal system of the PRC. The media sent messages that evoked values that might unify the audience with the PRC central government in a way symptomatic of Durkheim's vision of state and society. The positive spin put on the economic incentives for complying with family law attempted to communicate positive models for behavior in a fashion similar to that identified by Foucault in his vision of state and society. This language lauds discipline and hard work, and attaches these qualities to the state. The suggestion of negative consequences if the models were not complied with, and the portrayal as "work" of the central government, drives in family law, according to Foucault, Epstein, and Nagengast, the signal that compliance with the law, if not done voluntarily, will be forced.

As powerful as their explanatory power is, however, these frameworks do not shed light on all the facets of the relationship between media and law in China. Durkheim's government as keeper of societal values and Foucault's government as disciplinarian, do not fully capture the paternalistic self-image projected by China's rulers to its subjects for centuries. Recall the two types of messages sent in the articles about the Marriage Law. In one, the statute protected relatively defenseless people when they were most vulnerable to harm,[229] and in the other,

228. GOOD NEWS: 1991-1994, *supra* note 182, at 2.

229. *See, e.g.*, *Pregnant and Nursing Women*, *supra* note 188, at 3; *Different Interests*, *supra* note 213.

failure to comply with the Marriage Law would be detected, and if not then corrected, harshly punished.[230] Taken together, both types of messages communicated a parental image of the government: caring and protective,[231] yet strict and harsh when disobeyed.[232] The parental image of the PRC government echoes the paternalism of Emperor Zhu Yuanzhang, which he fostered in his public communications.[233] The use of media to instill in the public the models of the central ruler has deep roots in Chinese history. It has been a feature of government since at least the founding of the Ming Dynasty about 650 years ago, and was refined and expanded by Mao Zedong and the Chinese Communist Party.

To an extent, media transmissions in the PRC function as sources of law. Each item in the samples studied here filled in a gap in the formal law. Emanating from the same authority as enacted laws, these transmissions were authoritative in much the same way, despite their lesser status. The importance of the transmissions varied, depending on where in the publication they were placed and how bold was the typeface, but such a spectrum of importance for media transmissions about law does not mandate against their status or function as sources of law. On the contrary, it fits them within the sources of law in the PRC, which, as in many European countries, are officially recognized to vary along a spectrum of authoritativeness. Under the coordinated system of Party policy-making and judicial supervision, the media transmissions of stories and interpretations of the law rank second only to Supreme People's Court opinions that lawyers without Party connections can get to, which are official sources of law that bind judges.

The trend toward entertainment in the official media did not seem to necessitate a loosening of state control over the messages sent. The Party-run Xinhua news agency and the major legal newspaper continued to send the same types of messages about how the enforcers of the family laws and policies should do their work and how individuals should voluntarily comply with the law and encourage others to comply. Over the same period, the family planning transmissions increased their stress on economic incentives. Despite the enhanced appeal of the vehicle, the pervasiveness of economic incentives in the newer samples confirms that the official media did not stray from Party policy, which showed increasing stress on economic incentives in other areas of law.

The similarity between official messages about law and the legal themes treated in popular films further supports the possibility that some popular legal education is shifting to the "private" sector. Several films that were popular in the PRC in the 1990s sent official messages about law. In "Qiu Ju Goes To Court,"[234]

230. *See Bigamists*, *supra* note 188, at 3.

231. Two examples were *Pregnant and Nursing Women*, *supra* note 188; *Different Interests*, *supra* note 213.

232. For example, see *Bigamists*, *supra* note 188.

233. FARMER, *supra* note 3, at 103-07.

234. THE STORY OF QIU JU, (Sony Pictures Classics 1993) (directed by Zhang yimou) (viewed by author).

the system of administrative litigation proves to be fair but ill suited to the management of permanent personal relationships in the countryside.[235] Qiu Ju is a peasant woman who deeply feels that the village head has dealt her family an injustice, but her aggressive pursuit of justice through higher officials and courts ends in the defeat of not one, but two, ultimately likeable and decent officials who are friends of her family.

This caution against the use of litigation to solve problems in personal relationships figures prominently in the official media. For example, a television drama about a peasant family in northern China showed a grandmother's utter horror when she learned that a family dispute was going to court.[236] She acted as if the end of her life and her family's fortunes were in sight. She refused to eat, walked the long distance to the People's Tribunal (*renmin fating*), and threw herself on the doorstep of the outer office inhabited by two public security officers. She wailed and pleaded that they not send her family to jail. When the family appeared in court, she sat among the plaintiffs, but did not speak. Pleasant and fair-minded people staffed the court. After hearing five people speak, the judge, a female public security officer, asked if they wanted mediation. The defendants all cried "yes," while the plaintiffs cried and said nothing. The judge then dismissed the case and everyone joined in the crying, including the three tough male defendants. At this point, the grandmother spoke, announcing that the family could find a way to reunite.[237]

Echoing a theme from the official legal newspapers, director Huang Jianxin uses his film "Signal Left, Turn Right," which premiered in 1996, to criticize women who use their sexuality to enrich themselves financially.[238] All but one of the women portrayed in the film are preoccupied with money, and all of the women lack stable and dependable relationships with men who could provide for them. The wife of the driving instructor obsesses over the family finances and waits at home for her husband to bring her his cash earnings from work, which she hungrily counts while leaving her young son to play with her husband. When a wealthy entrepreneur gives an expensive pooch to Yang Wei, a driving school student whose husband recently had left her and her young son penniless, Yang Wei sells the pet for a wad of cash even after her son grows strongly attached to it. A woman who runs a restaurant greedily pockets hundreds of yuan in a scam she devised with the driving instructor to lure his students into her restaurant and saddle them with an inflated lunch tab.

Like the legal press accounts of women who con cash out of men who use the government's marriage brokers, Huang's criticism of women who trade idealism for money, as he puts it, is simplistic and does not plumb the depths of this issue. Neither his film nor the legal newspapers explore the sources of their financial

235. *See id.*

236. Shanghai broadcast June 22, 1993 (viewed by the author).

237. *Id.*

238. DA ZUO DENG XIANG YOU ZHUAN [SIGNAL LEFT, TURN RIGHT] (1996) (on file with author).

insecurity and anxiety, nor dwell on the societal trends which are pushing women into these kinds of compromising situations in such numbers that a new saying has been coined to describe it: "Rich men become corrupt; corrupt women become rich."[239]

But if films created outside the Party propaganda apparatus are reinforcing some of the Party's policies on law, they may be offering additional views of legal issues that are more complex, and even contrary to official policy. In "Qiu Ju Goes To Court," Zhang Yimou overturns some of the images of the family planning program transmitted by the official media. Far from setting an example for his neighbors, the village chief, the probable enforcer of the one-child policy in his community, has five daughters. Rather than work hard to achieve the quotas of the one-child policy and encourage the local leader to enforce them, peasant woman Qiu Ju becomes a visible symbol of defiance of the quotas. Eight to nine months pregnant, she crusades to and fro from village to town to district to city in search of revenge for a threat to her ability to be impregnated by her husband and bear more children.

On the eve of the twenty-first century, commercialization might appear to jeopardize the role of media in the legal system of China by diluting the authoritativeness of its messages, but the samples of state-run media transmissions studied here support a different conclusion. They show that, despite the growth of private media whose censored messages might contain official interpretations of law, a variety of state-run media have strengthened their role in the PRC legal system and sent messages that serve as sources of PRC law. If there has been a trend in the relationship between media and law in China during the twentieth century, it has been one where media have grown in their capacity to transmit the law.

239. Huang Jianxin, Film Dir., Address at the Walker Art Center, Minneapolis, MN (Apr. 12, 1996) (on file with author).

BILATERAL INVESTMENT TREATIES: A FRIEND OR FOE TO HUMAN RIGHTS?

MEGAN WELLS SHEFFER*

I. INTRODUCTION

The worst cases of corporate-related human rights harm have occurred, predictably, in the places that need economic development the most: "in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high."[1] Notably, corporations "increasingly play a significant role in the civil wars of developing countries from Sierra Leone, Angola, and the DRC [Democratic Republic of the Congo] to Azerbaijan and Myanmar."[2] For example, a United Nations Panel regarding the ongoing DRC conflict found that corporations trading minerals in the DRC were not only involved in the conflict but were "the engine of the conflict."[3]

Sustainable economic development requires both foreign direct investment (FDI) by multinational corporations (MNCs) and the protection of human rights. FDI is a "category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy."[4] Human rights law, as described by the Universal Declaration of Human Rights - and the subsequent International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) - provides duties for States and affect a multitude of human rights-related policy areas, such as labor law and environmental regulation. Undoubtedly, FDI and MNCs "constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law."[5]

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1. Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 16, U.N. Doc. A/HRC/8/5 (Apr. 7, 2009) (*prepared by* John Ruggie) [hereinafter Ruggie – *Protect, Respect and Remedy*].

2. Ole Kristian Fauchald & Jo Stigen, *Transnational Corporate Responsibility for the 21st Century: Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1045-46 (2009).

3. *Id.* at 1065.

4. Org. for Econ. Co-operation & Dev., *Glossary of Statistical Terms – Foreign Direct Investment* (Sept. 25, 2001), http://stats.oecd.org/glossary/detail.asp?ID=1028.

5. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 2.

Nevertheless, MNCs can also hinder economic development by violating, and inhibiting the protection of, human rights.

In addition to actively perpetrating and enabling human rights violations, MNCs can hinder a State's regulatory power to provide human rights protections. The increasing power of MNCs is strengthened, at least in part, by Bilateral Investment Treaties (BITs). A BIT is a treaty between two States that ensures that investors of a State-Party receive certain standards of treatment when investing in the territory of the other State-Party.[6] The purpose of the BIT is to encourage FDI between the two State-Parties, which hopefully leads to economic growth for both State-Parties. However, BITs grant MNCs rights against States, and allow MNCs to directly initiate arbitration against a State when the State has not fulfilled its obligations under a BIT. The threat of a multi-million dollar adverse arbitration decision pressures States to placate MNCs, and this limits a State's ability to regulate, even in important human rights-related policy areas. For example, MNCs have claimed millions of dollars in damages under BITs for State regulations addressing an emergency financial crisis, refusing to grant a license for a toxic waste facility, and enacting affirmative action legislation.[7]

The field of corporate social responsibility is vast and deep, and has produced a great deal of discussion and proposed solutions. However, this paper explores the narrow subject of BITs. Currently, BITs empower MNCs and encumber a State's regulatory power to promote and protect human rights. However, BITs can be reformed to remove, or at least limit, these encumbrances. Moreover, BITs could be restructured, not to remove the rights BITs grant to MNCs, but to create reciprocal obligations for MNCs to act responsibly and not violate human rights. Section I provides a brief history of the international investment law system and the development of BITs. Section II defines the basic components of a BIT. Next, Section III explains why the current patchwork BIT regime is insufficient. Finally, Sections IV and V discuss proposed solutions to the inadequacies of the present BIT regime.

II. BRIEF HISTORY OF INTERNATIONAL INVESTMENT LAW

The regulation of international investment has deep roots in the development of law regarding the treatment and legal status of foreigners over the past several centuries.[8] Formal treaties governing international commerce, known as Treaties of Friendship, Commerce and Navigation, flourished in the post-WWII era, and the

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6. Jose E. Alvarez, *Empire, Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 ALA. L. REV. 943, 957-59 (2009).

7. Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* 2, n.1 (World Bank Pol'y Res. Working Paper No. 3121, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541 (citing CME Ltd. v. Czech Republic, an award of $350 million; Loewen Group v. The United States, a claim for $450 million; and Methanex v. The United States, a claim for $950 million).

8. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 3-4 (2009).

investment protection function of these treaties came to dominate and evolved into BITs.[9] During this period, there were a series of initiatives to establish a multilateral legal framework for investment, including an International Trade Organization (ITO), which failed, in part, due to existing preferences for BITs. Consequently, the General Agreement on Trade and Tariffs, negotiated in 1947, did not include an investment framework.[10]

Since then, the international trade and investment law regimes have developed separately. The Uruguay Round of negotiations, which established the World Trade Organization (WTO) in 1994, provided for centralized regulation of international trade, but again excluded discussion of an investment framework. While two WTO agreements touch on trade-related investment they do not constitute comprehensive multilateral investment regulations: the Agreement on Trade-Related Investment Measures reaffirms that investment laws must be consistent with WTO trade obligations, and the General Agreement on Trade in Services creates rights for foreign investors to invest in certain service sectors.[11]

Presently, international investment law exists through a fragmented patchwork of BITs created to entice FDI. The frenetic rate of globalization has increased the number of MNCs, and consequently, the frequency of FDI and the use of BITs. During the 1970s there were more than 1,000 instances of States nationalizing private investments, which made the compelling need to protect foreign investors from unfair and arbitrary treatment by host governments more apparent and led to a proliferation of BITs.[12] Over the last two decades developing nations have entered the international investment environment, providing fertile new ground for investment opportunities and an exponential multiplication of BITs.[13] The rapid spread of BITs was likely the result of the increasing enthusiasm for foreign investment in the developing world. BITs appeared to address a need on the part of the developing countries "to add credibility to commitments these countries made to investors."[14] Today, there are nearly 3,000 separate BITs[15] among more than 170 countries.[16]

Recent attempts to restructure the patchwork BIT regime and create a multilateral investment framework have been largely unsuccessful. Following the

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9. *Id.* at 23-24.

10. *Id.* at 19-20.

11. *Id.* at 54-55.

12. Human Rights Council, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 22, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) *(prepared by* John Ruggie) [hereinafter Ruggie – *Further Steps*].

13. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303, 307-09 (2009).

14. Louis T. Wells, *Protecting Foreign Investors in the Developing World: A Shift in US policy in the 1990s?*, *in* INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 421, 444 (Robert Grosse ed., 2005).

15. Ruggie - *Further Steps, supra* note 12, ¶ 22.

16. Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 430 (2004).

failure of the Uruguay Round to obtain investment protection, the United States promoted negotiations of a Multilateral Agreement on Investment (MAI) within the Organization for Economic Cooperation and Development (OECD).[17] Activists argued against the agreement, concerned that it would constitute a corporate bill of rights with no corresponding obligations. In February 1998, more than 600 organizations from 67 countries released a joint statement calling for the suspension of MAI negotiations.[18] This heightened public scrutiny further discouraged interest by international businesses, which was already lacking. For these reasons, in addition to disagreement between States on a broad range of issues, MAI negotiations ended in April 1998 and have not resumed.[19]

However, the failure of the MAI renewed enthusiasm for bringing investment into the WTO regime. The 2001 Doha Declaration expressly recognized the need for a multilateral investment framework.[20] In 2003, at the Fifth Session of the Ministerial Conference in Cancun, Mexico, investment was at the center of the debate between developed and developing countries, and was one of the proximate causes for the breakdown of negotiations.[21] Developing nations wanted an investment framework to include special considerations for developing countries, including allowances for development policies and governments' rights to regulate in the public interest. [22] Due to the divisive nature of this debate, the WTO General Council has decided to exclude further discussion of multilateral regulation of investment from the Doha Round of negotiations.[23]

Most recently, the European Union (EU), whose members are parties to over 1,200 BITs, has taken steps to solidify its members' investment policies.[24] When the Lisbon Treaty entered into force on December 1, 2009, the EU received exclusive competence over FDI. This includes a transition of power to enter into

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17. NEWCOMBE & PARADELL, *supra* note 8, at 55.

18. *National & International Opposition to the MAI,* PUBLIC CITIZEN, http://www.citizen.org/trade/issues/mai/Opposition/ (last visited Mar. 1, 2011).

19. Press Release, Org. for Econ. Co-operation & Dev., Multilateral Agreement on Investment – Report to Ministers, April 1998 (Apr. 28, 1998) (on file at http://www.oecd.org/document/4/0,3746,en_2649_34529562_1933060_1_1_1_34529562,00.html).

20. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 20 WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

21. AARON COSBEY, ET. AL., INT'L INST. FOR SUSTAINABLE DEV., INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 25 (2004), *available at* http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf.

22. Doha Declaration, *supra* note 20, ¶ 22.

23. Doha Work Programme, *Decision Adopted by the General Council on 1 August 2004,* WT/L/579, ¶ 1(g) (Aug. 2, 2004), *available at* http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

24. Marc Maes, *Reclaiming the Public Interest in Europe's International Investment Policy: Will the Future EU BITs Be Any Better Than the 1200 Existing BITs of EU Member States,* INVESTMENT TREATY NEWS, Sept. 2010, at 5, *available at* http://www.iisd.org/itn/2010/09/23/reclaiming-the-public-interest-in-europe-s-international-investment-policy-will-the-future-eu-bits-be-any-better-than-the-1200-existing-bits-of-eu-member-states/.

BITs; the power EU members previously had to negotiate BITs with non-EU States has shifted to the Union.[25]

On July 7, 2010 the European Commission released a draft Regulation and a Communication. The draft Regulation, which proposes a transitional arrangement for existing BITs, has to be approved by both the Council and the Parliament.[26] It would give members temporary authority to maintain their existing BITs with non-EU countries, and to even negotiate new BITs. However, the Commission would be able to withdraw that authority if it concluded that a member's BIT compromised the EU's investment policy.[27] The Communication is not very detailed but it does mention broader policy objectives. It explicitly refers to the objectives of the overall European foreign policy, including the promotion of the rule of law, human rights, and sustainable development, and also to the OECD Guidelines for Multinationals.[28] The Communication does not add any nuance or a more balanced construction of typical BIT provisions, which are described in the next section. Nevertheless, this is a unique opportunity for an assessment of the existing BITs and for an open and broad discussion on the future European international investment policy.[29]

III. DESCRIPTION OF BILATERAL INVESTMENT TREATIES

A BIT is a treaty between two States. The BIT ensures that investors of a State-Party receive certain standards of treatment when investing in the territory of the other State-Party.[30] When there is a violation of a BIT, a victim investor can directly bring a claim against the State that violated the BIT. Generally speaking, there are five major actors on the international investment stage. First, a "Host-State" is the State-Party in which an investment exists. Generally, because developing States import more FDI, they are more often the Host-State. Second, a "Home-State" is the State of corporate citizenship of the investing MNC. Generally, because developed States export more FDI, they are more often the Home-State.[31] Third, "Investors" are the MNCs that are corporate citizens of the Home-State and that are making an investment in the Host-State. Fourth, "impacted non-State actors" are those people groups that are affected by the actions or demands of the investing MNCs. Fifth, "arbitration tribunals" serve as the dispute resolution mechanisms for disputes arising under a BIT.

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25. James Zhan, *UNCTAD's 2010 World Investment Forum: High-level Experts Discuss Investment Policies for Sustainable Development,* INVESTMENT TREATY NEWS, Dec. 2010, at 14, *available at* http://www.iisd.org/itn/2010/12/16/unctads-2010-world-investment-forum-high-level-experts-discuss-investment-policies-for-sustainable-development/.

26. Maes, *supra* note 24, at 5.

27. Zhan, *supra* note 25, at 14.

28. Maes, *supra* note 24, at 5.

29. *Id.*

30. Alvarez, *supra* note 6, at 957-59.

31. *See* NEWCOMBE & PARADELL, *supra* note 8, at 3, n.6.

BITs confer foreign investors rights, and while the specific language of BITs vary, they tend to contain the following similar provisions.[32] Most countries have a Model BIT which serves as a template and is typically used as a starting point to conduct negotiations of new BITs. The following provisions, taken from the United States Model BIT, are examples of rights BITs commonly confer.

A National Treatment provision provides that foreign investors have the right not to be treated less favorably than domestic investors in like circumstances:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[33]

A Most-Favored-Nation provision provides that foreign investors have the right not to be treated less favorably than investors of any other country:

> Each Party shall accord to investors of the other Party [and investors' investments] treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[34]

A Fair and Equitable Treatment provision provides that foreign investors have the right to a minimum standard of treatment:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> . . .
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[35]

Expropriation provisions ensure that foreign investors have the right to be compensated for expropriations:

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32. Alvarez, *supra* note 6, at 957-59.

33. 2004 Model BIT, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment art. 3 (2004), *available at* http://www.state.gov/documents/organization/117601.pdf [hereinafter U.S. Model BIT].

34. *Id.* art. 4.

35. *Id.* art. 5.

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law and [the Minimum Standard of Treatment][36]

Lastly, most BITs have a dispute resolution clause that constitutes "a unilateral offer to settle disputes by arbitration, extended to the investor by the state, and which the investor accepts by initiating arbitration under the treaty."[37] Where a Host-State has a BIT with a foreign investor's Home-State and the Host-State breaches its obligations to the investor enumerated in the BIT, the investor may bypass domestic court systems and bring a claim directly against the Host-State before an international arbitration tribunal.[38] Thus, the arbitration is not between the two States that entered into the BIT, but rather, BITs allow MNCs to directly sue nation-States for violating their treaty obligations to the corporate investor. Notably, investors have initiated the vast majority of cases. The few instances where Host-States have raised claims against foreign investors have not been based on a BIT, but rather based on the contractual relationship between the Host-State and the investor.[39]

There are a variety of arbitration institutions that are used to resolve disputes arising under BITs. The leading international arbitration institution devoted to investor-State dispute settlement is the International Centre for the Settlement of Investment Disputes (ICSID). ICSID is an autonomous international institution established under a multilateral treaty, the Convention on Settlement of Investment Disputes between States and Nationals of Other States, which has over 140 member States. ICSID does not arbitrate disputes directly, but rather it provides the institutional and procedural framework for independent arbitral tribunals to resolve the dispute.[40] Another example of an international arbitration institution is the United Nations Commission on International Trade Law (UNCITRAL).[41]

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36. *Id.* art. 6.

37. Noemi Gal-Or, *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate*, 32 SUFFOLK TRANSNAT'L L. REV. 271, 281 (2009).

38. *Id.* at 281-82.

39. Fauchald & Stigen, *supra* note 2, n.118 (citing Tanzania Elec. Supply Co. v. Ind. Power Tanzania Ltd., ICSID Case No. ARB/98/8 (2001); Genin v. Republic of Estonia, ICSID Case No. ARB/99/2 (2001); SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (2004)).

40. *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last visited Mar. 1, 2011).

41. United Nations Commission on International Trade Law, *About UNCITRAL*, http://www.uncitral.org/uncitral/en/about_us.html (last visited Mar. 1, 2011).

Regardless of which arbitral rules are used, the decisions of the arbitrators are only binding on the parties to the arbitration and do not create binding precedent. Awards from BIT arbitration tribunals are limited to financial compensation and "normally eminently enforceable."[42]

The enforceability of BIT arbitration awards is a function of two factors. First, a Host-State's non-compliance with an adverse award may deter future investments because investors will see the Host-State as inhospitable and a higher-risk investment environment. Second, where a MNC receives a favorable decision in a BIT arbitration and the Host-State does not comply with the arbitration award, the Host-State can expect diplomatic pressure from the Home-State to pay the MNC the compensation awarded by the arbitration tribunal.

For example, CalEnergy, a U.S. corporation, had two geothermal projects in Indonesia that became the subject of an arbitration and an award was issued in favor of CalEnergy. However, Indonesia refused to pay. CalEnergy had political risk insurance with the Overseas Private Investment Corporation (OPIC),[43] an agency of the United States government.[44] OPIC then had authority to seek payment from Indonesia under the arbitration award. In July 2000, the U.S. ambassador to Indonesia, Robert Gelbard, stated that he was "running out of patience" with Indonesia's tardy payment to OPIC. He threatened to cut off aid to Indonesia and declare expropriation: "There is always the possibility of declaring expropriation . If we were to do this, it would result in a dramatic deterioration of the rupiah and would hurt Indonesia very much."[45] OPIC also removed Indonesia from the list of countries eligible for political risk insurance. The strategy worked. OPIC and Indonesia reached a settlement in mid-2001.[46]

Investor-State disputes are increasing faster than other areas of public international law dispute settlement. These investor-State dispute resolution mechanisms were largely unknown until recently.[47] The first modern investor-State arbitration was decided in 1990.[48] After the passage of the 1994 North American Free Trade Agreement (NAFTA), which under Chapter 11 provides many of the same investors' rights provided in BITs, investors began to

42. Weiler, *supra* note 16, at 430-31.

43. Wells, *supra* note 14, at 452.

44. Press Release, Overseas Private Investment Corporation, Spinelli Addresses Sustainable Development at London Conference (June 17, 2009), *available at* http://www.opic.gov/news/press-releases/2009/pr061709 [hereinafter OPIC-Spinelli].

45. Wells, *supra* note 14, at 452.

46. Jennifer M. DeLeonardo, *Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage*, 45 VA. J. INT'L L. 737, 770 (2005).

47. Int'l Inst. for Sustainable Dev., *European Parliament Hearing on Foreign Direct Investment*, at 7 (Nov. 9, 2010) (*presented by* Nathalie Bernasconi-Osterwalder), *available at* http://www.europarl.europa.eu/document/activities/cont/201011/20101118ATT96250/20101118ATT96250EN.pdf.

48. *Id.* at 3.

increasingly use investor-State arbitration as way of settling disputes.[49] The exact number of investor-State arbitration cases are unknown because the initiation of the arbitrations and their results are not always released publicly. Given that there have been over 350 known cases, commentators estimate that the total is well over 400. On average, at least 30 to 40 more investor-State cases occur every year.[50]

To summarize, BITs give foreign investors highly enforceable rights against the Host-State, but provisions setting out investor obligations "are virtually nonexistent."[51] However, given that BITs are widely used and that the investment arbitration tribunals are very effective, BITs may be a promising choice to serve as a mechanism for the promotion of corporate social responsibility and the protection of human rights.

IV. GAPS IN THE PATCHWORK REGIME OF BITS

The patchwork of BITs that comprise the international investment system has resulted in a diverse and varied legal system, which suffers from several flaws. BIT investor-State arbitration tribunals pose challenges that are unique and not present in more traditional commercial arbitrations, which typically involve two private parties contesting commercial matters and do not include State governments.[52]

A. The Origin of BITs Has Created an Asymmetry in Power and Experience

One problem posed by BITs comes from the historical development of the patchwork BIT regime. BITs have been designed to facilitate and promote global commerce, and because international investment law is rooted in early notions of the protection of foreigners, BITs can be seen as primarily safeguarding the interests of private investors.[53] Essentially, BITs secure an exchange: the State agrees to certain protection obligations in exchange for a foreigner's commitment to invest.[54]

Given that the origins of BITs are in the former colonial powers with presently the largest economies, it should be recognized that "[e]xisting international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries."[55] According to a 2007 study of concluded and pending ICSID cases, the majority of cases have been filed against developing countries: 74 percent against middle-income developing

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49. *Id.*

50. *Id.*

51. Fauchald & Stigen, *supra* note 2, at 1054.

52. *See, e.g.*, Luke Eric Peterson, *Pakistan Attorney General Advises States to Scrutinize Investment Treaties Carefully,* INVESTMENT TREATY NEWS (Dec. 1, 2006) [hereinafter Peterson – *Pakistan*].

53. Weiler, *supra* note 16, at 430-31.

54. *Id.* at 431.

55. S. Afr., Dept. of Trade & Indus., *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, at 11 (June 2009), *available at* http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf [hereinafter S. Afr. BIT Review].

countries; 19 percent against low-income developing countries; and only 1.4 percent against G8 countries. Additionally, most cases have concluded in favor of the investors: 36 percent were decided in favor of investors and 34 percent were settled out of court with compensation to the investor.[56]

This asymmetry of power and experience has resulted in developing States negotiating BITs without fully appreciating the risks involved and entering into agreements that have heavily favored foreign investors.[57] Some scholars express that this will lead, or already has led, to a "race to the bottom," whereby developing nations loosen investment regulations in competition to attract FDI, constraining their regulatory power to pursue legitimate public interest objectives, and resulting in more human rights abuses.[58]

Currently, South Africa, like a growing number of developing States, is reviewing its BIT commitments "as an exercise to do damage control."[59] In reviewing the *travaux préparatoires* of its current BITs, the South African Department of Trade and Industry realized that the inexperience of its negotiators and their lack of knowledge of investment law have resulted in investment agreements that are not in the interests of South Africa.[60]

Similarly, Pakistan has, until recently, treated BITs as "photo-op" agreements, which were signed hastily with little consideration of the legal consequences. In 2006, Pakistan's Attorney General described this former approach as follows: "Because someone is going visiting someplace and wants to sign an 'unimportant' document; or someone is coming over for a visit and an 'unimportant' document has to be signed. And a BIT . . . until very recently was regarded as one such (unimportant) document." Pakistani officials estimate that dozens of BITs were concluded in this manner, with the consequences only becoming clear after foreign investors began invoking BITs and initiating investor-State arbitrations against Pakistan. In 2001, the first arbitration, filed by a Swiss MNC, Société Générale de Surveillance S.A. (SGS), took Pakistan's government by surprise: "SGS having lost before the Swiss Supreme Court, having lost in Pakistan, how could it start a third round?" Pakistan's Attorney General commented that "[i]n many ways, the foreign investor is seeking an international arbitral review of sorts of government

56. SARAH ANDERSON & SARA GRUSKY, INST. FOR POL'Y STUDIES & FOOD AND WATER WATCH, CHALLENGING CORPORATE INVESTOR RULE: HOW THE WORLD BANK'S INVESTMENT COURT, FREE TRADE AGREEMENTS, AND BILATERAL INVESTMENT TREATIES HAVE UNLEASHED A NEW ERA OF CORPORATE POWER AND WHAT TO DO ABOUT IT, ix (2007), *available at* http://www.ips-dc.org/reports/challenging_corporate_investor_rule.

57. *See, e.g.*, S. Afr. BIT Review, *supra* note 55, at 5.

58. Ruggie - *Further Steps, supra* note 12; Ruggie - *Protect, Respect and Remedy, supra* note 1, ¶ 14; Chalamish, *supra* note 13, at 317; Weiler, *supra* note 16, at 433.

59. S. Afr. BIT Review, *supra* note 55, at 55.

60. *Id.* at 5.

conduct on important public policy issues issues which, until recently, were immune from any non-domestic scrutiny."[61]

As these examples show, the patchwork BIT regime has developed in an ad hoc manner and developing countries are put at a disadvantage for two reasons. First, as developing nations entered the global economy they lacked the experience developed States possessed with decades of FDI, treaty negotiation, and knowledge of BITs. Second, developing nations are induced to sign BITs because they want to attract FDI for economic development. Thus, developing nations are more often Host-States rather than Home-States, and consequently, more often the defendant in BIT arbitration claims. Conversely, the plaintiff MNCs tend to be from larger, more powerful, developed States.

B. The Separation of Human Rights and Investment Law in Policymaking

Another problem with the current patchwork BIT regime is that, thus far, international investment law and human rights have existed in separate spheres. Generally, human rights norms are absent in the development of domestic investment policies and in the formation of BITs. A State's "duty to protect against non-State abuses [including those perpetrated by MNCs] is part of the very foundation of the international human rights regime."[62] However, governments often keep human rights policy within its own conceptual and typically weak institutional box, segregated from the development of other policies regarding investment and corporate governance.[63] This "horizontal incoherence" often results in circumstances where "departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government's own human rights obligations and agencies."[64] The fact that BITs are generally devoid of any mention of human rights[65] exemplifies the "horizontal incoherence" of government policymaking.

C. Lack of Jurisdiction to Address Human Rights-Related Issues in BIT Arbitration Tribunals

In investment arbitration, disputes arising under BITs are generally treated as solely commercial disputes.[66] Human rights and broader public interest

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61. Peterson – *Pakistan, supra* note 52.

62. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 18, U.N. Doc. A/HRC/4/035 (Feb. 19, 2007) (*prepared by* John Ruggie).

63. Ruggie - *Protect, Respect and Remedy, supra* note 1, ¶ 22.

64. Ruggie – *Further Steps, supra* note 12, ¶ 18; Ruggie - *Protect, Respect and Remedy, supra* note 1, ¶ 33.

65. Recently, States have considered adding human rights protections to their model BITs and this will be discussed later in this article.

66. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 37.

considerations typically have little if any role.[67] Moreover, the jurisdiction of the tribunal to address human rights violations will depend on the specific language of the underlying BIT.[68]

For example, consider the investment arbitration tribunal's decision in *Biloune and Marine Drive Complex Ltd. v. Ghana.* Mr. Biloune, a foreign investor, sought recovery alleging that the Government of Ghana's detention and expulsion of him and violations of his property and contractual rights constituted an actionable human rights violation under an applicable BIT. The arbitration tribunal concluded that it lacked jurisdiction over human rights violations because the underlying BIT only obligated the parties to arbitrate disputes regarding foreign investment and Mr. Biloune's allegations were independent of the investment violation claim.[69]

Additionally, when arbitral panels have referenced human rights issues in BIT arbitration awards, it is in relation to only the investors' rights (e.g. – rights to property, due process, etc.) and not the rights of Host-State's citizens. In 2008, arbitrators awarded moral damages to a company whose executives were intimidated by the Host-State's agents and armed individuals, and subsequently suffered the "stress and anxiety of being harassed, threatened and detained."[70]

D. Lack of Transparency and Public Participation in BIT Arbitration Tribunals

Further problems stem from the fact that BIT disputes are often resolved in secret. Preferences for commercial confidentiality often prohibit public knowledge of, or involvement in, the arbitration process.[71]

ICSID offers the greatest level of transparency.[72] All ICSID pending and concluded cases are available to the public, including the subject matter of the arbitration, party names, date of registration, composition of the tribunal, and the procedural timeline.[73] However, actual ICSID arbitration tribunals cannot be described as completely open.[74] Information on the parties' arguments, the

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67. *Id.*

68. NEWCOMBE & PARADELL, *supra* note 8, at 107-09.

69. *Id.*

70. LUKE ERIC PETERSON, RIGHTS & DEMOCRACY, INT'L CTR. FOR HUMAN RIGHTS AND DEMOCRATIC DEV., HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION 44 (2009), *available at* http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf [hereinafter PETERSON – MAPPING].

71. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 37.

72. PETERSON – MAPPING, *supra* note 70, at 41-42.

73. MARC JACOB, INST. FOR DEV. & PEACE, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS 24 (2010), *available at* http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.

74. PETERSON – MAPPING, *supra* note 70, at 41-42; Ignacio Torterola, *The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View*, INVESTMENT TREATY NEWS, Sept. 23, 2010, at 10.

minutes and other records of the proceeding are not available, and the parties may agree to keep the contents of the final award confidential.[75] Moreover, all proceedings are closed to the public unless both parties agree otherwise, and in the past many ICSID stakeholders have objected to measures for greater transparency.[76]

Additionally, there are many other investment tribunals that offer much less transparency. For example, the UNCITRAL rules require that awards not be published unless both parties consent.[77] Consequently, an unknown number of BIT arbitration cases have been completed without any public disclosure or any ability of interested observers to monitor and analyze developments in the investment law regime.[78]

Investment tribunals do often consult and cite other investment arbitration decisions. While BITs differ, many employ very similar language, as described above in Section II. For example, many BITs have similar language referring to "fair and equitable treatment." Looking at how other tribunals have interpreted this broad language is helpful. However, the lack of published decisions and the secrecy of BIT disputes make it difficult to know what areas of investment law are consistent and established and what areas are still emerging or ambiguous.[79]

E. Arbitrators' Lack of Human Rights Expertise and Opposing Allegiances in BIT Arbitration Tribunals

The arbitrators that resolve BIT disputes can also present a problem for the promotion and protection of human rights. Generally, in investor-State arbitration tribunals, the parties choose the arbitrators. Each party has the right to appoint one arbitrator and the third arbitrator is chosen through agreement of the two party-nominated arbitrators, and ideally, the parties as well.[80]

However, arbitrators present two distinct problems. First, human rights norms may be outside the scope of the arbitrator's expertise.[81] There are no significant restrictions on who can serve as arbitrators. ICSID requires that arbitrators must have "recognized competence in the fields of law, commerce, industry or finance."[82] Most BIT arbitrators have commercial backgrounds and are

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75. JACOB, *supra* note 73.

76. PETERSON – MAPPING, *supra* note 70, at 41-42.

77. JACOB, *supra* note 73.

78. LUKE ERIC PETERSON & KEVIN R. GRAY, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 34-35 (2005), *available at* http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf; PETERSON – MAPPING, *supra* note 70, at 44.

79. Torterola, *supra* note 74, at 10-11.

80. Tony Cole, *Arbitrator Appointments in Investment Arbitration: Why Expressed Views on Points of Law Should be Challengeable,* INVESTMENT TREATY NEWS, Sept. 23, 2010, at 14, *available at* http://www.iisd.org/itn/2010/09/23/arbitrator-appointments-in-investment-arbitration-why-expressed-views-on-points-of-law-should-be-challengeable-2/.

81. Chalamish, *supra* note 13, at 352-53.

82. Cole, *supra* note 80.

not familiar with matters pertaining to human rights-related laws. Thus, even if a tribunal found it appropriate to address a human rights-related matter, the arbitrators may not be fully versed in how to proceed. Conversely, many human rights experts would similarly lack the necessary expertise in international investment law to serve as an arbitrator in a BIT arbitration.[83]

Secondly, the world of international investment arbitrators is a relatively small, close community. Understandably, these specialized arbitrators are concerned with "the securing of their next appointment to a tribunal" and consequently, their actions must ensure that MNCs will want them to serve as arbitrators in the future. In this small community, to obtain future employment, arbitrators must make a "display of commercial probity and their loyalty to the values of multinational business." Moreover, arbitrators often also serve as counsel to parties in other international investment related cases.[84]

F. BITs Can Limit State Sovereignty

One of the most-discussed problems posed by BITs is their capability to limit State regulatory power. When a State creates a law or policy in an area that affects an MNC, and there are many policy areas that can affect a foreign MNC's investment, the State runs the risk that the MNC may bring a multi-million dollar claim against the State for violating a BIT. The majority of investment cases involve economic sectors and policy areas that governments often regulate because these areas are of critical importance to any society. According to a 2007 study of concluded and pending ICSID cases, the majority of cases involved either basic public services or energy resources: 42 percent involved water, electricity, telecoms, and waste management, and 29 percent involved oil, gas, and mining.[85]

Additionally, MNCs have won systematic victories regarding State regulation that could be characterized as responding to social and economic emergencies. The Argentine financial crisis of the early 2000s produced such emergencies, yet the resulting investor-State arbitration cases upheld investment contracts despite the fact that they were arguably economically and socially impossible due to the financial crisis. In the absence of express BIT provisions regarding human rights, arbitrators struggled with Argentina's human rights defense arguments.[86]

Generally, international arbitration tribunals have held that States must comply with both international investment law and domestic human rights obligations.[87] The following are four ways in which the current patchwork BIT regime can limit State sovereignty.

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83. JACOB, *supra* note 73, at 25.
84. *Id.* at 25-26.
85. ANDERSON & GRUSKY, *supra* note 56.
86. NEWCOMBE & PARADELL, *supra* note 8, at 75.
87. *Id.*

1. Host-State Agreements and Risk-Stabilization Clauses

In addition to BITs, Host-States enter into agreements with individual investors. Host-State agreements often include "risk stabilization clauses." These clauses can serve to insulate investors from having to implement human rights-related laws (e.g. – laws related to labor rights, environmental regulation, etc.) or may require Host-States to compensate investors for the costs of compliance.[88] Additionally, risk stabilization clauses can include promises to "freeze" the existing regulatory regime for the duration of the investment, which can be as long as fifty years if it is a major infrastructure or extractive industries project.[89]

Where a Host-State attempts to force an investor to comply with new legislation despite a risk stabilization clause, even where the legislation applies to all businesses uniformly, this action can be seen as violating the BIT between the Host-State and the investor's Home-State. Specifically, such an action would violate a BIT's assurances of "fair and equitable" treatment and "umbrella clauses," which require States to abide by contractual obligations with investors.[90] BIT disputes arising from these circumstances have involved staggering claims and awards for compensation, reaching to hundreds of millions of dollars.[91]

Studies have shown that this regulatory imbalance is particularly problematic for developing countries. Agreements between investor-MNCs and non-members of the OECD constrain Host-States' regulatory power significantly more than agreements with the thirty members of the OECD.[92] A study of 90 Host-State agreements showed that none of the Host-State agreements with OECD countries offered investors exemptions from new laws and they generally tailored risk stabilization clauses to preserve public interest considerations.[93] Conversely, a majority of the Host-State agreements between investing MNCs and non-OECD countries contained provisions that insulated investors from compliance with new environmental and social laws or mandated compensation from the Host-State for compliance. Host-State agreements between investor-MNCs and Sub-Saharan African nations had the most sweeping risk stabilization provisions.[94]

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88. *Id.*

89. *Id.*

90. ANDREA SHEMBERG, INT'L FIN. CORP. & OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STABILIZATION CLAUSES AND HUMAN RIGHTS ¶ 138 (2008), *available at* http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf; Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶12.

91. Hallward-Driemeier, *supra* note 7, at 2, n.1.

92. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶¶ 34-36. OECD members: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

93. Human Rights Council, *Business & Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, ¶ 32, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (*prepared by* John Ruggie) [hereinafter Ruggie – *Towards*].

94. *Id.* ¶ 32.

2. Host-State Regulatory Power and Indirect Expropriation

Investor-MNCs have challenged Host-State regulations by alleging that they violate BIT protections against expropriation. As discussed above, BITs generally prohibit government expropriation of an investor's investment unless the expropriation is for a non-discriminatory public purpose and the investor is compensated. An expropriation may be direct or indirect. Defining an indirect expropriation requires an "effects based approach" whereby "the focus of the analysis is the effect of the State measure on the investment."[95] A wide variety of government measures have been found to constitute an indirect expropriation: exorbitant or arbitrary taxation; measures substantially interfering with the management or control of a business enterprise; annulment and cancellation of property rights, contractual rights, debts, or licenses; the harassment of employees, blocking of access to a plant, and government take-over of a key supplier; and other arbitrary conduct depriving the investor of the benefits of its property.[96]

A recently decided BIT case further illustrates the problem.[97] In November 2006, European investors registered a claim with ICSID against South Africa, contending that the Mineral and Petroleum Resources Development Act (MPRDA) violated the Italy-South Africa BIT and BITs concluded by South Africa with Belgium and Luxembourg.[98] The investors involved hold large investments in the natural stone business in South Africa, controlling about 80 percent of South Africa's stone exports.[99] The MPRDA vests all mineral and petroleum rights with the South African government and requires that businesses apply for a right to convert their former holdings into "new-order" rights, which are held and used under license from the South African government. In this conversion process, South Africa's Department of Mining and Energy considers the Constitution's overall goal of redressing historical, social, and economic inequalities.[100] The investors claimed that the MPRDA extinguished their ownership of mineral rights in South Africa, which constituted an indirect expropriation. The claimants also alleged that they have been denied fair and equitable treatment because of affirmative action requirements for the hiring of black or historically disadvantaged managers and the selling of 26 percent of their shareholdings to black or historically disadvantaged individuals.[101]

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95. NEWCOMBE & PARADELL, *supra* note 8, at 326.

96. *Id.* at 327-28.

97. Ruggie - *Further Steps, supra* note 12, ¶ 21 (citing Piero Foresti v. Republic of S. Afr., ICSID Case No. ARB/07/1, Award (Aug. 4, 2010)).

98. Luke Eric Peterson, *European Mining Investors Mount Arbitration Over South African Black Empowerment,* INVESTMENT TREAT NEWS, Feb. 14, 2007, *available at* http://www.iisd.org/pdf/2007/itn_feb14_2007.pdf.

99. *Id.*

100. *Id.*

101. *Id.*

Ultimately, this case was settled outside of the arbitration tribunal. Following an agreement between the parties whereby South Africa granted the investors new mining rights, the investors requested to discontinue the arbitration proceedings. In August 2010, the tribunal then dismissed the investors' claims and ordered the investors to pay EUR400,000 to South Africa for arbitration costs.[102] While this case could have ended with much weightier consequences for South Africa, it exemplifies how the current BIT regime provides MNCs with a cause of action and a forum to directly challenge a nation-State's domestic policies. The stakes for developing nations are enormous.

Similarly, there have been several disputes regarding Host-State measures affecting the privatization of water supplies, which pit investors' rights against the increasingly recognized right to water.[103] In *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania,* the investors, a British-German consortium, won a bid to upgrade and manage water and sanitation infrastructure in Tanzania, but underestimated the difficulty of the project and sought to renegotiate the contract. Tanzania refused to renegotiate, repudiated the contract, and seized control of the project. The investors initiated a claim with ICSID requesting $20 million in compensation for the alleged expropriation of their investment in the water project. The arbitration tribunal held that Tanzania violated the expropriation clause of the United Kingdom-Tanzania BIT.[104] Tanzania, and several *amici curaie* submissions, argued that Tanzania's actions were justified on human rights grounds. Nevertheless, the tribunal refused to defer to human rights laws for clarification because the expropriation provisions were clear and Tanzania's repudiation of the contract was inconsistent with the contract's termination clause.[105] However, the tribunal awarded no compensation given that, due to the investor's poor planning and implementation, the monetary loss was inevitable.[106]

3. Police Powers and Indirect Expropriation

Not all governmental deprivations of property constitute an expropriation. International law authorities have regularly recognized three broad categories of "police power" regulation that might justify non-compensation where there is a deprivation: (1) public order and morality; (2) protection of human health and environment; and (3) State taxation.[107] However, particularly with public morality regulations and policies to protect human health and environment, there is a lack of precise definitions and guidance.[108]

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102. Piero Foresti v. Republic of S. Afr., ICSID Case No. ARB/07/1, Award, ¶ 133 (Aug. 4, 2010).

103. JACOB, *supra* note 73, at 14.

104. *Id.*

105. Jorge Daniel Taillant & Jonathan Bonnitcha, *International Investment Law and Human Rights, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 57, 75-76 (Marie-Claire Cordonier Segger et al. eds., 2011).

106. JACOB, *supra* note 73, at 14.

107. NEWCOMBE & PARADELL, *supra* note 8, at 358.

108. *Id.* at 360-61.

Moreover, perspectives differ regarding the effect of police powers. One perspective is that the "police powers" are a criterion which is weighed in the balance with other factors. Others argue that "police powers" are a controlling element that exempts automatically the measure from any duty for compensation.[109] In practice, BIT tribunal's put the burden of proof on the State, forcing the police power justification to become a defense.[110]

"A significant consideration in assessing police power regulations . is the proportionality between the harm that the government measure aims to address and its effect on the investor, in light of the investor's legitimate investment-backed expectations."[111] This was the issue in the ICSID case of *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (*Tecmed*).[112] In *Tecmed*, the investor alleged that the Mexican government's failure to re-license its hazardous waste site violated the Spain-Mexico BIT and constituted an indirect expropriation.[113] The waste site had been plagued by "sit-ins by local residents protesting the site's technical viability and lack of public participation in decisions regarding the hazardous waste confinement and [facility's] proximity to [nearby communities]."[114] Notably, civil society groups had alleged that the waste facility had "lacked the proper environmental impact authorization, and had illegally deposited hazardous waste from another company prior to the closing of the waste site in 1999." Consequently, the NAFTA Commission for Environmental Cooperation held that a fact-finding inquiry was warranted but this was deferred due to the ongoing ICSID arbitration.[115] The investor argued that its waste facility "was the target of organized protests designed to achieve a protectionist end: protecting Mexico's only other hazardous waste storage facility in Mina, near Monterrey."[116]

The Tribunal attempted to determine whether the Mexican government's measures had "a reasonable relationship of proportionality"[117] "with respect to their goals, the deprivation of economic rights and the legitimate expectations of [the investor]."[118] This standard appears to lie somewhere in vast expanse between

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109. Organization for Economic Co-operation and Development [OECD], *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 18 (Working Papers on International Investment No. 2004/4, Sept. 2004), *available at* http://www.oecd.org/dataoecd/22/54/33776546.pdf.

110. NEWCOMBE & PARADELL, *supra* note 8, at 366.

111. *Id.* at 363.

112. OECD, *supra* note 109, at 18 (discussing Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003)).

113. *Id.*

114. Luke Eric Peterson, *Mexico's Treatment of Hazardous Waste Site Violates Mexico-Spain BIT*, INVESTMENT L. & POL'Y WKLY. NEWS BULL., June 6, 2003, *available at* http://www.iisd.org/pdf/2003/investment_investsd_june6_2003.pdf.

115. *Id.*

116. *Id.*

117. OECD, *supra* note 109, at 18.

118. *Id.* at 20.

the requirement that there be a plausible basis for the measure and the requirement that the measure be the least restrictive means necessary to meet the government's objectives.[119] The Tribunal noted:

> Even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill.[120]

Based on these considerations of the investor's legitimate expectations and a finding that the government's actions were disproportionate to the investor's "infringements," the Tribunal found against Mexico and awarded the investor $5 million.[121]

4. Lack of Guidance Regarding How Tribunals Should Balance Investors' Rights Against States' Obligations and Sovereignty

Many BIT disputes pit an investor's rights against a Host-State's obligations under domestic and international law, and BITs give tribunal arbitrators little to no guidance on how these conflicts should be reconciled. At some point a Host-State's obligations must outweigh an investor's rights under BITs, but where this line is drawn remains unclear. States have achieved some limited success in arguing that international human rights law should be used as an interpretative aid to guide vague treaty and contract standards.[122]

An example of a successful attempt to invoke human rights obligations would be the case discussed above in Section III(F)(2), *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania.* While the investors won their expropriation claim, the tribunal rejected their fair and equitable treatment claim based on Tanzania's human rights obligations. The tribunal found that the investors' legitimate expectations were partly determined by the "particular investment environment." Here, the environment had two important characteristics: (1) Tanzania was a developing State; and (2) Tanzania was bound by international human rights obligations to protect its citizens' right to water.[123]

Conversely, an example of a failed attempted to invoke human rights obligations would be the case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentina.*[124] This claim concerned a 1993 water privatization program and a 30-year concession granted by the Argentine

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119. NEWCOMBE & PARADELL, *supra* note 8, at 365.

120. OECD, *supra* note 109, at 20.

121. *Id.*; Peterson, *supra* note 114.

122. Taillant & Bonnitcha, *supra* note 105, at 75.

123. *Id.* at 75-76.

124. Lise Johnson, *Argentina on the Hook for Breach of Fair and Equitable Treatment,* INVESTMENT TREATY NEWS, Sept. 23, 2010, at 23, *available at* http://www.iisd.org/itn/2010/09/23/awards-and-decisions/.

government to a company created by the claimants to operate water and waste-water services for Buenos Aires. In April 2003, the investor-MNCs initiated an ICSID arbitration against Argentina. They alleged that government actions and omissions related to the Argentine financial crisis stymied the concession and destroyed the value of the investment, in violation of Argentina's BITs with Spain, the United Kingdom, and France. During the arbitration, the tribunal addressed this claim under the BIT's fair and equitable treatment provisions. The tribunal interpreted the provision to require that Host-States must protect investors' objective and reasonable "legitimate expectations" by taking into account all relevant circumstances, including the nature of the investment, Argentina's rights and interests to exercise its regulatory authority, and Argentina's historical, political, economic, and social conditions.[125] Argentina, and NGOs, through *amicus curiae* briefs, argued that a government's human rights obligations to assure its population the right to water should trump its obligations to investors under BITs. In July 2010, the Tribunal rejected this, holding that a State must respect both its human rights and treaty obligations equally, and found Argentina liable for violating the applicable BITs.[126]

Thus, the fact that the current, nebulous BIT regime allows MNCs to punish a State's regulatory actions regarding important policy areas, such as public services or the energy sector, is particularly problematic. Notably, even where such disputes are decided with minimal financial awards to investors, the mere potential of an adverse arbitration decision with great financial and political costs "might suffice to cause 'chilling effect' on national regulation."[127]

V. HOW TO PROTECT HUMAN RIGHTS WITHIN THE PRESENT BIT REGIME

The future possibility of a multilateral investment framework is bleak. Nevertheless, given the increasing and widespread use of BITs worldwide and the effectiveness of BIT dispute mechanisms, it may still be possible for States to revamp the present BIT regime to better incorporate public interests, State sovereignty, and human rights. For example, in 2005, the International Institute for Sustainable Development (IISD) published a draft Model Investment Agreement including such protections, which will be discussed in more detail in Section VI.

Changing a treaty is complex and time consuming. Change can occur in one of three ways. First, a completely new BIT could be negotiated and concluded. Second, existing BITs could be amended. Third, the State-parties could issue binding interpretations of certain BIT provisions.[128] Given that BITs are a treaty between two States, the following are several suggested steps States could take in revising their BITs.

125. *Id.*
126. *Id.*
127. JACOB, *supra* note 73, at 13.
128. *Id.* at 33.

A. Integrate Domestic Human Rights Policy and Investment Policy

States should harmonize their approach to BITs with the rest of their domestic policy. As discussed above, many States' laws and policies suffer from "horizontal incoherence" where their investment-related departments may be working separately from, and potentially in conflict with, their human rights-related agencies and obligations.[129] A cohesive domestic legal system will help prevent risk stabilization clauses from constraining a State's ability to regulate.[130] The goal is to strike a balance between the need for investor certainty and ensuring that a State's legitimate interests are not compromised.[131]

Increasingly, States are exploring ways to integrate their domestic investment policies and human rights-related policies. For example, many of South Africa's BITs that were signed after 1994 will soon expire, providing an opportunity to reassess the State's approach towards BITs.[132] South Africa has announced that it intends to closely scrutinize the "horizontal incoherence" between its BITs and protections offered under South African law.[133]

B. Add Broader Policy Objectives to BIT Preambles

States should add broader policy objectives to the preambles, or the *chapeau*, of their BITs. While provisions of a preamble are not binding, they are a valuable tool for treaty interpretation and aid in deciphering the object and purpose a treaty.[134] Many arbitration tribunals have sought to interpret BITs, particularly fair and equitable treatment provisions, by looking to the treaty's preamble to decipher its object and purpose.[135] This is the principle of *effet utile,* in "that interpretation which accords practical content to a treaty provision will be favored over one that deprives it of such effect."[136] However, a teleological method of interpretation that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must be rejected as contrary to the parties' intention.[137] Additionally, interpretations which exaggerate investor protections may dissuade Host-States from admitting foreign investments and thereby undermine a BIT's overarching purpose of "intensifying" the economic relationship between the parties.[138]

Most BIT preambles are one-dimensional, emphasizing the need to create a favorable investment climate, without mentioning broader policy goals.[139] Very few BITs include in their preambles the need to respect State sovereignty and the

129. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 33.
130. *See* SHEMBERG, *supra* note 90.
131. S. Afr. BIT Review, *supra* note 55, at 56.
132. *Id.* at 55.
133. *Id.*
134. Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331.
135. NEWCOMBE & PARADELL, *supra* note 8, at 113-14.
136. *Id.* at 114.
137. *Id.* at 115, 125.
138. *Id.* at 115-16, 126.
139. *Id.* at 116.

laws of the State-parties.[140] However, a number of more recent BITs have included in their preambles that investment promotion and protection must be consistent with the recognition of internationally recognized labor rights,[141] the objective of not relaxing health, safety, and environmental measures, [142] and the goal of sustainable development.[143]

Norway's 2007 draft model BIT contains arguably the most extensive policy objectives in its preamble. In addition to the provisions discussed above, the preamble also references the following:

> . . sustainable utilization of economic resources . . the importance of corporate social responsibility [the parties'] commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights.[144]

However, in 2009, Norway abandoned its draft model BIT following polarized public criticism. While some felt that the model did not provide enough investor protections, others argued that the model would still restrain a government's ability to regulate in the public interest.[145]

While these preambles are not binding, they do affect the interpretation of Host-State's obligations to investors. Including broader policy objectives, like those in Norway's draft Model BIT, would counter-balance BITs' predominant focus on investor's rights and force BIT arbitration tribunals to reconcile investor protections with a Host-State's sovereignty and human rights-related obligations.

C. Acknowledge State Sovereignty

States should include in their BITs substantive language that acknowledges State sovereignty. While provisions recognizing human rights are rare in preamble provisions and non-existent in substantive treaty provisions, human rights-related areas, such as environmental and labor laws, are increasingly discussed. For example, Article 12 of the United States Model BIT provides for the following:

> The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it

140. *Id.* at 123.

141. *Id.*

142. *Id.* at 123-24.

143. *Id.* at 123.

144. Draft Version 191207, Agreement Between the Kingdom of Norway and _ for the Protection and Promotion of Investments pmbl. cls. 4, 6, 8 (Dec. 19, 2007), *available at* http://www.asil.org/ilib080421.cfm [hereinafter Norway Model BIT].

145. Damon Vis-Dunbar, *Norway Shelves Its Draft Model Bilateral Investment Treaty,* INVESTMENT TREATY NEWS, June 8, 2009, *available at* http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/.

> does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[146]

Additionally, Article 13 contains nearly identical provisions regarding "internationally recognized labor rights."[147] Language like these provisions should be included in BITs to recalibrate the balance between investors' rights and State sovereignty.

D. Provide Jurisdiction for Human Rights-Related Matters

States should provide investment tribunals with broader jurisdiction to include human rights-related matters. BITs should include that an investment tribunal "is competent to decide matters of public international law or human rights law that might arise in the course of an arbitration."[148] Specifically, a Host-State should be able to raise as a defense that the Host-State's action was necessary to prevent the investor from harming its citizenry or that the actions were necessary pursuant to the Host-State's human rights obligations under international law. This concept should include more specific guidance in BITs regarding the scope of the Police Powers and a State's ability to regulate public health, the environment, and labor rights, as discussed above.[149]

Additionally, requiring that the Host-State prove that such actions were done in good faith and with a non-discriminatory intent can mitigate the risk of abuse of this defense. For example, the U.S. Model BIT provides that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[150]

E. Provide Human Rights Expertise in BIT Arbitration Tribunals

States should provide in BITs that when a human rights-related matter arises, the arbitration tribunal must incorporate appropriate expertise into the decision-making process. As discussed above, one problem in BIT arbitrations is that arbitrators may lack the necessary expertise to deal with human rights-related matters. To deal with this issue, many commentators have suggested two solutions. First, BITs should require that arbitration tribunals dealing with human rights-related claims include at least one arbitrator with knowledge of human rights law.[151] Secondly, arbitrators should be allowed, encouraged, or perhaps even

146. U.S. Model BIT, *supra* note 33, art. 12.

147. *Id.* art. 13.

148. JACOB, *supra* note 73, at 45.

149. *See supra* Section III(F)(3).

150. U.S. Model BIT, *supra* note 33, Annex B 4(b).

151. Chalamish, *supra* note 13, at 352-53; Weiler, *supra* note 16, at 439.

required to consult outside experts or specialized agencies regarding human rights-related issues implicated in a case.[152]

F Require Transparency and Public Participation in BIT Arbitration

States should mandate open dispute resolution to bring greater transparency to the BIT regime.[153] Wider publication of BIT decisions will enable greater study of the international investment law environment. "Only the availability of a sufficiently large number of cases will lead to the emergence of a body of arbitral case law."[154] In turn, the development of a body of case law is necessary to bring more certainty to the investment arbitration system. This would benefit MNCs and States in that interpretations of common BIT provisions would gradually become more consistent and the outcome of disputes would become more predictable. Additionally, greater consistency in the arbitration process would also contribute to the credibility of, and public trust in, arbitration as an appropriate and effective dispute settlement mechanism.[155]

As discussed above, the United States now requires that investment rules expressly provide for full transparency in BIT arbitrations.[156] Article 10 of the U.S. Model BIT requires that decisions be "promptly published or otherwise made publicly available."[157] Similarly, ICSID offers the greatest level of transparency.[158] All ICSID pending and concluded cases are available to the public, including the subject matter of the arbitration, party names, date of registration, composition of the tribunal, and the procedural timeline.[159]

Additionally, States could add language to BITs allowing for *amicus curiae* participation in the arbitration proceedings. Participation by observers, who do not have a direct interest in the case, could be of great assistance to a tribunal by both drawing attention to relevant matters not pleaded by the parties and by offering expertise that may be outside the arbitrators' knowledge.[160] Currently, under ICSID's rules, a tribunal *may*, after consulting the parties, allow persons or entities, who do not have a significant interest in the proceeding, to file a written submission on a matter within the scope of the dispute.[161]

Notably, UNCTRAL is considering adopting greater transparency rules, including publicly registering cases (possibly via an on-line docket), publishing documents related to the arbitration, and providing rules for third-party *amicus*

152. Chalamish, *supra* note 13, at 352-53; PETERSON – MAPPING, *supra* note 70, at 45; PETERSON & GRAY, *supra* note 78, at 35.

153. PETERSON – MAPPING, *supra* note 70, at 44.

154. Torterola, *supra* note 74, at 11.

155. *Id.* at 8, 11.

156. PETERSON & GRAY, *supra* note 78, at 34.

157. U.S. Model BIT, *supra* note 33, art. 10.

158. PETERSON – MAPPING, *supra* note 70, at 41-42.

159. JACOB, *supra* note 73.

160. *Id.* at 37.

161. Torterola, *supra* note 74, at 11.

curiae submissions. However, there is a major divergence regarding whether new transparency rules should become the default UNCITRAL rules or whether they should be offered merely as a secondary alternative option to the current default rules. Indeed, a few States appear to prefer leaving the default rules in their current form. One proposed compromise would be to create an annex to the generic UNCITRAL rules that would apply to all investor-State arbitration, unless the parties to the BIT explicitly opt-out of the annex. This would ensure the "maximum application of the transparency rules" while preserving the opt-out option for States.[162]

VI. HOW TO PROTECT HUMAN RIGHTS BY MAKING ONE FUNDAMENTAL CHANGE IN THE BIT REGIME

Some argue that the above changes are not enough and that BITs, which provide investor-MNCs with highly enforceable rights, should also require of investors reciprocal obligations. However, such a concept is highly controversial as it would be a "radical departure" from the traditional purpose of a BIT – the protection of foreign investors – to having the dual purpose of human rights enforcement.[163] Additionally, those opposed to adding investor obligations to BITs argue that "such drastic gestures would run the serious risk of driving businesses out of the public system of international law and into the even less transparent, accountable, and legitimate realms of private regulation and non-legal dispute resolution."[164]

Commentators have generally suggested three very different possible constructions of investor obligations in BITs. One, an investor's failure to comply with investor obligations in the BIT would have "mitigating or off-setting effects... on the merits of a claim or on any damages award in the event of such award."[165] Two, investor obligations could act as a limit on investor rights. For example, a MNC would not be able to claim protection under the BIT unless they had complied with the investor obligations required by the BIT.[166] Three, investor obligations could expand the rights of the Host-State against an investor. For example, a Host-State would be enabled to bring a claim or counterclaim against an investor where the investor did not meet its obligations under the BIT.[167]

Below, Sub-Section A lays out a theoretical foundation for holding investor-MNCs responsible for human rights abuses. Sub-Sections B through K discuss

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162. *Transparency in UNCITRAL Arbitration Rules Discussed in Vienna,* News in Brief, INVESTMENT TREATY NEWS, Dec. 16, 2010, at 14-15, *available at* http://www.iisd.org/itn/2010/12/16/news-in-brief-2/.

163. JACOB, *supra* note 73, at 38.

164. *Id.* at 37.

165. HOWARD MANN ET AL., INT'L INST. OF SUSTAINABLE DEV., MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT art. 18(B), (D) (2005), *available at* http://www.fes-globalization.org/dog_publications/Appendix%202%20IISD%20Model.pdf [hereinafter IISD Model].

166. Fauchald & Stigen, *supra* note 2, at 1051-52.

167. *Id.*; IISD Model, *supra* note 165, art. 18(E).

several of the investor obligations that various commentators and scholars have proposed. These descriptions do not represent an exhaustive list of proposed investor obligations. Moreover, they are not meant to be considered in isolation; rather several of these obligations could be incorporated into a single BIT.

A. Theoretical Foundation: MNCs & Human Rights Obligations

Widespread trade and investment liberalization has allowed dominant corporations to enjoy increasing levels of economic and political clout.[168] However, the theory behind creating obligations for MNCs does not rest on the benefits or harm MNCs have brought to the global community but rather their collective global power as non-State actors. Many MNCs' revenues surpass the entire gross domestic products of nation-States.[169] In 2000, 51 of the world's top 100 largest economies were corporations, not nation-States, and 6 percent of the top 200 corporations' annual combined sales exceeded the total combined annual income of 1.2 billion of the world's population living in severe poverty.[170] Indeed, relations between States no longer dominate the international environment. Rather, autonomous, non-State actors, supranational corporations wield an extraordinary amount of financial and political power, acting "in near-total impunity."[171] Such power should be matched with a corresponding degree of responsibility and accountability.

Some argue that discussing international legal duties for MNCs redefines international human rights in an "unacceptable way," in that it is a departure from international law's traditional sphere of supplying duties only to governmental action.[172] Three factors must be considered in response to this concern.

First, a right may exist "without knowing who is bound by duties based on it or what precisely these duties are."[173] Thus, a right may exist with a wide range of corresponding duty-holders. Human rights are an entitlement to all mankind. In theory, the number of corresponding duty-holders is unlimited. However, historically, duties have been assigned primarily to nation-States.

Secondly, international law has recognized human rights duties on non-State actors, although this is limited to relatively few human rights abuses.[174] Under international humanitarian law, rebel groups have a duty to respect the

168. SARAH ANDERSON & JOHN CAVANAGH, TOP 200: THE RISE OF CORPORATE GLOBAL POWER 1 (2000), *available at* http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf.

169. *Id.* at 3.

170. *Id.*

171. Anne-Christine Habbard, *The Integration of Human Rights in Corporate Principles, in* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES FOR MULTINATIONAL ENTERPRISES 99, 99 (2001).

172. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L.J. 443, 466 (2001).

173. *Id.* at 468 (citing JOSEPH RAZ, THE MORALITY OF FREEDOM 184 (1986)).

174. *Id.* at 466-67.

fundamental rights of persons under their control.[175] States have also accepted that non-State actors have duties within international criminal law on human rights atrocities.[176] Lastly, war crimes, genocide, crimes against humanity, torture, slavery, forced labor, apartheid, and forced disappearances are all crimes under international law, even when perpetrated by non-State actors.[177] However, while these obligations on non-State actors have been extended to individuals, they have not been extended to legal entities. For example, the Nuremberg Tribunal after WWII focused on individual criminal responsibility, not corporate criminal responsibility. Similarly, the statutes for the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court do not authorize the prosecution of legal entities, only natural persons.[178]

Third, the origins of our present State-centered human rights system provides persuasive evidence that human rights duties should be extended to MNCs. Throughout history, nation-States have represented the greatest danger to the individual and human dignity. After WWII, the human rights developed and embodied in the Universal Declaration of Human Rights provided duties for States.[179] Given that MNCs have integrated into the daily fabric of our societies, have economic power comparable to some States, and have shown that they can pose a great danger to human dignity, it is not a leap in logic to suggest that these same human rights necessitate that MNCs should have some duties as well. Thus, new rights would not be created, but rather the duties States have to protect human rights would be extended onto MNCs.

Additionally, some argue that international corporate responsibility will only enable "company directors . . . to reallocate liability onto corporations by dispersing any penalty amongst the shareholders of the company." Additionally, "this not only diminishes the deterrent effect of the punishment," but it "ultimately may shift the punishment onto individuals [like shareholders] who may be entirely innocent."[180] However, corporate liability and individual liability are not mutually exclusive.[181] Moreover, like the breach of a fiduciary duty, or any poor corporate decision-making, shareholders would likely experience consequences if a corporation was found legally responsible for a human rights violation; plummeting stock values and tarnishing the corporate name are pivotal components to deterring illegal corporate behavior.

Lastly, while investor obligations may be a new, emerging concept, they are not "radical." Investment treaty awards have already incorporated the concept of investor obligations indirectly. Tribunals have interpreted the requirement in

175. *Id.*
176. *Id.*
177. *Id.*
178. Fauchald & Stigen, *supra* note 2, at 1037-40.
179. Ratner, *supra* note 172, at 469.
180. Fauchald & Stigen, *supra* note 2, at 1043-44.
181. *Id.* at 1044.

treaties that the investment be made "in accordance with local laws" as an investor obligation. Tribunals have also recognized a requirement of "good faith" by investors "to avoid hearing claims that are based on unlawful conduct . . . such as, bribing government officials or misrepresentation to authorities at a tender stage."[182] Moreover, there seems to be growing momentum towards serious consideration of investor obligations. Tomas Baert, the European Commission Directorate General for Trade, Services and Investment, has commented that the discourse and debate surrounding the formation of an EU investment policy has included the possibility of adding investor obligations in areas of human rights and corporate social responsibility in EU investment treaties.[183]

B. Umbrella Clauses: Discard Them or Make Them Reciprocal

One option for an investor obligation would be to structure "umbrella clauses" in BITs to be reciprocal. Umbrella clauses are common provisions that require a Host-State to, for example, "observe any obligation it may have entered" or "constantly guarantee the observance of the commitments it has entered into."[184] The exact wording for umbrella clauses varies[185] and the meaning of individual umbrella clauses has been very controversial.[186] For example, a MNC could bring a claim against a State under the umbrella clause where the State violated the terms of a contract, like a Host-State Agreement, between the State and the MNC. However, violations of umbrella clauses are not limited to contractual violations, and can also include legislation, regulation, and administrative acts,[187] and "collateral guarantees, warranties or letters of comfort" provided by a Host-State to induce foreign investment.[188] The effect of umbrella clauses is that violations of promises, contractual or not, given to an investor are elevated to be a violation of a BIT.

Umbrella clauses first appeared in the 1950s and originated in the trepidation of the asymmetrical balance of power between investors and States.[189] Given that

182. Mahnaz Malik, *The IISD Model International Agreement on Investment for Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 561, 581 (Marie-Claire Cordonier Segger et al. eds., 2011).

183. *Towards a Comprehensive European International Investment Policy: An Interview With Tomas Baert, European Commission, Directorate General for Trade, Services and Investment*, INVESTMENT TREATY NEWS, Sept. 23, 2010, at 4, *available at* http://www.iisd.org/itn/2010/09/23/towards-a-comprehensive-european-international-investment-policy-an-interview-with-tomas-baert-european-commission-directorate-general-for-trade-services-and-investment/.

184. NEWCOMBE & PARADELL, *supra* note 8, at 437; Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, *in* ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 101, 102 (2008), *available at* http://www.oecd.org/dataoecd/3/6/40471535.pdf [hereinafter OECD – Umbrella Clauses].

185. *Id.*

186. *Id.* at 101.

187. NEWCOMBE & PARADELL, *supra* note 8, at 457.

188. *Id.*

189. OECD – Umbrella Clauses, *supra* note 184, at 124; JACOB, *supra* note 73, at 20.

this power imbalance is less prominent in the present international environment and that some MNCs may arguably be as powerful, or even more powerful, than certain States, some argue that umbrella clauses are no longer necessary to insulate and protect investors.[190] Notably, the United States Model BIT no longer contains an umbrella clause.[191]

Alternatively, instead of abandoning umbrella clauses, they could be made to be reciprocal. While conceivably either an investor or a Host-State could breach an obligation or commitment, umbrella clauses are generally formulated as obligations solely on the Host-State. An umbrella clause could be recast to place strong reciprocal obligations on an investor to observe their commitments and obligations to the Host-State.[192] These reciprocal umbrella clauses could be re-framed to either allow the Host-State to invoke the clause as a defense or mitigating factor when an investor institutes a claim under a BIT, or as a basis for a Host-State to initiate a BIT arbitration against the investor.

C. Improve the Transparency of BITs and Host-State Agreements

States should consider stipulating in their BITs, or subsequent Host-State agreements with investors, that investment contracts and project information must be published. For example, Article 11 of the IISD Model requires that investors provide any information that a potential Host-State Party "may require concerning the investment in question for purposes of decision-making in relation to that investment or solely for statistical purposes," except "confidential business information . . . that would prejudice the competitive position of the investor or the investment."[193] Additionally, Article 15 requires that:

> [i]n accordance with the size and nature of an investment . . . Investors and investments shall make available to the public any investment contract or agreement with the [H]ost-[S]tate government involved in the investment authorization process, subject to the redaction of confidential business information. Investors or investments shall publish all information relating to payments made to [H]ost-[S]tate public authorities, including taxes, royalties, surcharges, fees and all other payments.[194]

Publication of project information, as described by these provisions, would serve three functions. First, it would inform impacted non-State actors of the investing MNC's plans and of the obligations that the government and the MNC have undertaken. Impacted non-State actors would then have notice of the impending investment and if needed, and were possible, take appropriate steps to object to actions or obligations undertaken by the investing MNC or their own government. Second, this notice would provide Host-States with an important

190. JACOB, *supra* note 73, at 20.

191. *Id.*

192. Fauchald & Stigen, *supra* note 2, at 1054.

193. IISD Model, *supra* note 165, art. 11(D).

194. *Id.* art. 15(B).

assurance of legitimacy of process. Third, because foreign investors negotiating Host-State agreements would have notice that their agreement would be published, and thus open to public scrutiny, foreign investors may act with a greater sense of fairness in negotiating Host-State agreements.[195]

D. "Due Diligence" Standard

Another option for investor obligations would be in line with the framework put forth by John Ruggie, the United Nations Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises. Ruggie's "Protect, Respect, and Remedy" policy framework, adopted unanimously by the Human Rights Council in June 2008, rests on three pillars. First, "the State [has a] duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication."[196] Second, there must be "corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others."[197] Third, States and MNCs should ensure that victims have "greater access . . to effective remedy, judicial and non-judicial."[198]

Thus, drawing from Ruggie's second pillar, one option would be "a due diligence standard for all obligations that have not attained the status of *jus cogens* norms."[199] Ruggie defines due diligence as requiring the following four components. First, companies should adopt a human rights policy,[200] and secondly, companies should integrate this policy throughout the company.[201] Third, companies should conduct a human rights impact assessment, including meaningful engagement and dialogue with impacted non-State actors, to better understand the effects of their existing and proposed activities.[202] "When conducting such assessments, companies can find an authoritative list of rights at a minimum in the International Bill of Human Rights" (including the Universal Declaration of Human Rights, the ICCPR, and the ICESCR), the International Labor Organization's (ILO) core conventions,[203] international humanitarian law in conflict-affected areas, and standards specific to vulnerable groups, such as, indigenous peoples or children.[204] Fourth, companies should adopt monitoring and auditing procedures to track the company's human rights impact and

195. SHEMBERG, *supra* note 90, at 43.

196. Ruggie – *Further Steps, supra* note 12, ¶ 1.

197. *Id.*

198. *Id.*

199. Weiler, *supra* note 16, at 445; Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 25.

200. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 60.

201. *Id.* ¶ 62.

202. *Id.* ¶ 61; Ruggie – *Further Steps, supra* note 12, ¶ 84.

203. Ruggie – *Further Steps, supra* note 12, ¶ 60; Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 58.

204. Ruggie – *Further Steps, supra* note 12, ¶ 61.

performance.[205] Due diligence, unlike commercial, technical, and political risk management, is not a one-time action but must be "ongoing and dynamic."[206]

This approach of a non-specific due diligence standard is advantageous for several reasons. First, this standard would not be new, but an extension of well-established practices. MNCs already routinely conduct due diligence to ensure that a contemplated transaction has no hidden risks and to manage risks to the company and stakeholders, for example, to prevent employment discrimination, environmental damage, or criminal misconduct.[207] Second, this standard is flexible to meet the needs of different industries, different size MNCs, and different country conditions, in that it allows MNCs to develop their own solutions and measures to comply with this standard.[208] The scope of due diligence depends on three factors: the country context in which a company is operating, the human rights impacts its activities may have, and whether the company may be contributing to abuses through relationships connected to its activities (e.g. subcontractors).[209] Thus, the due diligence standard "would permit investors to be held accountable for serious abuses but would not unduly impair their ability to efficiently establish and maintain their investment activity in the territory of the [H]ost-[S]tates."[210] Third, this approach would provide corporate boards with strong protection in mismanagement claims by shareholders, and in lawsuits under the Alien Tort Statute and similar lawsuits, as it would be proof that the corporation took reasonable steps to avoid involvement in the alleged wrong.[211]

Lastly, Ruggie describes this approach as "a game-changer" from "naming and shaming," the response by external stakeholders to a MNC's failure to respect human rights, to "knowing and showing," a MNC's internalization of human rights due diligence.[212]

E. Anti-Corruption Provisions

The IISD Model suggests an anti-corruption obligation,[213] derived from the 2003 United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business, which entered into force in 1999.[214] Investors and their investments can not, either prior

205. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 63.

206. Ruggie – *Further Steps, supra* note 12, ¶ 84-85.

207. *Id.* ¶ 81.

208. *Id.* ¶ 82.

209. Ruggie – *Protect, Respect and Remedy, supra* note 1, at ¶ 25, ¶ 57.

210. Weiler, *supra* note 16, at 445-46.

211. Ruggie – *Further Steps, supra* note 12, ¶ 86.

212. *Id.* ¶ 80.

213. IISD Model, *supra* note 165, art. 13.

214. HOWARD MANN ET AL., INT'L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS' HANDBOOK 24-25 (2d ed. 2005), *available at* http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf [hereinafter IISD MODEL - HANDBOOK].

to or after the establishment of an investment, commit, be complicit in, incite, aid and abet, authorize, or conspire to commit any of the following acts:

> [an] offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the [H]ost-[S]tate, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.[215]

The terminology is meant to make corruption practices an unacceptable business practice.[216] Where an investor or its investment breaches this provision, the investor would lose the right to initiate any dispute settlement process established under the BIT.[217]

F. Require Pre-Establishment Environmental and Social Impact Assessments

A BIT should include an investor obligation for environmental and social impact assessments. An environmental impact assessment would evaluate the investments anticipated impact on the local community's land, natural resources, air quality, water resources, and the like. Similarly, a social impact assessment would evaluate the investment's anticipated impact on the local community's society, which could include impacts on human rights, the decision-making and governing structure, religious beliefs, family values, and many other topics. In his April 2010 report, Ruggie stated that a key policy tool for States striving to uphold the "Protect" pillar is"[e]ncouraging or requiring companies to report on human rights policies and impacts."[218] Notably, it "enables shareholders and other stakeholders to better engage with businesses, assess risk and compare performance within and across industries" and reinforces and compliments the due diligence standard's component regarding human rights assessments.[219]

1. The Scope of Environmental and Social Impact Assessments

General descriptions of environmental and social impact assessments are necessarily ambiguous, as such assessments apply to a wide variety of investments. For example, OPIC's environmental and social assessment policy includes the following key process elements:

(1)project definition;

(2)(initial) screening of the project and the scoping of the Assessment process;

215. IISD Model, *supra* note 165, art. 13.
216. IISD MODEL – HANDBOOK, *supra* note 214, at 24-25.
217. IISD Model, *supra* note 165, art. 18(A).
218. Ruggie – *Further Steps, supra* note 12, ¶ 36.
219. *Id.*

(3)stakeholder identification and gathering of social and environmental baseline data, where relevant;

(4)impact identification and analysis; and

(5)generation of mitigation or management measures and actions.

Additionally, OPIC requires that the "breadth, depth and type of analysis . . be proportionate to the nature and scale of the proposed project's potential impacts," and that the assessment conform to any related Host-State requirements.[220]

Similarly, Article 13 of IISD's Model requires both environmental and social impact assessments. The Model requires a social impact assessment for all investments, according to "standards" that would have to be established by the State-parties.[221] However, environmental assessments would only be required for "applicable" proposed investments. The Model requires that the State-parties establish "screening criteria" and a process for the environmental assessments. The scope of the required assessment would vary depending on issues related to the enterprise's size and its inputs and output.[222] For example, small enterprises and many service-related enterprises should be exempt from the assessment requirements, while resource-related projects should be required to comply with the assessment process.[223] Thus, this assessment requirement could be introduced gradually, applying only to the most high-risk investments.

Determining what investments should be required to perform an environmental or social assessment would not be a new question, as it has been discussed and determined in other areas outside of BITs. For example, consider the approach of OPIC. OPIC refuses to provide political risk insurance for investments in the following specific categorically prohibited sectors:

- Conversion or degradation of Critical Natural Habitats (areas protected by traditional local communities and sites critical to biodiversity and vulnerable animal species).
- Large dams that disrupt ecosystems, displace more than 5,000 people, or impact local inhabitants' ability to earn a livelihood.
- Commercial manufacturing of ozone-depleting substances or persistent organic pollutants that are banned or scheduled to be phased out during the life the project.
- Projects that require the resettlement of 5,000 or more persons
- Projects in or impacting natural World Heritage Sites.[224]

220. INT'L FIN. CORP., GUIDANCE NOTE 1: SOCIAL AND ENVIRONMENTAL ASSESSMENT AND MANAGEMENT SYSTEMS G10 (July 31, 2007) *available at* http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_GuidanceNote2007_1/$FILE/2007+Updated+Guidance+Note_1.pdf.

221. IISD Model, *supra* note 165, art. 12.

222. *Id.*

223. *Id.* n.10

224. OVERSEAS PRIVATE INVESTMENT CORP., *Investor Screener*, http://www.opic.gov/doing-

Given that these investments have already been identified as representing a particularly high-risk, these would be the type of investments that BITs should require to complete an environmental and social impact assessment prior to establishing the investment. Thus, States can look to public and private political risk insurers for guidance regarding what investments are particularly risky in each Host-State.

Additionally, the IISD Model states that investors and the Host-State should apply the "precautionary principle" to the environmental impact assessment and decisions taken in relation to a proposed investment.[225] The precautionary principle, as defined in Article 15 of the Rio Declaration on Environment and Development, requires that "[w]here 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."[226]

2. Publish Environmental and Social Impact Assessments

The requirements for environmental and social impact assessments should also include that the assessments be published. For example, the IISD Model requires that all environmental and social impact assessments must be made public and accessible to the local community and affected interests in the Host-State before the Host-State makes any final decisions regarding whether to allow the investment.[227] This minimum obligation ensures that communities will be adequately informed about potential activities in the local area and that communities will generally have a chance to respond if needed.

Similarly, BITs could require that the assessments also be subject to a public comment period. For example, OPIC not only requires an impact assessment for environmentally or socially sensitive projects,[228] but also that the assessments be published and subjected to a public comment period. Assessments are posted for at least 60 days and OPIC invites public comment, which OPIC subsequently considers in making its final decision.[229]

G. Require Certification of a Management Standard

The IISD Model, in Article 14(A), also requires that all investments must "maintain an environmental management system." Specifically, companies with over a certain number of employees (e.g. 250 or 500) or high-risk industrial enterprises (e.g. resources exploitation), must maintain a current certification to the International Organization for Standardization's (ISO) "ISO 14001" standard, or an equivalent environmental management standard, including an emergency

business/investor-screener (last visited Mar. 1, 2011) [OPIC – *Investor Screener*].

225. IISD Model, *supra* note 165, art. 12(D), n.11.

226. *Id.*

227. *Id.* art. 12(C).

228. OPIC-Spinelli, *supra* note 44.

229. *Id.*

response and decommissioning plan.[230] However, in countries or regions where certification may not be possible, the IISD Model requires that companies must make a good faith effort to obtain and maintain certification.[231]

The ISO is the world's largest developer and publisher of international standards. It is comprised of a network of 160 countries' national standards institutes with a Central Secretariat in Geneva, Switzerland that coordinates the system. The ISO bridges the gap between the public and private sectors to reach solutions that meet both the requirements of business and the broader needs of society.[232] The ISO 14001 is a standard that is intended to provide a framework for a holistic, strategic approach to the organization's environmental policy, plans and actions.[233] The ISO 14001 gives the generic requirements for an environmental management system:

- identify and control the environmental impact of activities, products or services;
- improve environmental performance continually; and
- implement a systematic approach to setting environmental objectives and targets, to achieving these and to demonstrating that they have been achieved.[234]

Fulfilling these requirements demands objective evidence which can be audited to demonstrate that the environmental management system is operating effectively in conformity to the standard.[235]

H. Require Investors to Uphold International Human Rights Norms

Article 14 of the IISD Model provides a very general requirement that investors and investments should "uphold human rights in the workplace and in the [S]tate and community in which they are located" and not undertake, cause to be undertaken, be complicit with, or assist in, the violation of the human rights, including during civil strife.[236] This provision does not encompass proactive requirements; for example, it does not require corporations to build schools to achieve a child's right to education. IISD derived this provision from the OECD and UN instruments on bribery and corruption and the introductory words of Principles 1 and 2 of the Global Compact.[237] As discussed above, this would not create a new human right, but merely extend the duty to uphold human rights to include, not only States, but also MNCs.

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230. IISD Model, *supra* note 165, art. 14(A).

231. *Id.* n.12.

232. INT'L ORG. FOR STANDARDIZATION, *About ISO,* http://www.iso.org/iso/about.htm (last visited Mar. 1, 2011).

233. INT'L ORG. FOR STANDARDIZATION, *ISO 14000 Essentials,* http://www.iso.org/iso/iso_14000_essentials (last visited Mar. 1, 2011).

234. *Id.*

235. *Id.*

236. IISD Model, *supra* note 165, art. 14(B).

237. IISD MODEL – HANDBOOK, *supra* note 214, at 25-26.

I. Require Investors Should Uphold the Core ILO Standards

Many commentators have discussed the possibility of including the ILO's core conventions as investor obligations in BITs. The IISD Model, in Article 14(C), provides that investors and investments must act in accordance with core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work.[238] IISD notes that this "should be non-controversial, given the acceptance of this instrument by almost all countries of the world in the tri-partite ILO structure (labour, business, governments)."[239] Notably, some public political risk insurers, like OPIC, require that investors uphold the ILOs labor standards as a precondition to receiving political risk insurance for their foreign investments.[240]

J. Require a Standard of Corporate Social Responsibility

Another option would be to annex or adopt into the BIT human rights norms from existing corporate codes of conduct.[241] Since the early 1990s, MNCs have encountered criticism of their corporate practices in developing countries, which has pushed many to adopt corporate codes of conduct.[242] Corporate responsibility guidelines generally fall within two categories, those that are State-controlled and those that are industry-controlled. Examples of State-controlled codes include the United Nations Norms on the Responsibilities of Transnational Enterprises and Other Business Enterprises with regard to Human Rights, the United Nations Global Compact, and the OECD Guidelines for Multinational Enterprises.[243] Examples of industry-controlled codes include the Social Accountability 8000 Standard (SA 8000), the Global Sullivan Principles, and the Kimberly Process.[244]

However, all corporate codes of conduct share one characteristic; they are all voluntary with very limited enforcement mechanisms. Any code of conduct will not be successful if it lacks a credible threat of enforcement, including monitoring and reporting activities.[245] Additionally, many see corporate codes of conduct as public relations tools, rather than substantive and legitimate tools for the enforcement of human rights norms. For example, in 2007 the Global Compact Office reported that 63 percent of 400 companies surveyed indicated that one of the reasons they joined the Global Compact was to increase trust in their company.[246]

238. IISD Model, *supra* note 165, art. 14(C).

239. IISD MODEL – HANDBOOK, *supra* note 214, at 26.

240. OPIC – *Investor Screener*, *supra* note 224.

241. Chalamish, *supra* note 13, at 350; Weiler, *supra* note 16, at 445-47.

242. Chalamish, *supra* note 13, at 349.

243. Weiler, *supra* note 16, at 434.

244. *Id.*

245. *Id.* at 435-37.

246. U.N. GLOBAL COMPACT OFFICE, U.N. GLOBAL COMPACT ANNUAL REVIEW 2007 LEADERS SUMMIT 11 (2007), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/GC AnnualReview2007.pdf.

1. The SA 8000 Standard

Some commentators have highlighted the SA 8000 as a suggested standard for States to consider adopting into their BITs.[247] The SA 8000 was established by Social Accountability International and is grounded on the principles of core conventions of the ILO, the United Nations Convention on the Rights of the Child, and the Universal Declaration of Human Rights.[248] It is one of the world's preeminent social standards and is a recognized benchmark among the voluntary codes and standards initiatives by which companies and factories measure their performance.[249] The content of the standard includes nine requirements:

(1) prohibition of child labor;

(2) prohibition of forced and compulsory labor;

(3) basic health and safety requirements;

(4) guarantees for the freedom of association and the right to collective bargaining;

(5) prohibition on discrimination;

(6) disciplinary practices cannot include corporal punishment or other inhumane treatment;

(7) working hours are limited to 48 hours per week, not including overtime;

(8) requirements for reasonable remuneration; and

(9) requirements for management systems.[250]

Additionally, the SA8000 certifies conformance by auditing a corporation's facilities and practices.[251] Notably, a SA8000 certification would appear to meet Ruggie's "due diligence" standard and impose similar requirements to the IISD Model discussed above.

2. Non-Binding Aspirations for Corporate Social Responsibility

Alternatively, the IISD's Model remains in line with current non-binding, aspirational tone of corporate social responsibility, by using language just short of mandating compliance. Article 16 provides that "[i]nvestors and their investments should strive to make the maximum feasible contributions to the sustainable development of the [H]ost-[S]tate and local community through high levels of socially responsible practices."[252] In contributing to the sustainable development of the Host-State, the investor should take into account the following:

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247. Chalamish, *supra* note 13, at 352 n.323; Weiler, *supra* note 16, at 445-47.

248. SOCIAL ACCOUNTABILITY INTERNATIONAL, *Human Rights at Work*, http://www.sa-intl.org (last visited Mar. 1, 2011) [hereinafter SAI – *Human Rights at Work*].

249. *Id.*

250. SOCIAL ACCOUNTABILITY INTERNATIONAL, *The SA8000* Standard, http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937 (last visited Mar. 1, 2011).

251. SAI – *Human Rights at Work*, *supra* note 248.

252. IISD Model, *supra* note 165, art. 16.

(1) the Host-State's development plans and priorities;

(2) the Millennium Development Goals;

(3) the ILO Tripartite Declaration on Multinational Enterprises and Social Policy;

(4) the OECD Guidelines for Multinational Enterprises;

(5) sectoral standards of responsible practice where these exist; and

(6) the preliminary list of corporate social responsibility issues included in Annex F to the Model BIT.[253]

This type of corporate social responsibility provision would be included into a BIT as a supplement to other investor obligations delineated elsewhere in the BIT.[254]

K. Provide Possibilities for New Awards More Appropriate for MNCs

Recognizing that direct investor obligations would be a new addition to BITs, the content of BIT arbitration awards and applicable remedies should also be addressed. As with any BIT claim, the remedy of compensation should also be expressly permitted in arbitration disputes regarding human rights.[255] However, given that the financial cost of potential claims is already a factor in most corporations' cost-benefit analysis, financial compensation may not be an effective deterrent for human rights abuses. The compensation awards given against corporations for human rights-related violations would have to outweigh the benefits the corporation obtained from the violation. Alternative punishments could include management intervention, community-service orders, and adverse publicity. "Of these alternatives, adverse publicity may well be the most effective deterrent as it affects both the corporation's prestige and financial success."[256]

VII. CONCLUSION

Currently, international investment law consists of a patchwork of BITs. Gaps in the BIT regime have greatly affected Host-States' abilities to protect human rights. Additionally, while BITs grant MNCs valuable rights, they do not provide any reciprocal obligations. Despite these problems, the widespread establishment of BITs and their highly efficient use of arbitration tribunals to resolves disputes, makes BITs an unlikely but promising mechanism for human rights enforcement.

States should reform BITs to remove, or at least limit, encumbrances on a State's regulatory power to protect human rights. States should review their BITs, and where there is horizontal incoherence, harmonize their human rights policies across government departments and agencies. Additionally, States should add to

253. *Id.*

254. IISD MODEL – HANDBOOK, *supra* note 214, at 27.

255. Weiler, *supra* note 16, at 439 (noting that the "remedy of compensation for the breach of a human rights obligation has a long history in international treaty practice").

256. Fauchald & Stigen, *supra* note 2, at 1042.

their BITs broader policy objectives in preamble provisions, substantive language that acknowledges State sovereignty, broader jurisdiction regarding human rights-related matters, and requirements for expertise regarding human rights-related matters in arbitral tribunals. Lastly, States should mandate open dispute resolution to bring greater transparency to the BIT regime and wider publication of BIT decisions to enable greater study of the international investment law environment.

Moreover, BITs could be restructured, not to remove the rights and benefits BITs grant to MNCs, but to create reciprocal obligations for MNCs to act responsibly and not violate human rights. First, States could structure umbrella clauses in BITs to be reciprocal. Second, States could stipulate in their BITs, or subsequent Host-State Agreements with investors, that investment contracts and project information must be published. Third, States could require that investors comply with a "due diligence" standard, a general requirement to uphold human rights, the ILO's core conventions, existing corporate codes of conduct, and/or anti-corruption obligations. Lastly, States could require that investors complete and publish environmental and social impact assessments.

Given the growing body of scholarly discussion on this topic, and that States are willing and interested in revamping their approaches to BITs, political will seems to be growing in acknowledging that something must be done. Unfortunately, because investment law exists primarily through bilateral agreements, solutions to incorporate human rights must occur on a national level, and thus change undoubtedly will be diverse and slow.

INDIA'S ENVIRONMENTAL TRUMP CARD: HOW REDUCING BLACK CARBON THROUGH COMMON BUT DIFFERENTIATED RESPONSIBILITIES CAN CURB CLIMATE CHANGE

*Anjali D. Nanda**

I. INTRODUCTION

Although black carbon, commonly known as soot, is a leading contributor to global warming, second only perhaps to carbon dioxide (CO_2),[1] it has not received adequate attention on the international level. After the impasse at Copenhagen and very little progress at Cancun in reaching an agreement on the terms of a new treaty to address climate change, the international community is left wondering whether the Kyoto Protocol, which is set to expire at the end of 2012, will have a binding successor and, if so, what such an agreement will encompass.[2] No matter what form the Kyoto Protocol's eventual successor takes, it is essential that black carbon's role in mitigating climate change be taken into account primarily because, due to the nature of the sources from which it is emitted and its short lifespan in the atmosphere, reducing black carbon emissions could be the "fastest method of slowing global warming" in the immediate future,[3]

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* JD/MBA 2012, University of Denver, Sturm College of Law/Daniels College of Business. With deepest gratitude to Sherry Broder, Esq., Honolulu, Hawaii, for introducing me to the topic of black carbon and her continued support and guidance. Also thanks to the editorial staff of the Denver Journal of International Law and Policy for their editorial assistance, support, patience and friendship and to my parents.

1. V. Ramanathan & G. Carmichael, *Global and Regional Climate Changes Due to Black Carbon*, J. NAT. GEOSCIENCE, Mar. 23, 2008, at 221, *available at* http://www.climate.org/PDF/Ram_Carmichael.pdf (" . emissions of black carbon are the second strongest contribution to current global warming, after carbon dioxide emissions") [hereinafter Ramanathan & Carmichael]; *see* Tami C. Bond & Haolin Sun, *Can Reducing Black Carbon Emissions Counteract Global Warming?*, 39 ENVIRON. SCI. TECH. 5921, 5921 (2005), *available at* http://www.bioenergylists.org/tovesdoc/Bond/BondSun-BCPolicyAnalysis.pdf ("Black carbon is the second or third largest individual warming agent, following carbon dioxide and perhaps methane."); Durwood Zaelke, *Missing the Point on Soot; Nuclear Hypocrisy*, N.Y. TIMES, Nov. 13, 2007, *available at* http://www.nytimes.com/2007/12/13/opinion/13iht-edlet.1.8730762.html.

2. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (the commitment period, first stated in Article 3, ¶1, is from 2008 until 2012) [hereinafter Kyoto Protocol].

3. According to Mark Z. Jacobson of Stanford University, in his Oct. 2007 testimony for a House Committee Hearing on Black Carbon and Global Warming, controlling black carbon emissions could be the "fastest method of slowing warming." Mark Z. Jacobson, Testimony for the Hearing on Black Carbon and Global Warming, H. Comm. on Oversight and Gov't Reform, U.S. H.R. (Oct. 18, 2007), *available at* http://www.stanford.edu/group/efmh/jacobson/0710LetHouseBC%201.pdf [hereinafter Jacobson Testimony].

This comment discusses black carbon's environmental impact, reviews global approaches to addressing the problems associated with black carbon, and suggests a course of action for the international community to effectively reduce black carbon emissions. Section II presents a brief overview of black carbon's scientific composition, identifies the geographical hotspots producing black carbon, and examines solutions to mitigating black carbon emissions. Next, Section III focuses on international law relating to black carbon and how a two-fold approach involving treaties and customary international law should be utilized to set goals for reducing black carbon through international cooperation. Section IV discusses how curbing black carbon emissions through the shipping industry could alleviate warming of the Arctic and the Himalayan regions and the controversy surrounding the warming of the Himalayan region is addressed. In Section V India's legal framework is examined and it is suggested that India's legal system could play an important role in reducing global black carbon pollution. Finally, the concluding section offers recommendations for the international community. Throughout the article, India's role in addressing the black carbon problem and its capacity to achieve environmental justice are highlighted.

II. A SCIENTIFIC ACCOUNT OF BLACK CARBON AND EXPLANATION OF ITS WARMING CAPACITY

A. What is Black Carbon and Where Does it Come From?

Black carbon is a form of particulate air pollution produced by incomplete combustion[4] of fossil fuels (e.g., coal, oil, gasoline), bio-fuel (e.g., wood or cow dung burned in stoves for cooking and heating); and open biomass burning (e.g., forest fires), as well as diesel exhaust.[5] It is both anthropogenic and natural in origin.[6] Unlike carbon dioxide, which is inert and can remain in the atmosphere for up to 100 years, black carbon is a short-lived particulate, remaining in the atmosphere for approximately only one week after it is emitted.[7]

Five hotspots of regional black carbon producers have been identified: 1) East Asia (eastern China, Thailand, Vietnam and Cambodia); 2) the Indo-Gangetic Plains in South Asia (extending from Pakistan across India to Bangladesh and Myanmar); 3) Indonesia; 4) Southern Africa; and 5) the Amazon basin in South

4. Combustion is the act or instance of burning some type of fuel to produce energy. When any compound burns, the products are the oxides of the elements in the compound; combustion is a reaction with the oxygen in the air, accompanied by heat, light and often a flame. Incomplete combustion occurs when, due to a lack of oxygen or low temperatures, the complete chemical reaction does not take place and only partial burning of a fuel results, which may prevent the complete chemical reaction.

5. Charles Zender, Written Testimony for the Hearing on Black Carbon and Climate Change, U.S. H. Comm. on Oversight and Gov't Reform, *Arctic Climate Effects of Black Carbon* 2 (Oct. 18, 2007), *available at* http://dust.ess.uci.edu/ppr/ppr_hogrc_wrt.pdf [hereinafter Zender Testimony].

6. P.K. Quinn et al., *Short-lived Pollutants in the Arctic: Their Climate Impact and Possible Mitigation Strategies*, 8 ATMOS. CHEM. PHYS. 1723, 1724-25 (2008), *available at* http://www.atmos-chem-phys.org/8/1723/2008/acp-8-1723-2008.pdf.

7. *Id.*

America.[8] Emissions are especially high in India and China where cooking and heating utilize wood, field residue, cow dung, and coal burning at low temperatures, none of which allows for complete combustion.[9] China and India's heightened black carbon output can be explained by the use of solid/biomass fuels in cooking and heating in 80 percent of Chinese and Indian households.[10]

B. The Warming Effects of Black Carbon and its Impact on Human Health and Weather Patterns

Black carbon warms the earth's atmosphere in a number of different ways. First, when black carbon is released into the atmosphere it combines with other aerosols, forming atmospheric brown clouds.[11] It simultaneously warms the planet by intercepting direct sunlight and absorbing solar radiation.[12] Atmospheric brown clouds in turn affect weather patterns by reducing rainfall and increasing the occurrence of droughts.[13]

The brown clouds also intercept reflected sunlight by absorbing solar radiation reflected from the surface and clouds; this reduces solar radiation reflected to space by the earth-atmosphere system.[14] As a result, planetary albedo (earth's ability to reflect sunlight) decreases and solar radiation reaching the ground is reduced by five percent.[15]

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8. Ramanathan & Carmichael, *supra* note 1, at 221.

9. Marcel de Armas & Maria Vanko, *Mitigating Black Carbon as a Mechanism to Protect the Arctic and Prevent Abrupt Climate Change*, 8 SUSTAINABLE DEV. L. & POL'Y 41, 42 (2008), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1070&context=sdlp&sei-redir=1#search="Mitigating+Black+Carbon+as+a+Mechanism+to+Protect+the+Arctic+and+Prevent+Abrupt+Climate+Change"; Frederick R. Anderson, *Black Carbon Steps from the Shadows as a Major Climate Culprit Worldwide*, CLIMATE CHANGE INSIGHTS (Oct. 9, 2008), http://www.climatechangeinsights.com/2008/10/articles/air-water/black-carbon-steps-from-the-shadows-as-a-major-climate-culprit-worldwide/.

10. U.N. Dep't Econ. & Soc. Affairs, *Trends in Consumption Production: Household Energy Consumption*, U.N. DESA Discussion Paper No. 6, 5-9, U.N. Doc. ST/ESA/1999/DP.6 (Apr. 1999) (*prepared by* Oleg Dzioubinski & Ralph Chipman), *available at* http://www.un.org/esa/sustdev/publications/esa99dp6.pdf; Warwick J. McKibbin, *China and the Global Environment* 9 (2006), *prepared for* the conference on "China and Emerging Asia: Reorganizing the Global Economy," South Korea, May 11–12, 2006.

11. V. Ramanathan et al., *Atmospheric Brown Clouds: Impacts on South Asian Climate and Hydrological Cycle*, 102 PROC. NAT'L ACAD. SCI. USA 5326, 5326 (2005), *available at* http://www.pnas.org/content/102/15/5326.full.pdf; V. Ramanathan, *Role of Black Carbon on Global and Regional Climate Change*, Testimony to the H. Comm. on Oversight and Gov't Reform Comm. 2 (Oct. 18, 2007), *available at* http://thedgw.org/definitionsOut/..%5Cdocs%5Cramanathan_testimory_on_black_carbon.pdf.

12. Ramanathan & Carmichael, *supra* note 1.

13. UNEP & Science Team of Atmospheric Brown Cloud, *Black Carbon E-Bulletin*, vol.1, no. 1, p. 2, July 2009, www.rrcap.unep.org/abc/bc/BC%20e-Bulletin%20July09.pdf [hereinafter UNEP E-Bulletin].

14. Eleanor J. Highwood & Robert P. Kinnersley, *When Smoke Gets in Our Eyes: The Multiple Impacts of Atmospheric Carbon on Climate Air Quality and Health*, 32 ENVIRON. INT'L. 560, 563 (2006).

15. *Id.*

Furthermore, black carbon causes warming when deposits fall on snow and sea ice; this increases the absorption of solar radiation by ice and snow which has the effect of melting the ice.[16] When black carbon falls on snow it also darkens it: white snow reflects 80 percent of the sun's rays,[17] but with the presence of black carbon, darker snow absorbs the sunlight instead, which melts the ice.[18] Reduction in surface glacial ice, especially in the Antarctic and the Himalayas, has been found to contribute to rising sea levels and overall global warming.[19]

Thus, black carbon in the atmosphere heats the air, altering atmospheric stability and vertical motions, and also affecting the large-scale circulation and hydrological cycle with significant regional climate effects, such as droughts in India and floods in China.[20] The NASA Goddard Institute for Space Studies' climate computer model and aerosol data specifically indicate that black carbon is responsible for localized climate problems in China resulting in increased droughts in the north and summer floods in the south.[21]

Indoor air pollution is caused primarily by soot and dust particles released during the burning of traditional biomass fuels such as wood or dung. Soot has alarming impacts on human health; the World Health Organization (WHO) estimates that indoor air pollution is the eighth most important health risk factor responsible for 2.7 percent of disease worldwide.[22] The effects are especially acute in developing countries as, for example, indoor air pollution causes 3.5 percent of all diseases in India,[23] and 1.6 million deaths in Asia were attributable to indoor air smoke from solid fuel use and urban air pollution in 2000.[24] Air pollution's share of global disease may also have a quantifiable economic impact, as studies show that the detrimental health effects of small particulate matter in India and China

16. *See* Mark Z. Jacobson & David G. Streets, *Influence of Future Anthropogenic Emissions on Climate, Natural Emissions, and Air* Quality, 114 J. OF GEOPHYSICAL RES. JOURNALS 15 (2009).

17. Leslie Alderman, *Let the Sunshine In, But Not the Harmful Rays*, N.Y. TIMES, Jan. 14, 2011.

18. Ramanathan & Carmichael, *supra* note 1.

19. Jane A. Leggett, *Climate Change: Science Highlights*, 14, Congressional Research Service, Feb. 23, 2009, *available at* www.fas.org/sgp/crs/misc/RL34266.pdf.

20. Surabi Menon, et al., *Climate Effects of Black Carbon Aerosols in China and India*, 297 SCIENCE MAG. 2250, 2250 (2002), *available at* http://shadow.eas.gatech.edu/~jean/monsoon/Menonmonsoon.pdf.

21. David E. Steitz et al., *Black Carbon Contributes to Droughts and Floods in China*, NASA EARTH OBSERVATORY, Sept. 26, 2002, http://earthobservatory.nasa.gov/Newsroom/view.php?old=2002092610820.

22. World Health Organization [WHO], *Indoor Air Pollution and Health*, at 1, U.N. Doc. WHO/SDE/PHE/07.01rev (June 2005), *available at* http://www.who.int/mediacentre/factsheets/fs292/en/index.html.

23. Esther Duflo, Michael Greenstone, & Rema Hanna, *Cooking Stoves, Indoor Air Pollution and Respiratory Health in Rural Orissa, India*, 43 ECON. & POL. WEEKLY 71, 71 (2008), *available at* http://www.povertyactionlab.org/sites/default/files/publications/69_Duflo_Cooking_Stoves_Indoor_Pollution.pdf.

24. John C. Topping, Jr., *Reducing Soot: Common Ground for Climate Negotiations*, CLEANTECH ASIA ONLINE (Aug. 1, 2009), http://www.cleantechasiaonline.com/reducing-soot-common-ground-climate-negotiations.

could be as high as 3.6 and 2.2 percent of their gross domestic products, respectively.[25]

Although health concerns such as lung cancer and cardiovascular ailments have long been associated with black carbon,[26] its negative impact on the environment has garnered increasing attention only recently.[27] As explained by Örjan Gustafsson and colleagues at Stockholm University, biomass combustion in India produced about two-thirds of the total aerosol pollution, a much larger proportion than previously thought.[28] According to their study, "biomass combustion (such as residential cooking and agricultural burning) and fossil fuel combustion should be targeted to mitigate climate effects and improve air quality."[29]

In its Fourth Assessment Report in 2007, the Intergovernmental Panel on Climate Change (IPCC) estimated that a 2.4°C warming above preindustrial surface temperatures is inevitable;[30] this is referred to as the zone of "dangerous anthropogenic interference" (DAI).[31] More than 100 countries have generally agreed that the threshold for DAI is at a 2°C increase above preindustrial temperatures.[32] To illustrate the impact of black carbon on global warming, it is responsible for almost 50 percent of the 1.9°C increase in warming of the Arctic

25. U.N. Env't Programme [UNEP], *Atmospheric Brown Clouds: Regional Assessment Report with Focus on Asia: Summary*, at 8 (2008) (*prepared by* V. Ramanathan, et al.), *available at* http://www.unep.org/pdf/ABCSummaryFinal.pdf; *see also* Lindsay Beck, *Ship Emissions Seen Causing 60,000 Deaths a Year*, REUTERS, Nov. 7, 2007, http://uk.reuters.com/article/2007/11/07/environment-shipping-dc-idUKPEK34163320071107 (discussing the shipping industry's impact on human health).

26. Karen L. Jansen, et al., *Associations Between Health Effects and Particulate Matter and Black Carbon in Subjects with Respiratory Disease*, 113 ENVIRON. HEALTH PERSPECTIVE 1741, 1741 (2005), *available at* http://ehp03.niehs.nih.gov/article/fetchArticle.action?articleURI=info%3Adoi%2F10.1289%2Fehp.8153.

27. UNEP E-Bulletin, *supra* note 13, at 1.

28. Örjan Gustafsson, et al., *Brown Clouds Over South Asia: Biomass or Fossil Fuel Combustion?*, 323 SCIENCE MAG. 495 (2009) http://www.sciencemag.org/content/323/5913/495.full.pdf.

29. *Id.*

30. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], WORKING GROUP I, FOURTH ASSESSMENT, SUMMARY FOR POLICY MAKERS 13 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf [hereinafter IPCC, FOURTH ASSESSMENT]; V. Ramanathan & Y. Feng, *On Avoiding Dangerous Anthropogenic Interference with the Climate System: Formidable Challenges Ahead*, 105 PROC. NAT'L ACAD. SCI. USA 14245, 14245 (2008), *available at* http://www.pnas.org/content/early/2008/09/16/0803838105.full.pdf.

31. James E. Hansen, *Dangerous Anthropogenic Interference: A Discussion of Humanity's Faustian Climate Bargain and the Payments Coming Due*, Distinguished Public Lecture Series at the Department of Physics and Astronomy, Univ. of Iowa. Oct. 26, 2004, *available at* www.columbia.edu/~jeh1/2004/dai_complete_20041026.pdf.

32. Malte Meinshausen et al., *Greenhouse-gas Emission Targets for Limiting Global Warming to 2° C*, 458 NATURE 1158, 1158 (2009), *available at* http://www.ecoequity.org/wp-content/uploads/2009/07/meinshausen_nature.pdf; Mario Molina et al., *Reducing Abrupt Climate Change Risk Using the Montreal Protocol and Other Regulatory Actions to Complement Cuts in CO_2 Emissions*, 106 PROC. NAT'L ACAD. SCI. USA 20616, 20616 (2009), *available at* http://www.pnas.org/content/106/49/20616.full.pdf.

since 1890.[33] Second only to CO_2—which is responsible for 40 percent of the planet's warming—studies show that black carbon generates 18 percent of the planet's warming, a figure that is three to four times higher than estimated in the IPCC's 2007 report.[34]

Air pollution abatement policies aimed at protecting human health and the environment may inadvertently accelerate warming by decreasing sulphate and other aerosols.[35] The reason for this unexpected consequence is that these aerosols have a cooling impact on the climate, and thus, reduction of such pollutants in the interest of protecting human health can in fact negatively affect the environment.[36] However, after such aerosols are removed, reducing short-lived warming agents such as black carbon and methane can counteract the unintentional warming caused by efforts to improve human health, further highlighting the urgent need to decrease concentrations of black carbon.[37]

C. The Most Direct Methods to Curb Black Carbon Emissions

Due to its short life span and anthropogenic nature of the sources from which black carbon is polluted, researchers say that decreasing black carbon emissions would be inexpensive, direct, and the most efficient and immediate way to reduce warming.[38] While efforts remain primarily focused on cutting global CO_2 emissions, even after significant emissions reductions have been made, CO_2 will still linger in the atmosphere because of its extended life-span.[39] Moreover, as found by Dr. Veerabhadran Ramanathan, a professor of climate science at the Scripps Institute of Oceanography, reducing black carbon emissions by 50 percent

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33. Molina et al., *supra* note 32, at 20617; *Cutting Non-CO2 Pollutants Can Delay Abrupt Climate Change, Solve 'Fast Half' of Climate Problem*, INDOOR AIR QUALITY (IAQ) UPDATES, Oct. 13, 2009, http://iapnews.wordpress.com/2009/10/13/cutting-non-co2-pollutants-can-delay-abrupt-climate-change/; Int'l Maritime Org. [IMO], Marine Env't Prot. Comm., 60th Sess., Prevention of Air Pollutants from Ships, Submitted by Norway, Sweden and the United Nations, ¶ 2, IMO Doc. MEPC 60/4/24, Jan. 15, 2010, available at http://www.catf.us/diesel/policy/international/20100115-MEPC60-4-24-Prevention_of_Air_Pollution_from_Ships.pdf [hereinafter, Joint Submission to MEPC].

34. Ramanathan & Carmichael, *supra* note 1. *See also* Elisabeth Rosenthal, *By Degrees: Third-World Stove Soot is Target in Climate Fight*, N.Y. TIMES, Apr. 15, 2009, *available at* http://www.nytimes.com/2009/04/16/science/earth/16degrees.html; ECOSURVIVOR, *Still in a Haze: What We Don't Know About Black Carbon & Climate*, Mar. 15, 2011.

35. U.N. Econ. & Soc. Council [ECOSOC], Executive Body for the Convention on Long-Range Transboundary Air Pollution, *Air Pollution and Climate Change: Developing a Framework for Integrated Co-Benefits Strategies*, ¶ 27, U.N. Doc. ECE/EB.AIR/2008/10, 6 (Oct. 28, 2008), *available at* http://www.unece.org/env/documents/2008/EB/EB/ece.eb.air.2008.10.e.pdf.

36. *Id.*

37. *Id.*

38. Convention on Long-Range Transboundary Air Pollution, Sept. 13-15, 2010, EMEP Steering Body, *Draft Report of the Ad-Hoc Expert Group on Black Carbon*, ¶ 19 (Sept. 7, 2010), *available at* http://www.unece.org/env/documents/2010/eb/ge1/EMEP%2034th/Informal%20documents/Info.%20doc_2_Draft%20report%20of%20the%20Ad-Hoc%20Expert%20Group%20on%20Black%20Carbon.pdf.

39. NASA, Earth Observatory, *How Much More Will Earth Warm?*, http://earthobservatory.nasa.gov/Features/GlobalWarming/page5.php (last updated Apr. 4, 2011).

could also have the effects of delaying the warming effects of CO_2 by one to two decades.[40]

Because of the ease with which black carbon and ozone can be reduced compared with CO_2, Dr. Ramanathan and Dr. Jessica Wallack, Director of the Centre for Development Finance at the Institute for Financial Management and Research, in Chennai, India, view reducing black carbon as a "low-hanging fruit."[41] The Institute for Governance and Sustainable Development (IGSD) is demanding "fast-action mitigation strategies" to prevent passing the "tipping points"[42] (small increases in global warming which produce large and irreversible events) as a result of abrupt climate changes,[43] and is promoting non-CO_2 strategies such as reducing emissions of short-term climate forcers such as black carbon, for more immediate emissions reductions, to coincide with cuts in CO_2 that are necessary for significant long-term reductions.[44]

D. Mitigating Efforts and Solutions to Curb Black Carbon Emissions

The main sources of black carbon and their approximate contributions are: open biomass burning – forest and savanna (42 percent); diesel engines (40 percent); and residential burning of biofuels such as coal, wood, dung, and agricultural residues (18 percent).[45] It follows, therefore, that the most direct approach to reducing its emissions is mitigation of pollution from these sources.

Suggested methods for reducing black carbon in the atmosphere include upgrading diesel engines or completely phasing them out, replacing biomass burning stoves with gas or solar cookers and cutting down on deforestation, especially slash and burn techniques. In Russia, for example, the prominence of agricultural burning is known to significantly contribute to black carbon emissions.[46] Due to the proximity of the Arctic, which makes up one of the largest regions in Russia, domestic laws should be adopted to prohibit, restrict or monitor

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40. *Cutting Non-CO_2 Pollutants Can Delay Abrupt Climate Change, Solve 'Fast Half' of Climate Problem: Scripps Researchers Among Team Calling for Expansion of Montreal Protocol*, SCRIPPS INST. OF OCEANOGRAPHY, Oct. 12, 2009, http://scrippsnews.ucsd.edu/Releases/?releaseID=1028.

41. *Cleaning Up Black Carbon Provides Instant Benefits Against Global Warming*, SCRIPPS INST. OF OCEANOGRAPHY, Aug. 19, 2009, *available at* http://scrippsnews.ucsd.edu/Releases/?releaseID=1013; Jessica Seddon Wallack & Veerabhadran Ramanathan, *The Other Climate Changers: Why Black Carbon and Ozone Also Matter*, FOREIGN AFF. Sept./Oct. 2009.

42. Tipping Points, *Abrupt Climate Changes Approaching Faster than Previously Predicted Fast-Track Climate Mitigation Strategies Needed*, INST. FOR GOVERNANCE & SUSTAINABLE DEV. [IGSD], Dec. 1, 2008, http://www.igsd.org/tipping/index.php.

43. IGSD, *The Fast-Action Climate Mitigation Campaign*, http://www.igsd.org/ (last visited Apr. 8, 2011).

44. *Id.*

45. Dennis Clare, *Reducing Black Carbon*, *in* STATE OF THE WORLD 56, 56 (Dec. 16, 2008), *available at* http://www.worldwatch.org/files/pdf/SOW09_CC_black%20carbon.pdf (excerpt only available on this site); *see also* Tami Bond, *Summary: C. Aerosols*, Air Pollution as a Climate Forcing: A Workshop, Honolulu, Haw., Apr. 29-May 3, 2002, *available at* http://www.giss.nasa.gov/meetings/pollution2002/summaryc.html; Ramanathan & Carmichael, *supra* note 1, at 224.

46. *Black Carbon in Arctic Russia*, CLIMATE PROGRESS, Dec. 12, 2009, http://climateprogress.org/2009/12/12/black-carbon-in-arctic-russia/.

agricultural burning because at the present time no such law exists. [47] The international community should assist by applying pressure on Russia and elsewhere in the world where agricultural burning is common practice, in order to prevent it from being done without effective restrictions.

Reductions of diesel emissions can be achieved in a variety of ways and are especially effective in urban areas where cars and trucks are the main culprits. Highly effective diesel particular filters are available for diesel vehicles and can eliminate over 90 percent of particulate emissions.[48] Additionally, diesel oxidation catalysts have been available for over 30 years, can be used on almost any diesel vehicle and contribute to a 25-50 percent reduction of overall particulate emissions.[49] Unfortunately for India and much of the developing world, these filters require ultra-low sulfur diesel fuel which is not yet widely available outside the US, EU or Japan.[50]

Growing awareness of pollution-related health problems has prompted India to take action. To illustrate, India's Environmental Protection Act of 1981 set national standards for emissions of various substances.[51] The Supreme Court of India has also been significantly involved in mitigating black carbon emissions in India's densely populated cities; in its 1998 ruling[52] the Court directed Delhi's Government to address the problem of air pollution caused by public transport vehicles, including high amounts of black carbon emissions from buses, cars, and autorickshaws.[53] This decision led to a massive shift from diesel fuel to

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47. *Id.*

48. Clare, *supra* note 45, at 57.

49. MANUFACTURERS OF EMISSION CONTROLS ASSOCIATION [MECA], EMISSION CONTROL TECHNOLOGIES FOR DIESEL-POWERED VEHICLES 9 (2007), *available at* http://www.meca.org/galleries/default-file/MECA%20Diesel%20White%20Paper%2012-07-07%20final.pdf; IGSD, *Reducing Black Carbon May be the Fastest Strategy for Slowing Climate Change*, IGSD/INECE Climate Briefing Note, at 6, Aug. 29, 2008, *available at* www.igsd.org/docs/BC%20Summary%206July08.pdf [hereinafter IGSD/INECE Climate Briefing].

50. Clare, *supra* note 45, at 57.

51. *The Legal and Regulatory Framework for Environmental Protection in India*, *in* AGENDA 21: AN ASSESSMENT 23, 25, *available at* http://moef.nic.in/divisions/ic/wssd/doc2/main.html; The Environment (Protection) Rules 1986, ¶ 3, GAZETTE OF INDIA, Nov. 19, 1986.

52. *M.C. Mehta v. Union of India* (*Vehicular Pollution case*), (1991) A.I.R. SC 813. The Supreme Court directed the Union Government to provide lead free petrol to four metropolitan cities by April 1995 and petrol with a lead content of 0.15g/l in the entire country by December 1996. Automobile manufacturers were ordered to equip new vehicles to ply on lead free petrol and all new cars registered from April 1995 onwards have been fitted with catalytic converters. The Union Government was also asked to convert all government vehicles and public transport to lead free petrol. Delhi has become the only city in the world to have all public transport operating on Compressed Natural Gas (CNG); For a comprehensive examination of the Indian Supreme Court's role in abatement of air pollution in India, see Urvashi Narain & Ruth Greenspan Bell, *Who Changed Delhi's Air? The Roles of the Court and the Executive in Environmental Policymaking*, Resources for the Future (Dec. 2005), *available at* http://www.rff.org/documents/RFF-DP-05-48.pdf.

53. Conor C. O. Reynolds & Milind Kandlikar, *Climate Impacts of Air Quality Policy: Switching to a Natural Gas-Fueled Public Transportation System in New Delhi*, 42 ENV'T SCI. TECH. 5860, 5860 (2008), *available at* http://pubs.acs.org/doi/pdfplus/10.1021/es702863p.

Compressed Natural Gas (CNG), a much cleaner fuel which emits negligible particulate matter, in over 84,000 public vehicles and resulted in a 10 to 30 percent reduction of climate emissions.[54] Delhi thus became the first city in the world to have its entire public transport run on CNG[55] and now boasts the largest fleet of CNG-powered buses in the world.[56]

Another approach to reduce diesel emissions and thus further reduce black carbon emissions involves replacing vehicles equipped with very inefficient two-stroke engines. At a cost of about $350 per unit, motorized tricycles or rickshaws in Asia could be retrofitted which would reduce their CO_2 and black carbon emissions by about 70 percent, while increasing fuel efficiency by about 50 percent.[57] Microcredit institutions could play a key role in furthering this initiative.[58]

Reducing black carbon from rural sources will not be as easy. The main polluters of black carbon are deeply imbedded in culturally rooted facets of daily life that have been practiced in the same way for centuries by millions of people. The problem must be approached strategically and carefully. In March 2009, Dr. Ramanathan started Project Surya, which has provided 20,000 rural Indian households with smoke-free cookers equipped to transmit data through which a team of researchers observe air pollution levels in the region to measure the effect of the cookers.[59] This, along with other efforts to reduce the dependency on indoor cooking and heating, such as Solar Cookers International,[60] which seeks to replace indoor cookers with solar powered stoves throughout the developing world, shows how scientists and non-governmental organizations (NGOs) are addressing international environmental concerns in non-traditional and innovative ways.

Providing environmentally sound technology in the form of solar cookers to the developing world could have a positive effect on climate change and also curb the detrimental effects of indoor air pollution on health.[61] Notably, although

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54. *Id.*

55. *See* M C Mehta Environmental Foundation, http://mcmef.org/landmark_cases.html (last visited, Mar. 28, 2011).

56. Atul Mathur, *Diesel Demand Drops Sharply, Thanks to CNG*, HINDUSTAN TIMES, Oct. 21, 2010, *available at* http://www.hindustantimes.com/Diesel-demand-drops-sharply-thanks-to-CNG/Article1-615655.aspx.

57. Topping, *supra* note 24.

58. *Id.*

59. *Black Carbon Pollution Emerges as Major Player in Global Warming*, SCRIPPS INST. OF OCEANOGRAPHY, Mar. 23, 2008, http://scrippsnews.ucsd.edu/Releases/?releaseID=891.

60. About SCI, SOLAR COOKERS INTERNATIONAL, http://www.solarcookers.org/about/about.html (last visited Mar. 15, 2011). For information on recent US support for cookstove initiative programs, see Matthew McDermott, *US $50 Million Pledge for Cleaner Cookstoves is Big Win for Women, Forests & Climate*, TREEHUGGER, Sept. 21, 2010, http://www.treehugger.com/files/2010/09/u-s-50-million-pledge-cleaner-cookstoves-win-for-women-forests-climate.php (discussing Secretary of State Hillary Clinton's $50 million pledge of seed money, distributed over five years, to help the Global Alliance for Clean Cookstoves provide 100 million clean-burning biomass cookstoves by 2020 to people in Africa, Asia and South America).

61. Elizabeth Burleson, *Energy Policy, Intellectual Property, and Technology Transfer to Address*

downplaying any connection between open bio-fuel fires from chullahs (stoves) and climate change and instead focusing on health concerns,[62] Farooq Abdullah, India's Minister of New and Renewable Energy, along with Prime Minister Manmohan Singh's special envoy, Shyam Saran, announced the "National Biomass Cook-stoves Initiative" on December 2, 2009.[63] Seventy to 80 percent of rural villagers—an estimated 826 million Indians[64]— living in more than 160 million households depend on biomass cook stoves, burning solid fuel, mainly wood or coal, for cooking and heat.[65] More efficient stoves that combust cleanly are available for around US $15-$20.[66] Improved cook stoves could also significantly reduce non-CO_2 gas emissions and 0.5-1 billion tons of methane, black carbon, and carbon monoxide could be avoided.[67] India's Biomass Cook-stoves Initiative is only in its initial experimental phase but it is hoped that by providing cook stoves of various grades and combustion capacities throughout rural India, the program will be able to determine the best and most suitable options for the long-term.

The practice of burning cow-dung for warmth and cooking cannot change overnight. Abdullah and Saran both emphasized the degree of care that would be taken to ensure the chullahs as well as biomass fuels supplied "meet the diverse needs of people across the country."[68] While the government of India has implemented similar programs in the past, they failed largely in part due to the way in which the state attempted to impose uniform solutions across the country and failed to properly train households on how to use the new technologies.[69] This resulted in unfavorable responses from villagers because, *inter alia,* they did not

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Climate Change, 18 TRANSNAT'L L. & CONTEMP. PROBS. 69, 90 (2009); *see also* FRED PEARCE, STOKING UP A COOKSTOVE REVOLUTION; THE SECRET WEAPON AGAINST POVERTY AND CLIMATE CHANGE, ASHDEN AWARDS REPORT 7, *available at* http://www.ashdenawards.org/files/pdfs/reports/Cookstove_report_final.pdf (quoting Sarah Butler Sloss, Founder Director of the Ashden Awards for Sustainable Energy: "There is now a compelling case for getting improved stoves to millions more people. Better Stoves improve health, save lives, help mitigate the effects of climate change while also saving money. . . .").

62. *See Green Stoves to Replace Chullahs*, TIMES OF INDIA, Dec. 3, 3009, http://timesofindia.indiatimes.com/india/Green-stoves-to-replace-chullahs/articleshow/5293563.cms ("The black carbon or soot from the chullahs causes local health problems. It [is] also a greenhouse gas though of a far lesser concern internationally than carbon dioxide emissions.").

63. Ben Block, *India Announces Improved Cook Stove Program*, WORLDWATCH INSTITUTE, Dec. 2, 2009, http://www.worldwatch.org/node/6328 (last visited Apr. 8, 2011); *see also*, *No Differences in Gov't on Climate Change Issue: PM's Envoy*, INDIA TODAY, Dec. 2, 2009, http://indiatoday.intoday.in/site/Story/73300/world/No+differences+in+govt+on+climate+change+issue:+PM%27s+envoy.html.

64. Block, *supra* note 63.

65. Dzioubinski & Chipman, *supra* note 10; Carl Pope, *And How Good is India's Offer?*, HUFFINGTON POST, Dec. 7, 2009, http://www.huffingtonpost.com/carl-pope/and-how-good-is-indias-of_b_383163.html; TIMES OF INDIA, *supra* note 62.

66. Topping, *supra* note 24.

67. Block, *supra* note 63.

68. TIMES OF INDIA, *supra* note 62.

69. *Id.*

care for the stoves or did not like the taste of food prepared on the stoves.[70] Moreover, adapting to the new stoves requires users to change their traditional cooking methods. "You can't drop a stove into a household and walk away," explains Rita Colwell, an infectious disease researcher at the University of Maryland at College Park and former director of the U.S. National Science Foundation.[71] "[Y]ou need to do follow-up . . . [and] implementation."[72]

But if black carbon is ever to be addressed on a large scale, acceptance of the new stoves is crucial. "I'm not going to go to the villagers and say CO_2 is rising, and in 50 years you might have floods," said Dr. Ibrahim Rehman, Dr. Ramanathan's collaborator at the Energy and Resources Institute. "I'll tell her about the lungs and her kids and I know it will help with climate change as well,"[73] he added. If the Surya stoves program and the Indian Government's initiatives are successful they can ideally serve as a model to be implemented in other developing countries in Asia, Africa and Latin America.[74]

Most recently, the UN general Assembly kicked off the Global Alliance for Clean Cookstoves, as part of the Clinton Global Initiative and promoted by the UN Foundation and the UN Environment Programme.[75] The Alliance, launched in September 2010, in conjunction with the General Assembly's summit on the Millennium Development Goals, plans to put clean, new cook stoves in 100 million homes.[76] Because cook stoves employ a wide range of varied technology – from natural draft rocket stoves, fan stoves, semi-gasifier stoves, to natural draft top lighting stoves, institutional stoves, and of course, solar-powered stoves – replacing 3 billion old, inefficient cook stoves and traditional biomass burning practices across Africa, Asia and Latin America "holds the promise of saving lives, uplifting health, improving regional environments, reducing deforestation, empowering local entrepreneurs, speeding development and helping to stem global climate change.[77]

III. THE ROLE OF INTERNATIONAL LAW IN REDUCING BLACK CARBON AND MITIGATING ITS WARMING EFFECTS

No international instrument currently regulates or monitors black carbon. The United Nations Framework Convention on Climate Change (UNFCCC) contains

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70. Block, *supra* note 63.

71. *Id.*

72. *Id.*

73. Rosenthal, *supra* note 34.

74. Press Release, *India - Launching of the New Biomass Cookstove Initiative – 2 December 2009 at New Delhi*, INDOOR AIR QUALITY (IAQ) UPDATES, Dec. 3, 2009, http://iapnews.wordpress.com/2009/12/03/india-launching-of-the-national-biomass-cookstove-initiative/.

75. *UN-backed 'Clean Stove' Initiative to Save Lives and Heal Environment*, U.N. NEWS CENTRE (Sept. 21, 2010), http://www.un.org/apps/news/story.asp?NewsID=36040&Cr=mdgs&Cr1 [hereinafter *UN Clean Stove Initiative*].

76. *See* John Greenya, *Clean Stoves for the Third World*, MILLER-MCCUNE, Apr. 4, 2011, *available at* http://www.miller-mccune.com/environment/clean-stoves-for-the-third-world-29745/.

77. *UN Clean Stove Initiative*, *supra* note 75.

no provision to limit black carbon emissions and does not list black carbon as a defined greenhouse gas (GHG).[78] The world's two foremost documents on climate change, the Montreal Protocol and the Kyoto Protocol, are also silent on black carbon. Nevertheless, the international community is becoming increasingly aware of the need to include black carbon in climate discussions. As Romina Picolotti, Secretary of Environment and Sustainable Development in Argentina, aptly stated in a speech delivered at the international celebration of World Environment Day in Tromsø, Norway, on June 5, 2007:

> We must also strictly regulate emissions of "black carbon." Black carbon contributes more to climate change than any other substance or gas, with the exception of carbon dioxide, yet its impact on climate is not strictly regulated at the international level . Regulating black carbon will provide significant climate benefits, as well as other strong co-benefits, including improvements in public health, as it is a leading cause of asthma and respiratory diseases.[79]

Future regulation is necessary by means of amending existing treaties, combined with incorporation and integration of black carbon in future conventions and protocols, and continued affirmation of the customary international law norm of Common but Differentiated Responsibilities. The basis for this norm is that all parties are obligated to act (common) but developed nations assume greater responsibility (differentiated),[80] and its applicability to black carbon regulation is particularly notable.

A January 2011 Report, *Beyond a Global Deal: A UN+ Approach to Climate Governance*, postulated that three scenarios are possible in forthcoming climate talks: 1) the establishment of a successor to the Kyoto Protocol through negotiations under the UNFCCC; 2) a complete stalemate in climate negotiations; and 3) a "patchwork" scenario in which the UNFCCC continues to play a role but substantive actions to reduce climate change are agreed upon in smaller, bilateral or multilateral negotiations.[81] As part of the Global Governance 2020 program, the Report, produced by Princeton University and the Brookings Institution in the United States, Fudan University and the Shanghai Academy of Social Sciences in China, and the Hertie School of Governance in Germany, explained that a patchwork scenario was most likely because of the failures of Copenhagen and Cancun to yield a binding global agreement on greenhouse gas emission reductions

78. United Nations Framework Convention on Climate Change, art. 2, May 9, 1992, 31 I.L.M. 849 [hereinafter UNFCCC].

79. Romina Picolotti, *Rethinking Climate Strategies*, *in* THE MONTREAL PROTOCOL: CELEBRATING 20 YEARS OF ENVIRONMENTAL PROGRESS 155, 161 (Donald Kaniaru ed., 2007).

80. *See* Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276 (2004).

81. BRUCE AU ET AL., BEYOND A GLOBAL DEAL: A UN+ APPROACH TO CLIMATE GOVERNANCE, GLOBAL GOVERNANCE 2020, at 4 (2011), *available at* http://www.gg2020.net/products/climate_change_report/ [hereinafter BEYOND A GLOBAL DEAL].

to replace the Kyoto Protocol.[82] Whatever scenario eventually unfolds, regulating black carbon should be a priority.

A. Existing Treaties

1. Montreal Protocol

Former Secretary General of the United Nations, Kofi Annan, has referred to the Montreal Protocol as "perhaps the single most successful international agreement to date . . . ."[83] Opened for signature on September 16, 1987, the Montreal Protocol is aimed at repairing the ozone hole by 2050 and has reduced emissions of CO_2 by 135 billion tons, effectively delaying climate change by up to 12 years.[84] The treaty is structured around several groups of chlorofluorocarbons that have been proven to contribute to ozone depletion.[85] Although the Montreal Protocol fails to mention black carbon in its text, parties at the negotiating table overcame encumbering economic and environmental interests ingrained in the division between countries in the Northern hemisphere (primarily developed nations) and those in the Southern (the majority of which are developing nations), by including the principle of Common but Differentiated Responsibilities.[86] With its continued success in regulating ozone-depleting substances for both ozone and climate benefits, the Montreal Protocol can serve as an important model for climate regulation by either being updated to include black carbon or can be referenced as a template from which future agreements may be drawn.

2. UNFCCC

The United Nations Framework Convention on Climate Change (UNFCCC) was adopted in 1992 and entered into force in 1994 as an instrument for international cooperation on the issue of climate change for the purpose of stabilizing "GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[87] The Convention establishes the necessary principles and mechanisms to enable it to address black carbon emissions, yet it has thus far made little to no progress in this area. For example, the 2007 UNFCCC Bali Meeting produced the Bali Road Map, which consists of forward-looking plans necessary to reach a secure climate future, and, at least in principle encourages the development and transfer of technology to developing countries in order to promote access to affordable environmentally

82. *Id.*

83. KOFI ANNAN, WE THE PEOPLES, THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY, 56, U.N. Sales No. E.00.I.16 (2000), *available at* http://www.un.org/millennium/sg/report/full.htm.

84. Picolotti, *supra* note 79, at 158.

85. Montreal Protocol on Substances that Deplete the Ozone Layer, Annex A, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter Montreal Protocol].

86. Montreal Protocol, *supra* note 85, pmbl.; Lisa Schenck, *Climate Change "Crisis" – Struggling for Worldwide Collective Action*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 319, 361 (2008); *see infra* Section III(B).

87. UNFCCC, *supra* note 78, art. 2.

sound technologies.[88] However, it does not specifically mention or address black carbon.

3. Kyoto Protocol

The Kyoto Protocol, a product of the UNFCCC, was the first major agreement demonstrating unprecedented cooperation between developing and developed countries. It is based on a cap-and-trade regulatory system and sets binding limits of CO_2 and other greenhouse gases for developed country parties for the period of 2008-2012.[89] The Protocol reaffirms the UNFCCC's goal of preventing dangerous interference with the climate by regulating greenhouse gas emissions into the atmosphere and is set to expire in 2012.[90] The Kyoto Protocol places restrictions on industrialized nations (with the sole exception of the US as it is not a party to the Treaty), while developing nations are not obligated to reduce their emissions, apart from reduction efforts through the Clean Development Mechanism which enables developed member countries to invest in emission reductions in developing countries, resulting in credits that can count toward their emission goals.[91] With its limited time frame and participation, the Kyoto Protocol was only intended to be a first step in solving the climate problem.[92]

As a consequence of black carbon's classification as an aerosol, it has been left out of both the Montreal Protocol, which specifically regulates several different types of hydrocarbons, and the Kyoto Protocol, which is aimed at greenhouse gases. Although the impacts of aerosols are different from those of greenhouse gases, it is clear that the adverse effects on the climate are comparable and the principles outlined in the UNFCCC suggest that both should be addressed.[93] The US is currently not a signatory, partially due to President George Bush's dissatisfaction with the Treaty's exclusion of black carbon.[94] Hence,

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88. Rachmat Witoelar, President, U.N. Climate Change Conference, *Address to Closing Plenary at Closing of the Joint High-Level Segment: The Bali Road Map* (Dec. 15, 2007), *available at* http://unfccc.int/files/mcctings/cop_ 13/application/pdf/close_stat_cop13_president.pdf.

89. Kyoto Protocol, *supra* note 2.

90. Kyoto Protocol, *supra* note 2.

91. *See* Kyoto Protocol, *supra* note 2, art. 12.

92. Tom M.L. Wigley, *The Kyoto Protocol: CO_2 CH_4 and Climate Implications*, 25 GEOPHYS. RES. LETT. 13, 2285 (1998).

93. Tami C. Bond & Haolin Sun, *Can Reducing Black Carbon Emissions Counteract Global Warming?*, 39 ENV'T SCI. TECH. 5921, 5921 (2005), *available at* http://pubs.acs.org/doi/pdfplus/10.1021/es0480421.

94. In his public address explaining why the U.S. was withdrawing from the Kyoto Protocol, President George W. Bush explained that "Kyoto also failed to address two major pollutants that have an impact on warming: black soot and tropospheric ozone. Both are proven health hazards. Reducing both would not only address climate change, but also dramatically improve people's health." Remarks by the President on Global Climate Change, White House, June 11, 2001, *available at* http://usinfo.org/wf-archive/2001/010611/epf103.htm. According to Stanford University, President Bush used the findings presented by Mark Jacobson that "[r]eductions in [black carbon and organic matter] emissions from fossil-fuel sources will not only slow global warming, but also improve health," to justify the U.S. withdrawal from the Kyoto Protocol. Quote by U.S. President George W. Bush on Black Carbon, STAN. UNIV., http://www.stanford.edu/group/efmh/bush/ (citing Mark Z. Jacobson,

President Obama will have a second chance to review the Kyoto Protocol at the end the Protocol's first commitment period, in 2012,[95] at which time black carbon should be considered in relation to the Treaty's successor.

The primary strength of the Kyoto Protocol is its attempt to transform the principle of Common but Differentiated Responsibilities from customary international law into a policy instrument.[96] Realization of such a principle should enable countries such as the US, China and India to work together as a collective group with common interests to preserve global environmental integrity and tackle the problems posed by black carbon primarily in developing countries.

4. Copenhagen and Cancun Meetings

The Copenhagen meeting of the UNFCCC has been called the "emptiest deal one could imagine" by the Financial Times[97] and headlines read, "How China and India Sabotaged the UN Climate Summit."[98] On the other hand, Frank Loy, former US undersecretary of state for global affairs and the lead U.S. climate negotiator from 1998 to 2001, and Michael Levi, a senior fellow for energy and the environment at the Council on Foreign Relations recognized the Copenhagen Accord "a serious step forward," albeit a severely limited one.[99] By establishing a concrete goal of limiting the rise in global temperature to two degrees Centigrade,[100] Copenhagen could claim some success, but it failed to live up to lofty expectations that it would provide a binding document to replace the Kyoto protocol.

In August 2009, the Copenhagen Consensus Center commissioned 21 papers to examine the costs and benefits of various proposed solutions to global warming in response to the question: "If the global community wants to spend up to, say $250 billion per year over the next 10 years to diminish the adverse effects of

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Control of Fossil-Fuel Particulate Black Carbon and Organic Material, Possibly the Most Effective Method of Slowing Global Warming, 107(D19) J. GEOPHYSICAL RES. VOL. 16-1 (2002), *available at* http://www.stanford.edu/group/efmh/fossil/).

95. UNFCCC, *Kyoto Protocol*, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Mar. 15, 2011).

96. Christopher C. Joyner, *Common but Differentiated Responsibility*, 96 AM. SOC'Y INT'L L. PROC. 358, 358 (2002).

97. *Dismal Outcome at Copenhagen Fiasco*, FINANCIAL TIMES, Dec. 20, 2009, *available at* http://www.ft.com/cms/s/0/5b49f97a-ed96-11de-ba12-00144feab49a.html?nclick_check=1#axzz1EFtPIKQb.

98. Tobias Rapp, Christian Schwägerl & Gerald Traufetter, *How China and India Sabotaged the UN Climate Summit*, SPIEGEL INT'L, Mar. 5, 2010, http://www.spiegel.de/international/world/0,1518,692861,00.html.

99. Frank E. Loy & Michael A. Levi, *The Road From Copenhagen*, N.Y. TIMES, Dec. 23, 2009, *available at* http://www.nytimes.com/2009/12/24/opinion/24iht-edloy.html; *see also* Ved Nanda, *Not All Lost at Copenhagen Climate Talks*, DENVER POST, Dec. 24, 2009, *available at* http://www.denverpost.com/ci_14059461.

100. UNFCCC, Report of the Conference of the Parties on its fifteenth session, Copenhagen, Dec. 7–19, 2009, Addendum, Decision 2/CP.15, Copenhagen Accord, 5 ¶ 2, U.N. Doc. FCCC/CP/2009/11/Add.1, Dec. 18, 2009, *available at* http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf.

climate changes, and to do most good for the world, which solutions would yield the greatest net benefits?"[101] One of the papers, *An Analysis of Black Carbon Mitigation as a Response to Climate Change,* argues that an overall program should be implemented to encourage developing countries to reduce emissions by: 1) improving black carbon emissions inventory; 2) making use of better technology for current combustion practice; and 3) providing financing for these commercially available technologies on a sustainable basis.[102] As the international community moves into future negotiations, such strategies should be evaluated and prioritized.

At a high-level forum on energy in Washington D.C. leading up to the Copenhagen meeting, India's environment minister, Jairam Ramesh, rejected attempts to link black carbon to the efforts to reach an international agreement to cut greenhouse gas emissions. According to Mr. Ramesh, black carbon had no place in the Copenhagen negotiations towards a universal pact on global warming. As he explained, "Black carbon is another issue. I know there is now a desire to bring the black carbon issue into the mainstream. I am simply not in favour of it."[103]

The IPCC's Fourth Report acknowledged anthropogenic contributions to aerosols from black carbon and stated that the resulting impacts on climate are now better understood, while claiming that there is still a great deal of uncertainty.[104] It additionally stated that changes in surface albedo, due to land cover changes and deposition of black carbon aerosols on snow, cause further climate changes.[105] However, it failed to send a clear signal to policy makers that regulation is immediately necessary. United Nations Environment Programme (UNEP) has similarly acknowledged black carbon's role in climate change,[106] but has made no significant effort to include it in its spectrum of action. Moreover, in spite of the fact that scientists now estimate that nearly 50 percent of the emissions causing global warming in the 21st century are from non-CO_2 pollutants ranging from

101. *Cut Black Carbon Emissions, Reducing the Soot Created When We Burn Biomass Like Firewood*, COPENHAGEN CONSENSUS CENTER, http://fixtheclimate.com/component-1/the-solutions-new-research/black-carbon/#c500 (last visited Mar. 30, 2011).

102. ROBERT E. BARON, W. DAVID MONTGOMERY & SUGANDHA D. TULADHA, COPENHAGEN CONSENSUS CENTER, AN ANALYSIS OF BLACK CARBON MITIGATION AS A RESPONSE TO CLIMATE CHANGE 18, Aug. 14, 2009, *available at* http://fixtheclimate.com/component-1/the-solutions-new-research/black-carbon/#c500.

103. Randeep Ramesh & Suzanne Goldenberg, *Soot Clouds Pose Threat to Himalayan Glaciers*, GUARDIAN, Oct. 4, 2009, *available at* http://www.guardian.co.uk/environment/2009/oct/04/climate-change-melting-himalayan-glaciers.

104. IPCC, FOURTH ASSESSMENT, *supra* note 30, at 2.

105. *Id.* at 4-5.

106. *UN Agency Urges Measure to Slash Non-Carbon Dioxide Greenhouse Gas Pollutants*, U.N. NEWS CENTRE (Sept. 4, 2009), http://www.un.org/apps/news/story.asp?NewsID=31952&Cr=unep&Cr1.

black carbon to methane and nitrogen compounds,[107] the international community remains focused, almost exclusively and detrimentally, on CO_2 cuts.

India achieved marked success at the Cancun meeting in December 2009 by securing an agreement from the EU and G-77 to transfer climate change mitigation technology.[108] This was a significant outcome, despite the notable absence of the US in the deal,[109] as developing countries lack the financial or technical wherewithal to develop technologies that can deal with the adverse impacts of climate change. Additionally, at Cancun, India was applauded for its willingness to commit to legally binding commitments associated with an international climate deal.[110]

B. Customary International Law: Common but Differentiated Responsibilities

The most immediate approach for the international community to combat the effects of black carbon should be through the principle of Common but Differentiated Responsibilities, which has already been embodied in several international environmental treaties.[111] Article 3 of the UNFCCC first articulated the principle, acknowledging the "Common but Differentiated Responsibilities and respective capabilities" of the Parties, pursuant to which "the developed country Parties should take the lead in combating climate change and the adverse effects thereof."[112] The Kyoto Protocol further developed the idea, which was also articulated at the 1992 Rio Conference,[113] that all states have a common obligation to protect the environment but have differentiated levels of duty, depending upon their wealth and technology, and their share of causing global environmental degradation.[114] This is primarily due to the fact that the developed industrialized nations have contributed more to been the major source of today's environmental problems and also because of their greater technological and financial resources to contribute to the solution.[115] The principle relies upon cooperation in the spirit of

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107. *Climate Change – UNEP Points to Accelerated Opportunities for Action*, UNEP NEWS CENTRE (Sept. 4, 2009), http://new.unep.org/Documents.Multilingual/Default.asp?DocumentID=596&ArticleID=6299&l=en&t=long.

108. *India Scores Major Success at Cancun Climate Talks*, ECONOMIC TIMES, Dec. 4, 2010, *available at* http://economictimes.indiatimes.com/news/politics/nation/india-scores-major-success-at-cancun-climate-talks/articleshow/7038791.cms.

109. *Id.*

110. Nitin Sethi, *India Willing to Accept Legally Binding Pact at Cancun*, TIMES OF INDIA, Dec. 9, 2010, *available at* http://timesofindia.indiatimes.com/india/India-willing-to-accept-legally-binding-pact-at-Cancun/articleshow/7070583.cms.

111. *See, e.g.*, VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY 39 (2003).

112. UNFCCC, *supra* note 78, art. 3(1).

113. United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, Princ. 7, June 14, 1992, UN Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874.

114. NANDA & PRING, *supra* note 111.

115. Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation*, *in* PHILIPPE SANDS, GREENING INTERNATIONAL LAW 20, 28-29 (1993).

global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem.[116]

Implicit in this concept is the international legal principle that states have a right to development. To illustrate, India's position is, and has been for some time, that because current concentrations of greenhouse gases in the atmosphere are primarily the result of developed countries' activities during periods of industrialization, that it should be permitted to similarly develop.[117] Institutionalizing the principle of Common but Differentiated Responsibilities in the successor convention to Kyoto will further advance cooperation with respect to black carbon, even without mentioning it specifically, and developing countries will be able to request help from developed nations to address the problems of black carbon.

C. India's Role as a Leader of Developing Countries

The Government of India's official position is that the earth is a common resource of humanity and every person is entitled to equal enjoyment of that space.[118] Therefore, it is India's posture that all countries' per capita emissions should not only be uniform, but should be reduced to the low level of India's per capita emissions because each citizen of the world has an equal right to enjoyment of the natural environment.[119] While India ranks seventh in the world in annual GHG emissions, with 3.6 percent,[120] it is one of the lowest per capita emitters with only 1.5 tons of CO_2 emitted per person,[121] as compared for example, with the US per capita emissions of nearly 20 tons.[122]

On March 18, 2010, India announced its National Action Plan on Climate Change which incorporates a vision of sustainable development and the steps it must take to achieve it.[123] India is not likely to back down from its desires to develop, as articulated by the Indian Government's position paper in preparation for Copenhagen:

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116. *Id.*

117. *See* Warwick McKibbin, *Climate Change Policy for India* 2 (Lowy Inst. for Int'l Peace, Working Papers in Int'l Econ. No. 2.04, Apr. 30, 2004), *available at* http://www.lowyinstitute.org/Publication.asp?pid=128.

118. PUBLIC DIPLOMACY DIVISION, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA, THE ROAD TO COPENHAGEN: INDIA'S POSITION ON CLIMATE CHANGE ISSUES 2 (2009), *available at* http://pmindia.nic.in/Climate%20Change_16.03.09.pdf [hereinafter THE ROAD TO COPENHAGEN].

119. *Id.*

120. Neelam Singh, *Indian Industry Launches National GHG Inventory Program*, WORLD RES. INST. (May 30, 2008), http://www.wri.org/stories/2008/05/indian-industry-launches-national-ghg-inventory-program.

121. *Id.*

122. *Per Capita CO_2 Emissions for Select Major Emitters, 2007 and 2030 (Projected)*, WORLD RES. INST. (Nov. 4, 2009), http://www.wri.org/chart/capita-co2-emissions-select-major-emitters-2007-and-2030-projected.

123. NATIONAL ACTION PLAN ON CLIMATE CHANGE (NAPCC) (Mar. 18, 2010), http://www.energymanagertraining.com/NAPCC/main.htm.

> India is a country which is and will continue to be severely impacted by Climate Change precisely at a time when it is confronted with huge development imperatives. We therefore, expect that the Copenhagen outcome not only provides us with the space we require for accelerated social and economic development, in order to eradicate widespread poverty, but also create a global regime which is supportive of our national endeavors for ecologically sustainable development.[124]

India's stated priorities include: 1) defining per capita emission obligations; 2) continued acceptance of the principle of Common but Differentiated Responsibilities; 3) China's acceptance of voluntary actions to make energy-intensity reductions as the Indian government has done; 4) international sharing of technology and finance; and 5) the need for flexible dynamics during international negotiations.[125] In furtherance of its priorities, India must find a way to commit to long-term reduction of pollutants while at the same time not having to cut short-term costs of development.

Along with India's significant efforts to curb black carbon emissions, namely reductions in diesel emissions and solar cooker initiatives, the country plays a very important leadership role for other developing countries. Hence, it should also play a significant role in climate change negotiations and make a commitment to mitigating its own contributions. It seems that a breakthrough may be possible with India moderating its seemingly inflexible approach and moving toward a willingness to be bound.[126] This is significant, particularly as Prime Minister Manmohan Singh expressed the need for India's non-alignment movement to evolve forward in order to "meet the challenges of today."[127] Yet, in the same speech, he reiterated that industrial activity and unsustainable lifestyles in the developed world caused the current climate problems and emphasized the importance of reaching an equitable solution to the problem of climate change that acknowledges "this historical responsibility" and ensures that climate change action not perpetuate poverty of the developing countries.[128]

Thus, the Indian Government continues to demand that the US and other developed nations responsible for most of the greenhouse gas emissions worldwide cut their emissions before asking developing countries to take any action.[129] This has led to a "global standoff" as articulated by a Time Magazine article entitled

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124. THE ROAD TO COPENHAGEN, *supra* note 118, at 2.

125. *Id.* at 3-4.

126. Varad Pande, *India at Cancun: The Dawn of a New Era*, CENTER FOR THE ADVANCED STUDY OF INDIA, U. PENN (Jan. 3, 2011), http://casi.ssc.upenn.edu/iit/pande.

127. Press Release, Press Information Bureau, Government of India, Prime Minister's Office, *PM's Address at the 15th Non Aligned Movement Summit in Egypt* (July 15, 2009), *available at* http://pib.nic.in/newsite/erelease.aspx?relid=50449.

128. *Id.*

129. Bryan Walsh, *Why is India Playing Hard to Get on Climate Change?*, TIME, Nov. 6, 2009, *available at* http://www.time.com/time/specials/packages/article/0,28804,1929071_1929070_1936360,00.html.

"Why is India Playing Hard to get on Climate Change?"[130] As long as developing countries wait for the West to firmly commit to reductions, and the West points the finger back at developing countries to share in the responsibility, significant and timely progress is doubtful.

The key to achieving cooperation will be striking a balance between the negotiating positions of developing and developed countries, and recognizing that developing countries should not be expected to contribute equally to the cost of abatement of global greenhouse gas emissions as developed countries are doing. The issue is complicated by developing countries' claimed right to development[131] and, at least for the present time, the CO_2 discussion has not been able to address these issues to these countries' satisfaction. However, black carbon may offer a more direct and immediate solution that countries should be able to agree on. After all, involving the Indian government in promoting healthy lifestyle changes for its people - which is half of what the solar cookers are intended to do (the other half of course is to curb climate change) is easier than asking it to commit to reducing its CO_2 emissions and having to simultaneously slow development and growth. Moving forward, the US should pay special attention to India's prioritization of social and economic development and poverty eradication. As these are common concerns for most developing nations, India represents the interests of nearly two thirds of the world's population[132] and hence these concerns should not be ignored in future negotiations on the international level.

D. Future Developments in the International Regime Should Address Black Carbon

The Global Governance Report, finding that a so-called "patchwork scenario" was the most likely result of decades of efforts to bind the world community in committing to curb climate change, relied partially on the lessons learned from the failures of Copenhagen and Cancun to yield a successor to the Kyoto Protocol.[133] A "patchwork" scenario, involving the UNFCCC but shifting attention and resources toward smaller, bilateral or multilateral negotiations, entails an international framework in the future with multi-dimensional characteristics.[134]

Thus, based on the inability of Copenhagen and Cancun to produce a binding document, the post-Copenhagen approach should involve participation from a broad coalition of non-traditional groups of media, NGOs and companies working in cooperation with "ambitious and pragmatic countries, regions, cities . and leaders" to contribute to the "emergence of a complex, multilayered governance landscape."[135] This multi-dimensional framework demands that participants

130. *Id.*

131. Srikanta K. Panigrahi, Paper presented at Climate Change Kiosk, UNFCCC Facilitation Centre at COP-8, Vigyan Bhawan, New Delhi, Oct. 23-Nov. 1 2002, *Climate Change and Development in Indian Context* 7, *available at* http://unfccc.int/cop8/se/kiosk/cd4.pdf (last visited Mar. 30, 2011).

132. Two-thirds of the world's population lives in developing countries.

133. BEYOND A GLOBAL DEAL, *supra* note 81, at 4.

134. *Id.*

135. *Id.*

undertake innovative approaches to achieve the goals of the Kyoto Protocol. Implementing solar cookers in rural India can serve as an example of such outside the box thinking and can have immediate effects on slowing global warming.

With the recent emergence of scientific evidence explaining black carbon's contribution to arctic ice melt and its ability to mitigate harm caused by CO_2, it should first and foremost be classified as a greenhouse gas within the international environmental framework. This would require its inclusion in the UNFCCC regime and its regulation by upcoming agreements. A notable development was the 2009 creation of an *Ad Hoc* Expert Group on Black Carbon under the Convention on Long-range Transboundary Air Pollution of the UN Economic Commission for Europe (UNECE) and its subsequent first meeting in June 2010.[136] The group was tasked with identifying options for potential revisions to the Convention's 1999 Gothenburg Protocol,[137] which would enable parties to mitigate black carbon as a component of particulate matter for health purposes as well as climate benefits.[138] Such capacity shifting would have formidable results in the international legal framework through which black carbon should be regulated.

UNFCCC's precautionary principle additionally supports inclusion of black carbon within its purview because it urges parties to take precautionary measures to "anticipate, prevent, or minimize the causes of climate change and prevent its adverse effects" and scientific uncertainty should not be used as a reason for postponing such measures.[139] Accordingly, any claims, especially those from India, that there is still too much scientific uncertainty around black carbon for it to be regulated, should be considered in light of the factual data that has been presented.

The US failure to ratify the Kyoto Protocol poses a second major obstacle for further cooperation because of India's refusal to take action until the US does. Notwithstanding the US share of only six percent of black carbon emissions[140] combined with the Environmental Protection Agency's (EPA) regulation of black carbon as particulate matter under the Clean Air Act[141] to protect human health,[142] this country has a central role in the implementation of the Common but Differentiated Responsibilities principle and reaffirmation of the Kyoto Protocol's black carbon emissions provisions. In the 1960s, the US first started to regulate

136. News, *UNECE Black Carbon Group Holds First Meeting*, INT'L INST. FOR SUSTAINABLE DEV. (June 28, 2010), http://climate-l.iisd.org/news/unece-black-carbon-group-holds-first-meeting/?referrer=climate-l.org-daily-feed.

137. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, Nov. 30, 1999, U.N. Doc. EB.AIR/1999/1, *available at* http://www.unece.org/env/lrtap/full%20text/1999%20Multi.E.Amended.2005.pdf.

138. *Id.* arts. 2-3.

139. UNFCCC, *supra* note 78, art. 3.

140. Anderson, *supra* note 9.

141. *Atmosphere Changes*, US ENV'T PROT. AGENCY [EPA], http://www.epa.gov/climatechange/science/recentac.html (last updated Aug. 19, 2010).

142. *See* Clean Air Research, *Particulate Matter (PM) Research*, EPA, http://www.epa.gov/airscience/quick-finder/particulate-matter.htm (last updated Mar. 3, 2011).

black carbon indirectly as particulate matter primarily to protect human health and now its contribution of black carbon is negligible. Therefore, in a Common but Differentiated Responsibilities framework, the fact that developing countries contribute more to the problem of black carbon does not alleviate the responsibility of developed countries to contribute to the solution.

E. Other Approaches to Mitigating Black Carbon in International Law

As a promising development, the international community has finally started to study black carbon, focusing on its causes and effects. The most prominent voices originate from local and regional groups. As Andreas Stohl explained, "Finally, this topic has been put on the international political agenda," speaking as the project manager for the International Polar Year (IPY) project POLARCAT (Polar Study using Aircraft, Remote Sensing, Surface Measurements and Models, of Climate Chemistry, Aerosols, and Transport), which studies the transport of pollutants and climate forcing agents into the Arctic.[143] This project encompasses "spring agricultural burning, identification of other sources or black carbon impacting Arctic climate, and expansion of methane reduction efforts, worldwide."[144]

Thus, in May 2009, Arctic Council ministers agreed to jointly undertake efforts to reduce emissions of black carbon and other non-CO_2 pollutants in order to slow climate change and ice melt in the Arctic.[145] However, these voices have yet to reach the international scene on a large enough scale to effectuate meaningful change.

Additional efforts include a plea from the Indigenous People's Global Summit on Climate Change to the UNEP "to conduct a fast track assessment of short-term drivers of climate change, specifically black carbon, with a view to initiating negotiation of an international agreement to reduce emission of black carbon."[146] The Summit Declaration also calls for the US and Europe to take the lead by transferring appropriate technology, among other actions to reduce black carbon.[147]

IV. HOW REGULATING THE SHIPPING INDUSTRY CAN HELP CURB BLACK CARBON'S WARMING EFFECTS IN THE ARCTIC AND HIMALAYAN REGIONS

A. Arctic Region

Although the vast majority of black carbon emissions originate elsewhere, when such emissions reach the Arctic, the resulting ice-melt has widespread ecological implications; it has been postulated that reducing black carbon

143. Anita Thorolvsen Munch, *Arctic Council Targets Black Carbon*, POLARCAT (May 28, 2009), http://www.ipy-osc.no/artikler/2009/1243517028.28.

144. *Id.*

145. *Id.*

146. Indigenous People's Global Summit on Climate Change, Apr. 20-24, 2009, Anchorage, Alaska, *Report of the Indigenous Peoples' Global Summit on Climate Change*, 7 (2009), *available at* http://www.indigenoussummit.com/servlet/content/home.html [hereinafter Anchorage Declaration].

147. *Id.* at 96.

emissions is the fastest way to mitigate Arctic warming.[148] As a result of increased Arctic ice melting, shipping activity, which currently accounts for only 1.7 percent of the global black carbon inventory,[149] will also increase due to opening of Arctic channels, such as the Northwest Passage and the Northeast Passage,[150] thereby increasing emissions of black carbon from shipping vessels within the region.[151] As emissions from diesel engines and marine vessels contain higher levels of black carbon compared to other sources,[152] regulating black carbon emissions from these sources presents a significant opportunity to reduce black carbon's global warming impact.[153]

Given the expected increase in shipping throughout regions that are especially sensitive to black carbon, like the Arctic, regulation of the shipping industry can contribute to reductions in black carbon.[154] Otherwise, retreating Arctic sea ice will allow the Northern Sea Route and the Northwest Passage to remain open for longer periods of time each year, thus increasing shipping traffic through the Arctic.[155] The increased presence of the shipping industry in Polar Regions will in turn add a significant source of locally produced black carbon intensifying and exacerbating the pollution levels the Arctic already receives from lower latitudes.[156]

As the Kyoto Protocol does not regulate the shipping industry, a large emitter of black carbon[157] is allowed to continue emitting an estimated 70,000 to 160,000 tons per year.[158] Thus, implementation of a stricter set of environmental rules would have a powerful positive impact. In a joint submission preceding the March 2010 meeting of the Marine Environment Protection Committee (MEPC), Norway, Sweden and the US urged the International Maritime Organization (IMO) to take

148. Zender Testimony, *supra* note 5, at 6.

149. Daniel Lack et al., *Light Absorbing Carbon Emissions from Commercial Shipping*, 35 GEOPHYSICAL RES. LETTERS L13815 (2008), *available at* http://origin.pmcdn.net/p/ss/library/ocs/public/Lack_GRL_LAC_Shipping.pdf.

150. Armas & Vanko, *supra* note 9.

151. IGSD/INECE Climate Briefing, *supra* note 49, at 3.

152. *Id.* at 4-5; Jacobson Testimony, *supra* note 3, at 3.

153. Lack, *supra* note 149.

154. *Id.*

155. For an overview of the problem posed by black carbon related to the shipping industry see Armas & Vanko, *supra* note 9, at 44.

156. Joseph Cheek, *Black Carbon: Playing a Major Role in Arctic Climate Change*, INT'L POLAR FOUNDATION (June 12, 2008), http://www.sciencepoles.org/articles/article_detail/black_carbon_playing_a_major_role_in_arctic_climate_change/.

157. David Marshall, *No Progress to Reduce Shipping Climate Impact*, ACID NEWS, No. 3, at 19-20, Oct. 2008, *available at* http://www.airclim.org/acidnews/2008/documents/AN3-08.pdf.

158. *Id*; *see also* IMO, Marine Env't Prot. Comm., *Prevention of Air Pollution from Ships, Second IMO GHG Study 2009*, at 1, IMO Doc. No. MEPC 59/4/7, Apr. 9, 2009, *available at* http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D27795/GHGStudyFINAL.pdf (concluding that international shipping emitted 870 million tones of CO_2 in 2007, amounting to 2.7 percent of the global total that year). According to the IMO, the Second IMO GHG Study comprises the "most comprehensive and authoritative assessment of greenhouse gas emissions from ships engaged in international trade." *Greenhouse Gas Study 2009*, IMO, http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Greenhouse-Gas-Study-2009.aspx (last visited Mar. 11, 2011).

action on black carbon.[159] However, black carbon was not discussed, nor was it addressed at the February 2011 meeting of the MEPC.[160]

On a related subject, the US and Canada are nearing a Joint Marine Pollution Contingency Plan to clean up air pollution and emissions by regulating ships passing within 200 nautical miles of their shores,[161] but the plan does not address black carbon and new rules about black carbon emissions recently announced by Canada and the United States specifically exclude ships operating in the Arctic.[162] However, in February 2011, Rep. Jerrold Nadler, along with 50 other co-sponsors, introduced the Clean Ports Act in the U.S. House of Representatives.[163] The bill provides support for policies, such as the Los Angeles Clean Truck Program, that curb diesel pollution in port regions, thus reducing black carbon and improving the air quality affecting 87 million Americans who live and work in port regions.[164] Similar action should be taken in India since it lacks nationwide port legislation and has 12 major ports and 181 minor ports along its 6,000 km coastline, similar action should be taken.[165]

It is worth noting that estimating global greenhouse gas emissions from shipping is challenging due to the lack of data and scientific uncertainty on its overall impact. Research on quantification of shipping's emissions had previously focused on emissions of CO_2, but now attention is appropriately focusing on emissions of black carbon and NO_2 from ships.[166] Other potential solutions to such emissions from the shipping industry include installation of scrubbers on ships or reducing sulfur emission by switching to an ultra-low sulfur fuel and requiring shipping companies to reduce their ships' speed as ships that slow down by ten percent use twenty-five percent less fuel. Ports authorities could also encourage or require ships to reduce their engine use as they approach the shore and the port.

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159. Joint Submission to MEPC, *supra* note 33, at 1.

160. *IMO Meeting Makes no Progress on Controlling Black Carbon Emissions*, SUSTAINABLE SHIPPING, Feb. 11, 2011, http://www.sustainableshipping.com/news/i100607/IMO _meeting_makes_no _progress_on_controlling_black_carbon_emissions#.

161. Renee Schoof, *U.S., Canada Near Agreement to Control Pollutants from Ships*, MCCLATCHY (Sept. 2, 2009), http://www.mcclatchydc.com/2009/09/02/74811/us-canada-near-agreement-to-control.html#; *see also Canada-United States Joint Marine Pollution Contingency Plan*, Letter of Promulgation (May 22, 2003), *available at* http://www.nrt.org/production/NRT/NRTWeb.nsf/AllAttachmentsByTitle/A-403CANUSJCPEnglish/$File/CANUS%20JCP%20English.pdf?OpenElement.

162. Scott Highleyman & Marilyn Heiman, *Arctic Shipping: Stormy Seas or Smooth Sailing*, SACRAMENTO BEE, July 23, 2009, *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=54327.

163. Coalition for Clean & Safe Ports, *Clean Ports Act of 2011*, http://www.cleanandsafeports.org/clean-ports-act-of-2011/ (last visited Mar. 26, 2011).

164. *Id.*

165. Maritime Connector, *Indian Ports and Port Authorities*, http://www.maritime-connector.com/ContentDetails/3192/gcgid/219/lang/English/INDIAN-PORTS---PORT-AUTHORITIES.wshtml (last visited Mar. 26, 2011).

166. ELLYCIA HARROULD-KOLIEB, OCEANA, SHIPPING IMPACTS ON CLIMATE: A SOURCE WITH SOLUTIONS 4 (2008), *available at* http://na.oceana.org/en/news-media/publications/reports/shipping-impacts-on-climate-a-source-with-solutions.

Additionally, once ships are docked at a port, the port should require reliance on shore power instead of the ship's engines or generators,[167] because relying on shore power will reduce particulate emissions in accordance with regulations in many industrialized countries. Moreover, relying on shore power eliminates carbon and particulate emissions if shore power is generated by renewable sources, such as wind or solar.[168]

B. Himalayan Glaciers

Most scientists view the Himalayan glaciers as melting alarmingly rapidly, leading to severe flooding in the Southern Hemisphere.[169] Soot emitted from sources in India and China and the industrialized Northern Hemisphere is considered as further exacerbating such melting.[170] However, controversy surrounds the rate at which the glaciers are melting and the accuracy of the scientific data measuring their rate of retreat.[171] In the weeks leading up to the Copenhagen meeting, critics challenged the IPCC's projected timeframe for the Himalayan glaciers' expected disappearance.[172]

Notwithstanding the mistakes in the IPCC's reported findings, however, scientific research exists showing that in the Himalayan region, solar heating from black carbon at high elevations may contribute to glacial melting almost equivalent to CO_2.[173] According to some studies, warmer air resulting from black carbon in South and East Asia over the Himalayas contributes to a warming of approximately 0.6°C and studies on the Tibetan plateau show a warming in excess of 1°C since the 1950s.[174]

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167. John-Michael Cross, *Shore-Based Power: Reducing Idle Ships' Emissions*, CLIMATE INSTITUTE, Spring 2010. *See also* John Gillie, *Puget Sound First: Shore Power Instead of Generators for Docked Cargo Ship*, THE NEWS TRIBUNE, Mar. 26, 2011, *available at* http://www.thenews tribune.com/2010/10/28/1399238/ship-powers-up-from-shore.html.

168. HARROULD-KOLIEB, *supra* note 166, at 11. *See also* Join Submission to MEPC, *supra* note 33, ¶ 8.

169. Pope, *supra* note 65.

170. *Id.*

171. IPCC, *IPCC Statement on the Melting of Himalayan Glaciers*, Jan. 20, 2010, *available at* http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf [hereinafter *IPCC Statement*].

172. The Synthesis Report of the Fourth Assessment Report of the IPCC stated: "Climate change is expected to exacerbate current stresses on water resources from population growth and economic and land-use change, including urbanisation. On a regional scale, mountain snow pack, glaciers and small ice caps play a crucial role in freshwater availability. Widespread mass losses from glaciers and reductions in snow cover over recent decades are projected to accelerate throughout the 21st century, reducing water availability, hydropower potential, and changing seasonality of flows in regions supplied by meltwater from major mountain ranges (e.g. Hindu-Kush, Himalaya, Andes), where more than one-sixth of the world population currently lives." IPCC, FOURTH ASSESSMENT, *supra* note 30. The IPCC released a statement supporting the accuracy of the paragraph but pointed out that a paragraph in 938-page Working Group II contributed to the underlying assessment referred to "poorly substantiated estimates of rate of recession and date for the disappearance of Himalayan glaciers." *IPCC Statement*, *supra* note 171, *referring to*, IPCC, Working Group II, *Technical Report*, 37 (2009).

173. Burleson, *supra* note 61, at 92.

174. Ramanathan & Carmichael, *supra* note 1, at 221-24; *see also* IGSD/INECE Climate Briefing,

The Energy and Resources Institute (TERI) in Delhi has two sensors in the Himalayas, one on the Kholai glacier that sits on the mountain range's western flank in Kashmir and the other flowing through the eastern reaches in Sikkim.[175] Professor Syed Hasnain of TERI described findings from the sensors as indicating "concentrations of black carbon in the Himalayas in what are supposed to be pristine, untouched environments."[176] Glaciers in the Himalayan region feed a majority of the major rivers in Asia and the substantial melting results in severe flooding downstream.[177] Hasnain is critical of India's response, pointing out that although India and China both contribute to about a third of the world's black carbon, "at least in China the state has moved to measure the problem. In Delhi no government agency has put any sensors on the ground. [TERI] is doing it by ourselves."[178]

V. WHY INDIA'S LEGAL FRAMEWORK IS WELL SUITED TO ADDRESS BLACK CARBON

Indian Prime Minister, Manmohan Singh's goal of a common per capita global warming emissions level[179] is unrealistic given India's low per capita emission compared with the West. However, as the following discussion shows, India is capable of achieving success in curbing climate change through its legal system. To illustrate, India's National Green Tribunal Act, which passed in June 2010, established a new court, the National Green Tribunal, designed to exclusively hear cases concerning environmental law.[180] While the Court's parameters and functionality have yet to come to fruition, the existence of the Court elevates India to a position among leading countries in the world, including Australia and New Zealand, with such an extensive system of specialized environmental courts.[181]

India's Supreme Court has an already impressive jurisprudence with respect to individual rights to a healthy environment.[182] Notable decisions include *M.C. Mehta v. Union of India* (1987),[183] *M.C. Mehta v. Union of India* (1988),[184] *M.C.*

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supra note 49, at 4.

175. Ramesh & Goldenberg, *supra* note 103.

176. *Id.*

177. *Id.*

178. *Id.*

179. Dr. Manmohan Singh, *PM's Speech on Release of Climate Change Action Plan*, New Dehli, PRIME MINISTER OF INDIA (June 30, 2008), http://pmindia.nic.in/lspeech.asp?id=690.

180. Wendy Zeldin, *India: New Green Tribunal Established*, GLOBAL LEGAL MONITOR, Jan. 6, 2011, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402462_text.

181. *Id.*; *India First Country in the World to have Specialized Environment Courts*, GITS4U.COM, http://www.gits4u.com/envo/envo16.htm (last visited Mar. 30, 2011); GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS, v (2009) ("The Land and Environment Court of New South Wales, Australia, is a leading example of a specialized court.").

182. PRING & PRING, *supra* note 181, at v, 24; for an overview see also S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29 (2001).

183. *M.C. Mehta v. Union of India* (*Oleum Gas Leakage case*), 1987 A.I.R. 1086. This case involved the award of and compensation to the victims of the Oleum gas leakage from a factory of

Mehta v. Union of India (1998),[185] *M.C. Mehta v. Union of India* (1999),[186] *M.C. Mehta v. Kamal Nath*,[187] and *M.C. Mehta v. Union of India* (2004),[188] which upheld various environmental rights, generally finding that disturbing the basic environment, such as air and water, constitutes a violation of the right to life, as it encompasses the preservation of ecological balance. In a 2010 decision, the Court invoked the wisdom of Mahatma Gandhi by emphatically reiterating the importance of protecting the environment:

> Mahatma Gandhi once said that earth provides enough to satisfy every man's need but not every man's greed. It is the greed of the mankind which has brought environment degradation and pollution. Preservation of the eco-system is an immutable duty under the Constitution - a fine balance must be struck between environmental protection and development.[189]

In light of India's stance that climate mitigation must not impede economic development,[190] the Indian judiciary's interpretation of the Indian Constitution

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Sriram Foods manufacturing and hazardous chemical storage plants and Fertilizers in New Delhi on the night of December 3, 1985, which caused serious human health problems, including deaths. The Indian Supreme Court ordered compensation to the victims based on Article 21 of the Indian Constitution, which provides for the right to a pollution-free living environment.

184. *M.C. Mehta v. Union of India* (*Ganga Pollution case*), 1988 A.I.R. 1037, 1041. The Indian Supreme Court held that there was no dispute that the discharge of trade effluents from tanneries in Jajmau in Kanpur was polluting the river Ganga and thus causing considerable problems for human health and thus ordered the closing of 157 tanneries and 191 other industries in U.P., Bengal and Bihar. It also ordered more than 5,000 industries located in the Ganga basin to set up effluent treatment plants and pollution control devices; "We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people." Justice Singh, concurring opinion.

185. *M.C. Mehta v. Union of India*, 1998 A.I.R. 2340, modification of the Indian Supreme Court's 1992 order in the *Vehicular Pollution case*, *supra* note 52.

186. *M.C. Mehta v. Union of India* (*Badkhal & Surajkund Lakes case*), 1996 (8) S.C.C. 462. India's Supreme Court held "in order to preserve environment and control pollution within the vicinity of the two tourist resorts it is necessary to stop mining in the area." The Court ordered cessation of mining activity within 2 kms radius of the tourist resorts, and no construction would be permitted within 5 km radius.

187. *M.C. Mehta v. Kamal Nath*, 1997 (1) S.C.C. 388. The Supreme Court of India established the principle of exemplary damages for the first time in India, invoking the Polluter Pays Principle and Public Trust Doctrine in a case involving a family-owned motel's beautification plans that would have resulted in encroachment upon forest areas. The Court ordered the Span Motel owners to hand over forest land to the Government and remove any encroachments, thus holding that disturbing the basic environment, such as air and water, constituted a violation of the right to life which encompasses preservation of ecological balance.

188. *M.C. Mehta v. Union of India*, 2004 (3) S.C.R. 128. In reviewing the *Badkhal & Surajkund Lakes case*, *supra* note 186, the Indian Supreme Court held that the mine leases would not be renewed.

189. *Maharashtra Land Development Corp. v. State of Maharashtra*, Civ. App. 2147-2148, at 21 (2010), also stating that "[t]his Court has for long been an outspoken critic of attempts to degrade the environment, and a vocal supporter of sustainable development."

190. THE ROAD TO COPENHAGEN, *supra* note 118, at 4-5. Secretary of India's Environment Ministry, Pradipto Ghosh, made clear before the 2007 G8 summit that India would not accept CO_2 limits that would retard economic growth and damage India's attempts to eradicate poverty. *See* NIGEL

stands to facilitate the prioritization of favorable environmental conditions over development concerns. Article 21 of the Indian Constitution provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law."[191] In *Bandhua Mukti Morcha v. India*, Justice Bhagwati articulated that whenever a fundamental right is violated, any person could have standing to bring an action in the Supreme Court for the enforcement of such fundamental right.[192] The basis for India's public interest litigation is the belief on the part of judges and the Court that justice is not a privilege only for the rich, as stated in *PUDR v. India*, in 1982:

> Public interest litigation is brought before the Court not for the purpose of enforcing the rights of one individual against another as happens in the case of ordinary litigation, but is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.[193]

In line with the precedent of the Indian Supreme Court, the National Green Tribunal, when it becomes institutionalized,[194] will have the opportunity to seek redress for harm caused by black carbon. The Court's liberal rule of *locus standi* allows for individuals and groups, such as Peoples Union For Civil Liberties, and activists such as M.C. Mehta, to represent underprivileged sections of society.[195] A cause of action could accordingly be brought on behalf of the millions of poor who suffer from inhalation of soot and who breathe the smoke-filled air. A possible remedy to such action would be similar to that of the remedy in *M.C.*

LAWSON, AN APPEAL TO REASON: A COOL LOOK AT GLOBAL WARMING (2008).

191. INDIA CONST. art. 21.

192. *Bandhua Mukti Morcha v. Union of India*, 1984 A.I.R. 802.

193. *People's Union for Democratic Rights (PUDR) v. India*, 1982 A.I.R. 1473, 1476 (1982).

194. On Dec. 15, 2010 the Indian Supreme Court ordered the National Green Tribunal (NGT) to be set up within four weeks. Although the Tribunal was set to start hearing cases on Jan. 15, 2011, the launching of the Tribunal was delayed according to an environment ministry official who said it was still in the process of selecting candidates for the tribunal. Padmaparna Ghosh, *Gov't Misses Deadline to Set up Eco-Court*, LIVEMINT.COM, Jan. 17, 2011, *available at* http://www.livemint.com/2011/01/16210159/Govt-misses-deadline-to-set-up.html?atype=tp. "Two months have passed but the tribunal is still not functional." At the time of publication, the Court's chairperson position has been filled by Lokeshwar Singh Panta, a former Supreme Court judge. The tribunal's additional 10 judicial members and 10 expert members have not yet been appointed. According to the NGT Act, the chairperson alone cannot exercise the jurisdiction, powers and authority of the tribunal while the appointment of other members may take up to three months, according to a source in the environment ministry. The rules for the Tribunal's functioning have also not yet been finalized and no regional branch has been opened. Kumar Sambhav Shrivastava, *National Green Tribunal Fails to Start, Project Clearances Continue*, CLIMATE HIMALAYA INITIATIVE – NEWS, Dec. 25, 2010, *available at* http://chimalaya.org/2010/12/25/non-existent-check-post-india/. *See also* Kanchi Kohli, *A Crevasse in the Regulatory Environment*, INDIA TOGETHER, Nov. 28, 2010, *available at* http://www.indiatogether.org/2010/nov/env-ngt.htm.

195. Sathe, *supra* note 182, at 79.

Mehta v. Union of India & ORS,[196] in which the Delhi Supreme Court ordered an overhaul of Delhi's public transportation system in the interest of public health. A Court-ordered shift from traditional methods of burning biomass to cooking and heating through the use of cook stoves could have life-saving results.

Such a decision would also be in line with the U.N.'s Millennium Development Goals, which strive toward eradicating global poverty and ensuring environmental sustainability, because reduction of black carbon's harmful effects on human health and warming will facilitate achievement of the other goals.[197] A legal order to such effect would have global benefits. The combined power of India's activist Supreme Court having taken on a de facto legislative and regulatory role,[198] and existing legislation[199] places India in a position to be a leader in environmental justice.

VI. CONCLUSION

As developing countries focus their energies on efforts aimed at development, they must also prioritize safeguarding and improving the environment.[200] Although willing to accept certain measures to protect health concerns related to black carbon emissions, India must accept its role as a leader of developing countries to take steps to mitigate the harmful effect of such emissions on the environment.

Developing and developed nations must collaboratively address the problem of climate change resulting from non-CO_2 sources. While the international community's primary focus will likely remain on reducing CO_2 emissions in the near future, it is imperative that the successor to the Kyoto Protocol regulates black carbon emissions as well. Such inclusion in an international treaty, in conjunction with national efforts, particularly in India, and active NGO and community engagement, could have a positive impact on reducing black carbon. This would simultaneously benefit human health and slow warming in the Arctic and Himalayan regions.

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196. *Vehicular Pollution Case*, *supra* note 52.

197. Lakshman Guruswamy, *Energy Justice and Sustainable Development*, 21 COLO. J. INT'L L. & POL'Y 231, 237-38 (2010).

198. United States Agency for International Development (USAID), *India Air Quality Reforms*, 3, Apr. 2002 – Dec. 2003, finding that "the Court taking on a de-facto legislative and regulatory role, was aligned with technical and legal precedents and resulted in positive impacts on air quality."

199. The Air (Prevention and Control of Pollution) Act, No. 14, 1981, enacted in accordance "decisions made at the United Nations Conference on the Human Environment, held in Stockholm in June, 1972, in which India participated, to take appropriate steps for the preservation of the natural resources of the earth, which, among other things, include the preservation of the quality of air and control of air pollution."

200. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, ¶¶ 3-5, U.N. Doc. A/CONF.48/14/Rev.1, 11 I.L.M. 1416 (June 16, 1972).

Scientific evidence indicates the enormous benefit of reducing black carbon emissions, as found by a recent US EPA study.[201] As mentioned above, the Indian government, aware of the detrimental effects of black carbon on human health, especially on women and children who inhale soot regularly,[202] has taken preliminary steps to regulate it.[203] While these efforts are primarily motivated by public health concerns rather than to curb climate change, the resulting effects on the climate will directly promote environmental stability and sustainability.

201. *See* the EPA study of March 2011, Ari Natter, *Reducing Black Carbon Can Slow Warming, EPA Finds*, WORLD CLIMATE CHANGE, Mar. 25, 2011, which determined that although black carbon reductions should not be considered a substitute for reductions in greenhouse gas emissions, "[m]ounting scientific evidence suggests that reducing current emissions of [black carbon] can provide near term climate benefits, particularly for sensitive regions such as the Arctic." *See also* UNEP, *Integrated Assessment of Black Carbon and Tropospheric Ozone; Summary for Policy Makers*, 2 (2011); Ronald Bailey, *Cutting Black Carbon and Methane Emissions Would Reduce Projected Global Warming by Half*, Feb. 24, 2011, *available at* http://reason.com/blog/2011/02/24/cutting-black-carbon-and-metha; Matthew McDermott, *Reducing Black Carbon Soot Would Slash Arctic Warming Two-Thirds by 2030, Cut Temp Rise by 0.5C*, Feb. 23, 2011, *available at* http://www.treehugger.com/files/2011/02/reducing-black-carbon-soot-slash-arctic-warming-two-thirds-2030.php.

202. Anderson, *supra* note 9.

203. Chetan Chauhan, *India to Launch Black Carbon Plan on Dec. 15*, HINDUSTAN TIMES, Dec. 9, 2010, *available at* http://www.hindustantimes.com/India-to-launch-black-carbon-plan-on-Dec-15/Article1-636111.aspx (*quoting* India's Environment minister Jairam Ramesh from the UNFCCC's COP 16 meeting in Cancun, Mex., Dec. 2010: "Our position on the issue is clear. We are starting the programme on black carbon as it is a health issue more than [an] environment issue for us."). India's black carbon program, launched on Dec. 15, 2010, covers measurement, monitoring and modeling for black carbon, but India still officially objects to the inclusion of black carbon within the framework of UN climate talks. *Id.*

ENVIRONMENTAL COURTS AND TRIBUNALS: HOW CAN NATIONS TACKLE THE GROWING DEMAND FOR JUSTICE ON ENVIRONMENTAL ISSUES?

Reviewed by Erica Woodruff[*]

GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (2009).

Principle 10 of the Rio Declaration on Environment and Development declares that states shall provide citizens with "[e]ffective access to judicial and administrative proceedings."[1] This tall order leaves states wondering how they should structure their court systems to best address environmental issues and concerns. In *Greening Justice*, George "Rock" Pring, a University of Denver Sturm College of Law professor, and Catherine "Kitty" Pring, a professional mediator, offer a comprehensive guide to environmental courts and tribunals across the globe and the best ways for a state to both create and maintain these tribunals.[2] This guide is the culmination of two years of research and interviews across twenty-four countries, representing one hundred and fifty-two existing or proposed environmental courts and tribunals ("ECTs").[3] Because countries have differing legal systems and face diverse environmental problems, this guide highlights the wide variety of ECT structures, and considers which characteristics should be emphasized when states determine what type of ECT is best for their citizens.

Based on their research, the authors focus on twelve "building blocks" that are elements of what they believe form a successful ECT: type of forum; legal jurisdiction; ECT decisional levels; geographic area; case volume; standing; costs; access to scientific and technical expertise; alternative dispute resolution ("ADR"); competence of ECT judges and decision-makers; case management; and enforcement tools and remedies.[4]By focusing on these elements, a nation can

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1. United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

2. George (Rock) Pring & Catherine (Kitty) Pring, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (2009).

3. *Id.* at 4.

4. *Id.* at xiv.

ensure that its ECT will enhance a citizen's access to courts on environmental issues.[5] Of these factors, the authors considered standing, costs, access and ADR to be the most important components because they have a direct impact on a citizen's initial access to ECTs.[6] Throughout this guide, the authors also give examples of effective and non-effective designs for each factor, as well as create a list of the "best practices" for each of the categories based on their interviews with experts and the authors' own experiences.[7] This perspective not only offers insight into some of the world's smallest ECTs, but also provides inspiration for countries looking to reform their own ECTs or possibly create a new one entirely.

Type of Forum

The first "building block" that the authors consider is the type of forum that would be most appropriate for citizens to voice their concerns about environmental issues.[8] During their research, the authors examined several different types of forums, including freestanding specialized environmental courts, "green chambers," and "green judges."[9] Within a normal, non-specialized court, a "green chamber" is a court that takes only environmental law cases.[10] Similarly, "green judges" are specific judges on a general court who are only assigned environmental cases.[11] After considering all of these options, the authors determined that the "best practice" for a forum is a "clearly identified independent judicial court that is easily identified by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published."[12] This type of forum provides the public with reassurance that the ECT is an accessible, legitimate, unbiased place for citizens to bring their concerns about the environment.[13]

The authors especially emphasize that independence is a critical factor for any type of forum.[14] To ensure that an ECT is truly independent, a neutral third party must nominate the ECT's judges, and these judges should not be influenced or controlled by the government.[15] One example of a "best practice" independent environmental tribunal is the Environmental Review Tribunal of the Province of Ontario, Canada, which has the legislative authority to make binding decision on environmental issues. This type of tribunal stands as a separate entity from other courts and is not subject to the control of environmental and land use agencies. This separation allows the environmental tribunal to review these agencies' decisions without the fear of retribution.[16] As a result, citizens can be confident

5. *Id.* at 5.
6. *Id.*
7. *Id.*
8. *Id.* at 21.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 26.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 25.

that the ECT judges are making the best decision without undue influence from other parties.[17]

Legal Jurisdiction

The authors then consider how broad the legal jurisdiction of the ECT should be.[18] Depending on the court, an ECT can have broad jurisdiction, covering all environmental, land use development and public health issues, or narrow jurisdiction, such as water law.[19] The authors determined that an integrated environmental and land use planning ECT with both broad reach and enforcement power would be an ideal jurisdiction because it creates a "one-stop shop" for citizens with any kind of environmental law claim.[20] For example, the Environmental Court of New Zealand has a "hybrid" combination of civil, administrative and criminal powers.[21] The ability for an ECT to enforce decisions in different ways may act as a deterrent to parties who could afford civil penalties, but who may want to avoid criminal sanctions.[22]

Decisional Levels

Third, the authors confront the issue of how many decisional levels an ECT should have.[23] Ideally, a jurisdiction would have specialized ECTs at both the trial and appellate levels with an ability to review the merits of each claim.[24] For example, the United States Environmental Protection Agency ("EPA") uses this two-tiered system.[25] By giving litigants the opportunity to appeal a decision within the agency, the EPA provides environmentally knowledgeable and uniform outcomes on appeal, which in turn increase access to justice.[26] However, if a nation is unable to provide two levels or multiple levels are not justified, the authors argue that a trial level ECT is better than an appellate level ECT because "a well informed decision is less likely to be appealed and will be made earlier in the dispute resolution process."[27]

Geographic Area

The factor of geographic area greatly depends upon the jurisdiction of the ECT.[28] The authors conclude, however, that an ideal geographic area is one that is compatible with other judicial and political boundaries.[29] By coordinating with preset boundaries, citizens are more likely to have easier physical access to courts and therefore may be more willing to bring a claim than if they did not have the

17. *Id.* at 26.
18. *Id.*
19. *Id.*
20. *Id.* at 28.
21. *Id.* at 27.
22. *Id.*
23. *Id.* at 28.
24. *Id.* at 30.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 31.

funds, physical ability, or time to travel to the nearest forum.[30] If there are interested parties who live far away from the forum, traveling ECTs can provide access to these citizens as well as allow the court to see the site in dispute.[31] The Environmental Court in the State of Amazonas, Brazil, actually travels in a van that features a complete mini-courtroom.[32] This feature ensures that all citizens are given an equal opportunity to voice their concerns about the environment.[33]

Case Volume

The authors then look at what the ideal caseload would be for a given ECT.[34] This factor can vary greatly depending on the forum.[35] Many ECTs have a large caseload.[36] For example, New York City's Environmental Control Board hears more than 175,000 hearings per year.[37] On the other hand, the Trinidad and Tobago Environmental Commission has only heard five to eight new cases per year since it began ten years ago.[38] In such a case, the authors have determined that other factors, such as limited jurisdiction, lack of political independence, or lack of credibility may contribute to small caseloads.[39] The authors conclude that "at least 100 actual case filings per judge per year are required to justify a 'stand alone' ECT."[40] In addition, nations should consider building flexibility into an ECT in order to handle fluctuating caseloads.[41] One ECT that has found a creative way to manage case overload is the Planning and Environment Court of Queensland, which allows for the District Court Chief Justice to assign additional judges when the case volume increases.[42] Through this process, all citizens are provided access to the ECT without judges being overworked.[43]

Standing

The authors emphasize that standing is a key factor in maximizing access for citizens on environmental issues.[44] "If you cannot get through the door of the courthouse there is no access to environmental justice."[45] Ideally, any person raising an environmental issue should have standing in an ECT.[46] However, the court should retain the ability to dismiss or penalize frivolous claims.[47] The

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 32.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 33.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 40.
47. *Id.*

Philippines Supreme Court's 2009 draft rules provide a model example of open standing provisions, allowing any citizen, minors with the assistance of parents, NGOs, public interest groups, indigenous peoples, and "others similarly situated" to have standing in court.[48]

Costs

The authors note that costs also play a substantial role in citizen access to ECTs.[49] Because "[n]o ECT studied has adopted comprehensive cost-reduction strategies for environmental conflict resolution," the authors created a list of cost-mitigating ideas to enhance access to justice.[50] These factors include reducing or waiving filing or court fees, hiring public environmental prosecutors, and providing government funding for public interest plaintiffs, among others.[51] Australia's State of Queensland Planning and Environment Court has led the way in "individual case management," in which judges, attorneys and parties sit down together at the beginning of litigation and develop a "fast-track calendar" for the entire case, including the trial date.[52] This case management technique benefits both parties by cutting costs to both sides during a lawsuit because the meeting addresses legal issues that would normally be addressed in formal hearings, such as jurisdiction, and settles these issues quickly.[53] In addition, trial dates are usually available within three months of the meeting, and trials rarely last more than three days, reducing attorney's fees and court costs.[54]

Access to Scientific-Technical Expertise

An ECT's access to scientific and technical expertise is a main factor in how fair and informed each of the ECT's decisions will be. In order to make informed decisions, a judge needs to be able to understand complex environmental issues, which range from international principles to national standards such as best available technology.[55] Thus, the authors analyze how different ECTs ensure the "internal" expertise of judges and government experts, and how the ECTs manage the "external" expertise of expert witnesses brought to court to testify.[56] For example, New South Wales Land has coined the term "hottubbing" to describe its ECT's process in which judges, rather than attorneys, select which experts the jury can hear during a trial.[57] Before the trial, the ECT judge hears testimony from all experts and encourages them to discuss controversial issues among themselves while sitting in the jury box, jokingly "likened to a hottub without water," in order to determine areas of disagreement.[58] This judicial process aids judges in

48. *Id.* at 34.
49. *Id.* at 40.
50. *Id.* at 54.
51. *Id.*
52. *Id.* at 43.
53. *Id.*
54. *Id.* at 43-44.
55. *Id.* at 55.
56. *Id.* at 55-56.
57. *Id.* at 60.
58. *Id.*

managing external environmental expertise because it reduces the number of witnesses called at trial and increases the relevance of testimony.[59] In some cases, this pre-trial discussion can lead to the resolution of the issue in dispute, saving the parties the cost and time of going to trial.[60]

Alternative Dispute Resolution

Alternative dispute resolution ("ADR") is another important aspect of an ECT.[61] ADR methods can be effective in increasing access to justice because they lower costs, reduce caseloads, allow for greater participation by the public and encourage creative solutions.[62] ADR can include mediation, arbitration, negotiations, and restorative justice.[63] One unique ADR method is the ombudsman program. Through this system, government-appointed ombudsmen take on citizen's complaints and provide free dispute resolution for a complainant with a valid claim.[64] In Hungary, the Office of the Parliamentary Commissioner for Future Generations investigates claims relating to Hungarians' constitutional rights to a healthy environment.[65] The Commissioner has the power to find facts and make non-binding recommendations to competent authorities with the help of a thirty-five person staff.[66] This form of ADR allows the government to represent citizens who may not have the funds or time to bring their own complaints in court and also to resolve some issues before they get to trial.[67]

Competence of ECT Judges and Decision-Makers

The authors also consider what the general competence level of ECT judges and decision-makers should be in an ideal ECT.[68] The authors conclude that an independent, environmentally knowledgeable decision-maker appointed by a neutral process would provide the fairest opportunity to citizens pursuing environmental claims.[69] For example, the President of India will only appoint previous judges of the Supreme or High Courts to be the chairs of the country's ECTs to ensure that these tribunal members are sufficiently qualified.[70] In addition, a nation needs to provide a salary to decision-makers in order to be able to hire and hold onto the committed judges, rather than having to find volunteers on a case-by-case basis.[71]

59. *Id.*
60. *Id.*
61. *Id.* at 61.
62. *Id.*
63. *Id.*
64. *Id.* at 67.
65. *Id.* at 68.
66. *Id.*
67. *Id.*
68. *Id.* at 72.
69. *Id.* at 75.
70. *Id.* at 73.
71. *Id.* at 75

Case Management

The authors then tackle the question of what tools are necessary to achieve effective case management.[72] After interviewing parties and decision-makers, the authors determined that directions hearings, like Australia's State of Queensland's previously discussed "fast-track" meetings, ADR screenings, and information technology are the most helpful tools in managing a heavy caseload because they increase the efficiency of courts and lower costs.[73] Specifically, information technology embraces the Internet as a way to increase access to citizens through tools such as court websites with e-filing capabilities, information about costs and jurisdiction, and video-conferencing for long-distance parties.[74] However, the authors point out that parties and judges who are not familiar with technological advances may struggle with this method of case management.[75]

Enforcement Tools and Remedies

Finally, the authors look at what enforcement tools and remedies are needed to make ECT decisions effective.[76] They emphasize that ECT judges and decision-makers need broad enforcement powers and the ability to impose a variety of remedy options, including injunctions, restitutions, and criminal sanctions.[77] In addition, judges need to be able to consider creative remedies in order to fit the violation.[78] The authors also emphasize the importance of a strong prosecutor's office in an ECT because it can aggressively pursue the available remedies.[79] The Ministério Público of Brazil has gained notoriety for its broad enforcement powers and credibility with the public.[80] This office works closely with environmental NGOs and often represents them in lawsuits, along with ordinary citizens.[81] Because courts in Brazil are unlikely to issue an injunction while a case is pending, these prosecutors often negotiate agreements outside of court to ensure a quick and less expensive outcome.[82] Although the system is not perfect, the Ministério Público has increased access to environmental justice because citizens view the office as a place where their complaints will be pursued effectively and credibly.[83]

Conclusion

While these twelve building blocks are clearly vital to the effectiveness of ECTs, the authors acknowledge that they are not enough to ensure citizen access to courts on environmental issues.[84] The authors emphasize that each state needs to

72. *Id.* at 76.
73. *Id.* at 79.
74. *Id.* at 76
75. *Id.* at 78.
76. *Id.* at 79
77. *Id.*
78. *Id.* at 87.
79. *Id.* at 79.
80. *Id.* at 80-81.
81. *Id.* at 80.
82. *Id.*
83. *Id.* at 81.
84. *Id.* at 89.

develop an evaluation process to ensure that its ECTs are in fact meeting the state's goals for performance and outcome.[85] Given the dramatic expansion of ECTs over the past decade, this guide will be a great resource for states looking for guidance on how to improve or create effective environmental courts and tribunals in the future.

85. *Id.*

FINDING JUSTICE IN UGANDA

*Reviewed by Karli Dickey**

TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY (2006).

In 2005, after receiving a state referral from Ugandan President Yoweri Museveni, the International Criminal Court (ICC) issued its first indictments against five top commanders in the Lord's Resistance Army (LRA): Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odiambo, and Dominic Ongwen.[1] This move was both controversial and historically significant for reasons outlined in Tim Allen's book, *Trial Justice*.[2] *Trial Justice* provides readers with a unique glimpse into Ugandan culture and explains the complexities of the war in a comprehensive and clear manner. Perhaps the most valuable part of the book is found in the numerous interviews conducted with refugees concerning the origins of the conflict and the ICC's involvement in Uganda.[3] The interviews and the opinions expressed therein largely contradict the conclusions numerous scholars have drawn about the adverse impact of the ICC's investigations into the conflict.[4]

From the beginning of its involvement in Uganda, the ICC has continuously been confronted with hostility from a wide range of groups who claim that the Court is both biased and unwanted.[5] These critics, including tribal leaders, representatives of Christian churches, and non-governmental organizations, assert that the LRA's top commanders should be subjected to a traditional tribal type of justice rather than international prosecution.[6] This preferred justice is referred to as *mato oput* and stresses forgiveness and reconciliation in lieu of prosecution.[7]

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The author thanks Tim, Manjit, and Alex for their endless and unwavering support, Tim Danielsen for his creative influence, and Alonit Cohen for her insightful suggestions.

1. Press Release, International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/2005/ (follow "Warrant of Arrest Unsealed Against Five LRA Commanders" hyperlink).

2. *See* TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY (2006).

3. *Id.*

4. *Id.* at 129.

5. *Id.* at 96.

6. *Id.* at 129.

7. *Id.* at 130.

The desire for a more local and cultural process has received much international attention causing several state governments to finance projects aimed at researching the function of *mato oput* in Northern Uganda.[8] Unfortunately, these projects fail to consider the beliefs of the average Ugandan citizen and instead focus on the views expressed by the country's leaders.[9] In Chapter 6 of *Trial Justice*, Allen successfully documents the opinions of people directly affected by the war: refugees.[10] Surprisingly, through interviews conducted with these refugees, Allen discovers that most Ugandans favor international justice and retribution, not forgiveness and reconciliation as numerous Ugandan leaders have suggested.[11]

Allen's excerpts from these interviews provide a unique glimpse into the origins of the war and the impact that the ICC's indictment has had on Ugandan society. Before delving into Ugandans' opinions of the ICC, Allen provides a thorough history of the war, complete with details about the LRA's founder and top commander, Joseph Kony.[12]

I. HISTORY OF THE CONFLICT

The conflict in northern Uganda is both long and historically complex. The country has suffered from civil unrest since the early 1980s. However, it was not until 1991, with the establishment of the LRA, that the fighting greatly intensified, capturing the attention of countries around the world.[13]

The modern conflict began in 1986 and concerned the area of Acholiland, a region located in the northern most part of Uganda.[14] In 1985, Tito Okello became president of Uganda as the result of a coup d'etat.[15] Okello grew up in Acholiland, and with his presidency the Acholi people found themselves in a position of power in Ugandan politics.[16] However, this power was short lived because less than six months after taking office Okello was overthrown by the National Resistance Army (NRA) under the command of Yoweri Museveni.[17] In January 1986, Museveni took over the presidency and immediately instructed the NRA to occupy the area of Acholiland in an effort to squash any resistance perpetrated by supporters of Okello.[18] The Uganda People's Democratic Army (UPDA),

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8. *Id.* at 133.

9. *Id.* at 138.

10. *Id.* at 96-168.

11. *Id.*

12. *Id.* at 25-52.

13. *The Lord's Resistance Army (LRA)*, GlobalSecurity.org, http://www.globalsecurity.org/military/world/para/lra.htm.

14. ALLEN, *supra* note 2, at 34.

15. Ogenga Otunnu, *Causes and Consequences of the War in Acholiland*, CONCILIATION RESOURCES (2002), http://www.c-r.org/our-work/accord/northern-uganda/causes-dynamics.php.

16. ZACHARY LOMO & LUCY HORIL, BEHIND THE VIOLENCE: THE WAR IN NORTHERN UGANDA 17 (2004), *available at* http://www.iss.co.za/pubs/Monographs/No99/Contents.html.

17. Will Ross, *Uganda Rebels Grab Ex-President's Brother*, BBC NEWS, July 24, 2002, *available at* http://news.bbc.co.uk/2/hi/africa/2149675.stm.

18. Balam Nyeko & Okello Lucima, *Profiles of the Parties to the Conflict*, CONCILIATION

supported by the Acholi people, fought against the NRA in Acholiland, but eventually this battle proved futile.[19] By 1988, the UPDA was willing to sign a peace agreement with Museveni and the NRA. In June 1988, the Gulu Peace Accords were signed by both groups in an effort to end the two-year civil strife.[20] Most Acholis were willing to stop the fighting and move towards peace, but a percentage of the population refused to sign the agreement and instead turned to Joseph Kony and his organization, the LRA.[21]

Kony is from Acholiland and much like the rest of his family, is thought to possess spiritual powers making him capable of communicating with the Holy Spirit.[22] Kony encouraged his followers to continue fighting the NRA and claimed that the Holy Spirit would guide them to victory.[23] Kony further proclaimed that supporters of the 1988 Gulu Peace Agreement would be subjected to purification by violence and unfortunately for citizens in Acholiland, this declaration meant that they were targeted by the LRA.[24]

As Allen points out in Chapter 2 of *Trial Justice*, the LRA murdered and mutilated thousands of Acholis.[25] No one was spared from the violence. Priests were killed and children abducted.[26] Victims of the violence had their lips, hands, and feet cut off. [27] Moreover, the LRA received financial support from the government of Sudan, which enabled them to further perpetrate the violence across Northern Uganda.[28]

The exact ideology of the LRA is largely unknown and has been the center of much debate between politicians and scholars. Some believe that the group does not possess a central philosophy, but rather exists solely to terrorize civilians in Acholiland.[29] The International Crisis Group expressed this view when it stated "... the LRA is not motivated by any identifiable political agenda, and its military strategy and tactics reflect this."[30] Others believe that the group is driven by a desire to take over Uganda and establish a theocracy aimed at subjecting the nation to a rule of law mirroring the Ten Commandments.[31]

RESOURCES (2002), http://www.c-r.org/our-work/accord/northern-uganda/profiles.php.

19. Otunnu, *supra* note 15.

20. Caroline Lamwaka, *The Peace Process in Northern Uganda 1986-1990*, CONCILIATION RESOURCES (2002), http://www.c-r.org/our-work/accord/northern-uganda/peace-process-1986-90.php.

21. Nyeko & Lucima, *supra* note 19.

22. ALLEN, *supra* note 2, at 37-39.

23. *Id.*

24. *Id.* at 42.

25. *Id.* at 40.

26. *Id.* at 40-42.

27. *Id.* at 42.

28. HUMAN RIGHTS WATCH, TRAIL OF DEATH ch. IV (2010), *available at* http://www.hrw.org/en/node/89320/section/8.

29. LRA STRUCTURE AND IDEOLOGY, UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, http://www.irinnews.org/InDepthMain.aspx?InDepthId=23&ReportId=65772.

30. Nick Grono & Jim Terrie, *Trying Times in Uganda*, THE DIPLOMAT, Apr. 5, 2004, *available at* http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/trying-times-in-uganda.aspx.

31. IN-DEPTH: LIVING WITH THE LRA: THE JUBA PEACE INITIATIVE, UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (2007), *available at* http://www.irinnews.

Whatever the motivation may be, the population in Northern Uganda has suffered severely.[32] According to a statistic cited in *Trial Justice*, by the end of 2004, 1.5 million Ugandans were forced from their homes as a result of the on-going violence and sought protection at one of the numerous refugee centers located throughout the country.[33] Allen visited several of these camps and detailed the conditions he found in Chapter 3 of *Trial Justice*.[34] He found that these centers were overpopulated, infested with malaria, and plagued by poor sanitation.[35] Often, the centers lacked adequate amounts of food and water.[36]

By December 2003, President Museveni had lost control over the conflict in Acholiland and decided to refer the situation to the ICC in an effort to deter further attacks.[37] However, the public outcry stemming from this referral has proved detrimental to the success of the ICC's involvement in Uganda.

II. CRITICISMS OF THE ICC

As Allen discusses in Chapter 5 of *Trial Justice*, news of the ICC's investigation into the conflict in Uganda was met with fierce criticism from leaders within the country.[38] These critics asserted that 1) the Court was biased towards the government of Uganda and 2) the international community had no right to meddle in the affairs of a sovereign African nation.[39] Both of these assertions have gained support over time and continue to plague the ICC's presence in Ugandan affairs.

A. The Court's Bias

Shortly after the head prosecutor for the ICC, Luis Moreno-Ocampo, decided to investigate the conflict in Uganda, Moreno-Ocampo and Museveni held a joint press conference to inform the international community of the Court's involvement.[40] This act proved to be disastrous for both the ICC and Museveni. Ugandans who watched the press conference were convinced that the ICC was collaborating with the Ugandan government and would fail to investigate atrocities committed by the government during the war.[41] While crimes committed by the LRA are significant in scale and duration, the government of Uganda is not an

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org/IndepthMain.aspx?reportid=72471&indepthid=58.

32. *Congo/ Central African Republic: LRA Victims Appeal to Obama*, HUMAN RIGHTS WATCH (Nov. 11, 2010), http://www.hrw.org/en/news/2010/11/10/congocentral-african-republic-lra-victims-appeal-obama.

33. ALLEN, *supra* note 2, at 53.

34. *Id.* at 66-71.

35. *Id.* at 55-56.

36. *Id.* at 53.

37. Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/2004/ (follow "President of Uganda Refers Situation" hyperlink).

38. *See* Allen, *supra* note 2, at 96-127.

39. *Id.* at 96.

40 *Id.* at 96-97.

41. *Id.* 96-98.

innocent party to the conflict.[42] In fact, NRA forces committed numerous human rights abuses during the war.[43] However, Moreno-Ocampo's decision to stand by Museveni during the press conference solidified what many already believed: that neither the NRA nor Museveni would be held internationally accountable for their crimes.

In Chapter 5 of *Trial Justice*, Allen provides transcripts of interviews conducted with numerous citizens from Acholiland in an effort to determine the impact of the press conference on the perceived legitimacy of the ICC.[44] Unfortunately, he found that as a direct result of this event, most Acholis question the neutrality of the ICC.[45] This view was showcased in an interview conducted with a retired bishop who stated "The ICC cannot impose itself on people. The government is inviting it, so it has already lost its impartiality. It is an injustice . . . The ICC is just full of corruption."[46]

B. Tribal Justice

The second, and possibly most detrimental criticism of the ICC's involvement in Uganda, is that the Court failed to consider a traditional tribal type of justice adhered to in Northern Uganda.[47] Rather than prosecution, local leaders in Acholiland advocate the previously mentioned *mato oput*—a type of tribal justice that primarily focuses on restoring social harmony rather than placing guilt.[48] When these leaders called for *mato oput*, NGO's and state governments responded. In fact, the Belgian government financed several ventures in Uganda aimed at encompassing this ancient tribal belief.[49] However, as Tim Allen documents in Chapter 6 of *Trial Justice*, not everyone affected by the war supports *mato oput*.[50] By interviewing Acholi refugees in camps throughout the country, Allen effectively sheds doubt on how widely the principle of *mato oput* is accepted.

Allen describes *mato oput* as a ceremony, mediated by elders, in which a wrongdoer is required to admit responsibility for his action and ask for forgiveness from the family of his victim.[51] After this exchange, both parties drink the blood of a slaughtered sheep and the perpetrator is permitted to re-enter society free from further harassment.[52] In 2004, an Acholi Paramount Chief Elect was asked about the prevalence of *mato oput* and the Acholis willingness to cooperate with an international tribunal mandated to dispense western style courtroom justice. The Chief Elect responded by stating, "I wonder who will help them [ICC] in giving evidence to prosecute Kony since the Acholi do not buy their idea of taking him to

42. Otunnu, *supra* note 15.
43. *Id.*
44. ALLEN, *supra* note 2, at 96-99.
45. *Id.*
46. *Id.* at 99.
47. *Id.* at 128-29.
48. *Id.* at 132-33.
49. *Id.* at 133.
50. *Id.* at 138-48.
51. *Id.* at 132-33.
52. *Id.*

Court because the Acholi have forgiven all LRA rebels and their leader Kony of crimes committees against them."[53]

While the views expressed by the Chief Elect have received much attention from the international community in recent years, Allen's interviews successfully establish that such opinions are not widely accepted among Ugandan citizens. In one such interview, Allen asked a man from Acholiland about his willingness to forgive commanders of the LRA responsible for killing both his brother and sister.[54] The man responded by stating, "[w]e have to make them know it is wrong. We don't want to forgive."[55] This sentiment was re-affirmed in an interview with a woman living in a displacement camp in Uganda. Allen asked the woman about allowing perpetrators of violent crimes back into society to live amongst the families of their victims.[56] She asserted that these individuals "[s]hould be sent somewhere else, and kept there for a long time."[57] After analyzing these interviews, Allen concluded that most Ugandan refugees favor the intervention of an external agency responsible for prosecuting and jailing individuals guilty of international crimes.[58] In fact, of the 2,585 adults interviewed, 66 percent favored prosecution of the LRA while only 22 percent favored forgiveness or reconciliation.[59]

III. STATUS OF THE INDICTMENTS

Although Allen's findings suggest that most Ugandans favor the ICC's involvement, the Court continues to experience criticism from tribal leaders and NGOs within the country.[60] Unfortunately, the indicted suspects have not been arrested or forced to appear before court, which only serves to strengthen opposition to the ICC.[61]

In 2008, Museveni succumbed to pressure within his country and stated that he was not willing to arrest or extradite the LRA commanders.[62] Rather, he asserted that the LRA commanders would be subject to traditional Ugandan justice, *mato oput*, emphasizing forgiveness and reconciliation.[63] At a press conference in London, Museveni stated, "What we have agreed with our people is that they [LRA] should face traditional justice, which is more compensatory than a retributive system . . . . That is what we have agreed at the request of the local

53. *Id.* at 134.
54. *Id.* at 142.
55. *Id.*
56. *Id.* at 58.
57. *Id.* at 143.
58. *Id.* at 147.
59. *Id.*(The remaining 12% of Ugandans polled were unable to express an opinion).
60. Stephanie Hanson, *Africa and the International Criminal Court,* COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/publication/12048/africa_and_the_international_criminal_court.html #p7 (last updated July 24, 2008).
61. *Id.*
62. Chris McGreal, *Museveni Refuses to Hand over Rebel Leaders to War Crimes Court*, THE GUARDIAN, March 13, 2008, at 18.
63. *Id.*

community."[64] Moreno-Ocampo and other representatives from the ICC responded by asserting that the indictments against the top commanders of the LRA remain valid and that these individuals are still subject to the Court's jurisdiction.[65] However, it is unlikely that the suspects will ever appear before the ICC absent cooperation from the Ugandan government.

Whether these suspects are tried in Uganda or at the ICC, scholars and Ugandan leaders should consider Allen's interviews and the positions expressed therein before deciding the best course of action to establish peace and stability in Uganda. As *Trial Justice* makes clear, the desires of Ugandan leaders and the wishes of the Ugandan citizens are two separate realities which need to be reconciled.

IV. CONCLUSION

By returning to the scene of events and conducting exhaustive interviews with witnesses and victims of the LRA brutality, Tim Allen manages to break important new ground in *Trial Justice*. The book challenges the almost universal assumption that the ICC missed the mark by not giving greater credence to the concept of tribal justice, or *mato oput*. Allen's fieldwork, interviewing over 2,500 people directly affected by the LRA, provides empirical evidence that the vast majority of people with the greatest stake in the outcome favor third party justice over tribal justice. Furthermore, because confidence in the ICC has been low in Uganda since Museveni and Moreno-Ocampo appeared together, Allen provides insight that the court would best be served by distancing itself from the government of Museveni.

Trial Justice is a great book for anyone who desires a deeper understanding of the international criminal justice system, and the perils and pitfalls involved in trying to bring international concepts of justice to bear on individual nations.

64. *Id.*
65. *Id.*

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VOLUME 39
NUMBER 4
FALL 2011

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Denver Journal
of International Law and Policy

VOLUME 39 NUMBER 4 FALL-2011

ISSN 0196-2035

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