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ARTICLES

Is International Environmental Law Really "Law"?: An Analysis of Application in Domestic Courts

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Is international environmental law really "law"?[1] There is no standing legislative body that elaborates international environmental norms, standards, or procedures. International law often consists of general proscriptions or obligations that states are charged with implementing and enforcing. The bodies tasked with administering international environmental agreements (namely the secretariats, functioning on behalf of the respective conferences of the parties known as COPs) have a limited mandate to take measures to compel compliance: They possess limited investigative powers and no authority to arrest offenders. These bodies often rely on the voluntary cooperation of the member states, and their effective function is to serve the member states. There are relatively few enforcement mechanisms to punish violations of the agreements, and these often have a combination of facilitative and punitive roles and are only beginning to function in practice.[2]

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1. *Cf.* Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. L. REV. 1293 (1985). For the purposes of this article, "international environmental law" includes international environmental agreements (including multilateral and bilateral treaties, conventions, protocols, and other similar instruments); customary international law (which, with multilateral environmental agreements (MEAs), constitutes the body of "hard" law); and declarations and other "soft" law.

2. International environmental agreements that have established compliance mechanisms include, *inter alia*, the Montreal Protocol on Substances that Deplete the

Because international environmental law is the result of international negotiations among states and ultimately a compromise among competing interests, it is often general and flexible. It typically entails general provisions that envision domestic implementing legislation to provide the specific details, standards, and procedures to make international environmental law operational. Depending on the terms of a specific international agreement, countries may have flexibility when adopting implementing legislation so long as the legislation gives force to the operational provisions of the agreement. Unless specifically prohibited or preempted by the agreement, countries may also adopt more protective measures.

Without conventional legislative, executive, or judicial bodies and in light of the generality of many provisions, international environmental law lacks many of the traditional indicia of law. It can look more like international policy, in which states pledge to undertake certain measures. To the extent that international environmental law is binding, it is binding at the international level between states.

So why is there any debate regarding the legal status of international environmental law in domestic fora?

National constitutions often reference international law as a legitimate source of domestic law,[3] along with the constitution, statutes, regulations, and (where applicable) common law jurisprudence. Moreover, as this article explores, an increasing number of litigants and courts in a growing number of countries have

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Ozone Layer; the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Kyoto Protocol; the Basel Convention; and the Cartagena Protocol on Biosafety. *See, e.g.*, PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 171-228 (2nd ed. 2003) (including discussions of compliance mechanisms for the Montreal Protocol, the Aarhus Convention, the Kyoto Protocol, and the Basel Convention); Veit Koester, *Review of Compliance Under the Aarhus Convention: A Rather Unique Compliance Mechanism*, J. EUR. ENVTL. & PLAN. L., Jan. 2005, at 31; ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE (2002) (tracing the evolution of the CITES compliance system and providing detailed case studies of countries subject to trade sanctions for failing to comply with the treaty).

3. *See, e.g.*, INDIA CONST. pt. IV, sec. 51(c) (providing that "The State shall endeavor to . . . foster respect for international law and treaty obligations in the dealings of organised people with one another"); PAPUA-N.G. CONST. pt. III, div. 3, sub. C(39)(3) (stating a court may have regard to, *inter alia*, the Charter of the United Nations and the Universal Declaration of Human Rights); S. AFR. CONST. ch. 2, sec. 39(1)(b) (requiring courts, in interpreting the Bill of Rights, to consider international law).

sought recourse to international law, including international environmental law, in deciding cases. The breadth and extent of these decisions indicates that they cannot be dismissed as outcome-oriented aberrations. Thus, the practical application of international environmental law in specific, concrete cases provides a challenge to established dogma regarding the role of international environmental law.

Much has been written about the role that international environmental law *should* play in domestic environmental law, policy, and management: in shaping domestic legislation and regulations, in promoting particular governmental non-regulatory actions, and in informing the decisions of domestic courts.[4] While acknowledging this large body of literature, this article focuses on the role that international environmental law actually does play in one aspect of domestic environmental law: how domestic courts have interpreted and applied international environmental law.

This article seeks to contribute a few observations to the growing body of literature[5] on domestic application of international environmental law. First, actual practice does not comport with the traditional monist-dualist theory regarding the role of international law in domestic contexts. Second, domestic courts have used international environmental law for a wide range of purposes and in various contexts. Third, considering the rapidly

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4. *See, e.g.*, Dorit Talitman et al., *The Devil is in the Details: Increasing International Law's Influence on Domestic Environmental Performance—The Case of Israel and the Mediterranean Sea*, 11 N.Y.U. ENVTL. L.J. 414 (2003); Joel B. Eisen, *From Stockholm to Kyoto and Back to the United States: International Law's Effect on Domestic Law*, 32 U. RICH. L. REV. 1435 (1999); Philippe Sands, *The Greening of International Law: Emerging Principles and Rules*, 1 IND. J. GLOBAL LEGAL STUD. 293 (1994).

More generally, there is a rich body of legal scholarship exploring the application of international law by domestic courts. *See, e.g.*, L. ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY (Malgosia Fitzmaurice & Cees Flinterman eds., 1993) (surveying 2000 cases from common law and civil law systems around the world); *see generally* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996).

In addition, scholarship has addressed the converse question: how domestic law can influence the development of international law. *See e.g.*, ELIZABETH R. DESOMBRE, DOMESTIC SOURCES OF INTERNATIONAL ENVIRONMENTAL POLICY: INDUSTRY, ENVIRONMENTALISTS, AND U.S. POWER (2000) (highlighting ways in which domestic environmental regulations help to shape international environmental law and institutions).

5. *See, e.g.*, Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000); INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS (Michael Anderson & Paolo Galizzi eds., 2002); INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS (Alice Palmer & Cairo A.R. Robb eds., 2005). *See generally* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 4.

growing body of case law in this area and the frequent (if not necessarily consistent) discrepancy between practice and theory, it may be time to revisit the underlying legal theory regarding distinctions between monist and dualist systems.

Section I provides a brief overview of the theory regarding the role of international law in domestic courts, while noting that the practice is not so clear. Section II examines the various ways that domestic courts have interpreted and applied international environmental law. Section III explores the ambiguity in how domestic courts have applied international environmental law, some of the limitations on such application, and prospects for further development. Section IV provides a few concluding thoughts.

I. INTRODUCTION

At the outset, it is important to note that the primary responsibility for developing, implementing, and enforcing international environmental law rests with the legislative and executive branches of government. In most countries, the executive branch negotiates and signs international agreements, and the legislative branch ratifies the agreements.[6] Both branches are responsible for articulating laws (legislative and executive), regulations (executive), and rules (executive) that govern conduct, including those set forth in international environmental agreements to which the country has agreed to be bound. The executive branch is also responsible for enforcing such implementing legislation, regulations, and rules, as well as reporting to the COPs of the respective agreements regarding progress made in implementation.

Generally speaking, domestic courts interpret and decide cases dealing with domestic law, including those laws that implement international environmental law. In most cases they are still interpreting and applying domestic law.[7] From time to time, though, courts are called upon to interpret, apply, or otherwise use international environmental law. This may be because the relevant domestic law is vague, and international law can help in

6. In some countries, the constitution provides that the executive branch may "adopt" an agreement, and this adoption binds the country in the same way that ratification does. *See, e.g.*, ICE. CONST. art. 21; IR. CONST. art. 29(4.1), (4.2); JORDAN CONST. art. 33; RUSS. FED. CONST. art 86.

7. Occasionally, international agreements reference the use of national courts as a forum in which to hear enforcement cases. *See, e.g.*, Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mexico, art. 24(c), 59 Stat. 1219; Treaty Relating to Boundary Waters and Questions Arising along the Boundary, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448, art. XII.

interpreting or applying domestic provisions. Alternatively, the relevant domestic law may have gaps, and international environmental law speaks to a particular gap, providing an interpretive aid (particularly where the domestic law seeks to implement international environmental law), or even a cause of action. In other instances, reference to international environmental law may be necessary when the domestic implementing legislation or regulations are challenged (for instance, as being *ultra vires*).

From the perspective of a domestic court, is international law, including international environmental law, "law"? Can the court enforce it? Can it be used as an interpretive aid in deciding domestic cases? Or is international law the sole purview of the executive and legislative branches of government? The answer—at least according to traditional legal theory—is that it depends on the country.

There are two basic approaches that countries have adopted with regard to the domestic legal force of international law: monist and dualist.[8] In the monist system, international law is part of the domestic law of the country. In many monist countries, international law enjoys a higher priority than domestic legislation and regulations, while in some monist countries domestic law is at the same level as or higher than international legislation.[9] Thus, once a country ratifies, accedes, or otherwise becomes a party to an international agreement, that agreement is a part of the law of the land: It is directly applicable. In a dualist system, international law is on a different plane from domestic law, and implementing legislation is necessary for international law to have legal force within a country. So, if a country with a dualist system ratifies an international agreement, it incurs obligations vis-à-vis other countries, but that international law has no effect on the ground until the country passes implementing legislation (sometimes referred to as the "act of transformation").[10] There are a few

8. For a review of the legal theory regarding monist and dualist systems, see JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 253-58 (2002); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31-53 (6th ed. 2003). For a listing of European countries adhering to monist and dualist theories, see Privacy in Research Ethics & Law (PRIVIREAL), Countries Adhering to "Monism" or "Dualism," *available at* http://72.14.207.104/u/privireal?q=cache:FiPVcJIbcDYJ:www.privireal.org/monism.htm+monist&hl=en&gl=us&ct=clnk&cd=1&ie=UTF-8 (cached by Google July 19, 2005).

9. *See* Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, *in* NATIONAL TREATY LAW AND PRACTICE 1, 47-49 (Duncan B. Hollis et al. eds., 2005).

10. *See, e.g.*, John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM J. INT'L L. 310 (1992).

variations on these two basic approaches.[11] With some exceptions, common law countries have tended to adopt some form of dualist system, while French, Spanish, and Dutch civil law countries have tended to adopt some form of monist system.

As the cases cited in this article illustrate, though, practice often does not comport with theory. In practice, judges in many monist countries frequently are reluctant to apply international environmental law,[12] and in dualist countries, judges often look at international environmental law.[13] In dualist countries, judges may apply principles of customary international law, or they may apply agreements that have been ratified but have not been implemented. In these instances, the judicial decisions particularly resemble those of courts in monist countries.

II. EXAMPLES OF APPLICATION BY DOMESTIC COURTS

While the monist-dualist dichotomy suggests that international law is either irrelevant or a legitimate source of law for domestic courts, the reality is more nuanced. As this section illustrates, domestic courts ostensibly following both systems have invoked international environmental agreements and principles in a variety of contexts. In many if not most instances, though, the status accorded the particular international norm relied on is ambiguous. It is unclear whether the Court is treating the particular provision or instrument of international environmental law may be compulsory, persuasive, or simply adding weight to a decision that rests primarily (if not exclusively) on application of domestic law—the "kitchen sink" argument. That is, a court may cite many bases, including international environmental law, for a

11. For example, the United States has adopted a hybrid approach that requires a treaty to be self-executing in order for a domestic court to apply it, as discussed *infra* at notes 149-50 and accompanying text. Some other monist countries have adopted a similar approach regarding whether a treaty is self-executing in order for it to be directly applicable. *See* Directorate of International Law, Relation Between International and Domestic Law, *available at* http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/relat.html (last visited May 3, 2006).

12. *E.g.*, Tepulolo v. Pou, [2005] TVHC 1, Case No. 17 of 2003 (High Court of Tuvalu, Fam. App. J. Jan. 24, 2005), *available at* http://www.paclii.org/tv/cases/TVHC/2005/1.html (last visited May 8, 2006) (holding that although Tuvalu follows a monist system and was party to both the Convention on Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), no implementing legislation had been adopted and the Court refused to apply the agreements in a custody dispute, stating only that "the aims of an international convention may be relevant in the interpretation of existing laws of Tuvalu").

13. *See, e.g.*, *infra* notes 101-106 and accompanying text.

certain proposition so that the reference to international environmental law is the legal equivalent of "tossing in the kitchen sink."

To the extent that domestic courts have invoked international environmental law, the law has usually been what is termed "hard" law: either binding international instruments or customary international law.[14] The international instruments may be bilateral, regional, or multilateral, and they include conventions, treaties, agreements, and protocols. The body of customary international environmental law may be discerned through two elements: state action and *opinio juris*, which is the belief that the state action is obligatory and undertaken because it is required by international law.[15]

The cases discussed in this article reference, in one way or another, a wide range of treaty law.[16] They also reference a variety of principles of international environmental law.[17] While

14. For a discussion of the basics of "soft law" and "hard law," see Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment,* 12 MICH. J. INT'L L. 420 (1991). *See also* Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37 (1984); G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 187-91 (1983).

15. In addition to treaty law and customary international law, some scholars have argued that there is a class of law that may be termed "declarative" or "declaratory" international law. *See, e.g.*, Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991); Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 112 (1995); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604, 2641 (1997); Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 949-51 (2002); William L. Schachte, Jr. & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms*, 33 VA. J. INT'L L. 527 (1993); Stephen A. Rosenbaum, *Pro Bono Publico Meets Droits de l'Homme: Speaking a New Legal Language*, 13 LOY. L.A. INT'L & COMP. L.J. 499 (1991). These scholars argue that much of what is asserted to be customary international law does not actually have the necessary state action to be truly customary international law. Nevertheless, the argument goes, the norms are consistently repeated time and again in various international declarations and other instruments. The frequent and consistent use of such norms without repudiation is thus argued to entail a body of binding norms that is not customary, but rather declaratory. The specific cases examined in this article do not appear to take a position on such law.

16. These include the World Heritage Convention; the Aarhus Convention; CITES; the Ramsar Convention, the Convention on Biological Diversity; the UN Framework Convention on Climate Change (UNFCCC); the Convention on Biological Diversity (CBD); the Bern Convention; the UN Convention on the Law of the Sea (UNCLOS); the Oslo Dumping Convention; the London Dumping Convention; the International Convention for the Prevention of Pollution from Ships (MARPOL); and the Migratory Bird Treaties.

17. These include the precautionary principle, polluter-pays principle, principle of prevention, principle of intergenerational equity, and the principle of sustainable development.

scholars often argue that one or more of these principles constitute principles of customary international law,[18] there remains significant disagreement regarding the legal status of certain principles, particularly the precautionary principle (Principle 15 of the Rio Declaration on Environment and Development).[19] The key point for this article is that domestic courts have frequently cited these principles in their decisions.

In some instances, this article considers examples from human rights law. In practice, the domestic case law applying international human rights law (including genocide, rights of women, and rights of children) often emerged earlier and is more developed than domestic case law applying international environmental law.

Domestic cases cite international environmental law in at least eight contexts. These include (1) upholding domestic legislation or regulations, (2) upholding other governmental or administrative actions, (3) voiding governmental actions, (4) constraining the scope of domestic laws or regulations, (5) challenging actions by a private party, (6) assisting in interpreting domestic legal and regulatory provisions that are either vague or complex, (7) as a normative cause of action, and (8) for procedural matters such as judicial review and standing. Each of these eight contexts is considered in turn.

A. Upholding Domestic Legislation or Regulations

Some courts have invoked international environmental law to uphold domestic legislative or regulatory actions. For countries in which the constitution accords the national government plenary authority to enact laws (and by extension regulations) for the public good, such use of international environmental law may be unnecessary. However, in federal countries in which the constitution allocates certain authorities to the national level and certain authorities to the state or provincial level (and sometimes even authorities to the municipal level), there may be the issue of

18. *E.g.*, NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES (2002) (focusing on the evolution and application of the polluter pays principle, the principle of prevention, and the precautionary principle); Charmian Barton, *The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine*, 22 HARV. ENVTL. L. REV. 509 (1998).

19. U.N. Conference on Environment & Development (UNCED), June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 15, U.N. Doc. A/CONF. 151/26 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

whether a particular level of government has the authority to adopt a particular piece of legislation can, and does, arise. Even when the legislation in question implements a multilateral environmental agreement, there is the issue as to whether the subject matter is exclusively the purview of another level of government, and thus whether the national government could subvert the constitutional allocation of powers by entering into an international agreement to regulate certain actions that would normally be reserved to the states or provinces.

Australia, Canada, and the United States (all federal countries) have all used international environmental law to justify legislative initiatives, particularly at the federal level. The High Court of Australia in the *Tasmanian Dams* case[20] held that the federal World Heritage Properties Conservation Act, which implemented the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention), was a valid exercise of the federal government's external affairs power.

In Canada, courts have relied on international environmental law to uphold legislative actions at both the federal and municipal levels.[21] In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*,[22] (*Spraytech*), the Canadian Supreme Court upheld the authority of a municipality to regulate the spraying of pesticides. In *Spraytech,* lawn-care and landscaping companies were charged with using pesticides in such a way that violated a municipal bylaw. The companies held permits that were approved under the federal Pest Control Products Act and Quebec's Pesticides Act. In 1991, however, the town of Hudson adopted a bylaw referencing the precautionary principle that restricted the use of pesticides within its perimeter to specified locations and for enumerated activities. As such, the bylaw altered the conditions under which the landscaping companies held their permits. The appellants appealed, asserting that the bylaw was *ultra vires* be-

20. Commonwealth of Austl. v. Tasmania (*Tasmanian Dams* case), (1983) 158 C.L.R. 1, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1983/21.html (last visited May 8, 2006); *see also* Donald R. Rothwell & Ben Boer, *International Environmental Law and Australian Courts*, *in* INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS 23 (Anderson & Galizzi eds.), *supra* note 5, at 28 (describing the case as "the pivotal decision by the [Australian] High Court in regard to the extent of the treaties aspect of the external affairs power").

21. *See generally* Jerry V. DeMarco & Michelle L. Campbell, *The Supreme Court of Canada's Progressive Use of International Environmental Law and Policy in Interpreting Domestic Legislation,* 13 REV. EUR. CMTY. & INT'L ENVTL. L. 320 (2004).

22. 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, 2001 S.C.C. 40.

cause it did not fall within the enumerated objectives for which towns may adopt bylaws.

In dismissing the appeal, the Supreme Court of Canada interpreted the precautionary principle and looked to it in upholding the municipality's authority to enact the bylaw restricting the use of pesticides. In justifying application of the precautionary principle, the Court favorably cited an earlier decision, which stated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[23] The Court also quoted *Driedger on the Construction of Statutes*:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.* [Emphasis added by the Court.][24]

Writing for the majority, Justice L'Heureux-Dubé noted that Canada had "advocated inclusion of the precautionary principle" during negotiations of the 1990 Bergen Ministerial Declaration on Sustainable Development and that the principle was "codified in several items of domestic legislation."[25] The Court favorably cited scholarship and case law of India that supported a conclusion that the precautionary principle may be considered customary international law.[26]

The Court concluded that "In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."[27] The Court upheld the bylaw and the town's authority to adopt such a bylaw under the "general welfare" provision of the federal Cities and Towns Act.[28]

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23. *Id.* para. 30 (citing Baker v. Canada, [1999] 2 S.C.R. 817, 861).

24. *Id.* (quoting RUTH SULLIVAN, DRIEDGER ON THE CONSTRUCTION OF STATUTES 53 (3d ed. 1994)).

25. *Id.* para. 31.

26. *Id.* para. 32 ("The Supreme Court of India considers the precautionary principle to be 'part of the Customary International Law'" (quoting A.P. Pollution Control Board v. Nayudu, 1999 S.O.L. No.53, at 8)); *see also* Vellore Citizens Welfare Forum v. Union of India, (1996) Supp. 5 S.C.R. 241.

27. 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town) [2001] 2 S.C.R. 241, 2001 S.C.C. 40. para. 32.

28. *Id.* paras. 18-31.

The Court also noted that the bylaw was consistent with international law and policies.[29]

It should be noted that the Court did not rely on the precautionary principle as the sole foundation, or even the primary reason, for justifying the bylaw. Before addressing the precautionary principle, the Court noted that the bylaw could be justified as protecting the health and welfare of the town's inhabitants.[30] The analysis of the precautionary principle thus buttressed the analysis of the domestic prerogatives. It is more than a kitchen-sink argument thrown in with other justifications to support the upholding of the bylaw. In this context, consideration of principles of international environmental law may be important as an interpretive tool: Although the Court's interpretation of domestic law was reasonable, some might view it as involving a not-insignificant exercise of judicial discretion. Accordingly, principles of international environmental law—such as the precautionary principle—can provide an important metric by which to assess the manner in which a court exercises its discretion.

The other factor that may have influenced the determination in the *Spraytech* case is that the Court was asked neither to affirmatively create an obligation from international environmental law, nor to invalidate a law or other government action. In practice—and sometimes by judicial canon—courts often are reluctant to take such measures, preferring that the legislative and executive branches, as popularly elected representatives, decide such matters. Instead, the Court was called upon to decide whether a government action (in this case, a municipal bylaw) was legitimate.

Ultimately, *Spraytech* is significant because it is the first time the Supreme Court of Canada recognized that the precautionary principle may be (but is not necessarily) a principle of customary international law.[31] As such, the precautionary principle may provide guidance in interpreting Canadian environmental statutes.

In *R. v. Crown Zellerbach*,[32] the Supreme Court of Canada held that the federal government had the authority to enact the Ocean Dumping Control Act, which implemented the London

29. *Id.* para. 30.

30. *Id.* para. 29.

31. *See* Envtl. Appeal Bd., B.C., Appeal No. 2001-PES-003(a) 11 (June 17-20, 2002), *available at* http://www.eab.gov.bc.ca/pest/2001pes003a.pdf.

32. R. v. Crown Zellerbach Can. Ltd., [1988] S.C.R. 401.

Dumping Convention. The precise role of international environmental law in this case, however, was inconclusive.

In the United States, the use of international law by domestic courts is a subject of active academic and judicial debate.[33] As a practical matter, international environmental law has served as a basis for decisions in a number of cases. In *Missouri v. Holland*,[34] the State of Missouri sought to prevent a federal game warden from enforcing the federal Migratory Bird Treaty Act (MBTA).[35] The state argued that wildlife, including migratory birds, were the traditional purview of the states, and thus the MBTA was an unconstitutional infringement of rights reserved to the states under the Tenth Amendment. Moreover, the state argued that the underlying treaty was invalid, because "there are limits . . . to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."[36]

In a decision authored by Justice Holmes, the U.S. Supreme Court held that the 1916 Migratory Bird Treaty,[37] the MBTA, and

33. *See, e.g.*, MARK W. JANIS, THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914 (2004). In Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), the Court held that Military Commissions established by the United States to try people for "acts of international terrorism" violated the Uniform Code of Military Justice (UCMJ) and the four 1949 Geneva Conventions, and thus were illegal. *Id.* at 2786. While the majority voided the Commissions on parallel grounds—as violating the UCMJ and the Geneva Conventions—it explicitly held that the Geneva Conventions were judicially enforceable by private individuals. *Id.* at 2796-97. The dissents by Justices Scalia, Thomas, and Alito, illustrate that the role of international law in U.S. Courts remains a contentious issue.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court held that the death penalty was a disproportionate penalty for those under eighteen years of age when they committed their crime. The Court grounded its argument on Eighth Amendment considerations, but also considered the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of the Child (which the United States had not ratified). The Court noted that its decision was not guided by international law, but it was in conformity with it. The majority "acknowledge[d] the overwhelming weight of international opinion" that "provide[s] respected and significant confirmation of [the Court's] conclusions." *Id.* at 578. While Justice O'Connor disagreed with the holding, she agreed with the consideration of foreign and international law, noting that "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Id.* at 604. In his dissent, Justice Scalia argued that foreign law was irrelevant to the Court's opinion, unless it forms the basis for the judgment. *Id.* at 628 (Scalia, J., dissenting).

34. Missouri v. Holland, 252 U.S. 416 (1920).

35. Migratory Bird Treaty Act, 65 Cong. ch. 128, 40 Stat. 755 (July 3, 1918).

36. *Missouri v. Holland*, 252 U.S. 416, 432.

37. International Convention for the Protection of Migratory Birds, 16 U.S.C. §§ 703-712 (2000).

accompanying regulations were not an unconstitutional infringement on state authority to regulate wildlife within a state's borders. In particular, the court noted that:

> It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.[38]

The Court noted that the treaty did not violate any specific term of the Constitution and that its subject matter (namely, migratory birds) was transitory by nature.[39] Notwithstanding the role that states traditionally play in governing wildlife, the Court observed that the national interest involved was "of very nearly the first magnitude," that "[i]t can be protected only by national action in concert with that of another power," and that "[b]ut for the treaty and the statute there soon might be no birds for any powers to deal with."[40] Accordingly, the Court affirmed the validity of the treaty and the MBTA that implements the treaty.[41]

These cases highlight some of the disputes that may arise between national and subnational competences, especially in federal countries. In addition, the *Spraytech* case also illustrates the possible role of international environmental law in addressing issues of competence of municipalities to enact implementing legislation.

B. Upholding Administrative Actions

A number of courts have invoked international environmental law in upholding various administrative actions. Such actions include, for example, the designation of World Heritage Sites, the refusal of applications for development, and the establishment of commissions.

A series of Australian cases has considered governmental actions related to the management of World Heritage Sites. In the

38. *Id.* at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

39. *Id.* at 434-35.

40. *Id.* at 435.

41. *Id.* The progeny of *Missouri v. Holland* includes *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979) (holding that enforcement of the Endangered Species Act is not restricted by the Tenth Amendment, even with respect to a species that is endemic to a state, both because of the Congress's power to enact legislation to implement valid treaties and because of Congress's power to regulate commerce).

Tasmanian Dams case,[42] the High Court upheld the designation of World Heritage Sites and the government's refusal to issue an application for development.[43] Similarly, in the *Tasmanian Forests* case,[44] the Court upheld the establishment of a commission to investigate values of proposed World Heritage Sites and the application of interim protection measures.

Two cases from the United States and United Kingdom highlight the use and limitations of international environmental law. Both cases dealt with the importation of big-leaf mahogany, a species listed under CITES.[45] In each case, mahogany shipments were accompanied by documentation required under CITES; and in each case, questions were raised regarding the legitimacy of the documentation.

In *Castlewood Products, LLC v. Norton* (*Castlewood*),[46] the Brazilian government informed the U.S. Animal and Plant Health Inspection Service (APHIS) that the permits accompanying several shipment of big-leaf mahogany may have been illegally obtained. APHIS responded by seizing the shipment, and the importer sued. The District Court for the District of Columbia held that agencies may impose requirements above and beyond those set forth by CITES, especially when an agency may doubt compliance with CITES.[47] Thus, the court held that compliance with the specific terms of the Convention was not necessarily sufficient for APHIS to allow the shipment to enter the country. In reaching its decision, the court considered the text and intent of CITES as well as decisions of the COP.[48] COP decisions generally are considered soft law and are not necessarily binding, so this case is also significant for its use of soft law.

In contrast, in *Greenpeace v. Secretary of State for the Environment, Food and Rural Affairs* (*Greenpeace*),[49] England's cus-

42. Commonwealth of Austl. v. Tasmania (1983) 158 C.L.R. 1, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1983/21.html (last visited May 8, 2006).

43. *Id.* at 146-53.

44. Richardson v. Forestry Comm'n, 164 C.L.R. 261 (1988) *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1988/10.html (last visited May 11, 2006).

45. Convention on International Trade in Endangered Species of Wild Fauna and Flora, app. III, Mar. 3, 1973, 993 U.N.T.S. 243, 12 I.L.M 1088, *available at* http://www.cites.org/eng/disc/text.shtml (last visited May 8, 2006).

46. Castlewoods Prods. v. Norton, 264 F. Supp. 2d 9 (D.D.C. 2003), *aff'd*, 365 F.3d 1076 (D.C. Cir. 2004).

47. *Castlewoods Prods.*, 264 F. Supp. 2d at 12-13.

48. *Id.* at 12 (citing specific CITES Resolutions).

49. R (on the application of Greenpeace) v. Sec'y of State for the Env't, Food & Rural Affairs, [2003] Env. L.R. 9 (A.C. July 25, 2002).

toms service, Her Majesty's Commissioners of Customs and Excise (the Commissioners), recognized that there were questions regarding the validity of the Brazilian export permits, but felt constrained by the terms of CITES: The shipment was accompanied by what appeared to be a valid export permit that was consistent with CITES (if not necessarily local law), so the Commissioners did not believe that they had the authority to seize the shipment.[50] Greenpeace brought suit to compel seizure. In *Greenpeace*, the majority held that in order for there to be certainty in business, the government needed to accept documents that are on their face proper.[51] In dissent, Justice Laws argued that the government could rely either on documentary evidence (i.e., the export permit) or on both documentary evidence as well as substantive provisions of CITES; because this was an environmental protection measure, he advocated the latter approach.[52]

The *Castlewood* and *Greenpeace* cases are easily reconciled: In both cases, the court accorded a measure of deference to the respective governmental actions.[53] In *Castlewood*, where the agency went beyond the specific text of the convention, the court upheld the action, particularly where such action was consistent with and pursuant to a COP decision. In *Greenpeace*, the Court upheld the government's action where the agency accepted the permit on its face pursuant to the terms of the Convention. In both cases, the courts looked to the underlying convention and the implementing legislation. While the District Court for the District of Columbia also considered a non-binding COP decision, the key element in both cases appears to be the agency's efforts to comply with the text of the Convention. In contrast with the cases discussed in the following two subsections, which voided or constrained government action, the agencies in *Castlewood* and *Greenpeace* both appeared to comply with the Convention.

50. *Id.*

51. *Id.* para. 61.

52. *Id.* para. 33. Justice Laws noted that "The interpretation of statutes is never entirely value-free." *Id.*

53. *See* Chevron, U.S.A., Inc. v. N.R.D.C., Inc., 467 U.S. 837 (1984); *see also* Coal Contractors Ltd. v. Sec'y of State for the Env't, (1994) 68 P. & C.R. 285 (Q.B.D. 1993) (upholding agency action under the World Heritage Convention).

C. Voiding Governmental Action or Compelling Governmental Action

In most countries, cases that challenge governmental action or inaction can be difficult to win, and this is all the more so when the claim is based on international law. Nevertheless, a number of courts have voided governmental actions that were counter to international environmental law. Similarly, some courts have compelled governments to take action required by international law. A description of a few of these cases follows.

In *Humane Society of the United States v. Glickman*, the Court of Appeals for the D.C. Circuit voided the U.S. Department of Agriculture's integrated goose management plan.[54] As part of its plan, the USDA intended, among other measures, to kill Canada geese without first obtaining a permit from the Department of the Interior.[55] The court held that the USDA's failure to obtain a permit violated the MBTA.[56] The court explained that the MBTA implements the Migratory Bird Treaty entered into between the United States and Canada.[57] If the Canadian government slaughtered migratory birds in Canada without a permit, it would violate the treaty.[58] Thus, if a federal agency in the United States did the same, it too would violate the treaty.[59] The court found that there was no reason to treat the MBTA differently from the treaty, given that the MBTA was meant to give effect to the treaty.[60] Although the court focused on whether the plan violated the implementing act—the MBTA—its analysis relied on the reciprocal nature of obligations under the treaty. Indeed, the substantive analysis relied as much on what constitutes a violation of the treaty as it did on what constitutes a violation of the MBTA.

Two Dutch cases offer additional examples of domestic courts' reliance on international environmental law in cases against the government. In the first case, a local non-governmental organization (NGO) successfully challenged a government land use plan, the implementation of which would have resulted in harm to a

54. Humane Soc'y of the United States v. Glickman, 217 F.3d 882 (D.C. Cir. 2000).

55. *Id.* at 884.

56. *Id.* at 888.

57. *Id.* at 887.

58. *Id.*

59. *Id.*

60. *Id.* The treaty—the International Convention for the Protection of Migratory Birds, 39 Stat. 1702 (1916)—is the same as the treaty at issue in Missouri v. Holland, 252 U.S. 416 (1920), discussed *supra* at notes 34-41 and accompanying text.

salamander population; the NGO's claim rested on the assertion that the plan violated the Bern Convention.[61] In the second Dutch case, the court held that a plan by the province of Gelderland to build a hotel did not take sufficient account of the potential harm to badger habitat, which was protected under the Bern Convention.[62]

In *Vellore Citizens Welfare Reform v. Union of India* (*Vellore*), an NGO brought suit against the government of India to protect public health from the leather and tannery industries.[63] The NGO challenged governmental inaction, asserting that the failure to protect public health violated principles of customary international law. The Supreme Court of India recognized the significance of the leather industry to the country's economy, but also considered the long-term health and environmental impacts of how the industry was run.[64] To balance these interests, the Court considered the concept of sustainable development.[65] Within the rubric of sustainable development, the Court took judicial notice of the precautionary principle and the polluter-pays principle as principles of customary international law.[66] Accordingly, the two principles were accepted as part of Indian domestic law.[67] *Vellore* is noteworthy for at least two reasons. First, in contrast to the other cases in this section, the Court in *Vellore* relied on principles of customary international environmental law, rather than on specific treaties or other forms of hard law. Further, the Court relied on these principles to compel government action where the

61. Herpetologische Studiegroep Gelderland v. Provincial Executive Gelderland, Council of State, Admin. Justice Div., 22 Ap 1991, AB 1991, No. 592, *cited in* Daniel Bodansky & Jutta Brunnée, *The Role of National Courts in the Field of International Environmental Law*, *in* INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS 1 (Anderson & Galizzi eds.), *supra* note 5, at n.94 and accompanying text. For another Dutch case relying on the Bern Convention, see G.J.P. Ziers v. Provincial Executive Gelderland, Council of State, Admin. Justice Div. AB 1995, *cited in* Bodansky & Brunnée, *supra*, nn.55, 72.

62. *See* André Nollkaemper, *International Environmental Law in the Courts of the Netherlands*, *in* INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS (Anderson & Gallizi eds.), *supra* note 5, at 187 (noting that in this case, the Bern Convention served largely as an interpretive aid).

63. Vellore Citizens Welfare Forum v. Union of India et al., [1996] Supp. 5 S.C.C. 647, *available at* http://www.worldlii.org/int/cases/ICHRL/1996/62.html (last visited May 9, 2006).

64. *Id.* para. 9.

65. *Id.* para. 10.

66. *Id.* paras. 11-12.

67. *Id.* para. 14 (concluding that "In view of constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.").

government had previously refused to act, thus extending the review of government actions to also cover government inaction.

In Georgia, the Aarhus Convention[68] motivated a landmark case that compelled governmental action. Georgia was an early party to the Aarhus Convention, signing it on June 25, 1998 and ratifying it on April 11, 2000.[69] Under Georgian law, an international agreement must be officially published in the *Parliamentary Herald* in order for it to have direct legal effect.[70] Yet, more than three years after ratifying the Convention, the government still had not officially published it. A public interest environmental lawyer challenged the governmental inaction. The Court of Mtatsminda-Krtsanisi District of Tbilisi ruled in favor of the plaintiff, ordering the Ministry of Foreign Affairs to present the Convention to the Parliament of Georgia and the Parliament to officially publish the Convention.[71]

Australia,[72] the Philippines,[73] the United Kingdom,[74]

68. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, 38 I.L.M. 517 (1999), *available at* http://www.unece.org/env/pp/documents/cep43e.pdf.

69. *See* United Nations Economic Commission for Europe (UNECE), Aarhus Convention, http://www.unece.org/env/pp/ratification.htm (last visited May 9, 2006).

70. *See* UNECE COMMITTEE ON ENVIRONMENTAL POLICY, ENVIRONMENTAL PERFORMANCE REVIEWS: GEORGIA 43 (2003), *available at* http://www.countryanalyticwork.net/CAW/Cawdoclib.nsf/viewSampleDocsdisp/1A46A8B40CFD3B7A85256DFA0050C911/$file/georgia.pdf. A variety of common law and civil law countries require official publication for an international agreement to have direct effect. The publication is not necessarily tied to the development of implementing legislation, although such a provision may grant the government time to amend domestic legislation to be consistent with the country's commitments under the international agreement.

71. E-mail from Merab Barbakadze, lead counsel (Nov. 24, 2003) (on file with author) (discussing the decision of the Court of Mtatsminda-Krtsanisi District of Tblisi, Nov. 2003).

72. *E.g.*, Leatch v. Dir. Gen. Nat'l Parks & Wildlife, [1993] NSWLEC 191 (Land and Environment Court of New S. Wales (1993)) 81 L.G.E.R.A. 270, 1993 WL 1405558 (New S. Wales Nov. 23, 1993), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWLEC/1993/191.html (last visited May 11, 2006) (considering the precautionary principle in holding that a permit to construct a road and bridge could not take or kill endangered frogs during the project's development); Greenpeace Austl. Ltd. v. Redbank Power Co. Pty Ltd. [1994] NSWLEC 178 (Land and Environment Court of New S. Wales (1994), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWLEC/1994/178.htm (last visited May 11, 2006); (1994) 86 L.G.E.R.A. 143, 1994 WL 1657428 (New S. Wales Nov. 10, 1994) (holding that the precautionary principle required a cautious approach, but that greenhouse issues do not necessarily outweigh other issues when considering whether to grant a license to construct a power station and ancillary facilities).

73. Oposa v. Factoran, G.R. No. 101083. (Aug. 9, 1993). (Phil.), *available at* http://www.elaw.org/resources/text.asp?ID=278 (last visited May 9, 2006) (intergenerational equity); *see also* Antonio G.M. La Viña, *The Right to a Sound Environment in*

Pakistan,[75] and other countries have also invoked international environmental law in cases that have challenged governmental action, particularly administrative actions. As discussed in section III.B below, however, the precise role that the courts accord international environmental law in these decisions often is ambiguous.

D. Constraining the Scope of Domestic Laws or Regulations

In a few instances, courts have held that international environmental law limits the ability of the legislature or the executive branch to promulgate laws and regulations. For instance, in *Alaska Fish and Wildlife Federation v. Dunkle*, the Ninth Circuit Court of Appeals held that the Secretary of the Interior could adopt regulations that permitted subsistence hunting, but only to the extent that such hunting was allowed by migratory bird treaties.[76] In *Defenders of Wildlife v. Endangered Species Scientific Authority*, the D.C. Circuit Court of Appeals voided federal guidelines for granting permits to export bobcat pelts because it found that the guidelines failed to meet the requirements of CITES.[77] In these instances, the courts limited agency attempts to go beyond the international agreements, largely because the agency actions would have undermined the environmental goals of the relevant agreements.

In contrast, courts have upheld agency actions that go beyond an international agreement where the action furthers the agreement's environmental goals. In two Italian cases, the government instituted criminal prosecutions for marine pollution against several private parties. The charges were based on Italian legislation

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the Philippines: The Significance of the Minors Oposa Case, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 246 (1994).

74. R. v. Secretary of State for Trade and Industry *ex parte* Duddridge and Others, [1996] Env. L.R. 325 (A.C.) (1995) (U.K.) (considering the precautionary principle but refusing to compel a minister to issue regulations restricting electromagnetic fields from electric power cables).

75. Zia v. WAPDA, Human Rights Case No. 15-K (Pak. 1992), *available at* http://www.elaw.org./resources/printable.asp?id=280 (last visited May 9, 2006) (examining the precautionary principle and the 1992 Rio Declaration in holding that a proposed electric grid station should "make such adjustments, alterations, or additions which may ensure safety and security or at least minimize the possible hazards" from electromagnetic radiation).

76. 829 F.2d 933 (9th Cir. 1987).

77. Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth., 659 F.2d 168, 180 (D.C. Cir. 1981).

that implemented MARPOL.[78] The defendants claimed that the domestic Italian legislation went beyond the specific terms of MARPOL by prohibiting certain actions that MARPOL did not. Accordingly, they argued, the Italian legislation was *ultra vires*, because it went beyond the specific terms of MARPOL by prohibiting certain actions that MARPOL did not. The courts rejected these arguments, holding that the Convention allowed stricter national rules, and found the defendants guilty.[79]

Together, these cases highlight the general principle that national implementing legislation cannot be less protective than the relevant international environmental agreement, but national rules usually can be more protective if countries so desire. It is worth noting that some international environmental agreements do not permit more restrictive national legislation, but these agreements are in the minority.[80] Generally speaking then, international environmental law can serve as the floor, but not the ceiling.

E. Challenging Actions by a Private Party

Traditionally, international law has governed the actions of nations, not individuals, businesses, or organizations. Increasingly, however, international law has begun to address actions by individuals and other non-governmental actors. Since the Nuremburg Trials following World War II, it has been well established that human rights law and the law of war can apply directly to individual private actors.[81] Considering the diffuse actions underlying many contemporary environmental challenges—from land degradation to trade in endangered species, ozone-depleting substances, and hazardous waste to loss of habitat for biodiversity—international environmental agreements

78. International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), *adopted* Feb. 17, 1978, 1340 U.N.T.S. 61 & 1341 U.N.T.S. 3, *reprinted in* 17 I.L.M. 546.

79. Paolo Galizzi & Chiara Giorgetti, *The Application of International Environmental Obligations in Italian Courts*, *in* INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS (Anderson & Galizzi eds.), *supra* note 5, at 167.

80. *Cf.* General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 UNTS 190, art. XXIV(5)(b) (providing that the "duties and other regulations of commerce maintained in each of the constituent territories . . . shall not be higher or more restrictive" than those maintained before the formation of the free-trade area).

81. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995) ("'Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide'" (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt.II, introductory note (1986))).

have started to address a wide range of activities by non-state actors. Nevertheless, cases challenging actions by private parties rarely rely on international environmental law.[82]

Courts often hold that international environmental law is made between states, that it creates obligations of states to other states, and that a lack of "direct effect" limits the application of international agreements to private parties.[83] Nevertheless, some of the cases discussed above have applied laws or regulations implementing international environmental law to private parties. In some instances, such as *Spraytech* and the Italian MARPOL cases,[84] private parties have challenged the authority of the government to develop or impose these domestic measures. In such circumstances, however, courts have little difficulty upholding the legislative and executive measures or actions.

Additionally, there are a few cases where courts have directly applied international environmental law to private parties. For instance, the Australian case *Booth v. Bosworth* involved a suit against the owners of a lychee orchard in Queensland. The orchard owners had installed an electric fence, which was killing spectacled flying foxes.[85] The Federal Court held that the owners had thereby violated Australia's commitments under the World Heritage Convention to protect biodiversity in the Wet Tropics World Heritage Area.[86] Thus, *Booth* is an example of a case where international environmental law was invoked against a private individual; it probably helped that the case focused on enforcing domestic legislation that implemented the World Heritage Convention and did not entail direct application of the Convention to private actions.

82. *See* Bodansky & Brunnée, *supra* note 61, at 19.

83. *E.g.*, Case C236/92, Comitato di Coordinamento per la Difesa della Cava v Regions Lombardia, 1990 E.C.R. I-00483 (holding that an EU directive regarding hazardous waste did not confer rights on individuals as against states). In contrast, when international agreements protect individuals from state action, as in the human rights context, courts have been more willing to hold that the agreements have direct effect. *See, e.g.*, *infra* note 153 and accompanying text.

84. *See supra* notes 21-29 and 78-79 and accompanying text.

85. Booth v. Bosworth (2001) 114 F.C.R. 39 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1453.html (last visited May 9, 2006).

86. *Id.* para. 107.

F. Assisting in Interpreting Domestic Law

Courts use international environmental law to aid in interpreting domestic law that is vague or complex.[87] Courts do so in one of two ways: by either looking to the international law for definitions for terms used in domestic law, or by interpreting substantive legal provisions in accordance with international law.

1. Providing Definitions

Three cases illustrate how international environmental law can assist in defining terms of domestic law. Recently, the European Court of Justice sought to determine whether scrap metal that was recycled and resold was a "waste" for the purposes of regulation.[88] The Court held that the international environmental principles of prevention and precaution required taking a broad definitional scope of the term.[89] Thus, the Court used these principles of international environmental law to define what constitutes "waste."

The Supreme Court of Poland faced the question of what constitutes a "legal secret" in a case that sought to compel production of government-held documents.[90] The Court was reluctant to grant a broad definition of legal secret, and it held that the only basis on which documents could be exempted from disclosure as a "legal secret" was when it was provided in the constitution or under international law. This was shortly after Poland had signed the Aarhus Convention,[91] which includes detailed provisions regarding what constitutes a secret. While the Court did not go on to define the specific parameters of a "legal secret," it established the precedent that international law was one of the key elements in deciding the breadth (or narrowness) of the term. The Court thus opened the door to applying the Aarhus Convention in interpreting the scope of public access to environmental information.

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87. *See, e.g.*, Nollkaemper, *supra* note 62, at 188-91 ("there is a rich practice of courts using international environmental law to give effect to interpret provisions of national law"); Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 859-60 (1989).

88. Case C-444/00, R. (on the application of Mayer Parry Recycling Limited) v. Environment Agency, [2004] Env. L.R. 6 (Eur. Ct. of Justice June 19, 2003).

89. *Id.* paras. A100, A124-A126.

90. Judgment of 1 June 2000 (III RN 64/2000), cited in Jerzy Jendroska, *Poland*, *in* IMPLEMENTING RIO PRINCIPLES IN EUROPE: PARTICIPATION AND PRECAUTION (2001).

91. Aarhus Convention, *supra* note 69.

At the provincial level in Canada, the British Columbia Environmental Appeal Board applied the precautionary principle to help define the scope of "adverse effect" in a case addressing the spraying of pesticides. In *Shuswap Thompson Organic Producegrowers Association (STOPA) v. BC (Minister of Environment Lands and Parks)*,[92] STOPA appealed permits to use pesticides to control weed growth along railway lines. The primary issue was whether the spraying caused an "unreasonable adverse effect."[93] In determining whether there was an "adverse effect," the Board made specific reference to Principle 15 of the Rio Declaration (on the precautionary principle) to support its conclusion that proof of "scientific certainty" was not necessary.[94] The Board ordered the permits to be amended.[95]

2. Interpreting Domestic Legal Provisions

A number of cases discussed earlier in this article highlight examples where courts have looked to international environmental law when interpreting domestic legal provisions. These include, for example, many of the cases upholding or voiding governmental actions, which were within or outside (respectively) the scope of legislation implementing international environmental law.

G. As a Cause of Action

In a few instances, courts have used international environmental law as a source of binding norms that establish a cause of action. Courts in India, the Philippines, and other countries appear to have relied on principles of international environmental law as a cause of action.[96] In many of these cases, though, the precise role of the principles is ambiguous: The decisions do not make clear whether the causes of action are based on principles of international law or if they are based on common law or constitutional law as informed by international environmental law. The

92. Shuswap Thompson Organic Producers Ass'n (STOPA) v. BC, [1998] (Minister of Environment Lands and Parks) B.C.E.A. 24.

93. *Id.* paras. 11(3)-(4).

94. *Id.* paras. 16-18, 29 (citing *Rio Declaration*, *supra* note 19).

95. *Id.* paras. 90.

96. *E.g.*, Oposa v. Factoran, G.R. No. 101083, (July 30, 1993). (Phil.) (principle of intergenerational equity); Vellore Citizens Welfare Forum v. Union of India, (1996) Supp. 5 S.C.R. 241 (principles of sustainable development, precaution, and polluter pays).

decisions frequently do not clarify whether the principles are a source of norms or if they are simply persuasive.

It is more common for courts to rely on international law as a cause of action in the human rights arena. In Canada and Australia, courts have held that instruments that were ratified but unimplemented have legal force and create causes of action.[97]

Canada follows a dualist approach to international law, so international instruments generally require implementing domestic legislation to have legal force within the country. In *Baker v. Canada*, however, the Supreme Court of Canada held that values in international human rights law may inform statutory interpretation and judicial review.[98] In *Baker*, a Jamaican-born woman with Canadian-born children had been ordered deported.[99] She applied for an exemption from the requirement that an application for permanent residence be made from outside Canada, relying on section 114(2) of the Immigration Act (for humanitarian and compassionate considerations).[100] In reaching its decision to grant the woman an exemption, the Court considered three international instruments: the 1992 Convention on the Rights of the Child (in particular articles 3, 9, and 12), the Universal Declaration of Human Rights, and the 1959 UN Declaration on the Rights of the Child.[101] The Court noted that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[102] Ultimately, though, the Court relied on more than simply the values reflected in the Convention on the Rights of the Child. In fact,

97. *E.g.*, Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 (Alberta), *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/1987/vol1/html/1987scr1_0313.html (last visited May 9, 2003); Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273, 286-87 (Austl.), *available at* http://www.asutlii.edu.au/cases/cth/HCA/1995/20.html (last visited May 11, 2006) ("Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.") *Id.*

98. Baker v. Canada, [1999] 2 S.C.R. 817, 861.

99. *Id.* at 825.

100. *Id.* at 826.

101. *Id.* at 861-62.

102. In a subsequent case, the Canadian Supreme Court cited this language when it relied on the precautionary principle to uphold a municipality's authority to adopt a bylaw restricting pesticide use. *See* 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, para. 30.

the Court looked to the Convention itself to justify granting her exemption.[103]

Similarly, in *Minister for Immigration and Ethnic Affairs v. Teoh*,[104] the High Court of Australia held that a human rights convention that Australia had ratified but not implemented established a "legitimate expectation" that the government would follow certain procedures.[105] Failure to do so established a cause of action, notwithstanding the fact that the government had not yet developed the implementing legislation.[106]

The Supreme Court of India also has held that human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR), can provide a substantive basis for a cause of action under the Indian Constitution.[107]

The United States has looked to international law as a cause of action through the Alien Tort Statute (ATCA or Alien Tort Claims Act) of 1789, which provides that U.S. Federal Courts have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[108] The issue, then, becomes what constitutes "the law of nations" or an actionable "treaty." Since 1980, plaintiffs have brought a growing number of successful ATCA cases for torture, illegal detention, disappearance, and other human rights violations.[109] Attempts to use the ATCA to hold parties liable for viola-

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103. Baker v. Canada, [1999] 2 S.C.R. at 864.

104. Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273, 286-87 (Austl.), *available at* http://www.asutlii.edu.au/cases/cth/HCA/1995/20.html (last visited May 11, 2006). The decision generated controversy. Immediately after it was handed down, the government released a statement criticizing the decision and stating that the fact that the government enters into a treaty should not create an expectation that the government and its officials will comply with Australia's treaty obligations. Legislation overturning the decision was drafted but was never passed.

105. *Id.* at 289-92.

106. *Id.* at 302 (explaining that Australia's ratification of the Convention on the Rights of the Child "in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course.").

107. *See infra* notes 129-36 and accompanying text.

108. 28 U.S.C. § 1350 (2000).

109. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (torture); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (armed attack upon civilians); Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1989); *In re* Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (torture and other abuses); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (torture, rape, and other abuses); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (torture and other abuses); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (torture). *See also*

tions of international environmental law have been less successful.[110] Accordingly, advocates in cases that include a combination of environmental and human rights grievances often emphasize the human rights violations.[111]

H. For Procedural Issues

International environmental law can provide guidance on procedural matters, including judicial review, standing, and remedies. For example, the High Court of Australia rejected a challenge to the nomination and acceptance of an area for inclusion on the World Heritage List, finding that the existence of Australia's international duty to protect and conserve a particular property is conclusively determined by the inclusion of the property on the World Heritage List consequent on Australia's nomination.[112] While not explicitly saying so, the Court effectively held that the decision to nominate and affirmatively accept an area for inclusion on the World Heritage List was not subject to judicial review. In Canada, the Supreme Court considered the International Convention on the Rights of the Child and other human rights instruments when it considered the issue of judicial review of governmental action.[113]

Courts in a variety of countries have relied on international environmental law to grant standing (in many countries, "*locus standi*") to public interest litigants. These cases rely, alternately on the Aarhus Convention, the World Heritage Convention, and public international law generally.

In Ukraine, the Aarhus Convention served as the basis for establishing *locus standi* of a public interest environmental law NGO. In 2003, Ecopravo-Lviv (EPL) filed cases against the government of Ukraine challenging the government's decision to dig a

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that kidnapping was not the type of egregious violation of core human rights that ATCA seeks to address).

110. *See, e.g.,* Beanal v. Freeport McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd on other grounds*, 303 F.3d 470 (2d Cir. 2002).

111. *See, e.g.,* Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001); Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812 (5th Cir. 2004); Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004); Bano v. Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004). *But see* Arias v. DynCorp, No. 1:01CV01908 (D.D.C. filed Sept. 11, 2001) (alleged health and environment problems from herbicide spraying associated with coca eradication).

112. Queensland v. Commonwealth (*Daintree Rainforest* case), [1989] 167 C.L.R. 232.

113. *See* Baker v. Canada, [1999] 2 S.C.R. 817.

deep-water navigation channel through Ukraine's portion of the Danube Delta Bilateral Biosphere Reserve.[114] On February 10, 2004, the Commercial Court of Kyiv rendered a decision to sustain the suit by EPL against the Ministry for Environmental Protection.[115] The court based EPL's standing to sue on the Aarhus Convention, which Ukraine had ratified, even though the country had not yet adopted implementing legislation that would have guaranteed *locus standi*.[116] The court went on to declare invalid the conclusion of a state environmental *expertiza* (essentially an environmental impact assessment) regarding the Technical and Economic Assessment of Investments for development of the canal.[117] The court held that the public was not given an opportunity to participate in the *expertiza*, and thus their rights were violated. Accordingly, the court ruled that the consent by the Ministry for Environmental Protection regarding construction of the canal was illegal and the decision was invalid.

Other countries have also applied the Aarhus Convention directly, often to grant standing to public interest litigants. For example, in Estonia, two environmental NGOs brought suit against the government for refusing to conduct an environmental impact assessment (EIA) on the "Action Plan of the Estonian Oil-shale Based Energetics for 2001-2006."[118] Under Estonian law, an EIA is required for any large program that could have environmental effects at the national or regional level.[119] At the outset, the Tallinn Administrative Court held that, pursuant to the Aarhus Convention, environmental NGOs do not need to prove that their rights or interests were harmed in order to have standing in environmental cases.[120] Using this broad interpretation of standing, the court granted standing to the two NGOs.[121]

In Germany, a Federal Administrative Court in the *Lingen* case[122] interpreted the German Nuclear Act in light of public international law to grant standing to a citizen of the Netherlands

114. Letter from Andriy Andrusevych, Executive Director, Ecopravo-Lviv, to Carl Bruch (Aug. 27, 2004) (on file with author).

115. *Id.*

116. *Id.*

117. *Id.*

118. Estonian Society for Nature Conservation and Estonian Green Movement v. the Ministry of Economy (2002).

119. *Id.*

120. *Id.*

121. *Id.*

122. Lingen, Federal Administrative Court, Decision of 17 Dec. 1986, BverwG E 75, 285, *cited in* Bodansky & Brunnée, *supra* note 61.

to challenge the authorization of a nuclear power plant in Germany.

In Nepal, the Supreme Court of Nepal relied on the Constitution of the Kingdom of Nepal and the World Heritage Convention to grant standing to public interest litigants to protect historical and archaeological site. In *Prakash Mani Sharma v. Girija Prasad Koirala*, a public interest environmental litigant asserted that the construction of a building on the banks of Rani Pokhari destroyed the beauty of a historical and archaeological site.[123] The petitioner sought an injunction to cease construction and to demolish the structures that had already been constructed.[124] The Supreme Court held that the Nepalese government was obliged to apply the commitments that it had made under the World Heritage Convention.[125] The standing of the public interest litigant to bring the suit was also an issue in the case. The Court granted standing, holding that every individual was entitled to show concern for public property and "public rights" under article 88(2) of the Constitution.[126] Through the "public rights" term, the Court thus held that the World Heritage Convention provided the basis for public interest *locus standi* under Nepal's constitution.[127]

International law can also provide assistance in fashioning remedies. In *People's Union for Civil Liberties v. Union of India*, a NGO in India sought to institute a judicial inquiry into the deaths of two persons killed by police in the State of Manipur, to prosecute the relevant police officials, and to obtain compensation for the deceased person's families.[128] Rejecting the state's assertion that the deceased persons were terrorists who had been killed in a shootout, a judicial inquiry found that they had been shot while in police custody.[129]

In fashioning a remedy, the Supreme Court of India used the ICCPR[130] to assist in applying article 32 of the Indian Constitution, which grants jurisdiction to the Supreme Court to enforce fundamental rights, including the right to life (which is guaran-

123. Prakash Mani Sharma and others on behalf of Pro Public v. Honorable Prime Minister Girija Prasad Koirala and others, 312 NRL 1997, Supreme Court of Nepal.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. People's Union for Civil Liberties v. Union of India, (1997) 3 S.C.C. 43.
129. *Id.*
130. *Id.*

teed in article 21).[131] In particular, the Court looked to article 9(5), which provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[132] The Court noted that the ICCPR could elucidate and help to effectuate the fundamental rights guaranteed by the Constitution; indeed, courts could rely upon provisions of the ICCPR as facets of fundamental rights, and thus the ICCPR could provide a substantive basis for the cause of action.[133]

The Court observed that when the government of India ratified the ICCPR in 1979, it made a reservation to article 9(5) to the effect that the Indian legal system did not recognize a right to compensation for victims of unlawful arrest or detention.[134] However, the Court noted that in light of its earlier decisions, this reservation was of little relevance.[135] The Court awarded the families of each decedent a sum of Rs100,000 (approximately US$280 at the time of judgment) as compensation, as well as Rs10,000 to the NGO for costs.[136] Ultimately, the Court relied on the ICCPR as a basis for judicial review, as a cause of action, and in fashioning the remedy.

III. CONSIDERATIONS REGARDING APPLICATION BY DOMESTIC COURTS

The various cases described in section II above highlight some cross-cutting issues. Many of the judicial decisions cite international environmental law, but the precise role that the particular provision of international environmental law plays in the decision is ambiguous. A second set of issues relates to limitations that constrain the use of international environmental law by domestic courts. This section concludes with some thoughts on prospects for the future application of international environmental law by domestic courts.

131. *Id.*

132. *Id.*

133. *Id.* (citing Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 C.L.R. 273 (Austl.) (dictum)).

134. *Id.*

135. *Id.* para 13.

136. *Id.*

A. Ambiguity of International Environmental Law in Judicial Decisions

As the cases cited above show, domestic courts increasingly look to international environmental law. In some cases, the courts are clear as to the legal effect of the particular provision of international environmental law. International environmental law may be binding or persuasive.

In many cases, though, the precise role of international law is ambiguous, vague, or inconclusive. In these instances, the decisions consider, cite, and discuss international environmental law in support of the ultimate holding, but the weight that the court accords international environmental law is unclear. It could serve as a cause of action, a rule of decision, an interpretive aid, or a principle of national law notwithstanding the international status of the principle, or as "commonsense."[137] However, in many cases,

137. In *Leatch v. Director-General National Parks & Wildlife*, a city council proposed to build a road that included a bridge over a creek, which provided valuable fauna and flora habitat. Leatch v. Dir. Gen. Nat'l Parks & Wildlife, (1993) 81 L.G.E.R.A. 270, 1993 WL 1405558 (New S. Wales Nov. 23, 1993). A Fauna Impact Statement (pursuant to the National Parks and Wildlife Act) and a Review of Environmental Factors were conducted. Shoalhaven City Council was required to apply to the Director General of the National Parks and Wildlife Service for a license to take or kill endangered fauna. Dissatisfied with the decision of which proposed road plan to adopt, Ms. Leatch filed an appeal. Two species, the Yellow-bellied Gliders and the Giant Burrowing Frog, were the principal subjects of the discussion surrounding impacts on fauna. The appeal was upheld, with the concluding remarks citing the need to weigh all pertinent factors when making a decision—in this case, the need for a road, the specific location of the road, and the environmental factors involved.

After noting the recent addition of the Giant Burrowing Frog to the schedule of endangered species, Justice Stein observed that,

> caution should be the keystone to the Court's approach. Application of the precautionary principle appears to me to be most apt in a situation of scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to "take or kill" the species until much more is known.

Id. at 284.

His Honour further commented on the various activities that could modify the frog's habitat or otherwise disturb the "essential behavioural patterns of a species." *Id.* Under the circumstances, the Court then noted significant uncertainties regarding the potential effects of the development on the frog. Accordingly, the Court held that the license could not allow the taking or killing of the Giant Burrowing Frog during the project's development. *Id.* at 286-87.

While the judgment discussed the precautionary principle extensively and referred to it as "commonsense," the specific legal status of the precautionary principle is not specifically addressed. *Id.* at 282. The concluding remarks of the judgment do not explicitly refer to the precautionary principle, and it is unclear whether the principle was considered one of international law, national common law, or commonsense.

the court refers to international environmental law without explaining the legal status of the specific norm within the context of the judicial decision.

A survey by Professors Bodansky and Brunnée of experiences of domestic courts in applying international environmental law also noted this ambiguity. They observed that, "In a perhaps surprisingly large number of cases, courts refer to norms of international environmental law without explaining whether they regard them as rules of decision, as an interpretive aid, or as principles that, despite currency at the international level, are simply drawn from national sources."[138]

With respect to principles of international environmental law, Professors Bodansky and Brunnée noted that many decisions seemed to view the principles "as reflecting 'common sense,'" particularly in cases that interpreted and applied the precautionary principle.[139]

A variety of reasons for the ambiguity might be posited.[140] In some instances, the status of the legal provision might be unclear. For example, while many cases relate to the precautionary principle, there is controversy over whether the precautionary principle constitutes a principle of customary international law, or if it is an element of soft law, or if it is simply a good idea ("commonsense").[141] Accordingly, courts might seek to avoid taking a position regarding the international legal status of a particular provision. Similarly, there might be uncertainty within a country about the role of international law in domestic judicial decisions.[142] In other words, the domestic legal culture may be *de*

138. Bodansky & Brunnée, *supra* note 61, at 20.

139. *Id.* at 15 & n.70 (citing cases from Australia, Canada, and the Netherlands).

140. The following possible reasons are based on informal discussions with judges who have written some of the decisions cited in this article. They represent, however, solely the educated opinions of the author.

141. Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle*, 3 FORDHAM ENVTL. L.J. 375 (2002); Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 221 (1997); THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW (David Freestone & Ellen Hey eds., 1996).

142. The vigorous debate over the role of international law in U.S. case law provides one example. *See, e.g.*, Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); Joseph Keller, *Sovereignty vs. Internationalism and Where United States Courts Should Find International Law*, 24 PENN ST. INT'L L. REV. 353 (2005); Jordan J. Paust, *Customary International Law and Human Rights Treaties are the Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law*, 86 GEO. L.J. 479 (1998).

facto suspicious of international law. In order to avoid being overruled or treading unnecessarily into controversial areas, courts might blur the specific nature of the international provision before them.

In some instances, judges might not be particularly familiar with international law or its relationship with domestic law. Judges often are steeped in domestic law, its operation, and its interpretation but have not been trained in international law or practiced international law. Accordingly, they might be reluctant to apply international law, even if they are in a monist state and thus theoretically bound to give legal effect to the relevant provisions of international law. A lack of fluency regarding the precise role of international law in domestic litigation may also contribute to judges giving more weight to international law than would be merited under conventional legal theory (e.g., in a country with a dualist system).

Even if a judge does accord appropriate weight to international law, the judge might be intentionally vague about the rationale. This might be, for example, because other judges (e.g., those to whom the decision might be appealed) may be less familiar with or even hostile to international law, as discussed above.

Another complicating factor can be the dearth of relevant or applicable domestic legislation. When a litigant or a judge is faced with injustice without a clear legal basis under domestic law, they may seek recourse in international law. In order to avoid injustice, courts may then seek to justify the outcome on relevant international law, even if in theory such recourse is not rigorously defensible. While critics might argue that such recourse is unconstitutional, many of the decisions cited in this article were issued by a country's highest court, which is the ultimate arbiter of what is—and is not—constitutional. In these cases, where international law fills gaps in domestic legislation, a court may appear to rely on international law, but ultimately blur the precise role and status of the relevant provision of international law in order to avoid injustice without being unconstitutional. Thus, it should not be surprising that a number of courts have looked to international human rights law to fill gaps in domestic legislation.[143]

143. *E.g.*, Baker v. Canada, [1999] 2 S.C.R. 817, 861; Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273, 286-87 (Austl.), *available at* http://www.asutlii.edu.au/cases/cth/HCA/1995/20.html (last visited May 11, 2006); People's Union for Civil Liberties v. Union of India, (1997) 3 S.C.C. 43. *See also supra* notes 129-36 and accompanying text.

Ambiguity can also facilitate incremental legal development. The first decisions interpreting or applying international law might be ambiguous for the reasons cited above, with subsequent decisions taking increasingly clear interpretations that build upon the earlier decisions.[144]

B. Limitations on Application of International Environmental Law in Domestic Courts

The cases examined in this article illustrate a number of legal, policy, and practical limitations that constrain the use of international environmental law in domestic courts. The legal limitations relate to whether international law has "direct effect" and who has standing to enforce or invoke international law. The policy/legal limitations include concerns about judges making law and intruding into the political and foreign affairs realm of the executive branch; both of these limitations relate to separation of powers. Finally, as discussed above, there are practical difficulties given that many domestic judges are neither very familiar with nor comfortable applying international environmental law.

As may be seen from the growing body of domestic case law applying international environmental law, courts increasingly find ways to address and navigate these concerns. Accordingly, while the constraints persist, they are usually limited in scope.

1. Direct Effect

Some courts hold that international environmental law, especially treaties, lacks direct effect.[145] In order for litigants to invoke international environmental law (either to support a claim or a defense), it is necessary for the country to adopt implementing legislation. Without implementing legislation, the argument goes, international environmental law remains an obligation of the country but does not become directly applicable to domestic disputes.

There are various reasons for the doctrine of direct effect. It may be a legal requirement articulated in the constitution (or

144. *E.g.*, 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, 2001 S.C.C. 40 (extending reasoning in *Baker v. Canada* from the human rights realm to the environmental context).

145. For example, the Appeals Court of the Hague held that the maxim of *sic utero tuo* is not "binding on everyone," and thus could not be directly applied to a challenge to transboundary pollution of the Rhine River. Judgment of Sept. 10, 1986, *cited in* Nollkaemper, *supra* note 62, at 183, 187.

other law), or courts may read it into the law. For example, in the United States, in addition to the Constitution and national laws, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."[146] As such, the United States appears to be a monist state. In interpreting this provision, however, U.S. courts have required a treaty to be "self-executing" or "self-operative" in order for a court to apply the treaty.[147] Moreover, in practice, the United States has tended to adopt implementing legislation at the same time that it becomes party to an international agreement. As such, while the U.S. Constitution indicates a monist system, the judicial doctrine of direct effect and practice suggests a modified system with certain characteristics of a dualist system.

There are also practical aspects to the doctrine of direct effect. While international law may prescribe general obligations and duties, it often lacks precise standards, procedures, and institutional frameworks. Without the specific implementing details, the regulated community might not know what is expected of it beyond general prescriptions.

Even if a court finds that international environmental law does not have direct effect, courts often invoke it to assist in interpreting domestic law and they use it persuasively, rather than relying on its inherent legal power.[148] As such, direct effect might apply more in contexts where international law is argued to create a cause of action.

2. Standing

Standing or "*locus standi*" relates to the legal capacity of a particular individual or institution to bring suit before the court.[149] While the doctrine of direct effect governs whether the court can apply a particular provision of international environmental law (or whether the court is limited to considering it as an

146. U.S. CONST. art. VI, cl. 2.

147. *See, e.g.,* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004). In 1829, the U.S. Supreme Court held that a treaty might not "operate of itself" and thus not be directly applicable. Foster v. Nelson, 27 U.S. 253, 314 (1829), *overruled by* United States v. Percheman, 32 U.S. 51 (1833). That has created the doctrine of self-executing treaties and direct effect.

148. *See* Bodansky & Brunnée, *supra* note 61, at 20; *see also supra* section II.F.

149. *See, e.g.,* John E. Bonine, *Standing to Sue: The First Step in Access to Justice* (1999), *available at* http://www.law.mercer.edu/elaw/standingtalk.html (last visited May 9, 2006).

interpretive aid), standing issues generally arise from an interpretation that international environmental law creates rights and obligations for states, not individuals.

Standing has sometimes been an issue, but that is changing rapidly. Legislatures and courts increasingly recognize the essential role that individuals and NGOs have in complementing governmental efforts to enforce environmental laws.[150] Many national constitutions guarantee standing of individuals and NGOs to institute cases to protect environmental rights and public health.[151] Courts have also broadened standing through case law.[152] At the same time, international environmental law has provided an impetus for expanding national laws to ensure public access to justice, relaxing previously strict requirements for standing.[153]

3. Concerns About Judicial Activism

Recognizing that the primary responsibility for implementing international law lies with the legislative and executive branches, judicial application of international law raises concerns about judges "making law." This concern is based in part on the vagueness and "indeterminacy"[154] of international environmental law. As a matter of policy, judges often prefer that the legislative or executive branch define the contours of international law as applied in the country through implementing legislation or regulations.

This concern manifests itself in a few ways. First, judges may try to avoid issues of international environmental law, deciding cases on purely domestic grounds instead. Second, judges may

150. *See generally* ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE (Sven Deimann & Bernard Dyssli eds., 1995).

151. *See, e.g.*, Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 188-98 (2001).

152. *Id.* at n.219 (citing R. v. Somerset County Council and ARC Southern Ltd. ex parte Dixon, 75 P & CR 175, [1997] J.P.L. 1030 (Apr. 18, 1997); R. v. Inspectorate of Pollution, ex parte Greenpeace Ltd. (No. 2), 4 A.L.L.E.R. (Q.B.) 329, 350h (1994) (upholding standing of Greenpeace, "who, with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge.").

153. *See, e.g.*, *supra* notes 68-71, 90-91, 115-18 and accompanying text (cases on the Aarhus Convention); Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10,428 (2002).

154. Bodanksy & Brunnée, *supra* note 61, at 21.

dismiss international law claims as not resting on self-executing treaties.[155] Third—and this is often what happens—judges may make reference to international environmental law without clarifying what role it plays in the decision.[156]

The reservation to applying international environmental law that is deemed to be too general stands in stark contrast to the well-established judicial tradition of giving legal effect to common law or constitutional provisions.[157] In most instances, international environmental law has more detail than constitutional provisions, although principles of customary international law often have a level of detail comparable to that of constitutional and common law provisions. While operative constitutional provisions are often limited to a sentence, if not a clause or a word,[158] international environmental agreements are often many pages long. When the decisions of the COPs are taken into account, international environmental treaties take on a character that is much more legislative with regulatory clarifications (through COP decisions), administrative guidance (from the Secretariat), and (quasi-)judicial interpretation and enforcement (through the compliance committee decisions and findings). To be certain, specific details are often lacking, but that is not unique to international environmental law as frequent disputes arise in domestic environmental law regarding the scope of the law, the precise nature of the obligations, and so forth.

Concerns about "judicial activism" frequently rest on claims of strict legalism and the need to be faithful to the specific and plain language of the legal text. Justice Paul Stein (a former judge of the New South Wales Court of Appeal and the New South Wales Land and Environment Court) has noted, though, that strict legal-

155. *See, e.g.*, Lillich, *supra* note 87, at 855.

156. *See, e.g.*, Leatch v. Dir. Gen. Nat'l Parks & Wildlife, [1993] NSWLEC 191 (Land and Environment Court of New S. Wales (1993) 81 L.G.E.R.A. 270, 1993 WL 1405558 (New S. Wales Nov. 23, 1993), *available at* http://www.austlii.edu.au/au/cases/nsw/NSWLEC/1993/191.html (last visited May 11, 2006).

157. While civil law countries generally do not recognize common law provisions, many civil law jurisdictions have a robust body of case law interpreting and applying constitutional provisions. *See, e.g.*, Bruch et al., *supra* note 151 (examining constitutional environmental law cases from civil and common law jurisdictions around the world).

158. Consider, for example, the significant body of case law in the United States regarding the freedom of speech or guarantees of due process, both of which arise from brief constitutional provisions. Similarly, the growing body of constitutional environmental jurisprudence illustrates the willingness of courts around the world to interpret and apply general principles in an environmental context. *See, e.g.*, Bruch et al., *supra* note 151.

ism is neither possible nor desirable.[159] Strict legalism can mask unidentified policy values. In contrast, judicial application of general provisions—whether they are found in the constitution, common law, or international law—can provide a flexible means for addressing injustices which are not otherwise addressed by legislation. If such application is gradual and principled, injustices can be redressed while also allowing the legislative branch an opportunity to address the issue through statutory development.

There are various ways to address concerns about judicial activism. First, a country can clarify the legal status of international environmental law within its legal system (e.g., through constitutional provisions). If countries do this, their courts may be more comfortable interpreting international environmental law. If the provisions are general (e.g., principles of international environmental law), such application might be in a manner similar to interpretation and application of common law or constitutional law. In fact, Australian legal scholars have observed that:

> Customary international law has primarily affected Australian law through its impact on the common law. Though Australian courts traditionally adhered to the incorporation theory when considering the impact of international law, in recent years they have been more prepared to take into account of developments in customary international law and the impact this may be having upon the common law. This is particularly evident in the area of human rights, where *courts of all levels throughout Australia have been prepared to interpret the common law to reflect significant developments in international human rights law.*[160]

Another measure to alleviate concerns regarding judicial activism is to build judicial capacity regarding the appropriate role of international environmental law. Similarly, contextualizing application of international environmental law in an analogous way to application of general provisions of constitutional (and, where appropriate, common) law can reduce concerns about judicial activism. Finally, careful and principled application of international law can also minimize concerns.

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159. Paul Stein, *Environmental Law & The Judiciary After Johannesburg—Critical Roles in Compliance, Enforcement, and Dispute Resolution,* Keynote Address, North American Symposium on the Judiciary and Environmental Law (Dec. 6-8, 2004), *available at* http://law.pace.edu/environment/symposium/ceremony.html (last visited May 6, 2006).

160. Rothwell & Boer, *supra* note 20, at 25 (emphasis added).

4. Political and Foreign Affairs Concerns

One policy concern—with legal implications—is that application of international environmental law by domestic courts could intrude upon the political and foreign affairs powers of the executive branch, which includes respecting the sovereignty of other nations. This is primarily a concern when a court might be called upon to rule on actions in other countries and to apply standards (even standards dictated by international law) to conduct in another country, for instance under the ATCA.[161] This is much less of a concern, though, when a court is ruling on actions within the nation in which it sits. Accordingly, most cases in which domestic courts apply international environmental law relate to domestic actions or inaction.[162]

5. Unfamiliarity with International Law

As mentioned above, one practical constraint on the use of international environmental law in domestic litigation is the extent to which both litigants and judges are uncomfortable and unfamiliar with international environmental law. They are much more comfortable considering, interpreting, enforcing, and applying domestic law. In many countries, public international law—let alone international environmental law—is not part of the required curriculum for law students. To the extent that countries provide for continuing legal education, such training usually focuses on domestic law. Accordingly, litigants and judges have little exposure to or experience with international law. Even if a judge is familiar with international law, the judge might be uncomfortable relying too heavily on it because other members of the judiciary (including those to whom the case might be appealed) might not be as familiar with or sympathetic to international law. When considering these various factors together, commentators have observed a "*horror juris non domestici*" on the part of many judges.[163]

The growing body of domestic case law invoking international environmental law illustrates growing familiarity with interna-

161. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

162. Indeed, almost all of the cases cited in this article—except for the ACTA cases—relate to actions within the territorial scope of the nation in which the court sits. The *Castlewood* and *Greenpeace* cases represent a hybrid, resting in part on actions in a foreign country. *See supra* notes 45-53 and accompanying text.

163. *See* Galizzi & Giorgetti, *supra* note 79, at 179 (citing Tullio Scovazzi, *Una Storia di* Panthera Pardus *e di* Horror Juris Non Domestici, RGA 250 (1998)).

tional environmental law. Often, the cases cite earlier decisions from their country as well as those from other jurisdictions that have applied international law. Consequently, the cases build upon earlier precedents, and in many instances decisions are grounded in those earlier precedents. Thus, measures to facilitate information exchange among judges and litigants[164] not only raise judicial awareness regarding international environmental law and standards, but also provide precedents that can inform judicial decisions.

C. Prospects for Further Development

Over the last two decades, there has been a dramatic increase in the number of cases that interpret and apply international environmental law. As courts become more familiar with international environmental law and with the body of case law applying international law, it seems likely that this trend will continue.

In addition to growing familiarity, another key factor determining the extent to which courts will continue to apply international environmental law and the nature of the application is the development of implementing legislation. Many developing countries are parties to multiple international environmental agreements but have only begun to develop the necessary legislation converting their international commitments to domestic requirements. As countries develop implementing legislation, questions may arise as to the legitimacy of the legislation (particularly in federal countries), the precise meaning of the provisions in domestic implementing legislation, and the legality of governmental actions pursuant to the implementing legislation. Accordingly, it seems likely that international environmental law will continue to play a role in upholding (or constraining) domestic legislation or regulations; justifying or constraining governmental or administrative actions, especially those actions aimed at implementing in-

164. Such mechanisms include, for example, the UNEP/World Conservation Union (IUCN) Judicial Portal (by which judges can exchange experiences, post cases, and communicate with one another), UNEP's Compendia of Judicial Decisions, ECOLEX (with legislation and case law from around the world), and the Environmental Law Alliance Worldwide (E-LAW), which is a network by which public interest environmental litigators exchange experiences and advice. *See* IUCN Environmental Law Programme Portals, http://www.iucn.org/portal/elc/ (last visited May 9, 2006); Partnership for the Development of Environmental Laws and Institutions in Africa, http://www.unep.org/padelia/ (last visited May 9, 2006); A Gateway to Environmental Law, http://www.ecolex.org (last visited May 9, 2006); Environmental Law Alliance Worldwide, http://www.elaw.org (last visited May 9, 2006).

ternational environmental law; and providing guidance in interpreting provisions of domestic legislation, especially those implementing international environmental law.

The development of implementing legislation may have a countervailing effect on two other uses of international environmental law highlighted in this article: its use in challenging actions by a private party, and its use as a normative cause of action. To the extent that international environmental law has been used as a safety net to address gaps in substantive law, the elaboration of domestic implementing legislation may obviate or reduce the need to seek recourse in international environmental law.

IV. CONCLUSIONS

While courts have a role in giving legal force to international environmental law, the primary responsibility for operationalizing international environmental law rests with the legislative and executive branches. These branches adopt implementing legislation, regulations, and institutions to incorporate treaties into the particular national context. The executive branch also has primary responsibility for administering and enforcing this body of domestic implementing legislation.

As a practical matter, though, implementing legislation and regulations often lag behind the development of international environmental law. To the extent that countries have adopted implementing legislation, there may still be gaps, provisions might be vague, or there may be legal challenges to the legislation on its face or as applied. As such, international environmental law can help to address the gaps, interpret provisions of domestic law, and justify, clarify, or constrain domestic legislative or administrative actions.

International environmental law can also facilitate enforcement, including enforcement of domestic legislation implementing international environmental law. Due to limited human, financial, and technical resources to enforce, or to a lack of political will, enforcement can lag. As discussed above,[165] international environmental law can empower private individuals and other non-governmental actors to bring suits to enforce the law. This is not to suggest that such actions should preempt legislative development or official enforcement initiatives. Instead, private en-

165. *See supra* parts II.G., H.

forcement can complement governmental action, both in the interim, (until the government develops the resources to effectively implement and enforce international environmental law), and on an ongoing basis (as with the numerous citizen-suit provisions found in U.S. environmental laws, which allow individuals and NGOs to act as "private Attorneys General," supplementing governmental enforcement actions).

Notwithstanding the need for tools and approaches to implement international environmental law, promote environmental and human health, and avoid injustice, these cases challenge conventional legal theories regarding the role of international law. To the extent that a country follows a monist system, courts should—in theory—apply international environmental law with equal vigor as domestic law. While many courts in monist countries do apply international environmental law, it is often more for its persuasive value than for its normative qualities. At the same time, to the extent that a country follows a dualist system, courts should—in theory—ignore international environmental law. However, as cases in this article highlight, courts in a number of dualist systems have a well-established tradition of applying international environmental law.

It may be tempting for legal scholars to dismiss the cases as outcome-oriented aberrations resting on fuzzy legal reasoning. This would be a mistake. There are too many cases in too many countries to ignore or dismiss. The numerous instances of domestic courts invoking and applying international environmental law suggest that the legal framework is evolving, even if the theoretical basis has remained largely frozen in outdated dichotomies. Indeed, then-U.S. Supreme Court Justice Sandra Day O'Connor observed that "International law is no longer a specialty . . . . It is vital if judges are to faithfully discharge their duties."[166]

Because practice does not conform to legal theory, it is time to revisit the conventional legal theory regarding the role of international environmental law in domestic courts. In particular, there is a need to consider whether the growing body of case law represents a shift toward a more nuanced set of national legal systems. If there is such a shift—and the case law appears to indicate that a gradual but discernable shift is taking place—there is a need for

166. Associated Press, *O'Connor Extols International* Law, FOX NEWS, Oct. 27, 2004, *available at* http://www.foxnews.com/story/0,2933,136839,00.html (last visited May 9, 2006) (discussing Justice Sandra Day O'Connor's speech at Georgetown Law School).

scholarship that articulates a revised analytic framework that more accurately and clearly establishes the legal underpinnings for applying international environmental law (and international law more generally), as well as the parameters and procedures for such application.