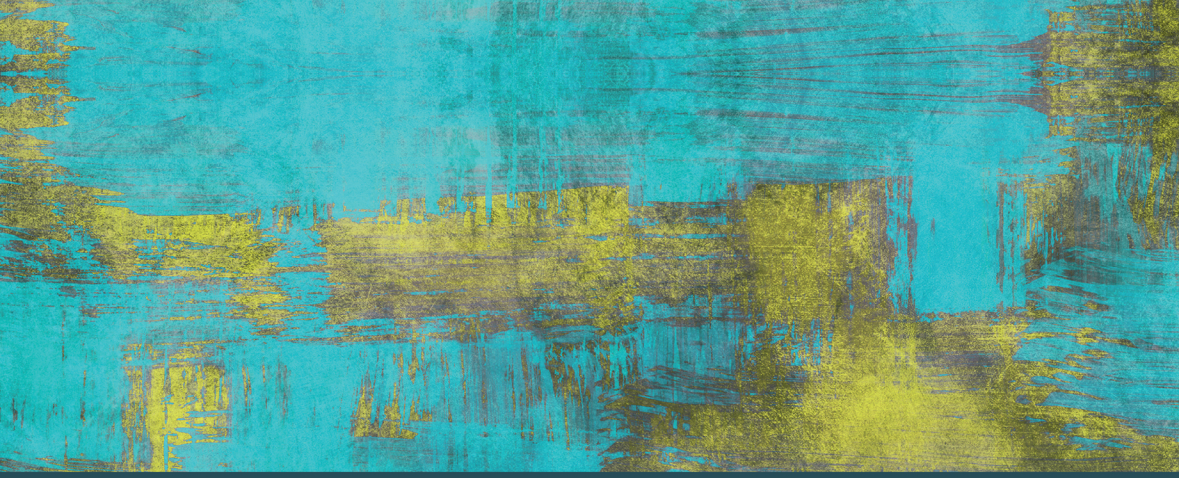
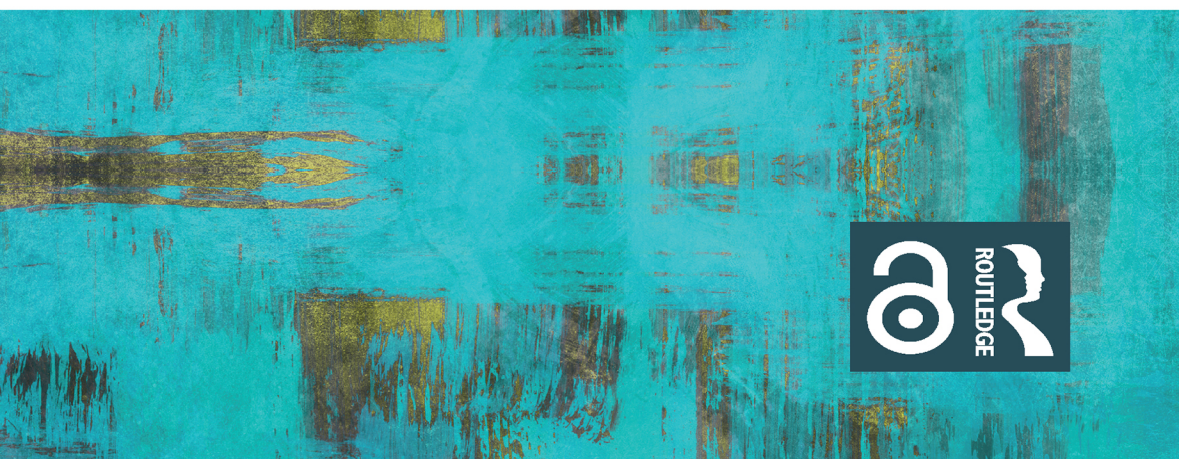


Routledge Explorations in Environmental Studies

GLOBALIZATION, ENVIRONMENTAL LAW, AND SUSTAINABLE DEVELOPMENT IN THE GLOBAL SOUTH

CHALLENGES FOR IMPLEMENTATION

Edited by
Kirk W. Junker and Paolo Davide Farah



"This book is a must-read for anyone working in international environmental law, sustainable development, or international economic law. It provides fresh perspectives on the interactions between international economic and environmental law, from a wide variety of countries in the Global South. The subject matter of the chapters is broad, spanning tax, trade and corporate law, as well as adverse impacts of oil pipelines and mitigating environmental risk in privately financed infrastructure projects. This book illustrates how critical it is for international law to serve the needs of those in the Global South. A fantastic read, highlighting authors from (or who work in) the Global South. This work fills a critical gap in the literature, illustrating the multifold implementation challenges facing the Global South. I have been waiting for a book like this to be written—and the authors and editors have done a great service to all of us who work on environmental and developmental issues involving the Global South."

— **Lisa Benjamin,** *Assistant Professor of Law, Lewis & Clark Law School, Portland, Oregon, U.S.A.*

"This book is very interesting because of the topics covered and their articulation by authors from various places. Navigating in and from environmental law (in the strict sense) is a matter of special importance in academia. Faced with the concept of development and the hegemony that certain disciplines such as economics impose, from the Global South we propose other diverse concepts, such as *Summa Kaway*, *Summa Qamaña* (Good Living and Living Well, respectively) in the Ecuadorian and Bolivian versions. The question of whether it is feasible to advance alternative constitutional approaches to the conceptualization and foundation of environmental law, environmental rights, environmental justice, the environmental state of law and rights, environmental citizenship, or environmental democracy is a great challenge that we must meet."

— **Gregorio Mesa Cuadros,** *Professor of Law and Director of the Research Group on Collective and Environmental Rights, Universidad Nacional de Colombia, Bogotá, Colombia*

"Globalization is core to environmental protection. Lately there have been developments at both international and regional levels that have great implications for the protection of the environment at the national level in the Global South. It is most gratifying to note that this book, *Globalization, Environmental Law, and Sustainability in the Global South: Challenges for Implementation,* presents an intellectual analysis on environmental issues of significance to the Global South. From built environment to the extractives, sustainability challenges to different legal solutions, this collection of painstakingly researched chapters offers an authoritative and indispensable knowledge on the delicate trinity of globalisation, environmental protection, and sustainability. It is a must-read for decision makers, academia and other stakeholders in the field of environmental governance in the Global South."

— **Ademola Oluborode Jegede,** *Professor of Law, University of Venda, Thohoyandou, South Africa*

"Based in part on actual case studies and personal experiences in countries that some call 'the Global South,' the authors in this book present a wide array of useful and practical ideas beyond academic theory for the implementation of environmental law. The book further demonstrates that these countries need environmental protection to enable sustainability against colonial and post-colonial economic interests that otherwise would proliferate northern economic globalization to the benefit of the few and the detriment of the many. It is well worth the reader's while to see the issues of legal practice and implementation through the words of these authors."

— **M. C. Mehta,** *M. C. Mehta Environmental Foundation, Delhi, India*

Globalization, Environmental Law, and Sustainable Development in the Global South

This volume examines the impact of globalization on international environmental law and the implementation of sustainable development in the Global South.

Comprising contributions from lawyers from the Global South or who have experience in the Global South, this volume is organized into three parts, with a thematic inquiry woven through every chapter to ask how law can enable economies that can be sustained, given the limited carrying capacity of the earth. Part I describes and characterizes the status quo of environmental, social and economic problems in the Global South during the process of globalization. Some of those problems include redistribution of environmental burden on the public through over-reliance on the state in emerging economies and the transition to public-private partnerships, as well as extreme uncontrolled economic expansion. Building on Part I, Part II takes an international perspective by presenting some tools that are in place during the process of globalization that lead to friction and interfaces between developed and developing economies in environmental law. Recognizing the impossibility of a globalized Northern economy, the authors in Part III present some alternatives through framework ideas of human and civil rights, environmental rights, and indigenous persons' rights, as well as concrete and specific legal tools to strengthen justice and rule of law institutions. The book gives new perspectives to familiar approaches through concrete examples by professional practitioners and theoretical discourse by academic researchers, and can thereby form the basis for changes in practices, as well as further discussions and comparisons.

This book will be of great interest to students and scholars of environmental law, sustainable development, and globalization and international relations, as well as legal professionals and practitioners.

Kirk W. Junker is a University Professor of Law, Director of the Environmental Law Center, Board Chair of the International Master of Environmental Science Program, and a Principal Investigator at the Global South Studies Centre at the University of Cologne, Germany. He is the editor of *Environmental Law Across Cultures: Comparisons for Legal Practice* (Routledge, 2020).

Paolo Davide Farah is a tenured Associate Professor in the Eberly College of Arts & Sciences, John D. Rockefeller IV School of Policy and Politics at West Virginia University, U.S.A. He is Founder, President, and Director of gLAWcal—Global Law Initiatives for Sustainable Development, U.K. He is the editor of *China's Influence of Non-Trade Concerns in International Economic Law* (Routledge, 2016).

Routledge Explorations in Environmental Studies

Climate Change Temporalities
Explorations in Vernacular, Popular, and Scientific Discourse
Edited by Kyrre Kverndokk, Marit Ruge Bjærke, and Anne Eriksen

Rights of Nature
A Re-examination
Edited by Daniel P. Corrigan and Markku Oksanen

Ecocritical Geopolitics
Popular Culture and Environmental Discourse
Elena dell'Agnese

Environmental Defenders
Deadly Struggles for Land and Territory
Edited by Mary Menton and Philippe Le Billon

Globalization, Environmental Law, and Sustainable Development in the Global South
Challenges for Implementation
Edited by Kirk W. Junker and Paolo Davide Farah

The Political Ecology of Austerity
Crisis, Social Movements, and the Environment
Edited by Rita Calvário, Maria Kaika and Giorgos Velegrakis

For more information about this series, please visit: https://www.routledge.com/Routledge-Explorations-in-Environmental-Studies/book-series/REES

Globalization, Environmental Law, and Sustainable Development in the Global South

Challenges for Implementation

Edited by
Kirk W. Junker and Paolo Davide Farah

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2022
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Names: Junker, Kirk W., editor. | Farah, Paolo, editor.
Title: Globalisation, environmental law and sustainable development in the global south : challenges for implementation / edited by Kirk W. Junker and Paolo D. Farah.
Other titles: Globalization, environmental law and sustainable development in the global south
Description: New York, NY : Routledge, 2022. |
Series: Routledge explorations in environmental studies | Includes bibliographical references and index.
Subjects: LCSH: Globalization—Economic aspects—Developing countries. | Sustainable development—Developing countries. | Environmental law, International.
Classification: LCC HF1365 .G56 2022 (print) |
LCC HF1365 (ebook) | DDC 338.9/27091724—dc23
LC record available at https://lccn.loc.gov/2021022770
LC ebook record available at https://lccn.loc.gov/2021022771

ISBN: 978-0-367-74913-2 (hbk)
ISBN: 978-0-367-74926-2 (pbk)
ISBN: 978-1-003-16023-6 (ebk)

DOI: 10.4324/9781003160236

Typeset in Bembo
by codeMantra

This book is dedicated to the persons who contribute the least to global environmental problems, but suffer the most from those problems.

Contents

Editors and contributors

Editors

Kirk W. Junker holds the Chair of U.S. American Law at the University of Cologne, where he is also Director of the Environmental Law Center, Board Chair of the International Master of Environmental Science (I.M.E.S.) Program, and a Principal Investigator at the Global South Studies Centre. He also serves as an expert witness before German courts. Before joining the Law Faculty at the University of Cologne, Prof. Junker was Associate Professor of Law and Director of International Programs at the Duquesne University School of Law in Pittsburgh, Pennsylvania, U.S.A. He held the first cross-border academic position after the Belfast Agreement simultaneously being a full-time faculty member at both Queen's University of Belfast, Northern Ireland, and Dublin City University, Republic of Ireland. Earlier, he was a member of the Faculty of Natural Sciences of the Open University in the United Kingdom. Prof. Junker is an Adjunct Professor of Comparative and International Environmental Law to the Law Faculty at Université Paris 1 Panthéon-Sorbonne; the Institute of Environment Education and Research, Bharati Vidyapeeth University, Pune, India; and Sts. Cyril and Methodius University, Skopje, Northern Macedonia. Prof. Junker is licensed to practice law in Pennsylvania and before the federal courts of the U.S.A. For nine years, he practiced environmental law as litigation counsel to the Pennsylvania Department of Environmental Resources.

Paolo Davide Farah is a tenured Associate Professor at West Virginia University, Eberly College of Arts and Sciences, John D. Rockefeller IV School of Policy and Politics, Department of Public Administration, having joined the faculty in 2014. He is also an Adjunct Associate Professor of Geography at West Virginia University, Eberly College of Arts and Sciences, Department of Geology and Geography, and the Coordinator of the Eberly College Interdisciplinary Research Collaborative on Global Challenges and Local Response Initiatives. He is the President and Director of gLAWcal—Global Law Initiatives for Sustainable Development. He is teaching and

researching in public policy and public administration, international law, climate change, international trade, business and human rights, social justice, sustainable development, and energy and environmental law and policy. Professor Farah is an expert in the interaction among trade, economic globalization, and non-trade concerns, such as sustainable development, energy, environment, and human rights. Prof. Farah was a Visiting Scholar (2011–2012) at Harvard Law School, East Asian Legal Studies Programme. As Scientific Director, since 2006, he has been coordinating the Summer Law Institute in China—Executive Education Training Programme held in China. He was an International Consultant and Legal Advisor for projects implemented for the United Nations Development Programme (U.N.D.P.), for the Italian Ministry of Economic Development and Commerce and for the O.E.C.D. Since 2018, Professor Farah has been an elected Board Member of the European Society of International Law (E.S.I.L.) and since 2016 he has been the Chair of the E.S.I.L. Interest Group on International Environmental Law (elected for an additional term until 2024). He is also the Chair of the American Society of International Law (A.S.I.L.) Interest Group on International Environmental Law and the Chair of the American Society of International Law (A.S.I.L.) Interest Group on International Law and Technology. From 2017 to 2020, he was Chair for the A.S.I.L. Interest Group on Intellectual Property Law. Professor Farah is also an Appointed Member of the International Law Association—I.L.A. Committees on Sustainable Development and the Green Economy in International Trade Law and I.L.A. Committee on Role of International Law in Sustainable Natural Resource Management for Development.

Contributors

Tamuna Beridze is a Doctoral Candidate at the University of Vienna, European Union Law and International Law Department. Her doctoral thesis concerns the compatibility of the EU's external policies in the Free Trade Agreements with the international commitments of the Member States within the field of investment and trade law. Along with her Doctorate, Beridze works for the Energy Community Secretariat Legal Unit in Vienna, Austria. Assisting with the legal matters connected to transposition of the E.U.'s environmental law policies in connection with the E.U.'s renewable energy agenda in the Contracting States.

Richard A. Byron-Cox is Head of the Capacity Development and Innovations Office at the Secretary of the United Nations Convention to Combat Desertification (U.N.C.C.D.). Among his credits are conceptualization and designed of the U.N.C.C.D. Capacity Building Marketplace; conceptualization and management of the implementation of the world's first project aimed at achieving Land Degradation Neutrality; and design and development of the U.N.C.C.D.'s e-learning program. He is a lawyer

holding a Ph.D. in Public International law; a trained diplomat, international relations specialist, and linguist; and is an internationally recognized expert in the field of sustainable development. His writings cover various subjects, including international law, sustainable development, global environmental politics, and Caribbean affairs. Dr. Byron-Cox has lectured at universities on every continent including the Namibia State University, Yonsie University, University of Bonn, Oxford University, the Hacettepe University, Kharazmi University, the University of Trinidad and Tobago, and many more. He is the author of the critically acclaimed historical novel, *Were Mama's tears in vain?*

Tsegai Berhane Ghebretekle is an Associate Professor of Law at Mekelle University College of Law & Governance, School of Law, in Mekelle, Ethiopia, where he teaches several courses, including public international law, environmental law, land law, environmental theories and principles, environment and development, and climate justice at the undergraduate and graduate levels. His research interests include sustainable development, corporate social responsibility, climate ethics and justice, and industrial pollution control management.

Winfried Huck (Dr. iur., University of Bonn) is a Professor for International Economic Law and European Economic Law at the Brunswick European Law School (B.E.L.S.) at the Ostfalia University of Applied Sciences in Wolfenbuettel, Germany. Huck also is Professor at the Chinese-German College for Postgraduate Studies (C.D.H.K.) of Tongji University, Shanghai, and corresponding member of the Society of Constitutional and Administrative Law in the Society of Jurists of Cuba. In 2019 he was accepted as Visiting Fellow at the Lauterpacht Centre for International Law (L.C.I.L.) at the University of Cambridge, and was appointed as Fellow at the Cambridge Centre for Environment, Energy and Natural Resource Governance (C-E.E.N.R.G.) at the Department of Land Economy, University of Cambridge. He is a member of I.L.A. and E.S.I.L. as well. His current research focus includes the Global Agenda 2030 and the effects of the Sustainable Development Goals (S.D.G.s) on different legal orders, A.S.E.A.N., CARICOM, Human Rights in International Economic Law, Investment Law, and related questions to Private Law.

Sanchir Jargalsaikhan is a political scientist, activist, and consultant broadly concerned with socio-economic development in Mongolia and in the Global South. Jargalsaikhan was recently a visiting scholar at the Emerging Subjects Project at University of College of London (U.C.L). His main area of research focuses on problems of late and uneven development, democratization process in post-socialist countries, issues of environment, trade, investment, poverty, and debt in the developing world. He has an interdisciplinary research agenda that combines political theory, global

political economy, and international law along with Central Asian and Russian studies.

George Nwangwu has two decades of experience spanning academia, legal practice, and consultancy in Nigeria and the United Kingdom. He was a lecturer in the Department of Commercial Law, University of Lagos, Nigeria. As an international consultant to multilateral institutions, he has been involved with issues in the fields of infrastructure/utilities regulation, infrastructure finance, project management and Public Private Partnerships. Dr. Nwangwu was a D.F.I.D./World Bank funded consultant with the Bureau of Public Enterprises where he held the following posts: Environmental Legal Adviser, Infrastructure Legal Adviser, Special Assistant to the Director General, and Head of the Strategy and Multilateral Relations Department. He has also served as P.P.P. Coordinator and Head of the P.P.P. Division, Federal Ministry of Finance, Nigeria. He was also a Special Adviser to the Coordinating Minister of the Economy and Hon. Minister of Finance on infrastructure finance and P.P.P.s. He is currently a Research Fellow at the Department of Mercantile Law, Stellenbosch University, South Africa.

Chidebe Matthew Nwankwo is a Barrister and Solicitor of the Supreme Court of Nigeria with ten years of legal practice experience. He holds an LL.B. from Igbinedion University in Okada, Nigeria; an LL.M. in International Economic and Trade Law from Brunel University in London, U.K.; and has been a member of the Nigerian Bar since 2008. Dr. Nwankwo also holds a Ph.D. in international law from Brunel University. He currently works at the Department for International and Comparative Law at the Faculty of Law, University of Nigeria, Enugu Campus. His areas of interest include International Economic Law, African Union Law, International Environmental Law, and Nigerian Land Law.

Daniel Neves Pereira graduated in Juridical and Social Sciences from the Federal University of Rio Grande do Sul in Brazil. He post-graduated on Fundamental and Consumer Rights by the Federal University of Rio Grande do Sul, Brazil. He also holds an LL.M. for International Human Rights as a Candidate in the Robert H. McKinney School of Law of Indiana University, Indianapolis, U.S.A. He is a member of the American Society of International Law (A.S.I.L.), the European Society of International Law (E.S.I.L.-S.E.D.I.), and serves as a Judge at the State Court of Rio Grande do Sul, Brazil.

Marek Prityi is State Adviser at the Slovak Ministry of Environment. Prior to that, he completed his doctoral research in the field of environmental comparative law at the University of Cologne, Germany. He completed a traineeship at the German Parliament and worked as a lawyer and contract analyst in Slovakia. He is a graduate of the Comenius University in Bratislava and Trnava University, Slovakia, and collaborated as

Research Associate with the organization gLAWcal-Global Law Initiatives for Sustainable Development. During his doctoral studies and in his capacity as Research Associate, he conducted research in the United States, India, and China. The views and interpretations are those of the author and do not represent the official position of the Ministry of Environment of the Slovak Republic.

Stella Emery Santana earned her J.D. at Faculdade de Direito de Cachoeiro de Itapemirim, Brazil, and received a Master's degree in business and economics focusing on international analysis at Federal University of Rio de Janeiro, Brazil. She further received a Master's degree in law and economics from Universidade Gama Filho—Rio de Janeiro, Brazil, where she wrote her thesis on the World Trade Organization and agriculture measures to promote a sustainable development in developing countries. Professor Santana holds a Ph.D. in environmental geography Federal University of Espírito Santo, Brazil. Her dissertation was on integrated river basin and coastal zone ecosystem management and governance. As a private consultant for international and environmental law issues, Professor Santana has been teaching these subjects since 2002 at Faculdades Integradas Espirito Santenses (F.A.E.S.A.) and has been the director of the international program that sends students from F.A.E.S.A. to McKinney School of Law in the U.S.A. Professor Santana has been the chairperson for the Espírito Santo state bar environmental commission for two terms. She worked with the president of the Espírito Santo Environmental Agency as the environmental and administrative law consultant for the Samarco mining dam breakout that occurred in November 2015.

Mrinalini Shinde is an Indian lawyer, and holds a B.A., LL.B. (Hons.) from National Law School of India University, an M.Sc. in Environmental Sciences from the University of Cologne, Germany and an LL.M. from the Goethe University Frankfurt, Germany. She is currently the Academic Manager of the International Master of Environmental Sciences (I.M.E.S.) Program at the University of Cologne, where she is also a Research Fellow at the Environmental Law Center. Previously, she has served as a Fellow in the Legal Affairs Programme of the U.N.F.C.C.C. secretariat in Bonn. She has practiced law as an Advocate in India, appearing in matters concerning environmental legal disputes and public interest litigation, including before the National Green Tribunal. She was also the Policy Associate at the global climate journalism non-profit Climate Tracker, Inc. Her areas of interest include comparative environmental law, environmental crime and criminal enforcement, international climate change law, and biodiversity law.

Xi Yu graduated from Paris II Pantheon-Assas University and holds an LL.M. in Environmental Law and Policy from University College London. Passionate about social entrepreneurship, he has previously advised social

entrepreneurs in the creation and management of their impact-focused projects in France and in Europe. His interest in policy-making has led him to take part in research commissioned by the European Social Enterprise Law Association (E.S.E.L.A.) and the European Venture Philanthropy Association (E.V.P.A.). Xi also works closely with local non-profits to reach out to underprivileged communities in the hope of spreading environmental and legal literacy. He is a member of the U.K. Environmental Law Association.

Foreword

I am exhilarated to provide a foreword to *Globalization, Environmental Law, and Sustainable Development in the Global South: Challenges for Implementation*, a book edited by Prof. Kirk W. Junker and Prof. Paolo Davide Farah, who are to be commended for their contributions to the field of Environmental Law and Policy.

Globalization has been the driving force for integration of world economy and trade. Although aspects of trade have been its focal point, environmental concerns have not been far behind. The global consensus for an Integrated Environmental Framework was felt with the Stockholm Declaration in 1972, issued by the United Nations Conference on Environment and Development, which was thereafter reiterated and deliberated holistically in the Rio Declaration in 1992. The strife for Sustainable Development has been ever continuing, with the conflict between needs for development and environment protection and conservation. The imposition of obligations based on principles of Common but Differentiated Responsibility and International Cooperation have been pivotal for the nascent success of the Global Environmental Framework. However, with the urge to declare a climate emergency in December 2020 by the U.N. Secretary General, efforts towards combatting the CO_2 emissions, and towards a global commitment to continue such emergency must progress until we attain zero CO_2 emissions.

The recent issue of Nigerian oil spill in the Niger Delta, where the Dutch Court in February 2021 ordered a leading multinational enterprise to make payments for compensation, has highlighted the traverse of environmental concerns and issues. However, the institution of a Bilateral Investment Treaty Arbitration against Nigeria, instituted by the entity for multiple lawsuits on the alleged environmental contamination before the International Centre for Settlement of Investment Disputes, has raised eyebrows on the implications of seeking environmental compensation vis-à-vis investment protection.

This book is a compendium of extensive research from authors from various jurisdictions concerning significant issues including, but not limited to climate change, energy security, environmental federalism, and environment risk management. The need for a synthesis of national legal frameworks to be integrated into a global framework is the need of the hour, where we see that

the world is in dire straits, and the contribution of every state is crucial to the protection of its environment.

This work categorically identifies the problems of globalization, wherein states have witnessed the gradual shift in the allocation and utilization of resources to becoming more private-centric, with unscrupulous exploitation of resources in an unplanned manner, with little or no regulatory intervention. The need for strengthening the legal framework of emerging economies is explicit, however, the problems associated therewith are multifarious and manifold.

The need for interweaving of economic progress with environmental conservation is well-elucidated in this work, including sector-specific analyses of the existing legal systems across E.U., A.P.A.C., and African States towards the development of global practices towards sustainable development. The degree to which the interface between environmental hazards and fiscal measures is highlighted in this work is noteworthy, testing such choices as whether countries would want to impose a carbon tax if there is an impact on inviting investment opportunities.

The authors in the book have succinctly provided the paramount significance to the need for sustainable development, criticizing the ill effects of globalization that have predominantly obliterated the environment, and altered the role of the emerging economies critically, requiring them to be less docile spectators, and undertake greater tasks and responsibility towards implementation of a robust environment protection legal framework.

With changing times, increased integration of economies, the postulates of liability between states and non-state actors need to undergo a dynamic transformation. Being in the transition phase, the quest for a stable and more suitable legislative and policy framework is imperative. The choice of alternative techniques of conservation poses us with a greater challenge of implementation and adaptation.

But as indicated in the Bhagvad Gita, one of the foremost ancient texts that promoted the concept of a globalized world with the concept of *"Vasudeiva Kutumbakam (the world is one family)": "karmanyevaadhikaaraste maa phaleshu kadaachana| maa karmaphalaheturbhuu maatesangotsvakarmani"* (We have the right to action for the protection of the environment, whether or not we are the recipients of the protected environment); thereby embodying the principles of Sustainable Development in the true sense in our actions for the rights of the future generation.

Dr. Sairam Bhat
Professor of Law,
Coordinator-Centre for Environmental Law,
Education, Research and Advocacy [CEERA]
National Law School of India University, Bengaluru

Preface

The seed from which this book grew was an international call for papers, made public through the academic networks of Global Law Initiatives for Sustainable Development (gLAWcal) in the United Kingdom, the European Society of International Law (E.S.I.L.) Interest Group on International Environmental Law, and the American Society of International Law (A.S.I.L.) Interest Group on Intellectual Property Law. The seed took root in a workshop, "Globalization of Environmental Law and the Role of Developing Countries towards Sustainable Development," co-organized by the Environmental Law Center (E.L.C.) at the University of Cologne, Germany, and gLAWcal, and hosted at the opening of the E.L.C. in Cologne. The workshop facilitated scholarly exchange as well as questions and comments from participants, altogether benefitting the quality of the ideas that eventually made it to this book.

From the gLAWcal call for papers and the joint ELC-gLAWcal joint workshop's roots, the project grew further branches of ideas and chapters from additional invited authors, including the theme of legal implementation. By the time the tree was fully foliated, all chapters had been peer-reviewed and edited to develop and complete the book's overall theme and subdivisions. Every semester, Professor Junker teaches either Comparative Environmental Law or International Environment Law at the University of Cologne, and every semester students from the Global South in those courses make the point that all countries have sources and institutions of environmental law, but their mere existence is of little use when they are not implemented. Thus it is clear that a book discussing environmental law issues in the Global South must include implementation as a theme, and not just discuss sources and institutions as though a new piece of legislation or a new institution is the answer to the problem.

Professor Farah teaches courses on International Energy and Climate Change Law and Policy and on Public Policy and Administration, featuring topics such as human rights, social, economic, cultural and environmental rights, environmental justice, health policies, indigenous people and traditional knowledge, intellectual property rights, and access to medicine—all very important issues for the Global South, at West Virginia University, John

D. Rockefeller IV School of Policy and Politics. His classes feature U.N. Model Negotiations where students play the role of different countries, including developing ones and in general the ones of the Global South, so the idea of this book benefitted from these conversations.

The official opening of the University of Cologne's E.L.C. (https://usrecht.jura.uni-koeln.de/the-environmental-law-center) on April 6, 2019 was an opportunity to put a signature on the enterprise that distinguishes it from other environmental law centers, and gives it usefulness and meaning through five features. First, practice informs theory and theory informs practice. Although our home is the university, it has members from legal practice, and it has contributed and continues to contribute expert opinions and *amicus curiae* briefs in legal practice. Second, the E.L.C. is international, with lawyer members from at least two countries from every continent, and nearly that many on the E.L.C. Advisory Board. Third, the E.L.C. invites insight from public and private concerns of environmental law. Fourth, it maintains that law is a part of culture and is to be practiced and studied as a part of culture, including the citizens whom law serves, not as a set of specialist practices separate from culture. Fifth and final, the E.L.C. is open to insight from all disciplines and thus also has a scientific Advisory Board. With little reflection, most would come quickly to the realization that an informed study and practice of environmental law without association with the natural sciences is not possible, but the E.L.C. equally makes that association with the social sciences and the liberal arts. The attitude with which the work of the E.L.C. is executed is made clear in its motto: "Strive to thrive, not simply survive." The E.L.C. book, *Environmental Law Across Cultures: Comparisons for Legal Practice,* Kirk W. Junker, ed. (Routledge, 2020) will be released in Spanish by the Pontificia Universidad Católica del Perú Press in 2021, and in Chinese by the Hohai University Press, Nanjing, in 2021.

Global Law Initiatives for Sustainable Development (gLAWcal) is an independent non-profit research organization (think tank) founded by Professor Paolo D. Farah and with a gLAWcal scientific committee in place (http://www.glawcal.org.uk/). Through research and policy analysis, gLAWcal sheds a new light on issues such as good governance, human rights, right to water, rights to food, social, economic and cultural rights, labor rights, access to knowledge, public health, social welfare, consumer interests and animal welfare, climate change, energy, environmental protection and sustainable development, product safety, and food safety and security. All these values are directly affected by the global expansion of world trade and should be upheld to balance the excesses of globalization.

In the past ten years, gLAWcal has promoted and successfully organized several events around the world, particularly in Europe, the United States, and Asia, partnering with various professional associations, such as the A.S.I.L. and the E.S.I.L., and institutions such as the E.L.C. at the University of Cologne. Many of these conferences and workshops have been carefully planned and later developed, having in mind a combination of factors such

as the academic impact, advocacy, and the outreach towards the broader audience, with the objectives of academic publication as peer-reviewed books and peer-reviewed journal special issues with various prestigious international publishers. Two book series have been established by gLAWcal: one on "Global Law and Sustainable Development" and the other "Transnational Law and Governance," both published by Routledge, edited by Professor Farah. In addition to these highly scientific and academic results, gLAWcal has also made these publications more accessible with the preparation of additional policy briefs rooted and based on the contents of these journal articles, chapters, and books, and available on the website, social media, and addressed and sent to policymakers and civil society representatives.

Part of the research leading to the results of this book has received funding from the People Programme (Marie Curie Actions) of the European Union's Seventh Framework Programme (FP7/2007–13) under Research Executive Agency (R.E.A.) Grant Agreement No 318908 (POREEN (2013–16)) entitled "Partnering opportunities between Europe and China in the renewable energies and environmental industries" within the results of the Research Team, Work Package Legal, coordinated by gLAWcal.

In keeping with one of the common features of both the E.L.C. and gLAWcal, the editors of this book proceeded from the twin bases that theory informs practice and that practice informs theory. By examining and presenting the law of sustainable development and globalization from perspectives of the Global South and emerging economies, the authors of this book have sought to re-inscribe meaning on the metal of "sustainable development," and thereby give value to the coinage.

Kirk W. Junker
Cologne, Germany
May 1, 2021

Paolo Davide Farah
Essex, United Kingdom, and
Morgantown, West Virginia, U.S.A.

Acknowledgements

We would like to thank Global Law Initiatives for Sustainable Development (gLAWcal) in the United Kingdom, as well as the European Society of International Law (E.S.I.L.), Interest Group on International Environmental Law, and the American Society of International Law (A.S.I.L.), Interest Group on Intellectual Property Law for providing a network through which to make an initial call for papers. In particular, Professor Farah would like to thank Dr. Chamu Kuppuswamy and E.S.I.L. and A.S.I.L. fellow colleagues and co-chairs, who had strongly supported his idea for the workshop leading to the book.

We would like to thank the University of Cologne, Germany, and its Faculty of Law for supporting the Environmental Law Center (E.L.C.) by providing staff and facilities for the workshop. In particular, we thank the E.L.C. volunteers who organized and orchestrated all the practicalities that made the initial workshop possible: General Manager Saskia Münster, Dr. Ryan Kraski, Lena Carduck, Michelle Quindeau, and Lukas Plenk.

Thanks are due to Professor Johannes Hamhaber and his more than one hundred student scholars from the Institute for Technology and Resources Management in the Tropics and Subtropics at the Cologne University of Applied Sciences for the sort of interdisciplinary collaboration that is essential to solve global environmental problems. Their workshop questions from the audience, suggestions, and ideas are all somewhere in the book.

Professor Junker would especially like to thank Saskia Militz of the E.L.C. for not only performing all the tasks of copy-editing, but also contributing to the development and organization of the book from beginning to end. He would also like to thank Dr. Dennis Agelebe and Adv. Mrinalini Shinde of the E.L.C. for substantial chapter review and editing, and thank Luka Vihuto, Claude M. Ngatchou, and Fabian Steinmetz from the University of Cologne for proofreading all chapter drafts of this book.

Professor Farah would like to thank his collaborators at gLAWcal and three of the gLAWcal scientific committee members for providing feedback during the development and writing of this book.

And finally, we wish to thank Hannah Ferguson and John Baddeley of Routledge for their support of the project at its inception, their patience with

the project throughout its development, and their tremendous assistance in bringing this book to its conclusion.

Kirk W. Junker
Cologne, Germany
May 1, 2021

Paolo Davide Farah
Essex, United Kingdom, and
Morgantown, West Virginia, U.S.A.

Abbreviations

A.A.A.A.	Addis Ababa Action Agenda
A.Cm.H.P.R.	African Commission on Human and Peoples' Rights
A.C.P.	African, Caribbean and Pacific Group of States
A.E.C.	A.S.E.A.N. Economic Community
A.J.U.R.I.S.	Association of Judges of the State of Rio Grande do Sul
ANAMCO	Anambra Motor Manufacturing Company
A.P.S.C.	A.S.E.A.N. Political-Security Community
A.S.C.C.	A.S.E.A.N. Socio-Cultural Community
A.S.E.A.N.	Association of Southeast Asian Nations
BiH	Albania, Bosnia and Herzegovina
B.P.O.A.	Barbados Plan of Action
B.R.I.C.S.	Brazil, Russia, India, China and South Africa
CARICOM	Caribbean Community and Common Market
CARIFORUM	Caribbean Forum
C.B.D.	U.N.- Convention on Biological Biodiversity
C.B.D.R.-R.C.	principle of common but differentiated responsibilities and respective national circumstances
C.C.P.	Common Commercial Policy
C.E.L.A.C.	*Comunidad de Estados Latinoamericanos y Caribeños*
C.E.T.A.	Comprehensive Economic and Trade Agreement
C.J.E.U.	Court of Justice of the European Union
C.N.O.O.C.	China National Offshore Oil Company Uganda
CO_2	carbon dioxide
COMECON	Council for Mutual Economic Assistance
C.P.	Contracting Party
C.S.R.	Corporate Social Responsibility
D.P.	Democratic Party
D.R.	dispute resolution
E.A.C.O.P.	East African Crude Oil Pipeline
EaP	Eastern Partnership
E.C. or EnC	Energy Community

E.C.E.S.A. Plus	Executive Committee of Economic and Social Affairs Plus
E.I.A.	Environmental Impact Assessment
E.I.S.	Environmental Impact Statement
E.P.A.	Environmental Protection Agency of the United States
E.P.O.E.P.	Environmental Protection Organs Establishment Proclamation
E.P.R.D.F.	Ethiopian Peoples' Revolutionary Democratic Front
E.S.C.A.P.	United Nations Economic and Social Commission for Asia and the Pacific
E.S.I.A.	Environmental and Social Impact Assessments
E.U.	European Union
E.U. E.T.S.	European Union's Emission Trading System
E.U.-A.A.	European Union Association Agreement
F.A.O.	Food and Agriculture Organization
F.D.R.E.	Federal Democratic Republic of Ethiopia
F.E.P.A.	Federal Environmental Protection Agency
G.A.	General Assembly of the U.N.
G.C.F.	Green Climate Fund
G.D.P.	Gross Domestic Product
G.E.G	Global Environmental Governance
G.I.F.	Global Indicator framework
G.N.P.	Gross National Product
G.O.	Guarantee of Origin
GoM	Government of Mongolia
G.S.T.	Goods and Services Tax
H.I.V.	Human Immunodeficiency Virus
H.L.G.-P.C.C.B.	Coordination and Capacity-Building for statistics for the 2030 Agenda for Sustainable Development
H.P.P.	Hydro Power Plant
I.A.C.H.R.	Inter-American Commission on Human Rights
I.A.E.G.-S.D.G.s	Inter-Agency and Expert Group on S.D.G. Indicators
I.D.P.	Internally Displaced Persons
I.E.A.	International Energy Agency
I.F.I.	International Financial Institutions
I.P.C.C.	Intergovernmental Panel on Climate Change
I.P.I.	Imposto sobre Produtos Industrializados Tax
I.U.C.N.	International Union for Conservation of Nature
J.E.F.T.A.	Japan-E.U. Free Trade Agreement
K.P.I.s	Key Performance Indicators
L.P.G.	Liquefied petroleum gas
M.B.E.	Multinational Business Enterprises
M.C.	Ministerial Council

M.N.E.T.	The Ministry for Nature, Environment and Tourism
M.P.R.P.	Mongolian People's Revolutionary Party
M.S.	Member State
M.S.I.	Mauritius Strategy of Implementation
N.D.C.s	nationally determined contributions
N.E.M.A.	National Environment Management Act
N.E.S.	National Environmental Statute
N.E.S.R.E.A.	National Environmental Standards and Regulation Enforcement Agency
N.G.O.	Non-Governmental Organization
N.I.E.S.V.	Nigerian Institution of Estate Surveyors and Valuers
N.I.I.M.P.	National Integrated Infrastructure Master Plan
N.N.P.C.	Nigerian National Petroleum Corporation
N.R.E.A.P.	National Renewable Energy Action Plans
N.R.S.E.	New and Renewable Sources of Energy
N.S.S.O.	the National Sample Survey Office
O.T.	Oyu Tolgoi
P.D.C.A.	Political Dialogue and Cooperation Agreement
P.E.S.A.	Panchayats Extension to the Scheduled Areas Act
P.F.I.	Privately Financed Infrastructure
P.H.L.G.	Permanent High Level Group
P.P.P.	Public-Private Partnership
R.E.	Renewable Energy
R.E./R.E.S.	Renewable Energy
R.E.I.N.T.E.G.R.A.	*Regime Especial de Reintegração de Valores Tributários para as Empresas Exportadoras*
S.D.	Sustainable Development
S.D.G.s	Sustainable Development Goals
S.E.R.A.C.	Social Economic Rights Action Centre
S.I.A.	Social Impact Assessment
S.I.D.S.	Small Island Developing States
T.E.U.	Treaty on European Union
T.F.E.U.	Treaty on the Functioning of the European Union
U.N.	United Nations
U.N.C.C.D.	United Nations Convention to Combat Desertification
U.N.C.E.D.	United Nations Conference on Environmental and Development
U.N.C.L.O.S.	United Nations Convention on the Law of the Sea
U.N.E.C.E.	United Nations Economic Commission for Europe
U.N.F.C.C.C.	United Nations Framework Convention on Climate Change
U.N.G.A.	United Nations General Assembly
U.S.S.R.	Union of Soviet Socialist Republics

V.A.T.	value added tax
V.F.M.	value for money
W.B.	Western Balkans
W.B.	World Bank
W.C.E.D.	World Commission on Environment and Development

Introduction

Paolo Davide Farah and Kirk W. Junker

"Globalization" is a word with many meanings. Some people say globalization is responsible for having lifted millions of people out of poverty over the past decades. Other people say that globalization is neocolonialism. All will agree that the processes that accompany globalization have had tremendous impacts on the environment. Commodification of the environment along with environmental degradation have led to an almost universal awareness of the negative effects of such crises as climate disruption. The conservation and restoration of the environment, as well as the protection of biodiversity are essential for human life, including its economic components.

The international community has responded to the challenge by shifting away from the Brundtland Commission's intergenerational concept of "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs"[1] to equating "development" with economic development under the New York Convention[2] and reserving a third and separate pillar for economics over and against social concern and the environment. However promising the concepts of "sustainable development" and "sustainability" may have been, they have become overused and meaningless. Like worn-out coins, they became just placeholders.

To re-inscribe meaning in the metal of sustainable development, the authors in this book examine environmental problems caused, facilitated, or exacerbated by globalization, as seen from the perspectives of the Global South and emerging economies. Investments, trade, and technological advances are key driving forces of transition in these countries. The economic development component (also known as "green-growth" policies) may be preferred by globalizing forces, which also regard it as most suitable to cope

1 Gro H. Brundtland, *Our Common Future: Report of the World Commission on Environment and Development*. (Geneva: UN-Document A/42/427, 1987) p. 16.

2 United Nations, Resolution adopted by the General Assembly, http://data.unaids.org/Topics/UniversalAc-cess/worldsummitoutcome_resolution_24oct2005_en.pdf(retrieved January 10, 2021).

DOI: 10.4324/9781003160236-1

with climate disruption, for example. With the globalization of economics comes some aspects of the globalization of law.

The globalization of environmental law that is currently under formation in the Global South addresses the integration of the ecological and economic components by analyzing the contribution of emerging and developing economies. Sometimes, environmental law is part of the solutions; sometimes environmental law is part of the problems. In this book, the terms "Global South" and "emerging economies" are included as alternative conceptualizations to the "developed" and "developing" countries. But this alternative conceptualization itself is a divide that enables globalization.

The Global South is no longer a passive actor in the environmental global discourse, but is proactively and assertively shaping, advancing, and furthering environmental law.[3] In these countries, environmental degradation is a new form of "poverty" that curtails and undermines the right to development and, in extreme cases, the right to life. Therefore, in these countries, we must look for innovative strategies and approaches to mitigate environmental crises. By the year 2100, the Global South will be 82.2% of global population with tremendous effects on the perception and framing of the priorities of the international community.[4] Not only because of population but also due to economic, social, and cultural development, the Global South merits attention.[5]

In the chapters of this book, the perspectives of the Global South and emerging economies are presented by lawyers from Brazil, Ethiopia, France, Georgia, Germany, India, Mongolia, Nigeria, St. Vincent and the Grenadines, and Slovakia. The authors are natives of either emerging economies, or of the Global South, or work extensively in those regions.

All of the book's themes are mentioned in the title: globalization, environmental law, sustainable development, the Global South, implementation, and challenges. Within the term "sustainable development" we find the word "development." As regards globalization, this word indicates that the world is still divided between developing and developed countries. If one allows this differentiation, then the implication is that the world is described only in terms of economy. However, the exclusive focus on the economy is too shortsighted, because without a healthy environment, an economy can hardly thrive. Moreover, as Indian public interest environmental lawyer M. C. Mehta has insisted, "Only when the environment is degraded or the people

3 For an analysis of China, see Paolo Farah and Elena Cima, eds, *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge, 2016).

4 Marcin Wojciech Solarz and Małgorzata Wojtaszczyk, "Population Pressures and the North–South Divide between the First Century and 2100," 36 *Third World Quarterly* (2015) 802, 812.

5 For a review of the debate of the potential of the Global South, see Kevin Gray and Barry K. Gills, "South–South Cooperation and the Rise of the Global South," 37 *Third World Quarterly* (2016) 557, 559–564.

ripped from their connection with the Earth, can they truly be considered poor."[6] Consequently, the concept of development must be expanded to include topics other than the economy, and to feature these other topics, and thus answer questions such as how a system can function if responsible states are not required to carry the burdens of degradation. Topics include investment in clean industries, trade in green goods and agricultural products, intellectual property rights, traditional knowledge, technology transfer, emerging technologies such as big data, climate disruption, energy security, food security, conservation of biodiversity, environmental restoration, development aid and trade facilitation.

As a political, economic, social, and legal organizing strategy, globalization tends toward a one-world system. Important questions to answer are: Whose world will that one world system resemble? Will it look like the Global South, the Global North, or a third way? If the one world is to be the Global North, what is the carrying capacity of the planet for the necessarily greater demand on limited resources that the Northern lifestyle will require upon achieving globalization? Even within the northern economy of the United States, the divide between the wealthy and the poor grows at an increasing rate.[7]

The processes that accompany globalization have undeniably taken a tremendous toll on the environment. As an economic strategy, the commodification of the environment has caused degradation resulting in such unintended results as global climate disruption. This, in turn, has an inevitable impact on people's health and thus on the value of a country's development. Environmental degradation is a new form of "poverty" that curtails and undermines the right to development and, in some cases, even the right to life. The pressure on developing countries and emerging economies to conserve resources and support sustainable development is therefore evident. Although they are no longer passive actors, and are proactively and assertively shaping the environmental law that is part of the global fabric, the rationale for doing so widely differs from that of the Global North. [8]

So far, the approach of multilateral development banks is to use and transplant institutions from the Global North in order to strengthen market forces, which continues a dependency relationship that smacks of neocolonialism. More recently, those banks have considered environmental protection. Too little attention is paid to local circumstances and to the different ethical underpinnings of development in these countries. The main question that this book attempts to answer is how to include the contributions of the

6 M. C. Mehta, *In the Public Interest: Landmark Judgements & Orders of The Supreme Court of India on Environment and Human Rights*, Volume I, (New Delhi: Prakriti Publications, 2009), p. xxiv.

7 Jane Mayer, *Dark Money* (New York: Anchor Books, 2018), p. 16.

8 Paolo Davide Farah, "Strategies to Balance Energy Security, Business, Trade and Sustainable Development: Selected Case Studies," 2 *The Journal of World Energy Law & Business* 1 (2020) pp. 4–5.

Global South in the sustainable development paradigm that proved to be so far ineffective. Reaching a balance between the Global North and Global South in globalized environmental law is of utmost priority for the international community.

If environmental law is to be globalized, will it just be a tool of enablement for a globalized Northern economy until, in the not too distant future, all of earth's resources are exhausted? If not, then globalized environmental law requires a different path than that taken by previous globalized environmental exploitation. For a globalized environmental law to be just and to sustain life in a truly global sense, it must benefit the developing and emerging economies, and benefit *from* those economies. Otherwise, states and cultures of the Global North are only attempting to fix environmental problems with the same rationale and instruments that in fact created the very same problems.

Implementation is another theme of the book. Experience demonstrates many times over that if "environmental law" is presented in the context of how it is experienced in the Northern Hemisphere, a student of law from the Global South is likely to say "we have constitutional provisions, legislation, and regulations, too, but they are not implemented." This edited collection reviews the difficulties in transplanting and implementing legal norms aimed at the management of environmental risks in the Global South.

The methods of the authors span from pure theory to original data collection in the field, with most contributions falling somewhere between. The book is organized into three parts. Each part's theme is presented by the authors largely through the concrete context of a representative country. In addition, a theme that is woven through every chapter is to ask how law can enable sustainable development, given the limited carrying capacity of the earth. Although it might otherwise be just, we know that it would be unsustainable if the Global South were to repeat the industrial economic practices that caused the environmental degradation. The book first covers the effects and impacts of the Global North on the Global South. It then moves the analysis to how the Global North shapes international law and the reactions and criticisms that have arisen from Global South countries. The final part addresses the proposed alternatives from the Global South to environmental law globalized from the North.

Part I, "The environment in the Global South during the globalization of 'sustainable development,'" describes and characterizes the status quo of environmental and economic problems in the Global South during the process of globalization. Some of those problems include redistribution of environmental burden on the public through over-reliance on the state in emerging economies, the transition to public-private partnerships, and extreme, uncontrolled economic expansion without effective environmental governance, and interstate independence through (transnational) environmental problems. This first part sheds light on how countries from the "Global South" lacked capabilities to reduce the negative environmental impacts of infrastructure planning and development, due in part to colonial dependencies. The contributions dissect the criticisms that arise from implementing transnational laws

and models of conduct without duly considering the specifics and peculiarities of host countries.

Chapter 1, "Managing environmental risks in privately financed infrastructure projects in Nigeria," gives special attention to the development of infrastructure and the investment mechanisms put in place that favor foreign investments. Against this background, George Nwangwu, with more than two decades of experience in public and private partnerships, as well as at the Federal Ministry of Finance in Nigeria, highlights the shift from pure public financing, in which environmental risk costs are passed to the public and borne by citizens, to private financing in which liabilities and environmental risks are accepted, negotiated, and mitigated with the involvement of private parties. Nwangwu describes types of risks usually associated with infrastructure, namely technical risk, construction risk, operating risk, revenue risk, financial risk, force majeure risk, environmental risk, and project default. The author explains how in all phases of infrastructure development, the environmental dimension is too often ignored. To specifically address environmental damages, environmental statutes and the law of torts are used in Nigeria. Nwangwu concludes that the transition to privately financed infrastructure projects has had a positive effect on environmental risk management in Nigeria and because private organizations have economic incentives to prevent environmental harms. Reduction of environmental degradation could be reached by addressing the environmental dimensions of mega infrastructure via the involvement of private actors. He points out the advantages and disadvantages during the era of complete state control, and offers the reader the specifics of public-private partnerships, including the concrete details of contracts in those partnerships for infrastructure projects.

In **Chapter 2**, "The curse of best practices: impact assessment in the context of the governance of extractives in Mongolia," political scientist and activist Sanchir Jargalsaikhan of Mongolia moves the analysis from infrastructure to a specific industry with relevant implications for the ecosystem. The author presents the case of mineral extraction projects in Mongolia as a case study of regional overview systems used to mitigate impacts of those projects. Mongolia often has been presented by the Global North as a successful example of a democratic transition in a hostile environment. From the perspective of a state in transition and having been a Soviet-dependent economy, he specifically points out that since the 1990s, over thirty environmental statutes, as well as several hundred environmental regulations and bylaws were approved, but enforcement mechanisms and bureaucratic capacity to implement the legal acts are both lacking. The notion of "best practices" was responsible for introducing the environmental impact assessment (E.I.A.) to Mongolia. Jargalsaikhan extrapolates a very important point from the E.I.A. experience in Mongolia when he notes that without sufficient personnel and structure, when a developing country borrows an environmental law tool like an E.I.A. from the economically developed countries, it does not function as intended, and becomes only window dressing for donors.

Chapter 3, "Extra-territorial litigation remedies: a case study of the East African Crude Oil Pipeline in Uganda," closes Part I by analyzing the actor that has most influenced the worsening of environmental conditions across the globe: multinational business enterprises (M.B.E.). The inability of states or the international community to control M.B.E. has had negative consequences on the protection of the environment and reduced the number of host countries that can implement sustainable development.[9] In Chapter 3, Xi Yu presents a case study in extra-territorial litigation remedies when he analyzes the East African Crude Oil Pipeline (E.A.C.O.P.) in Uganda. He notes that while foreign investors bring economic development opportunities to host countries, the harm caused to local communities, including diseases, torture of activists, and human rights violations, as well as harm to the environment, can well outweigh any economic benefits. Consequently, this chapter examines the prospects of access to remediation for victims of environmental injury caused by multinationals operating in the Global South. Using the E.A.C.O.P. and the subsequent case against Total Oil as illustration, he demonstrates that plaintiffs are effectively muzzled due to the fragile independence of the judiciary in host countries and the unwillingness of courts in home jurisdictions to recognize the liability of parent companies. The chapter also evaluates the implementation of a forward-looking statute recently enacted in France that aims to subject M.B.E. to more stringent environmental regulations in the Global South. However, effective compensation of people in parent company jurisdictions affected by environmental degradation in host countries is still in its infancy. Xi Yu demonstrates that current remedies are not enough, and the work of M.B.E. regarding corporate social responsibilities tends to be more a *façade* than a real change in the mindset and priorities of M.B.E.

Building on Part I, **Part II**, titled "Interfaces between developed and developing countries in environmental law," analyzes how tools and solutions shaped and crafted by the Global North are not so easily applicable in the Global South, where social, economic, and cultural factors greatly differ. A single-set solution to global challenges proves to be ineffective in several cases. While a particular governance model could work in the Global North, the same is not automatically true in the Global South, especially given the attitudes that were developed toward Northern governance ideas during colonialism. Flexible policies and experimentation should be therefore preferred as demonstrated by the four contributions. Part II presents more international perspectives through tools that have been in place during the process of globalization, but that have led to friction between developed and developing economies in environmental law. The authors in Part II analyze the extent to

9 Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," 7 *Transnational Environmental Law* (2018) 229, 233–239.

which international environmental law and development regimes can provide instruments to do more than copy Northern economic development patterns, and thereby offer positive alternatives in the Global South. This analysis includes the examination of existing agreements between the European Union (E.U.) and contracting states with regard to implementation. Globalization is shown to lead to interdependencies between the Global North and the Global South that are not only economic but also ecological.

In **Chapter 4**, "Sustainable development through environmental federalism in the case of Ethiopia," Professor Tsegai Berhane Ghebretekle considers whether the very structure of the state can lend itself to greater sustainability. After an explanation of why Ethiopia is an important biodiversity hotspot, Ghebretekle discusses the benefits and drawbacks of constitutionalizing environmental regulatory approaches and the mechanisms by which they operate. The "federalist" focus of recent constitutional developments in the country highlights the importance of improving the constitutional structures. Environmental federalism could benefit Ethiopia but still needs to be adapted to the specific needs of the country. This also does not mean that other countries of the Global South should blindly adopt a governance scheme that features a decentralized control system. Effectiveness of a particular governance model needs to be assessed case-by-case and with flexibility. To prove this point, Ghebretekle tests federalism in Ethiopia to determine whether various other forms of state structure are more likely to lend themselves to achieving the goal of sustainable development. He maintains that one must choose a concrete legal set of criteria by which to measure whether sustainable development is being met, because the term is overused in politics, economics, and other areas, and with the overuse, one loses the ability to test the meaning of the term.

From examining the federal system of government, the next chapter moves to a crucial topic: the regulation of foreign investments in the Global South. Chidebe Matthew Nwankwo, a Nigerian barrister and solicitor, examines both litigation and legislation in **Chapter 5**, "Diversification of mono-economies: How legislation manages the environmental impact of foreign investments in Nigeria." There, he and George Nwangwu discuss the diversification of mono-economies and the ways in which legislative controls manage foreign investments as regards their environmental impact. They note the environmental degradation in Nigeria since the discovery of oil in 1956. Then later, the world's turn to the production of oil from shale exposed the weaknesses of the Nigerian mono-economy. The almost total dependence of the country on oil prompted serious reflections on how to balance environmental degradation with economic concerns. Environmental legislation, such as the Environmental Impact Assessment Act of 1992 together with the establishment of the National Environmental Standards and Regulations Enforcement Agency (N.E.S.R.E.A.), have been put in place in the country to counteract the negative effects of oil exploitation. Nwankwo and Nwangwu discuss how all legal enactments are closely connected.

Infrastructure development and environmental legislation both find their roots in, and are shaped by, the petroleum-friendly legislation of the country. The country's colonial past and the *laissez-faire* approach to foreign direct investment influence not only environmental legislation but also the attitude of the judiciary towards environmental justice. The authors call for an examination of the adequacy of the extant legal system for the management of mega infrastructure projects within the context of sustainable development in Nigeria. The adequacy of statutes, vis-à-vis the environmental hazards that various phases of these mega projects pose, are examined to flesh out areas that require improvement. Nwankwo and Nwangwu examine the pronouncements of Nigerian courts on critical aspects of Nigerian mega projects and its socio-economic implications for future reference. The authors look to shift the focus in environmental law from the environmental hazards of oil and gas production towards greater attention to construction of mega projects and related operations.

Not only national, but also regional groups and organizations play pivotal roles during the globalization of environmental law. In **Chapter 6**, "Transformation of sustainable development goals in regional international organizations: Vertical effects, contested indicators, and interlinkages for the formation of environmental law," Professor Winfried Huck turns to the Association of Southeast Asian Nations (A.S.E.A.N.), the Caribbean Community and Common Marketplace (CARICOM), and the African, Caribbean, and Pacific Group of States (A.C.P.) for evidence and analyses. Due to their geographic location, these emerging economies are among the most impacted by climate disruption. Even if they do not share physical borders, they are all facing common challenges. As demonstrated by Huck, these organizations proactively participate and have an important role in defining the norms and procedures for the implementation of the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (S.D.G.). Despite the lack of funding from the international community, they are effectively including environmental protection in development strategies. Huck focuses also on the importance and utility of indicators, used on a global scale, to measure the adherence to these S.D.G. and the overall mission of the Global Agenda 2030. Huck notes that although the application of global indicators are not legal standards, they are economic tools developed and used by statistics offices all over the world. These indicators can provide a transparent and factual basis by which members of the international community can hold one another accountable under the auspices of the Global Agenda 2030, thereby helping to reduce corruption. The indicators used by international organizations provide a metric to measure adherence, and also a measure of legitimacy to the overarching goal of sustainable environmental protection. The S.D.G. regarding such things as climate change and drinking water do not stand alone but are interconnected among themselves and with specific expressions of human rights to quality education and gender equality, which are in turn also enshrined in the S.D.G. Huck concludes that there is a need

to formalize the creation of environmental standards based on a rule-of-law concept, justice, and strong institutions, as stated in S.D.G. 16 and to spell out the missing side of the equation: access to courts for groups and individuals.

In **Chapter 7**: "The implementation of the Paris Agreement through tax law: Examples from Brazil, Russia, India, China, and South Africa," Indian trial lawyer Mrinalini Shinde is writing from her experience in the Legal Affairs Division of the United Nations Framework Convention on Climate Change Secretariat. Shinde presents the current state of implementation of the Paris Agreement in selected countries. The Paris Agreement and the importance of involving all the relevant interested parties to build consensus are discussed in great detail. Compliance under the Paris Agreement is focused on the idea that only with an increase in a country's accountability and responsibility via the Nationally Determined Contributions (N.D.C.) can environmental degradation be reduced. Shinde reminds the reader that under the Paris Agreement, all parties, including those of the Global South and emerging economies, must communicate and periodically scale up their climate ambition through their N.D.C., in order to contribute to the reduction in global greenhouse gases, with a view towards achieving the global temperature increase goals set forth under Article 2 of the Paris Agreement. Shinde discusses some of the ways the N.D.C. are met by paying particular attention to taxation. Through taxation, Shinde integrates considerations of larger economic legislation and the provision for economic tools such as emission trading regimes and the consequent revenue generated from their taxation. Using a wide array of states, she evaluates different kinds of taxes that are deployed by states to achieve emission reduction targets across various sectors such as housing, transport, aviation, energy (both fossil fuels and renewables), manufacturing, and industry.

Whether the global challenge is poverty, biodiversity loss, aging population, or gender equality, when mitigation is not accomplished, adaptation should be prioritized. In some instances, regions of the E.U. have addressed environmental challenges in similar ways to that of East Asia or South America.[10] The character of regional ecosystems goes beyond state borders, and the same should be sought for the needed solutions. The development of a globalized environmental law means not only integrating Global South priorities and experiences in this discourse but also placing ecosystem needs at the center of this discourse. Recognizing the unsustainability of a globalized Northern economy and of the business as usual mindset, the authors in **Part III**, called "Alternatives to globalization in environmental law," specifically provide alternatives and different perspectives and experiences for addressing

10 Regional desertification sheds lights on the interconnected of the ecosystem. The greening trend could be found in regions such as Mediterranean Sahel and Northern China, which are usually addressed in an opposite and diverging manner: Ulf Helldén and Christian Tottrup, "Regional Desertification: A Global Synthesis," 64 *Global and Planetary Change* (2008) 169, 175.

globalization in environmental law. The authors present some alternatives through legal expressions of human and civil rights, environmental rights, and indigenous persons' rights, as well as concrete and specific legal tools to strengthen justice and rule-of-law institutions by providing access to courts for groups and individuals on environmental standards. Furthermore, precautionary principle practices such as E.I.A. are examined to determine the impact of legislative proposals, non-legislative initiatives, and the implementation and delegation acts in legal systems. In addition, the implementation of S.D.G. through domestic environmental law in emerging and developing economies is proposed as an environmental law alternative to economic globalization. The first two chapters of Part III offer the alternative of treating the Global South and emerging economies as partner states for the sake of the environment rather than as states to be governed for the sake of the economy.

In **Chapter 8**, "The contracting state's role in the energy community to build the European Union's envisioned sustainable future," Tamuna Beridze, a lawyer with the Energy Community Secretariat Legal Unit in Vienna, Austria, explains current developments within the environmental protection aspects of European Union Contracting States, focusing on the implementation processes of the E.U.'s renewable energy law and the need to achieve 2030 S.D.G. Beridze analyzes in detail the external governance model of the E.U. and alternatives employed in the energy sector by its members. The importance of reaching an effective energy transition is made clear from the analysis of legislation and of the concept of sustainable development. Trade in energy products is equally informed by core principles of E.U. law, but in some instances this results in a curtailment with neighboring countries that could adopt diverging approaches to energy production and distribution. The chapter develops both Part III and the book on the whole. Beridze argues that fulfilling commitments under internationally binding agreements, such as E.U.-Association Agreements, which had a rise in the E.U. neighboring countries, such as the western Balkans, Black Sea region, and Southeastern Europe in recent years, has crucial importance for the E.U. to achieve the goals envisaged within its external policies with other states, including emerging economies. Beridze further emphasizes the impact of China's increased financing of coal-based energy production projects in these countries, especially Bosnia and Herzegovina. Beridze uses the Western Balkan states of Northern Macedonia and Albania as examples of alternatives to previous energy and economic design choices. She adds the further example of her native Georgia, which recently signed more than 120 Hydroelectric Power Plant Memoranda, as an example of using rich hydroelectric capacity for adopting alternatives to previous energy and economic design choices. And finally, she examines N.G.O. complaints about lack of transparency and credibility of the governmental actions on the stage of issuing E.I.A. decisions.

Dr. Richard Byron-Cox is the Programme Officer for Capacity Development and Innovations at the Secretary of the United Nations Convention to Combat Desertification. A native of St. Vincent, Byron-Cox writes

from the perspective of the small island developing states (S.I.D.S.) of the Caribbean, with the environmental, ecological, social, developmental, and other challenges as depicted in Chapter 17, section G of Agenda 21. In **Chapter 9**, "Global environmental governance: A necessary pathway for sustainable development of Caribbean Small Island Developing States," Dr. Byron-Cox emphasizes that S.I.D.S. are virtually powerless in the international arena where economic, technological, and military power holds sway, yet their contribution to the climate crisis is negligible. Despite this, these same small island states suffer disproportionately from climate disruption and the worsening global environment through sea level rise, deadly hurricanes, and increasingly destructive droughts. Several initiatives have been put in place by the international community to guarantee one of the key but often neglected principles of international environmental law: common but differentiated responsibilities. These initiatives are neither sufficient nor effective in helping to meet the S.I.D.S. goals. Byron-Cox argues that, in order to meet these goals, a global environmental governance approach must be taken. He thus argues that for small island states to secure their sustainable development, there is need for more than the piecemeal implementation of instruments like the Barbados Programme of Action and the Small Island Developing States Accelerated Modalities of Action. Rather, these states must push the international community to accept the need for and practice of global environmental governance, based on international environmental law. In that sense, any one small island state is a legal indicator species of the world's sustainable environmental health and therefore must be included in designing a new international legal architecture, and should be part of any resulting environmental governance structure that results from such laws. For small island states, this is not a luxury or a matter of competition—it is a matter of survival.

The public participation of citizens is key to bringing the balance among social concern, economics, and the environment back to the center.[11] Marek Prityi, State Adviser at the Slovak Ministry of Environment (although he makes clear that his chapter presents only his personal scholarly views and interpretations and does not represent the official position of the Ministry) discusses in **Chapter 10** "Going beyond the law: The potential and limits of public participation in the context of sustainable development," Prityi discusses the nature of public participation and how to incorporate diverse opinions as they pertain to the core precursors to consensus building. Prityi maintains that public participation requirements constitute a firm part of environmental law across the world and represent one of the crucial preconditions for consensus-building in the context of projects with competing priorities, often including economic, social and environmental matters, which are all core components of the concept of sustainable development.

11 Margaret Stout and Jeannine M. Love, *Integrative Governance: Generating Sustainable Responses to Global Crises* (Routledge, 2018).

The inclusion of vulnerable and historically disenfranchised people in the decision-making process concerning environmental protection will help to generate consensus building on a global scale. Prityi addresses this in the context of the Global South and, more specifically, with discussions and examples from the Regional Agreement on Access to Information, Public Participation and Access to Justice in Latin America and the Caribbean, and the Escazú Agreement. In addressing the conditions that make public participation meaningful, Prityi presents practical examples of public participation practices from both developed and developing countries. These examples help to illustrate the specific approaches and actions that are being taken in these situations as well as how they compare and are effective in the broader, global scheme. Public participation can help to ensure responsible scientific responses and recommendations concerning the environmental problems and issues that are currently facing the Global South and the entire world. This chapter leads to the end of the book through an analysis across all states, rather than a case study, thereby encouraging applications of all the authors' points to more states and contexts. Prityi emphasizes distinctions among individual countries in public participation, so as to emphasize the relevance of public participation in the context of the current globalized world.

Sustainable development has not only been addressed through a focus on environmental protection. As introduced by Winfried Huck earlier, in Chapter 6, a human rights perspective and the linked need for a different and effective path for environmental protection is central to provide any meaningful alternative to the extant system. **Chapter 11**, "Environmental hazards and human rights violations: The case study of Presídio Central Prison in Brazil," connects environmental harm to humans at the point where the daily living conditions of those persons violates their legal human rights. The authors frame this problem by questioning what we consider to be our environment. Our environment is not limited to soil, water, and trees, but contains also the circumstances and setting in which marginalized human beings are forced to live their lives. Furthermore, the third pillar of sustainable development demands emphasis on social concerns. As a case study, Daniel Neves Pereira and Stella Emery Santana examine one of the largest prisons in Latin America: Presídio Central of Porto Alegre, Brazil. Prisoner's rights, as well as the treatment of prisoners, have been central for the spread of human rights in the Western world. This chapter ends Part III and the entire book by provoking the reader to emphasize the social pillar of sustainable development and to extend the categories in which we understand environmental law in three alternative directions. First, the chapter concerns the humanly built environment, not the natural "found" environment. Second, the chapter considers human rights law as an alternative to traditional environmental law to address wrongs taking place in the built environment, and third, the authors illustrate their points using prisons as the built environment and presenting prisoners as the humans whose rights are being abused. Presídio Central, located in the south of Brazil, was considered the worst facility in

the country by a legislative commission in 2008. The Association of Judges of the State of Rio Grande do Sul filed a claim in the Inter-American Court of Human Rights addressing human rights violations at the prison, most of which were related to environmental hazards. Pereira draws on his experience as a Judge at the State Court of Rio Grande do Sul, and Santana draws on her education in geography, economics, and law, as well as her teaching in law and her professional consulting work with the President of the Espírito Santo (state) Environmental Agency as the environmental and administrative law consultant in Brazil. Together, the authors remind the reader that a legal system, be it domestic or international, must enable justice for the members of the society, regardless of how the categories of intellectual cake are sliced. In the case study of Presídio Central prison, water infiltration, leaking, fungi, the nonexistent sewage system, overcrowding, human waste, rats, cockroaches, and extreme temperatures all constitute the prison's physical environment. Pereira and Santana subsume physical environment under international rules regarding prisoners' human rights and the environment by considering prisoners as a group of involuntary displaced persons. These environmental hazards are human rights violations not only of prisoners, but of employees, families, and the population living near the facilities. The authors also examine a case filed before the Inter-American Court of Human Rights and the implementation of its decision. Santana and Pereira conclude that as an alternative path to redress environmental damages, one can use the tools of human rights, including international or regional jurisdictions, to make it possible to execute in national courts the decisions of the Inter-American Court of Human Rights that identify environmental hazards, not only to compensate individuals' damages, but also to determine specific performance liability for environmental damages.

The audience of readers for our book is anyone interested in sustainable development law, environmental law, international environmental law, the relationship of environmental law to politics, or the relationship of law to development. Policymakers, students in later semesters of university programs, postgraduate students, and scholars will all find the book to be a useful resource. Because the book is written by authors from Asia, Africa, Europe, North America, and South America, almost any reader should be able to see connections with his or her own part of the world.

The wide range of topics includes investment in clean industries, trade in green goods and agricultural products, intellectual property rights, traditional knowledge, technology transfer, emerging technologies such as big data, pollution control, climate change, energy security, food security, conservation of biodiversity, environmental restoration, development aid, and trade facilitation. The authors connect this range of topics to domestic environmental law, comparative environmental law, and international environmental law with globalization and economic development. The authors bring their own experiences as diplomats, judges, barristers, solicitors, lawyers, advocates, activists, and administrators to the topics, which makes the book an educational

and interesting work for the discussion of environmental law in all facets of society.

The book could be a supplementary textbook for advanced undergraduate and postgraduate students, as well as a research source for scholars working in topics of sustainable development implementation in international or comparative environmental law, and the interfaces of those law topics with political science, international relations, and development studies. It gives new perspectives to familiar approaches through concrete examples by professional practitioners and through theory construction by academic researchers, and can thereby form the basis for further discussions and comparisons, as well as form the basis for changes in practices.

Part I

The environment in the Global South during the globalization of "sustainable development"

1 Managing environmental risks in privately financed infrastructure projects in Nigeria

George Nwangwu[1]

1.1 Introduction

From the mid-1980s to the present, Nigeria has been experiencing a privatization program through which over two hundred publicly owned assets that were hitherto owned by the government have been divested and sold to private sector entities.[2] The privatization program also included a reform program encompassing the liberalization and deregulation of several sectors of the economy.[3] Taking advantage of the liberalized economic environment, Nigeria subsequently engaged in a public-private partnership (P.P.P.) program to run in parallel to the privatization program.[4] Under the P.P.P. program, both existing and new infrastructure assets have been made concessions to private sector entities.[5]

Nigeria, like many countries of the world, turned to private finance to fund large infrastructure projects like roads, dams, ports, and railways, due principally to the paucity of funds.[6] These large infrastructure undertakings, however, come with many project risks, including significant environmental risks. Some of the environmental risks that are likely to arise as a consequence of these projects include air and water pollution, land contamination, and resettlement risks. Previously, when these large scale projects were funded through the public purse, the issues of environmental risks were less

1 Dr. George Nwangwu is currently a Research Fellow at the Department of Mercantile Law, Stellenbosch University, South Africa.

2 See the Annexure to the Public Enterprises (Privatization and Commercialization) Act 1999 (2007 print) for a comprehensive list of the privatized assets.

3 This program was pursed through the Bureau of Private Partnership (B.P.E.).

4 This was enabled by the Infrastructure Concession Regulatory Concession Act 2005.

5 Several assets mostly in the transport and electric power sectors have been concessioned to private sector operators.

6 There are other factors that motivate governments to use private finance to fund infrastructure projects. For instance, it is said that P.F.I. projects promote a more efficient procurement regime, reduced life cycle costing, and had better value for the money, among other things. See for example: P.P.I.A.F, "Toolkit for Public-Private Partnerships in Roads and Highways," March, 2009, available at: https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-14.pdf (retrieved 2 November 2020).

DOI: 10.4324/9781003160236-3

pronounced, as the government quietly assumed the risks and therefore all potential liabilities that were likely to arise from the eventuation of such risks. These risks that were shouldered by the government were subsequently passed down to the public in the form of high remedial costs settled from the public purse and in worst cases, a badly degraded environment.

However, with the growth in the use of private finance for the development of infrastructure projects, the issues around environmental risks have become more prominent.[7] The need for the two principal parties to the infrastructure contract—the public and private sector parties—to identify environmental risks and manage them better have become more apparent.[8] Particularly, the likelihood of transferring environmental risks along with the infrastructure assets ensures that environmental risks are vigorously negotiated by the contracting parties. The private sector parties are typically more commercially orientated than the government and therefore warier of the sort of liabilities that arise from the eventuation of environmental risks. This is because the occurrence of the risk event is likely to lead to catastrophic commercial, penal, and even criminal liabilities. The inclusion of environmental risk in contracts for infrastructure has been highly beneficial to the environment. Therefore, as parties strive to make their projects commercially viable and avoid criminal liabilities, environmental issues are being properly identified and remedied or mitigated.

The main research question that this chapter explores is: Compared to traditionally procured infrastructure projects, do privately financed infrastructure (P.F.I.) projects lead to the better management of environmental risks in large scale infrastructure projects? This chapter explores the accuracy of this position by looking at how environmental risks were managed in some large projects funded and operated previously by the government. This is compared with how projects are currently being managed under P.F.I. projects. The chapter then analyzes some of the legal tools that are being employed by the parties in privately financed projects to identify, price, allocate, and mitigate environmental risks.

1.2 What are privately financed infrastructure projects?

To understand the term "privately financed infrastructure projects" as used in this chapter, it is important to distinguish the term from its direct opposite

7 For instance, the likely impact of climate change risk on water availability for power generation became relevant to the parties involved in the negotiation of the concession of government owned Kainji and Shiroro hydropower dams to private sector investors. This was taken into consideration in calculating the wholesale electricity tariff due to the investors.

8 This is evident from the detailed negotiated environmental liability clauses in some of the agreements discussed in this chapter. The intensive negotiations themselves could be attributed to the increased likelihood that environmental liability would be penalized where the asset is operated by private sector parties as opposed to where they are operated by the public sector.

"publicly financed projects," also referred to as "traditional" or "conventional" procurements. Publicly financed infrastructure projects are projects delivered by the government through its normal budgetary process. In this case, the government finances, constructs, or operates the project, or both constructs and operates the project, using its own funds raised through taxes or sovereign loans.[9] The key aspect of projects that are publicly funded is that government assumes the majority of the project risks.[10] Privately financed infrastructure projects, on the other hand, are projects that are delivered through the use of private sector funds. In this case, in addition to providing a substantial portion of the funds required to deliver the project, the private sector party typically may also assume responsibility for operating and maintaining the infrastructure asset on behalf of the user public. Under this financing structure, the private sector party assumes more risks than it would ordinarily assume if the infrastructure project was financed using public sector funds.

The most common type of privately financed infrastructure arrangement is the public-private partnership (P.P.P.). However, there are other widely used models such as joint ventures, contractor finance, and privatization.[11] It is not uncommon to see these different terms used interchangeably among practitioners as these arrangements are very fluid, typically morphing from one form to the other and sometimes subject to geographic and legal differences across jurisdictions.[12] However, using risk transfer as a measure, it is commonly agreed that P.P.P.s provide a middle ground between contractor finance, with minimal risk transfer, at one end, and privatization, with complete risk transfer, at the other.[13]

9 George Nwangwu, "The Management of Risks in the Procurement of Privately Financed Infrastructure Projects in Nigeria," in *Public Procurement Regulation in Africa: Development in Uncertain Times*, (Johannesburg: LexisNexis South Africa, 2020), p. 271.

10 These risks include most risks that are ordinarily assumed by the private sector party under P.F.I. projects. These include finance, construction, revenue, and environmental risks.

11 The differences between the models are determined by the level of risk transfer between the private and public sectors. Privatization occurs when the government completely divests all its interests in the asset, thereby transferring the entire risk to the private sector. Joint ventures are where the public and private sectors jointly own equity in the entity that owns and or operates the asset, thereby sharing risk. Contractor finance models allow the private partner finance the asset in return for periodic repayment of its investment by the public sector, in which case there is little or no risk transferred to the private sector party.

12 For instance, it is not uncommon to see practitioners and academics in the United States refer to all types of P.F.I. projects collectively as privatization. See for example: Drury D. Stevenson, "Privatization of State Administrative Services," 68 (4) *Louisiana Law Review* (2008), p. 128; Ellen Dannin, "Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance," 6 *Northwestern Journal of Law and Social Policy* (2011), pp. 47–105.

13 For further discussions, see for example: Jean-Paul Rodrigue, "Risk Transfer and Private Sector Involvement in Public-Private Partnerships," in *The Geography of Transport Systems*, found online at https://transportgeography.org/?page_id=8689 (retrieved 14 December,

Due to the popularity of P.P.P.s over all the other private finance methods and the fact that risk allocation and balancing of interests is more delicate under this model, the discussions that follow in the subsequent sections of this chapter will be centered mostly around P.P.P.s.

P.P.P.s refer to long-term contract relationships between public sector agencies and private sector entities, under which the responsibility for any or all of the combination of designing, financing, construction, management, and operation of public infrastructure and utilities that were traditionally undertaken by the public sector are contractually shared and jointly undertaken by both the public and private sector, usually in proportion to the kind of risks each party can best carry.[14] The allocation, transfer, mitigation, and management of risks are therefore central to the way P.P.P.s are structured and delivered.

1.3 Privately financed infrastructure and environmental risks

Environmental risks in large scale infrastructure projects take various forms, degrees, and duration. First, the scale of construction and earth moving equipment deployed in these large infrastructure projects is likely to lead to the degradation and pollution of the environment. Pollution may be in the form of air pollution, noise pollution, water pollution, or any combination of the three.[15] Large projects like the construction of dams may also lead to the displacement of people and disruption of livelihoods.[16] The likely severity of environmental risk will typically depend on whether the project is a greenfield project or a brownfield project.[17] For instance, the level of air pollution in a greenfield project with substantial construction using heavy earth moving equipment will usually be much more than would occur in brownfield projects.[18]

2020); Graeme Hodge, "Risk in Public-Private Partnerships: Shifting, Sharing or Shirking?," 26 *Asia Pacific Journal of Public Administration* (2004), pp. 155–179.

14 George Nwangwu, "The Legal Framework for Public-Private Partnerships (P.P.P.s) in Nigeria: Untangling the Complex Web," 7 *European Procurement and Public Private Partnership Law Review* (2012), pp. 268–277.

15 Nik Norulaini Nik AbRahman and Norizan Esa, "Managing Construction Development Risks to the Environment," in *Sustainable Living with Environmental Risks*, (Tokyo: Springer Japan, 2014), pp. 193–202.

16 Georg Caspary, "Assessing, Mitigating and Monitoring Environmental Risks of Large Infrastructure Projects in Foreign Financing Decisions: The Case of OECD-Country Public Financing for Large Dams in Developing Countries," 27 *Impact Assessment and Project Appraisal* (2009), pp. 19–32.

17 Greenfield projects are those that are built from scratch (e.g., new power plants and railway lines). Brownfield Projects, on the other hand, are existing infrastructure projects that require mere rehabilitation or renovation.

18 However, brownfield projects are also likely to have suffered historical pollution, effects and liability of which might manifest at a later date.

The types of environmental contamination resulting in liability can be divided into four categories:

a) onsite environmental contamination (e.g., soil contamination)
b) offsite environmental contamination (e.g., ground water aquifer contamination)
c) injuries and illness suffered by employees of a facility, and
d) damages to third parties (e.g., health problems borne by neighboring residents).

The parties in privately financed projects are aware of the likelihood of one or more of these liabilities arising and try to manage the risk. There are two obvious ways of managing environmental risks: through mitigation and by procuring insurance coverage.[19] Mitigation in the traditional sense means taking measures to minimize damage in the event the risk eventuates. The problem with this management choice is that it is not preventive in nature but merely reduces the impact of the risk when it occurs. Insurance also does nothing to prevent or reduce the likelihood of damage. Instead, it ensures that those who are adversely affected receive compensation after the insured event has occurred.[20] The most effective measures are therefore those that are preventive in nature. These can be achieved through upfront investments by firms in environmental performance measures or through compliance with government regulation.[21]

Regardless of the risk management strategy that is adopted by the parties in P.F.I. projects, it is usually expensive. Environmental liability prevention measures are only relevant after the infrastructure has been transferred to the private sector party, and therefore its further analysis is not relevant to the discussions that follow in the rest of this chapter. This chapter focuses on environmental risk and potential liability that had arisen before the asset is transferred to the private sector investor. It explores how contracting parties determine which one of them should bear the risk of that potential liability. This is only achievable through risk mitigation and insurance measures that the parties deploy to manage the incidence and severity of the risk. Environmental risk mitigation and insurance measures can be very expensive to execute. Also, in the case of insurance, most environmental problems lack accurate historical data that is necessary for traditional actuarial modeling.[22] Insurance companies therefore just include a cost for this

19 See Graciela Chichilnisky and Geoffrey Heal, "Global Environmental Risks," 7 (4) *Journal of Economic Perspectives* (1993), pp. 65–86.

20 Ibid.

21 Timothy Cuddihy, "Environmental Liability Risk Management for 21st Century," 25 *The Geneva Papers on Risk and Insurance* (2000), pp. 128–135.

22 See Howard Kunreuther and Paul Freeman, *Managing Environmental Risk Through Insurance,* (Berlin/Heidelberg: Springer, 1997).

additional uncertainty into the premiums they charge. For these reasons, parties in privately financed infrastructure projects structure their contracts in such a way as to control exposure to uncertainties and align the interests of contracting parties.[23]

1.4 Research methods

The approach adopted in this chapter is to compare how environmental risks were managed when projects were financed mainly through public budgetary allocations with when they were financed using private sector funds. To achieve this comparison, a sample of ten environmental audit reports of public assets were examined. These audit reports were prepared prior to the privatization of these assets and therefore reported on the environmental conditions of the assets when they were managed by government agencies. They also proposed some possible remedial actions to resolve the environmental issues that were discovered during the audit process.

To discover how environmental risks were managed during the process of transferring the assets to private sector parties, the accompanying asset sale agreements to the audit reports were also examined. This revealed how the environmental risks that had been earlier identified in the audit reports were allocated between the public and private sector parties and also how the risks were mitigated.

The audit reports and asset sales agreements that were examined in relation to this research were:

a) national parks: Chad Basin National Park; Cross River National Park; Gashaka Gumti National Park; Kainji Lake National Park; Kamuku National Park; Okomu National Park; Old Oyo National Park
b) bitumen and coal blocks: Okpara, Onyeama, Amasiodo, Ezimo, Inyi, Ogwashi-Azagba, Owukpa Coal Blocks
c) Pipelines and Products Marketing Company of Nigeria
d) The Nigerian Mining Corporation
e) electricity companies: six electric power generation, eleven electric distribution companies, and the Transmission Company of Nigeria
f) Anambra Motor Manufacturing Company (A.N.A.M.C.O.)
g) The National Theatre Complex Lagos
h) Trade Fair Complex Lagos
i) Tafawa Balewa Square, and
j) the Kaduna and Port Harcourt refineries.[24]

23 Weijian Shan, "Environmental Risks and Joint Venture Sharing Arrangements," 22 *Journal of International Business Studies* (1991), pp. 555–578.

24 These audits were all conducted between 2001–2007, and the outcomes were extensively reported in the 2007 Annual Report of the Bureau of Public Enterprises (B.P.E.), Abuja Nigeria, pp. 88–123.

To find out how project risks were managed when procuring P.F.I. projects, the concession agreements for the following assets were evaluated:

a) The Concession Agreement for Shiroro Hydroelectric Power Plc.
b) The Concession Agreement for the Kainji and Jebba Hydroelectric Dam
c) The Concession Agreements for agriculture silos
d) The Concession Agreements for the Zobe and Jibya Dams, and
e) The Concession Agreement for the Bakalori Dam.

1.5 Research findings

The environmental audit reports of the assets sold during the privatization era revealed serious historical environmental issues with the assets. The audit reports recommended a number of remediation activities to remedy the issues. In some cases, environmental risks that needed to be managed were also highlighted by the audit reports. However, the subsequent asset sales agreements that followed these audit reports did not provide any evidence that these identified risks were properly allocated, valued, or mitigated when the assets were transferred to private sector investors. A number of the assets were either sold on an "as is" basis or without any further consideration of the environmental issues.[25] One of the other significant findings was that most of the audit reports and asset sale agreements did not mention anything about transferring environmental permits and licenses upon completion of the sale of the assets. This was because these permits and licenses did not exist. The government entities that had operated these assets never applied for the permits. In a few cases where some of the audit reports referenced the existence of some form of environmental permits, the corresponding sale or purchase agreements were silent on the transfer of these permits with the assets.

The results obtained from the analysis of the transactions that were carried out during the privatization era[26] were compared with the results obtained under privately financed transactions.[27] The comparison showed that there was a remarkable difference regarding how environmental risks were managed under the two eras. In contrast to what had obtained previously, the contracts negotiated under privately financed transactions showed that the management of environmental risks was prominent and important to the parties. The contracts contained copious environmental protection clauses dealing with the management of environmental risks. In conclusion, it was

25 Where assets are sold on an "as is," basis they are sold along with all preexisting conditions. In this case, the seller basically disclaims all warranties whether express or implied relating to the condition of the asset.

26 As mentioned above, Nigeria had embarked on a privatization program since 1986, which really reached its peak between the late 1990s and early 2000s.

27 The enabling legislation allowing for P.P.P.s was passed in 2005.

generally obvious that parties under P.F.I. projects took the management of environmental risks more seriously.

The summary of the findings demonstrated that before the mid-1980s, most infrastructure in Nigeria was publicly owned and managed. Then, around 1986 when the country commenced a privatization program, the contracting parties failed to pay sufficient attention to environmental risks, and instead, preference was given to the management of other project risks, such as financial, commercial, and political risks. This situation was probably due to the erroneous belief that these other project risks affect the commercial valuation of the project more than "secondary" risks like environmental risks. However, this belief is misplaced, as a closer examination reveals that environmental risks have serious negative effects on the commercial viability of projects. Also, the apathy of the management towards environmental risks may also be traced to the historical apathy towards environmental risk by the government. It appears that this apathy towards the management of environmental risks was as a result of the absence of any serious penal or contract consequences for non-compliance. This was driven primarily by the weak regulatory oversight from environmental authorities. However, this situation is quickly changing under private infrastructure initiatives, as environmental regulation in the country has improved, and multilateral and development finance institutions continue to make environmental conditions of assets a prerequisite for funding. That change makes this phenomenon a prime example of the implementation of environmental law and sustainable development in the Global South during globalization.

1.6 Analysis of findings: management of environmental risk in Nigeria

A critical finding of this research as articulated in the previous section is that the management of environmental risks in projects in Nigeria has improved greatly under P.F.I. projects, above the level of management that was the case under traditionally procured infrastructure projects. This section elaborates on the reasons for this improvement.

1.6.1 Risk management

One of the possible reasons for the improvement is the nature of contract negotiations between the parties involved in P.F.I. project negotiations. The negotiations are both adversarial and collaborative. It is important to note that project risks, including environmental risks, arise in all projects, regardless of how they are procured. In publicly financed projects, it is sometimes erroneously assumed that these risks are solely assumed by the public sector, but in reality, they are passed on to citizens as asset users and taxpayers. In P.F.I. projects, risks are shared between the contracting parties. Therefore, under P.F.I. projects, the mechanism of contract negotiations typically

involves compromises on the quantity and quality of risks transferred to the different parties involved in those negotiations. The management of risks is also central to project finance, which forms the bedrock of P.F.I. projects. It is for these reasons that the awareness of risk has increased greatly under P.F.I. projects, taking it above the level that public procurement had been able to do to date.[28]

Another reason for the improvement in risk management is the private sector's propensity to manage risks better than the public sector. Risk itself is defined as any factor, event, or influence that could threaten the successful completion of a project in terms of time, cost, or quality.[29] Risk reflects the underlying uncertainty inherent in developing and operating projects and is therefore not entirely a negative event. Consequently, it can either be a threat or an opportunity.[30] To this end, successful private sector entrepreneurs manage risk in a manner that produces rewards, thereby converting the initial threat into an opportunity. The public sector on the other hand has not felt any incentive to take the management of risks seriously. This might explain the reason for the poor management of environmental risks during the period when the infrastructure assets were entirely under public sector management. There was little or no incentive for the public sector to manage environmental risks at that time.

1.6.2 Environmental liability

Another possible reason for the improved management of environmental risks under P.F.I. projects is the possibility that the private sector party to whom the asset is transferred may incur civil or criminal liability from historical environmental pollution. For this reason, the private sector investor is mindful of the type of environmental risks it assumes. Environmental liability in Nigeria is regulated by different statutes and the common law of torts.

Environmental statues

There are several laws that create environmental liability in Nigeria. However, the principal environmental statute is the National Environmental Standards and Regulation Enforcement Agency (N.E.S.R.E.A.) Act of

28 Darrin Grimsey and Mervyn K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*, (Cheltenham: Edward Elgar Publishing, 2007), p. 136.

29 R. Max Wideman, *Project and Program Risk Management: A Guide to Managing Project Risks and Opportunities (PMBOK Handbooks)*, (Newtown Square: Project Management Institute, 1992), p. 3; Akintola S. Akintoye and Malcom J. MacLeod, "Risk Analysis and Management in Construction," 15 *International Journal of Project Management* (1997), pp. 31–38.

30 Julie Froud, "The Private Finance Initiative: Risk Uncertainty and the State," 28 *Accounting Organizations & Society* (2003), pp. 567–589.

2007.[31] This statute replaced the Federal Environmental Protection Agency (F.E.P.A.) Act. The N.E.S.R.E.A. Act created the N.E.S.R.E.A., which is charged with the responsibility of environmental standards, regulations, and other policy guidelines. The Agency is however precluded from making regulations for the oil and gas sector.[32]

The N.E.S.R.E.A. Act empowers the agency to establish effluent limitations on existing and new point sources, for the protection of human, animal, marine, and plant life. Any person who violates the provisions of the Act commits an offence and shall, upon conviction, be liable to a fine or even imprisonment for a term not exceeding five years or to both a fine and imprisonment.[33] Section 27 of the N.E.S.R.E.A. Act deals with the discharge of hazardous substances into the air or upon the land and the waters of Nigeria or at the adjoining shorelines. According to the Act, every person who at the time the offence was committed controlled the body corporate shall be deemed to be guilty of such offence and shall be proceeded against and punished accordingly.[34]

From the foregoing, it is apparent that both the company involved in the pollution and the individuals in charge of such pollution are liable for the offence. Therefore, it becomes especially important that parties involved in the acquisition of P.F.I. projects should be mindful of the environmental risks that may be transferred to them along with the purchased asset. A person is however not liable for punishment under section 27 of the Act if he, she, or it proves that the offence was committed without knowledge or that he, she, or it exercised all due diligence to prevent the commission of such offence.[35] It supposes that an innocent purchaser of an asset without notice of the discharge of hazardous substances will not be liable under this provision.

There are other statutes and regulations that create criminal liabilities due to environmental pollution. These include the National Effluent Limitation Regulations;[36] the National Environment Protection (Pollution Abatement in Industries and Facilities Producing Waste) Regulations (1991);[37] the Federal

31 National Environmental Standards and Regulation Enforcement Agency (N.E.S.R.E.A.) Act 2007, Act No. 25.

32 Section 1 of the N.E.S.R.E.A. Act.

33 Section 31 of the N.E.S.R.E.A. Act.

34 Section 27(4) of the N.E.S.R.E.A. Act.

35 Section 27(4) of the N.E.S.R.E.A. Act.

36 These Regulations were made under Section 40 of the Federal Environmental Protection Agency Act. The regulations require every industry to install anti-pollution equipment for the detoxification of effluent and chemical discharges emanating from the industry and specify selected wastewater parameters for the industries.

37 These Regulations were made under Section 37 of the Federal Environmental Protection Agency Act. They provide for the control of discharge by industries in Nigeria. Under these Regulations, no industry or facility shall release hazardous or toxic substances into the air, water, or land of Nigeria's ecosystems beyond limits approved by the Federal Environmental Protection Agency.

Solid and Hazardous Waste Management Regulations (1991);[38] the Hydrocarbon Oil Refineries Act 2004;[39] the Oil in Navigable Waters Act 2004;[40] and the Oil Pipelines Act.[41] All these laws create one form of environmental liability or another, with some of them even creating strict liability.

The law of torts

In Nigeria, the liability for environmental degradation can also arise through a claim in tort. Despite being excused from Article 27 liability, a purchaser of a contaminated asset may be liable in tort for the contamination even where the purchaser was unaware of such contamination at the time of purchase.[42] Actions in tort may be brought under trespass where for instance the contamination migrates into adjoining properties,[43] under negligence where a land owner fails to exercise due care in handling the contamination and the other party suffers damage as a result,[44] or under nuisance (whether public or private),[45] where the polluting activity for instance interferes with another's use or enjoyment of the asset.[46] There are also acts that carry strict liability where the liable party needs not have been knowingly at fault for such contamination.[47] The private party that is taking over the operations and management of a hitherto publicly-owned asset or constructing infrastructure from scratch must be mindful of these potential statutory and tortious liabilities. These potential liabilities ensure that private operators and investors respect environmental requirements and appropriately manage infrastructure projects.

38 These Regulations were made under Section 37 of the Federal Environmental Protection Agency Act. The Regulations provide for the handling and management of solid, radioactive, and (infectious) hazardous waste.

39 Act No. 17 of 1965. This Act makes provisions for the licensing and control of the refining of hydrocarbon oils.

40 Act No .65 of 1965. This Act is to implement the terms of the International Convention for the prevention of pollution of the Sea by Oil 1954 to 1962 and to make provisions for such prevention in the navigable waters of Nigeria.

41 Act No. 31 of 1965. This Act makes provisions for licenses to be granted for the establishment and maintenance of pipelines, incidental and supplementary to oil fields and oil mining.

42 In some cases, environmental liability is for the occupier or person in control of the asset. See S. Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades After the Koko Incident," 15 (1) *Annual Survey of International and Comparative Law* (2009), pp. 1–18; Edwin Obimma Ezike "Remediating Environmental Pollution Damages in Nigeria: Need to Adopt Principle of Absolute Liability," 3 *Petroleum Resource and Environmental Law Journal* (2011), pp. 1–30.

43 See the rule in *Rylands v. Fletcher* (1866) L.R. 1 Ex. 265.

44 See for instance, *Shell Petroleum Development Company of Nigeria Limited v Chief Otoko and others* (1990) 6 N.W.L.R.L. (part 159), p. 693.

45 See *Ifejika v Oputa* (2001) 11 N.W.L.R.L. (part 725), p. 583.

46 An action may be maintained under trespass or nuisance in this case.

47 See for example the rule in *Rylands v Fletcher, supra* note 43.

1.7 The mechanism for the management of risks

The previous section established that the propensity of the private sector party to manage risks better and thereby reduce the likelihood of environmental liabilities arising, lead to the better management of environmental risks under P.F.I. projects. This section looks at the general rules guiding contracting parties in P.F.I. projects in the management of environmental risks.

This management of project risk typically involves the following:

a) risk identification: the process of identifying all the risks relevant to the project;
b) risk assessment: the determination of the degree of likelihood of the risk and the possible consequences if the risk occurs;
c) risk allocation: assignment of the responsibility of the consequence of the risk to one or more of the contracting parties; and
d) risk mitigation: the process of controlling the likelihood of occurrence of the risk and or the consequence of the risk.[48]

There are also certain rules that specifically guide the allocation of risk to parties in P.F.I. projects. It is agreed that risk should only be allocated to a party who:

a) has been made fully aware of the risks that the party is taking;
b) has the greatest capacity to manage the risk effectively and efficiently (and charge the lowest risk premium);
c) has the capability and resources to cope with the risk eventuating;
d) has the necessary appetite to take the risk; and
e) has been given the chance to charge the appropriate premium for taking the risk.[49]

These rules are essential to the successful management of project risks and non-adherence may have catastrophic consequences. According to Ng and Loosemore:

> Not following these simple rules will compromise the success and efficiency of the project since it will produce higher risk premiums than necessary, increase the chance of the risk arising and the consequences if they do arise. Further inefficiencies can arise from confused responsibility for

48 Department of Economic Affairs, *National Public-Private Partnership Handbook, Department of Economic Affairs, Ministry of Finance, Government of India*, 2006, available at https://assets.publishing.service.gov.uk/media/57a08afa40f0b649740008b6/TI_UP_HD_Aug2010_Public_Private_Partnership_in_India.pdf (retrieved 4 March 2021), pp. 1–246.

49 A. Ng and Martin Loosemore, "Risk Allocation in the Private Provision of Public Infrastructure," 25 *International Journal of Project Management* (2007), pp. 66–76.

> monitoring and responding to risks; resentment for being forced to take them and denial, conflict and dispute to avoid responsibility when they do arise. In effect, by not following the above rules, the public sector is merely gaining the illusion of risk transfer, since it is likely that the risk will be transferred back to them in the form of higher risks, risk premiums and project problems.[50]

The management of environmental risks in P.F.I. projects is unique because it forms part of the project from inception to completion. As the study discussed above has shown, where government operated public assets in Nigeria, there was very little incentive to manage environmental risks. The government agencies operating these projects did not bother with obtaining requisite environmental permits or licenses, even where they were statutorily mandated to obtain them. Government agencies never bothered because there was no possibility of any penal or financial consequence for not managing environmental risks related to public assets at that time. As a result, there was no basis from which the regulators could hold them accountable. Public sector asset operators, who also happened to be the regulators, did not subject themselves to any form of regulatory oversight. This situation led to poorly managed assets from an environmental perspective with the biggest losers being the environment and ultimately the citizens.

The situation is, however, different where the private sector is responsible for the infrastructure assets, as they are compelled to obtain permits and licenses, and regulators have shown to be very keen to enforce non-compliance. This has led to better identification of environmental risks. The underlying structure of privately financed projects also means that there are two parties collaborating as partners but at the same time involved in a negotiation process that is slightly adversarial. This combination means that parties try to negotiate the best possible deal for themselves, which, if successful, leads to an agreement that both parties consider to be fair and acceptable to them. In the process of negotiating their contract, the parties agree as to whom a particular risk should be allocated and the pricing of this risk. The structure of these contracts also means that the party that bears a particular risk is incentivized to find ways of avoiding the risk or reducing the impact of this risk if it occurs. For instance, the party assuming the risk may decide to transfer the risk through insurance or subcontract it to another party. This sort of risk mitigation is only possible because the structure of privately financed projects encourages parties to whom risks have been allocated to take ownership of the risk and mitigate them.

Therefore, it is correct to conclude that contract clauses are the basic instruments for the transfer of risk in P.F.I. projects. Some of the clauses that are used to allocate risks are: indemnities, conditions, warranties, and force

50 Ibid.

majeure clauses. However, the contract only translates what has been agreed between the parties and must not become a substitute for conducting a proper procurement process that leads to the procurement of the right partners with requisite skills and competences to manage the risk. It must not also replace an atmosphere of cooperation and trust between the parties, where parties are only allocated risks that they can manage, charging only reasonable premiums. As Ward et al. pointed out:

> Successful and appropriate allocation of risk presupposes an atmosphere of trust between contracting parties and a clear mutual appreciation of all relevant project risks and their effects… in the absence of one or both of these guidelines, it is perhaps not surprising that the debate about the appropriate allocation of risk is often diverted to the investigation and clarification of the effectiveness of allocation mechanism such as contract clauses.[51]

It is also worth mentioning that there are several risk management devises that are useful for dealing with risks during the procurement stages of a project, especially during the feasibility studies stages. They are also valuable during contract negotiations. These devices like risk registers and risk matrices help in identifying and evaluating project risks to ensure optimal risk transfer and requisite mitigation. Where they are put to good use, the outcomes from the exercises are ultimately transferred into the concession agreements.

1.8 Contract management of environmental risks

Having established that environmental risks in P.F.I. projects are ultimately managed using contract clauses, the following discussions reveal the mechanics of how negotiated terms are reflected in contracts. It provides an introduction into how contract clauses are used as an environmental risks management tool.[52]

A well-drafted agreement involving the sale, lease, concession, or financing of a greenfield or brownfield asset is not complete unless it undertakes to allocate environmental liabilities. Typically, the private sector party prior to negotiating the asset sale or concession must identify any actual or potential environmental liability that is attached to the asset under consideration now or in the future. This is achieved through a proper environmental due diligence process or through an audit.[53] An audit will signpost likely environmental risks and liabilities that are associated with the asset under consideration. The parties then use a risk register or risk matrix to document the

51 Stephen C. Ward et al., "On the Allocation of Risk in Construction Projects," 9 (3) *International Project Management* (1991), pp. 104–147.

52 For a more comprehensive discussion, see Tahir M. Nisar, "Risk Management in Public–Private Partnership Contracts," 7 (1) *Public Organization Review* (2007), pp. 1–19.

53 See Section 2 of the Environmental Impact Assessment Act No. 86 of 1992.

identified risk. This exercise is useful to both parties as it will aid an informed negotiation process.

After the risks are identified, the parties then negotiate and allocate the risks between the parties. This is where the rules discussed by Ng and Loosemore above[54] are crucial in ensuring that the risk is allocated in a manner that ensures the creation of value for money (V.F.M.).[55] Typically, the negotiation process would involve agreeing on extensive representations and warranties. For instance, the public sector party may represent to the private sector investor that the asset is not contaminated with hazardous substances, thereby assuming the environmental risk. Where the audit report confirms that there are environmental issues with the asset, the parties may also attempt to negotiate remediation agreements where one party commits to undertake certain clean-up responsibilities after the contract's closing date. One of the parties may also negotiate an indemnity provision that assures that the other party will cover costs relating to the environmental conditions arising from operations or use of the assets prior to closing. Other typical clauses considered by the parties are "as is" clauses, releases, and pre-condition clauses. Other contract provisions that have been so far used in managing environmental risks in P.F.I. projects include indemnities, hold harmless clauses, exculpations, disclaimers, survival provisions, and releases.[56] The discussion that follows below is a general overview of some of these contract provisions. Many of the contract provisions are either used on their own or in combination with each other to achieve the desired result.

1.8.1 Representations and warranties

In most cases, especially for brownfield P.F.I. projects, the private sector investor would generally require the public sector concessionaire to give representations and warranties concerning environmental matters affecting the asset. A representation is an express statement of fact made by a party to a contract that induces the other party to enter into the contract.[57] A warranty is a promise that the representation is true.[58] In other words, in P.F.I. projects, representations and warranties confirm the existence of material conditions that have been declared by the public sector party and may now therefore be said to be within the knowledge of the private sector investor. The consequence is that the private sector party may not turn around on a future date

54 A. Ng and Martin Loosemore, *supra* note 49.

55 In simple terms, V.F.M. under P.F.I. projects means achieving optimal combination of costs and benefits to ensure that the citizens using the services delivered with the asset benefit. See Tahir M. Nisar, "Value for Money Drivers in Public- Private Partnership Schemes," 20 (2) *International Journal of Public Sector Management* (2007), pp. 147–156.

56 Penny L. Parker and John Slavich, "Contract Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On," 44 (4) *SMU Law Review* (1990), p. 1349.

57 See Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 1996, p. 275.

58 Ibid, p. 151.

and claim to be unaware of the existence of the material conditions that are the subject matter of such representation or warranties.

Typical environmental representations cover matters such as past use of the facilities, hazardous materials present onsite and actions or claims by the government or private parties relating to environmental compliance or clean up. In practice, the public sector party would resist making too many representations or warranties and insist that the private sector investor rely on the results of any environmental due diligence processes or audits carried out by the private sector party. The parties may retain, allocate, or transfer environmental risk by capping the effect of their representations and warranties. For example, the party making the representation or warranty might limit the survival period of such representations and warranties or restrict the use of the representations to only the immediate parties, as opposed to extending it to their successors.[59] The party making the representation or warranty may also require that any amount of claim for breach of warranty exceeds a certain threshold before the beneficiary of such warranty becomes entitled to compensation.[60]

Representations and warranties, if used properly, have several advantages. For instance, they can identify and qualify the environmental liabilities, allocate risks, and adjust the concession price. They will also help the parties to the contract organize their disclosure records and enable the private sector concessionaire to streamline its due diligence process by focusing only on matters where it assumes the risk.[61] The concessionaire is able to do this because of the assurance that if the representations are untrue, then it can bring a breach of warranty claim.[62] Representations and warranties may also be used by the public sector especially in greenfield projects to require the concessionaire to comply with certain national and international environmental standards in the construction and operation of the assets.[63]

1.8.2 "As is" clauses

In some instances, the public sector party may decide not to assume any of the environmental risks. This is very common in "red flag" high risk

59 See Will Pugh, "Getting What You Bargained for: Avoiding Legal Uncertainty in Survival Clauses for a Seller's Representations and Warranties in M&A Purchase Agreement," 12 (1) *The Journal of Business, Entrepreneurship and the Law* (2019), pp. 2–33.

60 This provision is used as a *de minimis* provision. This simply means that the courts will not concern itself with matters which the parties to the contract have considered to be trifles or too small.

61 This is the case since the public sector would have assumed the environmental risks relating to the aspects of the projects covered by the representations and warranties.

62 See the common law case of *Pilmore v Hood* (1833) 5 Bing N.C. 97.

63 This emphasizes the flexibility in the use of representations and warranties. See Will Pugh, *supra* note 59 for a comprehensive discussion of how representations and warranties can be utilized.

industries.[64] In these types of high-risk projects, the public sector party may employ an "as is" clause. This clause is generally a warning to the private sector investor that it should determine for itself that the asset is in an acceptable condition.[65] This clause, if properly used, usually recites that the private sector investor has had the opportunity to investigate the environmental conditions of the asset prior to contract conclusion and agrees to take the property "as is." It is important to note the correlation between the use of this clause and the price that the investor is willing to pay for the asset. This is because the investor would typically include a risk premium in valuing the asset to cover the possibility of the environmental risk eventuating in future since the investor would bear the risk.

There is not yet a local judicial interpretation on the effect of the use of this clause. However, there is a United States authority to the effect that merely inserting an "as is" clause into an agreement does not automatically transfer environmental liability to the party acquiring the asset. There must be a positive and unambiguous intention of the parties to do so. In the United States case of *New West Urban Renewal Co. v. Westinghouse Electric Corporation*,[66] a section of a sales contract entitled "Property Sold As Is" provided that the property was to be sold in its present condition and that the seller would have no obligation to alter, restore, repair, or develop the property. The court held that this "as is" provision did not automatically transfer liability for site contamination to the buyer, noting that the agreement was silent regarding allocation of environmental liability. The court rejected the argument that the buyer was a sophisticated developer that knowingly assumed liability for environmental conditions at the property. Nigerian courts are not bound by this decision; however, it may have persuasive value.[67]

It is suggested, therefore, that if it is the intention of the parties to transfer environmental risk and thereby potential liability, the parties must show an express intention to do so. An example of such an intention may be to insert this clause into the agreement: "*The concessionaire assumes all responsibility for any damages caused by the conditions on the asset upon transfer of title.*" This provision was employed in the U.S. case of *Niecko v. Emro Marketing Co.*[68] In this case, the purchase agreement not only contained an "as is" clause but also recited that the buyer assumes all responsibility for any damages caused by

64 These are industries that are more likely to generate serious environmental pollution. An example of a red flag industry is the oil and gas sector.

65 A good explanation of this clause was given by the Texas Supreme Court in *Prudential Ins. Co of Am v Jefferson Assocs.* 896 S. W.2d 156, 161 (Tex. 1995). According to the court: "The 'as is' negates causation essential to recovery of all the theories (plaintiff) asserts-D.T.P.A. violations, fraud… negligence and breach of duty of good faith and fair dealing. Thus, Plaintiff's injury could not have been caused by (defendant)."

66 U.S. District Court for the District of New Jersey, 909 F. Supp. 219 (1985).

67 It is not unusual for the Nigerian courts to follow foreign decisions where there is a lack of local precedent.

68 973 F.2d 1296 (1992).

the conditions on the property upon transfer of title. The court found that the buyer was liable for environmental conditions on the property not merely because of the "as is" clause, but also because of the specific assumption of liability language of the contract. It is also most likely that Nigerian courts will interpret this provision in a similar manner since in the absence of any ambiguities, Nigerian courts would prefer to give contract provisions or statutes their literal and ordinary meaning.[69]

1.8.3 Indemnities

An indemnity clause is an undertaking obtained by a party in a contract against the other party (or third parties) as a security against any future loss or liability arising from the activity that the indemnity seeks to cover.[70] Generally, indemnifications provide that one party to a contract promises to compensate or reimburse the other party for environmental losses or damages arising after contract close. Indemnities are very good tools for allocating environmental risks, as they can be used in a very flexible manner. For instance, in P.F.I. brownfield infrastructure projects, the concessionaire will typically require the public sector party to indemnify it against any liabilities resulting from the presence of any pre-existing contamination at the time of the transaction.

There are several options open to the party who wishes to mitigate the risk assumed through the use of an indemnity. Firstly, the party may seek to limit the effect of the indemnity with the use of time limits. For instance, the party's obligation to indemnify may be structured in such a manner that it decreases over a given time frame or may expire at the occurrence of a particular event or by effluxion of time. Secondly, the indemnity may be structured to only trigger after a certain financial threshold is met. Thirdly, the indemnity may also be subject to a financial cap or fourthly, structured in a manner that the indemnity given for known liabilities identified from the due diligence report is significantly different from those that are unknown.[71]

1.8.4 Release and waiver provisions

A release clause functions to waive or surrender a right, claim, or interest. In the context of negotiating environmental liability, the releasing party generally agrees not to seek from the released party damages arising out of environmental conditions in the property.[72] A release or waiver provision is particularly useful for the public sector party who has agreed to remediate

69 See *Niger Progress Ltd v N.E.I. Corp* (1989) 3 NWLR Pt.107, p. 68.
70 See Penny L. Parker and Slavich, *supra* note 56, p. 1349.
71 See Penny L. Parker and Slavich, *supra* note 56.
72 George W. Dent, "Limited Liability in Environmental Law," 26 *Wake Forest Law Review* (1991), p. 151–182.

certain environmental issues discovered during the due diligence process. Therefore, in exchange for an agreement by the public sector party to remediate certain environmental conditions (when the public sector prefers this course of action), the public sector party may obtain a full release from any future environmental claims that could be asserted by the concessionaire under any statute or common law.

1.8.5 Remediation agreements

Where there is evidence of the presence of adverse environmental conditions on a site or where the adverse conditions are discovered on the asset during due diligence, the parties may decide to enter into a remediation agreement. A remediation agreement compels one of the parties to perform certain environmental remediation on the property as a condition precedent to the contract conclusion, or as a condition subsequent to the contract conclusion.[73] The public sector party may choose to take control of the process and perform the remediation itself as opposed to allowing the private sector investor to carry out the remediation and then later be reimbursed. This may have the advantage of the public sector not having to pay for a concessionaire's excessive or ineffective remediation efforts. However, this strategy transfers the risk of remediation to the seller and is therefore not always advisable. The better option from a risk management perspective is for the public sector party to allow the buyer to undertake the remediation. The public sector party may, however, manage the process by inserting a cap on the cost of the clean-up or generally place a limitation on the level of clean-up that is carried out. For instance, the remediation may be limited "only up to the level that is required to satisfy regulatory agencies with jurisdiction over the matter."

Also where the private sector investor is responsible for the clean-up, it is advisable that the agreement specifies the standards that are required and imposes a duty on the investor to cooperate with public sector party with respect to the clean-up exercise. It is further advisable that the parties address issues like access, permits, and other issues regarding the public sector's ability to interfere with ongoing operations after concluding the contract. The remediation agreement is usually carefully worded and specifically addresses issues like the type of costs and expenses that are to be covered. For example, some of the items that are typically covered are whether interests, the value of losses, and oversight expenses are included as applicable costs.

1.9 Other environmental risk management strategies

There are other strategies that have been adopted by the parties in allocating and managing environmental liabilities in privately financed infrastructure

73 See Edwin Obimma Ezike, *supra* note 42.

projects. Some of these strategies are price reductions, indemnification of buyer's liability using reimbursement schemes, setting aside a portion of the consideration, insurance, and conditions precedent or subsequent.

1.9.1 Price reductions

The public sector party may agree with the private sector investor to discount the value of the investor's bid to a value commensurate with the cost of the remediation. A problem with this strategy is that if it is used at the early stage of contract negotiations, it is unlikely that investors have complete understanding of the full extent of the contamination. If this is the case, they would not be in the best position to forecast the extent of potential clean-up costs with a reasonable degree of certainty. The resultant effect is that the public sector party might end up paying far more than is necessary or far too little. In most cases, this strategy has been known to be counterproductive for the public authority because the private sector investor usually tries to protect itself in such situations by adding a high-risk premium to the estimated clean-up cost.

1.9.2 Indemnification of buyer's liability using reimbursement schemes

As stated above, the public sector party may either do the clean-up itself or allow the private sector investor to do the clean-up and then the public sector will reimburse the investor later. The problem that is likely to arise when the public sector party commits to reimbursing the investor and the investor decides to be excessive and unnecessarily aggressive in implementing the clean-up program. The public sector party may mitigate this by monitoring the clean-up, however, this may also create the additional problem of the public sector party incurring very high administrative costs for operating or monitoring the reimbursement program.

1.9.3 Setting aside a portion of the consideration

The parties may agree to set aside a portion of the concession fee paid by the investor (where this is applicable to the transaction) and earmark the funds for reimbursement of clean-up costs borne by the private sector investor. The parties may enter into an escrow agreement to provide the mechanism for managing this process. The escrow agreement is particularly useful to the concessionaire where it fears that the concession fees may be easily dissipated.

1.9.4 Insurance

The parties may also procure insurance policies to cover potential environmental risks. The problem here is to determine which of the parties is to bear

the premium for such policies and whether there exist appropriate insurance products within the Nigerian market to cover these sorts of risks. The Nigerian insurance market is usually not deep enough or sophisticated enough for some of these products.

1.9.5 Conditions precedent or subsequent

Parties may require certain studies or remedial actions as conditions precedent to the transfer of the asset. Where the private sector investor has agreed to take some of the environmental risks, the public sector party may require that the corrective or remedial plan, including agreed timelines, is annexed as part of the concession agreement. In this case, failure to comply with the plan may lead to the termination of the concession agreement and the return of the asset.

1.10 Conclusion

This chapter looked at how environmental risks are managed in large infrastructure projects. First, it evaluated how these risks were managed when government was solely responsible for procuring infrastructure projects, noting the absence of any risk management framework. This was attributed to the fact that the sole government ownership and management structure of these assets did not incentivize or compel responsible government agencies to manage environmental risks. However, when this era was compared with the situation where there was increased utilization of private finance to fund infrastructure, there was a remarkable difference. There was an increased willingness of the parties to manage environmental risks. The chapter found that the reasons for this were simply that the transaction structure of P.F.I. projects provided the right incentives for parties to collaborate in an adversarial manner through contract negotiations that encouraged and at the same time compelled the parties to take environmental risks more seriously. Also, the likelihood that the party acquiring the asset could potentially be liable for environmental liability arising from the historical use of the asset is also a factor that make P.F.I. project parties manage environmental risks better. Another major reason for the improved risk management under P.F.I. projects is the requirement by multilateral financing institutions that certain environmental studies be carried out and that issues flagged in such studies be dealt with before funding can be made available for projects.[74] This has

74 One of the frameworks employed by multilateral institutions to achieve this is using the Equator Principles. The Equator Principles themselves are a risk management framework created and adopted by financial institutions for determining, assessing and managing environmental risks in projects. See Christopher Wright and Alexis Rwabizambuga, "Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct:

helped focus the attention of investors on the management of environmental risks.

Apart from the overwhelming benefits to the environment, the management of environmental risk in P.F.I. projects reduces project economic costs, provides incentives for sound delivery of projects and reduces the likelihood for contract dispute or even renegotiations.[75] It was noted that these benefits are only attainable if the P.F.I. project contracts are drawn up in such a way that it takes into consideration most of the eventualities that may affect the environmental risk profile of the parties. Infrastructure contracts that fail to address environmental risks in a comprehensive manner are likely to raise the project costs and ultimately the cost of infrastructure services to the final consumers.[76] This chapter also looked at how some contract clauses have been employed to achieve better environmental risk management.

In conclusion, it is important to note that it is not in all cases that negotiations between contracting parties provide desired results. This is because effective contract negotiations require a level of skill or capacity that is not always available, particularly to the public sector party. In these cases, it may be useful to provide more prescriptive guidelines in policy and legislative instruments, instead of relying only on the negotiating skills of the parties. This will guide the parties through the contract negotiation process where there is a dearth of capacity.[77] There is also sometimes a need for standardization of P.P.P. contracts by creating templates that parties to the P.F.I. contracts can use. This leads to greater certainty and improves transparency.[78] However, it is also important to note that such standardization may lead to a greater deal of contract rigidity, which may be counterproductive.[79]

An Examination of the Equator Principles," 111 (1) *Business and Society Review* (2006), pp. 89–117.

75 Darinka Asenova, *Risk Management in Private Finance Initiative Projects: The Role of Financial Services Providers*, 2010.

76 Rui Cunha Marques and Sanford V. Berg, "Risks, Contracts and Private Sector Participation in Infrastructure," 137 (11) *Journal of Construction Engineering and Management* (2010), pp. 1–16.

77 Geert Dewulf et al., "What Are the Benefits of Standardized PPP Procurement Processes," Conference Paper delivered at the International Conference on Facilities Management, Procurement Systems and Public- Private Partnerships. At Cape Town South Africa, January 2012, available online at: https://www.researchgate.net/publication/267568995_What_are_the_benefits_of_standardized_PPP_procurement_processes (retrieved on December 14, 2020), p. 47.

78 Geert Dewulf et al., Ibid.

79 Martijn Van Den Hurk, *What's the Deal? Standardizing Contracts for Public-Private Partnerships*, (Antwerp: University of Antwerp, 2015), pp. 1–109.

Bibliography

Ab Rahman, Nik Norulaini Nik and Esa, Norizan. *Managing Construction Development Risks to the Environment: Sustainable Living with Environmental Risks*. Springer Japan, 2014.

Akintoye, Akintola S. and MacLeod, Malcom J. "Risk Analysis and Management in Construction." 15 *International Journal of Project Management* (1997): 31–38.

Asenova, Darinka, eds. *Risk Management in Private Finance Initiative Projects: The Role of Financial Services Providers*. LAP LAMBERT Academic Publishing, 2010.

Caspary, Georg. "Assessing, Mitigating and Monitoring Environmental Risks of Large Infrastructure Projects in Foreign Financing Decisions: The Case of OECD-country Public Financing for Large Dams in Developing Countries." 27 (1) *Impact Assessment and Project Appraisal* (2009): 19–32.

Chichilnisky, Graciela and Geoffrey Heal. "Global Environmental Risks." 7 (4) *Journal of Economic Perspectives* (1993): 65–86.

Cuddihy, Timothy. "Environmental Liability Risk Management for 21st Century." 25 *The Geneva Papers on Risk and Insurance* (2000): 128–135.

Dannin, Ellen. "Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance." 6 *Northwestern Journal of Law and Social Policy* (2011): 47–105.

Dent, George W. "Limited Liability in Environmental Law." 26 *Wake Forest Law Review* (1991): 151–182.

Dewulf, Geert, et al. "What Are the Benefits of Standardized PPP Procurement Processes?" Conference Paper delivered at the International Conference on Facilities Management, Procurement Systems and Public- Private Partnerships. At Cape Town South Africa, January 2012.

Froud, Julie. "The Private Finance Initiative: Risk Uncertainty and the State." 28 *Accounting Organizations & Society* (2003): 567–589.

Furmston, Michael. *Cheshire, Fifoot & Furmston's Law of Contract*. Butterworths, 1996.

Grimsey, Darrin and Mervyn K. Lewis. *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*. Edward Elgar Publishing, 2007.

Hodge, Graeme. "Risk in Public-Private Partnerships: Shifting, Sharing or Shirking?" 26 *Asia Pacific Journal of Public Administration* (2004): 155–179.

Kunreuther, Howard and Paul Freeman. *Managing Environmental Risk Through Insurance*. Springer, 1997.

Marques, Rui Cunha and Sanford V. Berg. "Risks, Contracts and Private Sector Participation in Infrastructure." 137 (11) *Journal of Construction Engineering and Management* (2010): 1–16.

Ng, A. and Martin Loosemore. "Risk Allocation in the Private Provision of Public Infrastructure." 25 *International Journal of Project Management* (2007): 66–76.

Nisar, Tahir M. "Risk Management in Public–Private Partnership Contracts." 7 (1) *Public Organization Review* (2007): 1–19.

Nisar, Tahir M. "Value for Money Drivers in Public-Private Partnership Schemes." 20 (2) *International Journal of Public Sector Management* (2007): 147–156.

Nwangwu, George. "The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web." 7 *European Procurement and Public Private Partnership Law Review* (2012): 268–277.

Nwangwu, George. "The Management of Risks in the Procurement of Privately Financed Infrastructure Projects in Nigeria." *Public Procurement Regulation in Africa:*

Development in Uncertain Times. Eds. Geo Quinot and Sophe Williams-Elegbe. LexisNexis South Africa, 2020.

Obimma Ezike, Edwin. "Remediating Environmental Pollution Damages in Nigeria: Need to Adopt Principle of Absolute Liability." 3 *Petroleum Resource and Environmental Law Journal* (2011): 1–30.

Ogbodo, S. Gozie. "Environmental Protection in Nigeria: Two Decades after the Koko Incident." 15 (1) *Annual Survey of International and Comparative Law* (2009): 1–18.

Parker, Penny L. and John Slavich. "Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On." 44 (4) *SMU Law Review* (1990): 1349–1381.

Pugh, Will. "Getting What You Bargained For: Avoiding Legal Uncertainty in Survival Clauses for a Seller's Representations and Warranties in M&A Purchase Agreement." 12 (1) *The Journal of Business, Entrepreneurship and the Law* (2019): 2–33.

Rodrigue, Jean-Paul. "Risk Transfer and Private Sector Involvement in Public-Private Partnerships." *The Geography of Transport Systems*. Ed. Jean-Paul Rodrigue. 5th ed., Routledge, 2020.

Shan, Weijian. "Environmental Risks and Joint Venture Sharing Arrangements." 22 (4) *Journal of International Business Studies* (1991): 555–578.

Stevenson, Drury D. "Privatization of State Administrative Services." 68 (4) *Louisiana Law Review* (2008): 128.

Van Den Hurk, Martijn. *What Is the Deal? Standardizing Contracts for Public-Private Partnerships*. University of Antwerp, 2015.

Ward, Stephen, et al. "On the Allocation of Risk in Construction Projects." 9 (3) *International Project Management* (1991): 104–147.

Wideman, R. Max. *Project and Program Risk Management: A Guide to Managing Project Risks and Opportunities* (PMBOK Handbooks). Project Management Institute, 1992.

Wright, Christopher and Alexis Rwabizambuga. "Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles." 111 (1) *Business and Society Review* (2006): 89–117.

2 The curse of best practices

Impact assessment in the context of the governance of extractives in Mongolia

Sanchir Jargalsaikhan[1]

2.1 Introduction

The implementation of social and environmental policies in the governance of extractives in developing countries has been relatively ineffective or in the worst case, even counterproductive. Over the past decade, development agencies have been mostly fixated on financial and management issues rather than environmental and social problems emanating from extractive industries.[2] More generally, this tendency has been structured and magnified by "good governance" policies of importing best practices of "getting institutions right." Primary examples of these "best practice" policies in the sector are the Environmental Impact Assessment (E.I.A.) and the Social Impact Assessment (S.I.A.). E.I.A.s are often considered to be the most comprehensive mechanisms for evaluating the potential environmental and social impacts of large-scale projects in developing countries. This is particularly disconcerting given ambitious developments such as the Belt and Road Initiative in the region.[3]

Most analyses seeking reasons for the weak implementation of E.I.A. have focused on legal regulation and procedural correctness. Also, the emphasis has been placed on capability that involves shortfalls in skills and essential competencies necessary for policy implementation. In other words, the debate has not been generally informed by theoretical approaches that focus on power, vested interests, and political aspects of different reforms. There is a need to explore why the formal regulation and administrative structures in Mongolia, which look like those of developed countries, do not yield the outcomes

1 Sanchir Jargalsaikhan is a political scientist, activist, and consultant broadly concerned with socio-economic development in Mongolia and in the Global South. Sanchir was recently a visiting scholar at the Emerging Subjects Project at University of College of London (U.C.L.).

2 Kari Lipschutz and Mark Henstridge, *Mapping International Efforts to Strengthen Extractive Governance*, (Oxford: Oxford Policy Management, 2013).

3 See, World Bank, "Belt and Road Initiative," *World Bank Brief*, 29 March 2018, https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative (retrieved 11 March 2020).

DOI: 10.4324/9781003160236-4

they were intended to produce. This chapter will identify capability traps, such as premature load bearing, where the government adopts new best practice mechanisms but lacks the capability to do those, and will analyze political aspects that hold environmental policies back, where institutions look like those of developed or modernized countries but evolve to fulfill other functions (which is sometimes referred to as "institutional isomorphism"). Furthermore, the author will interweave the experiences of companies, herders, and local officials who negotiate E.I.A.s as power relations and connect those to structural conditions and reforms, thereby providing a multi-level analysis of environmental governance.

2.2 Mongolian context

An important aspect that remains under-researched and under-theorized is how E.I.A.s are embedded in a country's politics and power relations and how the borrowing of well-intentioned best practice policies can cause undesired outcomes. Mongolia provides a compelling case of these contradictory developments. With the sudden crumbling of the Union of Soviet Socialist Republics (U.S.S.R.) and the Council for Mutual Economic Assistance (COMECON) in 1991, the country was forced to cope with significant social and economic challenges. The U.S.S.R.'s collapse with corresponding cuts of most funding proved to be an external shock of great magnitude. As a result, Mongolia underwent a democratic revolution and proceeded to build a whole new political, administrative, and ideological architecture. Drastic slashes to economic assistance from the U.S.S.R. to Mongolia from the late 1980s to the early 1990s, coupled with unemployment, hyperinflation, and the reduction of gross domestic product (G.D.P.) reduced the amount of money available for most governance programs that included environmental and social policy.[4] During the earlier stages of the democratic transition, Mongolia, along with many developing countries, was subjected to the so-called "shock therapy" reforms propagated by international financial institutions (I.F.I.). Despite these hardships, Mongolia has established a political system that meets most of the formal and procedural criteria for democracy.[5]

This is the main context and rationale behind reforms geared towards transforming a Soviet-style environmental system with its top-down structure into a more decentralized, demand-driven architecture. Since the 1990s, over thirty environmental statutes, as well as several hundred environmental

4 Morris Rossabi, *Modern Mongolia from Khans to Commissars to Capitalists*, (Oakland: University of California Press, 2005).

5 As a result, it has been often described as "an oasis of democracy" and unlikely success story of democratization. However, these accolades conceal fundamental issues of a country with weakening institutions, rising poverty and inequality, and rent seeking marriage between business and politics that have provided a fertile breeding ground for widespread corruption.

regulations and bylaws have been ratified. During this timeframe, Mongolian environmental governance has evolved congruously with the law of many transitioning countries and stands up well compared with international best practices. However, many studies have concluded that the Mongolian environmental governance system lacks the capability to effectively manage environmental problems experienced by the country.[6]

2.3 Environmental governance

The development of environmental governance in Mongolia has largely conformed to the legal norms and institutions of developing countries that were subject to development assistance. General environmental legislation was prepared and approved from 1992 to 1996. The norms and institutions to protect environmental resources are specified in the 1992 Law on Environment. Programs have operated both by supporting "the process of preparing the legislative framework" and "its implementation."[7] However, many studies have concluded that the Mongolian environmental governance system is stretched between the demands of balancing "environmental protection against dramatically increasing economic interests in the use of natural resources"[8] and consequently lacks the capacity to implement best practice policies.[9] Specific problems include structural and procedural deficiencies and poor quality of legislation; poor government administration of the environment, inadequate institutions, lack of effective community participation, and the failure to prepare environmental law around the sensitive ecological environment.[10]

For the past twenty-five years, Mongolia's economic development and its organizational structure have been based on infrastructure, agriculture, and energy sectors, and almost no attention has been paid to natural resource management, which cuts across all sectors of government.[11] It is well established that coordination between ministries and their corresponding agencies is crucial for effective management. A major drawback for environmental

6 Ian Hannam, "National Developments in Soil Protection in Mongolia," in *International Yearbook of Soil Law and Policy* (Berlin/Heidelberg: Springer International Publishing, 2016), p. 285–307.

7 Helle Munk Ravnborg et al., "Environmental Governance and Development Cooperation – Achievements and Challenges," Danish Institute for International Studies, 2013, Copenhagen, available at https://www.diis.dk/files/media/publications/import/extra/rp2013-15-environmental-governance_web_1.pdf (retrieved 29 December 2020).

8 Danaasuren Vandangombo, *Democratising the Environmental Impact Assessment in Mongolian Mining*, (University of Wellington, 2012).

9 Ian Hannam, "International Perspectives on Legislative and Administrative Reforms as an Aid to Better Land Stewardship," in *Rangeland Stewardship in Central Asia* (2017) pp. 407–429.

10 Ian Hannam, "International Pastoral Land Law," in *International Farm Animal, Wildlife and Food Safety Law* (Heidelberg: Springer, 2017), pp. 599–628.

11 Tumuriin Namjim and William Rozyci, *Economy of Mongolia: From Traditional Times to the Present*, (Bloomington: Mongolia Society, 2000).

management is the significant imbalance between the Ministry and Departmental organizational system and the distribution of individual laws and administrative functions and duties across respective organizations.[12] According to their mission, the Ministry for Nature, Environment, and Tourism (M.N.E.T.) is responsible for a number of principal environmental laws, strategic papers and programs, inter-sectoral coordination and international cooperation, mitigation of climate change impacts, monitoring, evaluation, analysis of respective laws, provisions, acts, programs, projects, and many others.[13] These enormous responsibilities present a difficult challenge for the Ministry, because it has no means effectively to administer these responsibilities due to significant financial, organizational, and human resource restraints.

This same problem applies to the main legislative body, The State Great *Khural* (Assembly) and its Parliamentary Committees. For example, the Parliamentary Standing Committee on Agriculture and the Environment[14] has the responsibility for an extensive array of environmental concerns along with its responsibilities to evaluate respective legal projects, individual programs, and potential international agreements. The facts that most members of parliament (M.P.) are assigned to several Standing Committees and that these committees do not have permanent research bodies under them, place severe pressures on these bodies. In addition, individual M.P.s oftentimes are not sufficiently competent to operate in multiple Standing Committees. As a result, the Ministry is pressured to cope with its environmental responsibilities nearly all alone.

2.4 Environmental impact assessment

Over the last thirty years, E.I.A.s have been advocated as the most effective environmental management and policy tool in developing countries and have been implemented nearly universally. Its institutionalization has progressively developed from being an instrument for assessing biophysical impacts on environment to being a policy instrument for decision makers.[15] Since the late 1990s, various sustainability approaches have been used as possible methods for impact

12 Ian Hannam, *Environmental Law and Institutional Framework Mongolia: UNDP Project Strengthening Environmental Governance in Mongolia*, (United Nations Development Program, 2009).

13 Devex, "Ministry of Environment and Tourism (Mongolia)," 2017, available at https://www.devex.com/organizations/ministry-of-environment-and-tourism-mongolia-126727 (retrieved 9 March 2021).

14 Since 9 July 2020, the Chair of the Standing Committee on Environment, Food and Agriculture is M.P. Kh. Bolorchuluun. See Montsame, "New Parliament's First Session Closes," 10/7/2020, available at https://montsame.mn/en/read/231012 (retrieved 9 March 2021).

15 Stephen Jay et al., "Environmental Impact Assessment: Retrospect and Prospect," 27 *Environmental Impact Assessment Review* (2007), pp. 287–300.

assessment starting from "adaptive environmental assessment"[16] and then going to "life-cycle assessment,"[17] and ending with "strategic impact assessment."[18]

A significant number of studies demonstrates that most E.I.A.s are failing to realize their intended social and environmental impacts due to weak procedural execution.[19] For example, some of these findings demonstrate a positive correlation between industrial mining and poverty exacerbation rather than the opposite. Most analysis of E.I.A. failings in developing countries has focused on legal and procedural correctness as well as on resource and capability shortcomings of regulatory bodies.[20] Nonetheless, despite widespread implementation of legal and administrative E.I.A. structures that resulted in the adoption of mandatory E.I.A.s for such things as large scale mining projects,[21] implementation is still very weak.[22] Considering these developments, various scholars[23] have turned to analyses of power and local context in a search for the factors that influence differing outcomes.

The lack of focus on power relations and politics in explaining E.I.A. performance in developing countries is based on a narrow set of assumptions that

16 C. S. Holling, *Adaptive Environmental Assessment and Management*, (Hoboken: John Wiley & Sons, 1978).

17 Canadian Standards Association, *Environmental Life Cycle Assessment, CAN/CSA-Z 760.2*, (Toronto: Canadian Standards Association, 1994).

18 Thomas B. Fischer, "Strategic Environmental Assessment in Post-Modern Times," 23 (2) *Environmental Impact Assessment Review* (2003), pp. 155–170.

19 Dieudonné Bitondo et al., "Evolution of Environmental Impact Assessment Systems in Central Africa: The Role of National Professional Associations," 2014, available at https://www.commissiemer.nl/docs/mer/diversen/os_evolution_eia_centralafrica_2014.pdf (retrieved 9 March 2021); Madeleine Marara et al., "The Importance of Context in Delivering Effective EIA: Case Studies from East Africa," 31 (3) *Environmental Impact Assessment Review* (2011), pp. 286–296.

20 For example: Rafique Ahammed and Nick Harvey, "Evaluation of Environment Impact Assessment Procedures and Practice in Bangladesh," 22 (1) *Impact Assessment and Project Appraisal* (2004), pp. 63–77; John Glasson and Nemesio Neves B. Salvador, "EIA in Brazil: A Procedures-Practice Gap. A Comparative Study with Reference to the European Union, and Especially the UK," 20 (2) *Environmental Impact Assessment Review* (2000), pp. 191–225.

21 Patrick Harris et al., "Assessing Health Impacts within Environmental Impact Assessments: An Opportunity for Public Health Globally Which Must Not Remain Missed," 12 (1) *International Journal of Environmental Research and Public Health* (2015), pp. 1044–1049.

22 Alison Clausen et al., "An Evaluation of the Environmental Impact Assessment System in Vietnam: The Gap between Theory and Practice," 31 (2) *Environmental Impact Assessment Review* (2011), pp. 136–143; Ram B. Khadka and Uttam S. Shrestha, "Process and Procedure of EIA Application in Some Countries of South Asia," 4 (3) *Journal of Environmental Science and Technology* (2011), pp. 215–33; Madeleine Marara et al., *supra* note 19.

23 Matthew Cashmore and Anna Axelsson, "The Mediation of Environmental Assessment's Influence: What Role for Power?," 5 *Environmental Impact Assessment* (2012), pp. 5–12; Anne N. Glucker et al., "Public Participation in Environmental Impact Assessment: Why, Who and How?," 43 *Environmental Impact Assessment* (2013), pp. 104–111; Maria Rosario Partidario and William R. Sheate, "Knowledge Brokerage-Potential for Increased Capacities and Shared Power in Impact Assessment," 39 *Environmental Impact Assessment Review* (2013), pp. 26–36.

emphasizes its basic theory. The basic assumption and the "theory of change" presume that rational actors in a straightforward policy process, where accurate scientific analyses of probable environmental and social impacts is provided to decision-makers, will automatically lead to better outcomes.[24] According to this linear model of policy-making, "a set of research findings or lessons shift from the 'research sphere' over to the 'policy sphere', and then has some impact on policymakers' decisions and practical programmes."[25]

Evidence-based policy analyses have become the primary example of this attitude due to their attempts to describe "what works" rather than developing an understanding of specific contexts and circumstances that can structure "what works."[26] When it comes to assessing a working system, there is no agreement on what counts as evidence.[27] While there are approaches, such as a "hierarchy of evidence" where certain research evidence (i.e., randomized control trials) is preferred as a gold standard, many policymakers have a more nuanced view about evidence and its use. According to this view, evidence quality is contingent on its relevance to policy problems and depends on "what we want to know, why we want to know it and how we envisage that evidence being used."[28]

Over the last two decades, development studies and related disciplines have debated the reasons why institutions that look like those in developed countries cannot function in the same way when established and implemented in developing countries. So for example, a key driving force to introduce E.I.A.s in the countries of the Global South relates to the activity of the I.F.I. to reproduce and replicate institutions that were developed in the West. Some research concludes that E.I.A. was a consequence of a particular set of power relations regarding the knowledge production in the international development industry's community of actors.[29] So for example, some research has observed that E.I.A. turned out to be an opportunity for the World Bank to strengthen its role as a leading knowledge broker for the development industry.[30]

24 Matthew Cashmore et al., "The Interminable Issue of Effectiveness: Substantive Purposes, Outcomes and Research Challenges in the Advancement of Environmental Impact Assessment Theory," 22 (4) *Impact Assessment and Project Appraisal* (2004), pp. 295–310.

25 Overseas Development Institute, "Bridging Research and Policy in International Development. An Analytical and Practical Framework," 2004, available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/198.pdf (retrieved 9 March 2021), p. 2.

26 Ray Pawson and Nick Tilley, *Realistic Evaluation*, (London: Sage Publications Ltd., 1997).

27 Paul Cairney, *The Politics of Evidence-Based Policy Making*, (Basingstoke: Palgrave Macmillan, 2016).

28 Sandra Nutley et al., "What Counts as Good Evidence? Provocation Paper for the Alliance for Useful Evidence," 2013, available at https://www.alliance4usefulevidence.org/assets/What-Counts-as-Good-Evidence-WEB.pdf (retrieved 9 March 2021).

29 Matthew Cashmore and Anna Axelsson, *supra* note 23.

30 Ibid.

Many studies that examine the effectiveness of E.I.A. systems around the world are conducted descriptively and mostly investigate only formal arrangements. Even when these studies investigate E.I.A. practice and highlight significant aspects such as the training of "project managers and technical specialists" and the role of informality,[31] crucial contextual factors concerning power relations at the local level are neglected. According to Professor of International Development, Brian Levy: "no simple reform dictum can substitute for in-depth, country-specific knowledge and informed judgement."[32] In other words, incremental policy design that is accustomed to local realities and existing institutions that are locally anchored may offer a resource on which to build formal rules. Developing countries are replete with informal rules and procedures that prevail over formal ones, which is a tendency that curtails the possibility of straightforward policy borrowing.[33] As a result, in developing countries the legislation, procedures, and guidelines aiding E.I.A. are not fully embedded within the prevailing socio-economic structure.

2.4.1 Environmental impact assessment framework in Mongolia

As of today, Mongolia is yet to join either the Aarhus Convention on Public Participation[34] or the Espoo Convention on E.I.A. in Transboundary Context.[35] This indicates an inadequate formal commitment to international environmental regimes, insofar as they concern E.I.A. The E.I.A. process consists of both screening and a detailed assessment. Screening is mandatory for authorization of project implementation or issuance of permits on land use for household purposes, the search for, and use of mineral resources and the general use of the natural environment. E.I.A. are conducted for projects that plan to use natural resources in the construction, reconstruction, or expansion of new or existing industries, services, or structures,[36] and are used

31 Anne Merrild Hansen, "SEA Effectiveness and Power in Decision-Making: A Case Study of Aluminium Production in Greenland," *Department of Planning and Development, Aalborg University* (2011); Anne Merrild Hansen et al., "The Significance of Structural Power in Strategic Environmental Assessment," 39 *Environmental Impact Assessment Review* (2013), pp. 37–45.

32 Brian Levy, *Working with the Grain: Integrating Governance and Growth in Development Strategies*, (Oxford: Oxford University Press, 2014), p. 50.

33 Matt Andrews et al., *Looking Like a State: Evidence, Analysis, Action,* (Oxford: Oxford University Press, 2017).

34 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, Denmark, 25 June 1998, *United Nations Treaty Series,* Vol. 2161, p. 447, available at https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf (retrieved 29 December 2020).

35 *Convention on Environmental Impact Assessment in a Transboundary Context*, Espoo, Finland, 25 February 1991, *United Nations Treaty Series*, Vol. 1989, p. 309, available at https://treaties.un.org/doc/Treaties/1991/02/19910225%2008-29%20PM/Ch_XXVII_04p.pdf (retrieved 29 December 2020).

36 Asian Development Bank, *Annual Report 2012* (Manila, 2013), p. 15.

for establishment and evaluation of the estimated environmental impacts of the project. The classes of projects subject to screening through E.I.A. are mining, heavy industry, the food industry, agriculture, infrastructure development, urbanization, defense, civil protection, water supply, water purification, refuse disposal, biological species research, transmutative living organism research, chemical toxicants, radioactive substances, hazardous waste, and protected areas. The main purposes of an E.I.A. in Mongolia are not only to assess, but to integrate the generation and dissemination of environmental information. For the screening procedure, the Mongolia E.I.A. system utilizes categorical exclusion criteria, which are lists of categorical criteria developed by the state agencies that aid in determining whether a proposed project must undergo detailed environmental evaluation.

Mongolia's law on E.I.A. ensures some rights of consultation. Projects that are required to undertake a detailed, cumulative, and strategic E.I.A. include some public consultation even though a term like "meaningful consultation" is not specifically mentioned in the E.I.A. regulations. And even though the law on E.I.A. has provisions calling for public involvement,[37] critical things remain absent. For example, Article 17.2 allows "public comments during the process of strategic assessments of national and regional polices that the government plans to adopt and development programs and plans to be implemented," but there is no definition of "the public," nor is it clear how these suggestions will be reflected in the assessment or which kind of public "opinion" will be taken into consideration.

2.5 E.I.A.: structural analysis

The conventional political science and international relations theories are based on assumptions of nation-states that exercise internal and external types of sovereignty as a basic unit. Yet, critical strands of international relations and political theory[38] hold that different levels of asymmetries between states have increased significantly. The critical factor in introduction of E.I.A. practice in Mongolia is the intensification of economic liberalization, globalization, and policy diffusion after the collapse of the U.S.S.R. and urgent drive of newly independent states to reimagine their identities and build new socio-political systems.

37 See Law of Mongolia on Environmental Impact Assessment, 30 December 2011, available at http://admin.theiguides.org/Media/Documents/LawEnvironmentalImpactAssessments.pdf (retrieved 9 March 2021), Article 7.7.

38 Robert W. Cox, "Social Forces, States and World Orders: Beyond International Relations Theory," 10 (2) *Millennium: Journal of International Studies* (1981), pp. 126–55; Stephen Gill, *Gramsci, Historical Materialism and International Relations*, (Cambridge: Cambridge University Press, 1993); Susan Strange, *The Retreat of the State*, (Cambridge: Cambridge University Press, 1996).

2.5.1 Locked between national and transnational: E.I.A. as policy borrowing

The increasing role of international organizations, non-governmental organizations (N.G.O.), and different policy actors are seen by many as eroding internal sovereignty and fundamentally changing the character of policy problems.[39] In Mongolia's adoption of E.I.A., bilateral donors and I.F.I.s were instrumental due to their abilities to both frame issues and extend policy consultation. In other words, globalization creates "issues" that are being defined as "problems" with a transnational dimension to them as well as "issues" that mobilize epiphenomenal cross-border publics and create transnational forms of politics. Consequently, research finds that in Yemen, Lebanon, Lesotho, and Mauritius, for example, donors have implemented E.I.A. frameworks "without sufficiently considering the specific context and capacities of the country."[40] As is evident from these countries' experiences, introduction of overly-ambitious E.I.A. legal frameworks that demand capacities lacking in host countries results in disembedded systems that do not work as intended, or work in opposite directions.

The case of Mongolia is a situation where ambiguity and bounded rationality prevailed within a context of necessity to create a totally new environmental policy architecture in the nascent democratic transition after the collapse of the U.S.S.R. Under time pressure and uncertain conditions, politicians tend to borrow so-called "best practices."[41] This was especially pertinent for a small open economy such as Mongolia, during a time of transition and institution building, developing in the context of domination by neoliberal institutions and ideologies. Many governments of post-socialist countries needed to make immediate policy decisions after the sudden dissolution of the U.S.S.R. To remain financially solvent and create new policy architectures aligned with liberal values, policymakers of these countries looked for recognized foreign policy inventions.[42] Policies that were already functioning elsewhere were regarded as legitimate bases for reforms.[43]

39 Hildy Teegen et al., "The Importance of Nongovernmental Organizations (NGOs) in Global Governance and Value Creation: An International Business Research Agenda," 35 (6) *Journal of International Business Studies* (2004), pp. 463–483.

40 Arend Kolhoff et al., "The Contribution of Capacities and Context to EIA Effectiveness in Developing Countries: Towards a Better Understanding," 27 (4) *Impact Assessment and Project Appraisal* (2009), pp. 279.

41 David Brian Robertson and Jerold Waltman, "The Politics of Policy Borrowing," 2 (2) *Oxford Studies in Comparative Education* (1992), pp. 25 ff.

42 Willbard Abeli, "Higher Education and Development: A Critical Nexus," 2 (2) *SARUA Leadership Dialogue* (2010), p. 9–18; Molly N. N. Lee, "Higher Education in Southeast Asia in the Era of Globalization," in *International Handbook of Higher Education*, (Berlin/Heidelberg: Springer, 2006), pp. 539–555.

43 Geoff Whitty, Sally Power, and Tony Edwards (1998) "The Assisted Places Scheme: Its Impact and Its Role in Privatization and Marketization," *Journal of Education Policy*, 13:2, pp. 237–250.

The succession of Mongolian governments (1992–1996, 1996–2000) had to be entrepreneurial to create institutional frameworks of environmental policy and implement specific laws. The Government of Mongolia (G.o.M.) abandoned the Soviet environmental model and started speaking the policy language of the donors in order to receive or borrow money from them. During that time, according to Satoko Yano of the United Nations Educational, Scientific and Cultural Organization, the G.o.M. tended to accept foreign initiatives when they were financially supported, but only some of them were adapted to the "Mongolian way."[44] Moreover, as has been noted in the post-sovereignty era of international public policy, "the state is not central, it is only one player transnationally."[45] Consequently, there is no point at which we can say policy is being implemented. The case of Mongolia illustrates this point: formal Mongolian policy legislation has just been the point when new Parliament and executives stated their preferences and commitment to pursue democracy, decentralization, and market-based reforms via the 1991 Constitution and objectives via sector laws and programs. Having set up a very broad vision of environmental governance, the G.o.M. went out to shape, influence, and negotiate with other non-state actors including the World Bank (W.B.).

These transnational institutions were, for the most part, responsible for shaping ideological aspects of reforms. The policy programs, for the most part, have been characterized "as voluntarily borrowed for fear of falling behind internationally."[46] However, in this atmosphere, it is difficult to distinguish between such things as borrowing and imposing, since donors like the W.B. attach decentralized environmental management reforms and related capacity building as part of their technical assistance programs and aid packages. Therefore, Mongolian policymakers' attempt at legitimizing their policies and desperate attempts to deal with sudden uncertainty coupled with external pressure from I.F.I.s combined to create a window for policy entrepreneurs who are trying to find the right time to propose solutions.[47]

2.5.2 Political settlement analysis of Mongolia

Mongolia's political system reflects its socialist past in several ways. One of the two main political parties, the formerly communist Mongolian People's Revolutionary Party, was able to keep most of its structures while re-organizing

44 Satoko Yano, "Overeducated? The Impact of Higher Education Expansion in Post-Transition Mongolia," 2012, available at https://academiccommons.columbia.edu/doi/10.7916/D8571K5N/download (retrieved 9 March 2021), p. 24.

45 Adrian Kay and Robert Akrill, "Ambiguity, Multiple Streams, and EU Policy," 20 *Journal of European Public Policy* (2014).

46 Gita Steiner-Khamsi and Ines Stolpe, *Educational Import: Local Encounters and Global Forces in Mongolia*, (Bastingstoke: Palgrave MacMillan, 2006), p. 160.

47 Paul Cairney and Tanya Heikkila, "A Comparison of Theories of the Policy Process," in *Theories of the Policy Process*, 4th ed. (London: Routledge, 2018), p. 319.

itself as a "center-left" political organization. Even though not all apparatchiks of the socialist period have remained within the Mongolian People's Revolutionary Party, the party has managed to retain many of its features such as wide-ranging network of local party offices all over the country that allows political power to be maintained through patronage networks that allows its continuous reproduction. The main other political party, the Democratic Party, has largely attempted to emulate this organization with a considerable level of success.

Another socialist legacy that persists to this day relates to the fact that substantial numbers of former party members were among the losers in the transition to a market economy. Most of them were not able to convert their political capital into economic wealth, thus directly contradicting the "political capitalism hypothesis,"[48] which argued that the former communist party members would be able to establish a new grand bourgeoisie. However, a legacy of political culture that has persisted is the top-down governance that naturally rewarded bureaucrats for loyalty and obedience, rather than accountability to the populace. This tendency legacy has been one of the central stumbling blocks for policy borrowing and the introduction of legal structures such as E.I.A. that rely on successful public participation.

Certain types of corruption are deeply embedded in Mongolian politics, and mineral rents coming from the extraction of the country's vast mineral resources encourages more of that behavior. Therefore, access to patronage networks is essential for control over the management of natural resources. The continued centralization of mining revenues was therefore a predictable outcome of the country's political economy and its evolution. The Mongolian state contains both formal and informal structures without the strict division between private and public spheres that is familiar to many "third world" developing countries. The main organizational structure can be tentatively defined as neo-patrimonial, where "relationships of a broadly patrimonial type pervade a political and administrative system which is formally constructed on rational-legal lines."[49] As a result, the defining feature of Mongolian politics is the pervasiveness of patron-client factions within and across all major political parties that use public offices for personal gains, kickbacks, and payment to allies. Thus, any policy implementation and its success depends on these above-mentioned factors.

2.5.3 E.I.A. governance through political settlements framework

The current political economy of Mongolia is characterized by big patrons who mostly depend on off-budget resources such as creation and distribution of special purpose funds, mining licenses, and other natural resource exploitation licenses, whereas their clients will be more be interested in getting

48 Randall G. Holcombe, *Political Capitalism*, (Cambridge: Cambridge University Press, 2018).
49 Christopher Clapham, *Politics in the Third World: An Introduction*, (London: Helm, 1985), p. 48.

public jobs and business opportunities from government procurement. The factors listed as contributing the most to corruption such as "conflicts of interest, lack of transparency, lack of access to information, an inadequate civil service system and weak government control of key institutions"[50] directly relate to features of patrimonialism. As of 2018, there were approximately 165 active companies that were accredited to conduct environmental audit and assessments. From them, 602 detailed E.I.A.s were approved in that year of which, approximately 100 were mining related documents. The sheer number of these companies compared to the number of proposed projects attests to the fact that the political economy of E.I.A.s in Mongolia is significantly different from those of more developed, or even fellow developing, countries. Only a few companies have relevant in-house expertise and sufficient political connections or clout to produce "bullet-proof" E.I.A.s that have a chance of approval by the relevant ministry.

In this situation, factional membership within a party, corporation, or informal network is most often a better and more "rational" strategy compared to formal political and legal activities. Whereas political capital, materialized by special privileges, was the main source of power during socialism, the importance of social capital has been rising during post-socialism due to the rent prone nature of the country's economy. This is especially pertinent for the intermediary classes since they supply the cadres of members of both formal and informal political organizations by mobilizing horizontally and vertically. Since these classes possess a number of different forms of capital, they "try to reshuffle this portfolio to get rid of forms of capital which are losing value and convert them into forms of capital which are more valuable."[51] For example, a member of the petite bourgeoisie relies on his *habitus*[52] to convert social and economic capital into informal social networks, subsequently connect with political parties and patronage networks which can then be usefully deployed to take advantage of new market opportunities. A glaring example of these conflicting and overlapping possibilities of rent seeking is a former high official who is still influential within political and administrative circles. To provide anecdotal evidence in support of the points made in this chapter, the author conducted his own interviews. Many of the interviewees informed that this particular high official runs an educational institution that trains environmental inspectors and other related professionals while many of his protégés sit on a committee that approves detailed E.I.A.s.

Almost all interviewees informed the author about prevalence of former (or even current) ministry officials' presence in assessment companies or their direct involvement with E.I.A. approval procedures. The field of

50 B.T.I., "Mongolia Country Report 2020," 2020, available at https://www.bti-project.org/en/reports/country-report-MNG-2020.html (retrieved 9 March 2021).

51 Gil Eyal et al., *Making Capitalism without Capitalists: The New Ruling Elites in Eastern Europe*, (London/New York: Verso, 2000).

52 Pierre Bourdieu, *The Social Structures of the Economy*, (Hoboken: John Wiley & Sons, 2005).

possibilities consists not of purely public or purely private institutions, but a mix of many differing ones. There is a dialectical interaction between *habitus* and institutional (both formal and informal) positions: new positions change incumbents, but new incumbents rely on their *habitus* to interpret how an institution ought to operate. However, there is a hard limit to *habitus* in Mongolia where there is a limited pool of qualified individuals who can possibly occupy key positions. Many of the interviewees complained that a handful of environmental specialists overlap their jobs on E.I.A. reports with personal stakes in its approval. The result is a creative interactive relationship between the characteristics of individuals who are recruited or retained in various institutional positions and the characteristics of those positions.

Another fact that undermines the purpose of E.I.A.s is the vested interest of the M.N.E.T. in E.I.A. approval. This concern is exemplified by a contradictory position that the M.N.E.T. holds within the overall E.I.A. framework. Currently, E.I.A.s are being conducted after relevant exploration licenses are issued but before the mining process begins. In this context, the Ministry of Environment and Green Development's (M.E.G.D.) position as a member of a special council that is responsible for final mining approvals is contrary to its mandate to approve environmental plans. In this respect, it is vital to scrutinize the political economy of E.I.A.s—the formal and informal relationships among "politicians, policy-makers, lobbyists, donors, business people, leaders of cooperatives or associations, and members of regulatory institutions"[53] responsible for the governance of natural resources.

There are other significant issues pertaining to E.I.A.s. A recent United Nations Environmental Program report highlights the fact that a significant number of detailed E.I.A. reports are copied and pasted, of very low quality, and most importantly, have failed to incorporate environmental concerns into decisions.[54] This is consistent with prevailing criticisms of E.I.A.'s rational model, based on decision-making processes that incorporate all necessary environmental information about a project, but that overlook its political nature.[55] The standard remedies coming from I.F.I.s or consultants are to create additional sets of statutes or regulations or to require more training and capacity building programs, none of which has been demonstrated to have positive effects, and some of which have been demonstrated to have counterproductive effects.[56]

53 Chris Huggins, "Artisanal and Small-Scale Mining: Critical Approaches to Property Rights and Governance," 1 (2) *Third World Thematics: A TWQ Journal* (2016), p. 151.

54 United Nations Environment Programme, *Assessing Environmental Impacts: A Global Review of Legislation* (2018.) https://wedocs.unep.org/bitstream/handle/20.500.11822/22691/Environmental_Impacts_Legislation.pdf.

55 Stephen Jay et al., "Environmental Impact Assessment: Retrospect and Prospect." 27 *Environmental Impact Assessment Review* (2007), p. 287.

56 Dan Biller, "Environmental Impact Assessment," in *Does Environmental Policy Work? The Theory and Practice of Outcomes Assessment*, (Cheltenham: Edward Elgar Publishing, 2004).

2.6 Biodiversity offset (case study)

The following is a case study based on a fact-finding mission that was conducted in April 2015. The mission included representatives from four European organizations: Both Ends (Netherlands), Re:Common (Italy), Urgewald (Germany) and C.E.E. Bankwatch Network, in addition to the host organization, Oyu Tolgoi Watch. The purpose of the mission was to explore the conditions and administrative context of the new legislation on biodiversity offsetting within the context of the implementation of the new E.I.A. law. The author along with the team went to the Tsogtstsetsii and Hanbogd *soums* (district) in Umnugovi province to interview the local stakeholders such as local administration, herders, and people in charge of protected areas.

2.6.1 Policy borrowing and premature load

The fact-finding mission found significant concerns regarding the implementation of the new E.I.A. law, and especially, the understanding and implementation of biodiversity offsetting, as follows:

a) First, there was overall confusion and lack of information about the concept of biodiversity how to implement offsetting. The M.N.E.T. reported ongoing cases where some companies that worked with international consulting companies used different methods from the one approved and prescribed by the government. The confusion is highlighted by the case of Energy Resources and its Ukhaa Khudag coal mine deposit in Tsogttsetsii.[57]
b) Second, the national, *aimag* (provincial) and *soum* level governments admitted their lack of information and capacity to monitor offsetting measures of different projects. The M.N.E.T.'s devolution of monitoring responsibilities to the local administration that had up to that point struggled to monitor other programs was striking. This phenomenon can be provisionally described as a "selected absence of the state." In this situation, international entities or non-governmental entities, or both, assume the function of the government both in its monitoring and regulatory capacities.
c) Third, the international best practice of offsetting as a last resort measure was not understood by all parties as provided in the regulations. This fact clearly led to an incentive for companies to bypass the well-established steps of avoiding negative impacts through mitigation and rehabilitation.
d) Last, biodiversity offset trading seems to be the worst case of a borrowed policy mechanism, since it opens legal loopholes and avenues of abuse, such as when companies elect to rehabilitate areas that are less exploited and less costly.[58]

57 Antonio Tricarico and Regine Richter, "Blessed Are the Last for They Shall Be First!," 2017, available at https://www.bothends.org/uploaded_files/document/1Mongolia-biodiversity_offsetting_april_2017.pdf (retrieved 9 March 2021).

58 U.N.D.P.-Ministry, "Biodiversity Offsets," 2016, available at https://www.undp.org/content/dam/sdfinance/doc/biodiversity-offset (retrieved 9 March 2021).

2.6.2 The case of Oyu Tolgoi

Oyu Tolgoi (O.T.), the largest foreign direct investment mining project in Mongolia, was the first entity to incorporate a biodiversity offset measure in its E.I.A. and management plan. O.T. sought to ensure that the biodiversity of the southern Gobi region ultimately benefitted from the project's presence in the region. In keeping with the Rio Tinto corporate Biodiversity Strategy, O.T.'s goal was to have a net positive impact on biodiversity in the southern Gobi region. O.T. aims to reach this goal by mine closure, but will also seek opportunities to achieve a net positive impact as early as practicable in the project life.[59] International consultants who developed a biodiversity offsets strategy for the O.T. project identified "the reduction of illegal hunting" and "improvement of rangeland management" among potential offset objectives. While O.T. talked about its biodiversity offsetting activities, such as monitoring of endangered species with a view to reduce illegal hunting within the project impact area, the mission experts found that "no real offsetting activities are taking place so far." The O.T. case appears to confirm a widespread trend of "tokenistic tools to approve developments rather than to genuinely engage with the concerns of interested and affected groups."[60]

2.7 Analysis

In this section, a thematic analysis is carried out utilizing interview data gathered by the author in addition to the data Gobi Partnership Framework projects and its researchers. This section explores contextual factors that aid or impede successful implementation of E.I.A. governance. The three themes that were developed from the field research and interviews are: 1) E.I.A.s as sites of contestation; 2) conflicting set of understandings about the purposes of public participation in E.I.A.s; and 3) locked between meanings and interpretations: E.I.A.s as sites of differing subjectivities.

2.7.1 Theme 1: E.I.A.s as sites of contestation

"Deconstructing situated contestations" around E.I.A.s can open "critical avenue[s] for rethinking diverse social, material and symbolic meanings" that are neglected in most technocratic accounts of resource extraction.[61] The underlying structural factor that enables local contestation is the selective absence of the state. It results in atomization of risk, division, and contestation within and among the local government, herders, and companies. The nomadic pastoralist identity, for example, and how people frame "risks" to

59 Oyu Tolgoi, L.L.C., "Biodiversity Strategy," E.S.I.A. Appendix 1, December 2011, p. 1.

60 Llewellyn Leonard, "Examining Environmental Impact Assessments and Participation: The Case of Mining Development in Dullstroom, Mpumalanga, South Africa," 19 (1) *Journal of Environmental Assessment Policy and Managemen*t (2017), p. 175000-2.

61 Samuel Spiegel, "EIAs, Power and Political Ecology: Situating Resource Struggles and the Techno-Politics of Small-Scale Mining," 87 *Geoforum* (2017), p. 95.

their environment is highly sensitive to belief systems and crucial in any discussions of E.I.A. and environmental management practices. As Mary Douglas points out in her discussion of the term "risk," the reality of dangers is not the issue, but rather how they are politicized.[62] When risk is transferred from the state to the individual household, belief systems acquire a dominant role in public preferences setting.[63]

For many *aimags* and *soums* struggling with poverty and lack of other life sustaining services and opportunities, patronage networks are an important lifeline,[64] as these networks link the periphery and particular regional interests to Ulaanbaatar, the capital and political center of Mongolia. These patronage networks also act as platforms for vertical and horizontal social networks to counter poverty and inequality of resources in the communities arising from the effects of neoliberalism.[65] It often involves different groups of people without stable preferences and interests. According to Professor of Anthropology, Dulam Bumochir, "in the so-called local community, there are the local government employers, local residents who live in settlements of the administrative unit centre, and local herders who live in the countryside."[66]

As one interviewee noted, this contestation is amplified by the necessity to negotiate about "which things to be done, and the amounts to be contributed by the miner" and so on. This is of course prone to differentiated opportunities for local stakeholders, which is inherent where asymmetry of power exists. For example, "local-level agreements" were introduced as a mandatory mechanism of addressing local relations between the community and the company. However, this practice is still extremely vague, lacks necessary guidelines, and is ultimately dependent upon local contexts and project sizes, among other things. In this respect, property rights through license and the different cooperation mechanisms stop making sense at the local level. When atomized and articulated at the local level, these mechanisms become a site of contestation both in *de jure* and *de facto* respects. A general lack of congruence between licenses, community and local development agreements, E.I.A.s, permits, and other types of agreements leads to a situation where a particular governor might be tempted to deal with a mining company using mechanisms under his or her discretion. For example, as one company representative remarked:

62 Mary Douglas, *Risk and Blame: Essays in Cultural Theory*, (London: Routledge, 1992).

63 Oliver Marchart, *Thinking Antagonism. Political Ontology after Laclau.* (Edinburgh: Edinburgh University Press, 2018).

64 Sergey Radchenko and Mendee Jargalsaikhan, "Mongolia in the 2016–17 Electoral Cycle. The Blessings of Patronage," 57 (6) *Asian Survey* (2017), pp. 1032-1057.

65 Mathijs Pelkmans, "On Transition and Revolution in Kyrgyzstan," 46 *Focaal-European Journal of Anthropology* (2005), pp. 147-157; Elmira Satybaldieva, "Working Class Subjectivities and Neoliberalisation in Kyrgyzstan: Developing Alternative Moral Selves," 31 *International Journal of Politics, Culture, and Society* 2018, pp. 31–47.

66 Dulam Bumochir, *The State, Popular Mobilisation and Gold Mining in Mongolia*, (London: UCL Press, 2020), p. 12–13.

> It takes about a year to come to an understanding with the local government and another year to negotiate terms and agreements. When the next governor is appointed, he comes in with his/her own set of demands about local level agreements, E.I.A. approvals and etc. and the cycle goes on ....[67]

Continuous negotiation becomes everyday reality and practice for all parties, be they local government, herders, operators, or companies.[68] E.I.A.s are situated and shaped by the imperative to negotiate *access* to mineral resources and their benefits. Thus, E.I.A. procedures such as public participation mainly become tools for negotiation.

One local government official's reasoning with a company representative provides an example:

> Let's talk and try to resolve this issue, okay? The local administration will support the stability of your operation at Ovoot Tolgoi mine as it has already started. You have many dealings with the administration such as land permits, general local administration responsibility, EIA, road construction, etc. In return, will you return your land that is under exploration license to the local administration?[69]

In the above situation, negotiation of property rights becomes an avenue of both compromises and contestations. Studies suggest that Mongolia lacks the necessary expertise at local government levels[70] to monitor and negotiate with big mining companies. However, they possess significant bargaining power when it comes to dealing with small and medium sized companies.

When a company representative complains about excessive decentralization, he or she effectively questions the sanctity of property rights embodied in a particular mining license, as when one representative reported:

> We used to pay relevant fees and collect all necessary permits in Ulaanbaatar without any local permission. Of course, this was not the best system. However, a complete reversion of this process where we have to go through every level of administration is too troublesome.[71]

67 Notes on file with author.

68 Eleanor Fisher, "Artisanal Gold Mining at the Margins of Mineral Resource Governance: A Case from Tanzania," 25 (2) *Development Southern Africa* (2008), p. 199; Sabine Luning, "Liberalisation of the Gold Mining Sector in Burkina Faso," 35 (117) *Review of African Political Economy* (2008), pp. 387–401.

69 Interview on file with the author.

70 Peter Blunt, "Whose Resources Are They Anyway? 'Development Assistance' and Community Development Agreements in the Mongolian Mining Sector," 14 (4) *Progress in Development Studies* (2014), p. 383.

71 Notes on file with the author.

As most natural resource extraction in Mongolia has been going on at the at *soum* or *bag* levels where state authority is feeblest and most fragmented, access—broadly defined as "*all* possible means by which a person is able to benefit from things"[72]—to mineral resources is a matter of continuous negotiation between mining companies, local government administration, and host communities.[73] This is especially relevant to Mongolia where political mobilization is done through both budget and off-budget resources that are used to pay off supporters of the factions in power.[74] In other words, political mobilization functions through the mobilization of differing patron-client groups containing different political or economic factions, vast numbers of political party members, entrepreneurial type middlemen, and state officials. This arrangement extends to *aimags* and *soums*, where political power is contested amid local resource extraction contestation. Under these circumstances, mineral extraction projects—and E.I.A.s by extension—invite contestation of the local population but also of political forces that sometimes, but not always, overlap with *nutgiin udirdlaga* or *irgediin tuluulugchid* (local representative councils).

And yet, despite a widely held belief that "local livelihoods rarely profit from mining activities,"[75] evidence from Gobi Framework project suggests widespread "symbiotic relationships…between miners and local communities."[76] Negotiation of socio-economic benefits is necessarily a political undertaking that is fraught with benefits and grievances. Where the security and operation of property rights are unstable and unpredictable stakeholders of all sorts face an uncertain situation.

2.7.2 Theme 2: Conflicting set of understandings about the purposes of public participation in E.I.A.s

As touched upon in the previous section, E.I.A. practices need to be assessed within the framework of situated politics, in time and space, amid varying relations of power. The dominant view of E.I.A.s as universal tools for governance must therefore be unpacked. For example, many E.I.A. laws, including the Mongolian Law on E.I.A.s, mandate public participation, but we must ask how those provisions are implemented on the ground. In general, public participation mechanisms have been limited to formal legal obligations and

72 Jesse C. Ribot and Nancy L. Peluso, "A Theory of Access," 68 (2) *Rural Sociological Society* (2003), p. 156.

73 Eleanor Fisher, *supra* note 68, p. 199.

74 David Sneath, "Transacting and Enacting: Corruption, Obligation and the Use of Monies in Mongolia," 71 (1) *Ethnos* (2006), pp. 89–112.

75 Vivian Schueler et al., "Impacts of Surface Gold Mining on Land Use Systems in Western Ghana," 40 (5) *AMBIO A Journal of the Human Environment* (2011), p. 528.

76 Frank K. Nyame and Joseph Blocher, "Influence of Land Tenure Practices on Artisanal Mining Activity in Ghana," 35 (1) *Resources Policy* (2010), p. 50.

function as just another bureaucratic step for a project. This is particularly true for Mongolia where most provisions on participation remain at the level of a manifesto, are extremely general, lack accompanying procedures, specific guidelines on timing and methods, and effective liabilities. For example, the provision that allows members of the public to comment "within 30 working days"[77] takes no account of the differing opportunities of local communities and certain population groups to access information and act thereof. The vague provision "may be invited" that is found in all these laws allows environmental decision makers to abuse the rule. The result is the prevalence of ineffective and perfunctory public consultations that take no account of the particular requirements of affected groups.

Only recently has the true worth of participation and value of public engagements to environmental decision-making been elaborated.[78] Article 17.4 of the Law on E.I.A. states that the person authorized to do the E.I.A. should hold meetings with "the local government, citizens and all who are to be affected by the project to receive their suggestions." Still, however, there are many occasions when people are not consulted at all or when people who are involved in the process are not the ones "to be affected by the project." Instances where projects are not introduced in detail or possible environmental effects are not told, are also prevalent. For example, a monitoring project covering forty-seven reports, established that in ten (22%) cases people were not consulted at all, in thirty-three (70%) cases consultation did not meet procedural guidelines, and in only four (8%) cases were people consulted properly.[79] These findings would support a narrative that characterizes impact assessments as an "informative instrument based on experts' knowledge," out of realm of public scrutiny. An alternative narrative would characterize the legitimacy of the assessment based upon the degree to which the public is involved. During another interview, a local government official stated:

> I would like for detailed E.I.A.s to be passed by all residents. Let's say we have 500 people of voting age in our *bag*. More than half of the vote should be sufficient to legitimate the document. It should be done right and just. However, in current practice the E.I.A. document is treated as just another paper that needs to be stamped and sent as fast as possible to upper levels of administration.[80]

77 Article 17.3 of the Law on E.I.A., see *supra* note 37.

78 Bo Elling, *Rationality and the Environment: Decision Making in Environmental Politics and Assessment,* (London: Routledge, 2008); Meri Juntti et al., "Evidence, Politics and Power in Public Policy for the Environment," 12 (3) *Environmental Science & Policy* (2009), pp. 207–215; Christopher M. Raymond et al., "Integrating Local and Scientific Knowledge for Environmental Management," 91 (8) *Journal of Environmental Managemen*t (2010), pp. 1766–1777.

79 Sinclair et al., "Conceptualizing Learning for Sustainability through Environmental Assessment: Critical Reflections on 15 Years of Research," 28 (7) *Environmental Impact Assessment Review* (2008), pp. 415–428.

80 Notes on file with the author.

This narrative is consistent with many studies[81] that advocate for socio-political conception of E.I.A.s as opposed to a mere technocratic instrument. Article 8.4.8 of the Law on E.I.A. requires the project implementer to consult with the *bag* where the project is set to take place. But there is an ambiguity on who the local level of government is. For example, in a study done on detailed E.I.A.s in the Arkhangai province, 82% of public consultation reports were conducted either by the head of local citizen representatives' office or the *soum* level governor. Other consultation reports were signed by subjects such as office of the *aimag* governor or even *aimag* level environmental offices. These instances point to the fact that E.I.A. consultations are becoming tools for different branches of local government or citizen representatives' offices. Differing locations where E.I.A. public consultations are organized is also emblematic of these contestations. For instance, 51.1% of all *bag khurals* (sub-district assembly) where E.I.A. consultations were conducted happened in either *soum irgenii tanhim* (civil representative's hall) or a *soum* cultural center. The rest occurred in places like herder's *gers*, at the mining camp sites, and school gymnasiums. The general logistics that require detailed E.I.A.s to be consulted by *bag khural* within 15 days after completing the assessment is extremely unrealistic, as there are a few *bag* who conduct *khurals* with such a short interval. This difficulty is compounded by the lack of aptitude in local N.G.O.s, local administration, company public relations representatives, and other stakeholders on how to conduct participation sessions.

The general themes and sentiments that emerge from nearly all stakeholders' interviews are the lack of legitimacy, the lack of understanding of the E.I.A. process, and the assessment document itself. The general lack of influence of evidence, knowledge, and of the existence of E.I.A.s as policy tools has been the subject of extensive scrutiny.[82] The significance of legitimacy "of both knowledge itself and those producing knowledge" in the context of E.I.A.s has been widely debated.[83] Partidario and Sheate elaborate this point in the following passage:

> The engagement of stakeholders in IA [impact assessment] processes has considerable possibilities for improvement as long as stakeholders are made part of the process and not used only as a checking mechanism.

81 Thomas B. Fischer et al., "Learning through EC Directive based SEA in Spatial Planning? Evidence from the Brunswick Region in Germany," 29 (6) *Environmental Impact Assessment Review* (2009), pp. 421–428; Urmila Jha-Thakur et al., "Effectiveness of Strategic Environmental Assessment: The Significance of Learning," 27 (2) *Impact Assessment and Project Appraisal* (2009), pp. 133–144; Mario R. Partidario, "Does SEA Change Outcomes?" 2009 (31) *OECD/ITF Joint Transport Research Centre Discussion Papers* (2009), pp. 1–25.

82 Sandra M. Nutley et al., *Using Evidence – How Research Can Inform Public Services*, (Bristol: The Policy Press, 2007).

83 William R. Sheate and Maria Rosári Partidário, "Strategic Approaches and Assessment Techniques – Potential for Knowledge Brokerage towards Sustainability," 30 (4) *Environmental Impact Assessment Review* (2010), pp. 278–288.

> The institutionalization of IA is in part, and paradoxically (given its current weak practice), responsible for this encouraging shift in perception.[84]

One begins to recognize the concept of knowledge brokerage as the primary point. This term can be defined not only as a mechanism for making research evidence accessible to policymakers, but as a way of "breaking down barriers that impede interaction, healthy communication and collaboration."[85] Almost all herders who were interviewed were deeply unfamiliar with or apathetical toward the E.I.A. process. This apathy was largely due to the lack of knowledge brokerage mechanisms available in the process. The study of public participation in the Arkhangai *aimag* concluded that nearly 26.4% of *bag khurals* were conducted with the presence of only *soum* or *bag khural* heads. This is especially worrying in a context where stakeholders have reported a significant level of frustration and disengagement with *bag khurals* and local politics. As one herder put it:

> The cultural center gets full as long as there is an announcement of discussing a particular mining operation at the *bag khural*. A quarrel and argument are guaranteed as almost all the herders are pretty informed. And those usually end without any results or agreement. Because no information is provided from both inside [from fellow herders] and outside [companies or local administration] the *khural* transforms it into arguments about the Chinese, their operations, of ruining the land and the need to chase them away.[86]

Conflicting impulses resulting from environmental centralization and decentralization, coupled with political, economic, and cultural factors, has in certain extents converted provincial governments into enablers of environmental pollution. Quasi decentralization reforms, including provisions for public participation that is implicit in E.I.A. policies, presents a stark case of policy borrowing that has not been embedded into Mongolian realities.

2.7.3 Theme 3: Locked between meanings and interpretations: E.I.A. as sites of differing subjectivities

The resource curse, in mainstream interpretation, is seen as a technocratic problem emanating from "questions about the relationship between extractive companies, governments of resource endowed countries, and local populations."[87] However, this study of E.I.A. practice in Mongolia shows

84 Ibid., p. 285.
85 William R. Sheate and Maria R. Partidario, *supra* note 81, p. 278.
86 Notes on file with the author.
87 Emma Gilberthorpe and Dinah, "The Anthropology of Extraction: Critical Perspectives on the Resource Curse," 53 (2) *Journal of Development Studies* (2016), p. 4.

that resource conflicts go beyond relationships of groups or economic benefit sharing by involving deeply held belief systems or ideologies that play a normative role in structuring debates. Foucault's term "governmentality" described a major change in the practice of government that was preoccupied with static and formalistic understanding of the state, as manifested in its properties.[88]

> State theory attempts to deduce the modern activities of government from essential properties and propensities of the state, in particular its supposed propensity to grow and swallow up or colonize everything outside itself. Foucault holds that the state has no inherent propensities; more generally, the state has no essence. The nature of the institution of the state, Foucault thinks, is a function of changes in practices of government, rather than the converse. Political theory attends too much to institutions, and too little to practices.[89]

The E.I.A. is both an institution and a practice that involves a set of beliefs and rules of governing that is necessarily complemented by the belief of the subjects in the above rule. According to mainstream accounts, an overarching economic rationale that frames these contradictions is how and to what degree revenue from mining will be used to expand versus restrict or privatize the distribution of government services and access across the population.

2.8 Conclusion

Globalization has produced a "one-size-fits-all" module of sustainable development. One of the tools of this globalized approach is the E.I.A. The E.I.A. is often considered part of "best practices," but the implementation of the E.I.A., as a representation of many best practices and globalized tools, must fit the cultures in which it has been introduced.

The local populations in Mongolia that face environmental problems, for example, are not powerless indigenous groups. As Dulam Bumochir, Professor of Anthropology at the National University of Mongolia, has noted, "the context of the nation in Mongolia does not put the local population in the position of the peripheral, powerless and minority other."[90] In many cases of environmental nationalist protests in Mongolia, local governments and authorities started and promoted strikes and movements against those promoting,

88 Michael Foucault, *Discipline and Punish: The Birth of the Prison* (Munich: Penguin Social Sciences, 1991).

89 Colin Gordon et al., *Governmental Rationality: An Introduction: In the Foucault Effect: Studies in Governmentality: With Two Lectures by and an Interview with Michel Foucault*, (Chicago: Chicago University Press, 1991), p. 4.

90 Dulam Bumochir, *The State, Popular Mobilisation and Gold Mining in Mongolia Shaping 'Neoliberal' Policies* (London: UCL Press, 2020), p. 14.

advocating, and operating mines. Tsetsegee Munkhbayar, the leader of the nation's most successful environmental movement, has challenged the environmentalist perspective on pastoralism's unsustainability by invoking a pastoralist identity as the basis of an "original environmentalism" and to argue that "Mongol pastoralists are the original environmentalists," who have stewarded the environment "from generation to generation."[91] This position of pastoralists or other indigenous population, supported by natural science research, is found elsewhere as well.[92]

Bibliography

Abeli, Willbard. "Higher Education and Development: A Critical Nexus." 2 (2) *SARUA Leadership Dialogue* (2010): 9–18.

Ahammed, Rafique, and Nick Harvey. "Evaluation of Environment Impact Assessment Procedures and Practice in Bangladesh." 22 (1) *Impact Assessment and Project Appraisal* (2004): 63–77.

Ahmad, Balsam, and Christopher Wood. "A Comparative Evaluation of the EIA Systems in Egypt, Turkey and Tunisia." 22 (3) *Environmental Impact Assessment Review* (2002): 213–234.

Andrews, Matt, et al. *Looking Like a State: Evidence, Analysis, Action*. Oxford University Press, 2017.

Biller Dan. "Environmental Impact Assessment," in *Does Environmental Policy Work? The Theory and Practice of Outcomes Assessment*. Edward Elgar Publishing, 2004.

Blunt, Peter. "Whose Resources Are They Anyway? 'Development Assistance' and Community Development Agreements in the Mongolian Mining Sector." 14 (4) *Progress in Development Studies* (2014): 383–399.

Bumochir, Dulam. *The State, Popular Mobilisation and Gold Mining in Mongolia*. UCL Press, 2020.

Cairney, Paul, and Tanya Heikkila. "A Comparison of Theories of the Policy Process," in *Theories of the Policy Process*. Ed. Christopher M. Weible, 4th ed. Routledge, 2018, p. 363–387.

Cairney, Paul. *The Politics of Evidence-Based Policy Making*. Palgrave Macmillan, 2016.

Cashmore, Matthew, and Anna Axelsson. "The Mediation of Environmental Assessment's Influence: What Role for Power?" 5 *Environmental Impact Assessment Review* (2012): pp. 5–12.

Cashmore, Matthew et al. "The Interminable Issue of Effectiveness: Substantive Purposes, Outcomes and Research Challenges in the Advancement of Environmental Impact Assessment Theory." 22 (4) *Impact Assessment and Project Appraisal* (2004): 295–310.

Clausen, Alison et al. "An Evaluation of the Environmental Impact Assessment System in Vietnam: The Gap between Theory and Practice." 31 (2) *Environmental Impact Assessment Review* (2011): 136–143.

91 Ibid, p. 130.

92 Somini Sengupta, Catrin Einhorn and Manuela Andreoni, "There's a Global Plan to Conserve Nature. Indigenous People Could Lead the Way," *New York Times*, March 11, 2021.

Cox, Robert W. "Social Forces, States and World Orders: Beyond International Relations Theory." 10 (2) *Millennium: Journal of International Studies* (1981): 126–155.

Douglas, Mary. *Risk and Blame: Essays in Cultural Theory*. Routledge, 1992.

Elling, Bo. *Rationality and the Environment: Decision Making in Environmental Politics and Assessment*. Routledge, 2008.

Eyal, Gil et al. *Making Capitalism without Capitalists: The New Ruling Elites in Eastern Europe*. Verso, 2000.

Fernandez-Gimenez, Maria and B. Batbuyan. "Law and Disorder: Local Implementation of Mongolia's Land Law." 35 (1) *Development and Change (*2004): 141–165.

Fischer, Thomas B. "Strategic Environmental Assessment in Post-Modern Times." 23 (2) *Environmental Impact Assessment Review* (2003): 155–170.

Fischer, Thomas B. et al. "Learning through EC Directive Based SEA in Spatial Planning? Evidence from the Brunswick Region in Germany." 29 (6) *Environmental Impact Assessment Review* (2009): 421–428.

Fisher, Eleanor. "Artisanal Gold Mining at the Margins of Mineral Resource Governance: A Case from Tanzania." 25 (2) *Development Southern Africa*, (2008): 199–213.

Gilberthorpe, Emma, and Dinah Rajak. "The Anthropology of Extraction: Critical Perspectives on the Resource Curse." 53 (2) *Journal of Development Studies* (2016): 4.

Glasson, John, and Nemesio Neves B. Salvador. "EIA in Brazil: A Procedures-Practice Gap. A Comparative Study with Reference to the European Union, and Especially the UK." 20 (2) *Environmental Impact Assessment Review* (2000): 191–225.

Glucker, Anne N. et al., "Public Participation in Environmental Impact Assessment: Why, Who and How?" 43 *Environmental Impact Assessment* (2013): 104–111.

Gordon, Colin et al. "Governmental Rationality: An Introduction," in *The Foucault Effect: Studies in Governmentality: With Two Lectures by and an Interview with Michel Foucault*. Chicago University Press, 1991: 4.

Hannam, Ian. "International Pastoral Land Law," in *International Farm Animal, Wildlife and Food Safety Law*. Eds. Steier, Gabriela and Kiran Patel. Springer, 2017: 599–628.

Hannam, Ian. "International Perspectives on Legislative and Administrative Reforms as an Aid to Better Land Stewardship," in *Rangeland Stewardship in Central Asia*. Ed. Victor Squires. Springer, 2012: 407–429.

Hannam, Ian. "National Developments in Soil Protection in Mongolia," in *International Yearbook of Soil Law and Policy*. Springer International Publishing, 2016: 285–307.

Hannam, Ian. *Environmental Law and Institutional Framework Mongolia: UNDP Project Strengthening Environmental Governance in Mongolia*. (United Nations Development Program, 2009).

Hansen, Anne M. "SEA Effectiveness and Power in Decision-Making: A Case Study of Aluminium Production in Greenland." *Department of Planning and Development, Aalborg University* (2011).

Hansen, Anne M. et al. "The Significance of Structural Power in Strategic Environmental Assessment." 39 *Environmental Impact Assessment Review* (2013): 37–45.

Harris, Patrick et al. "Assessing Health Impacts within Environmental Impact Assessments: An Opportunity for Public Health Globally which Must Not Remain Missed." 12 (1) *International Journal of Environmental Research and Public Health* (2015): 1044–1049.

Holling, C. S. *Adaptive Environmental Assessment and Management*. John Wiley & Sons, 1978.

Huggins, Chris. "Artisanal and Small-Scale Mining: Critical Approaches to Property Rights and Governance." 1 (2) *Third World Thematics: A TWQ Journal* (2016): 151–164.

Jay, Stephen et al. "Environmental Impact Assessment: Retrospect and Prospect." 27 *Environmental Impact Assessment Review* (2007): 287–300.

Jha-Thakur, Urmila et al. "Effectiveness of Strategic Environmental Assessment: The Significance of Learning." 27 (2) *Impact Assessment and Project Appraisal* (2009): 133–144.

Juntti, Meri et al. "Evidence, Politics and Power in Public Policy for the Environment." 12 (3) *Environmental Science & Policy* (2009): 207–215.

Kay, Adrian, and Robert Akrill, "Ambiguity, Multiple Streams, and EU Policy." 20 *Journal of European Public Policy* (2014): 871–887.

Khadka, Ram B. and Uttam S. Shrestha. "Process and Procedure of EIA Application in Some Countries of South Asia." 4 (3) *Journal of Environmental Science and Technology* (2011): 215–233.

Kolhoff, Arend, et al. "The Contribution of Capacities and Context to EIA System Performance and Effectiveness in Developing Countries: Towards a Better Understanding," 27 (4) *Impact Assessment and Project Appraisal* (2009): 279–282.

Lee, Molly N. N. "Higher Education in Southeast Asia in the Era of Globalization," in *International Handbook of Higher Education*. Eds. James J. F. Forest and Philip G. Altbach. Springer, 2006: 539–555.

Levy, Brian. *Working with the Grain: Integrating Governance and Growth in Development Strategies*. Oxford University Press, 2014.

Lipschutz, Kari, and Mark Henstridge. *Mapping International Efforts to Strengthen Extractive Governance*. Oxford Policy Management, 2013.

Llewelyn, Leonard. "Examining Environmental Impact Assessments and Participation: The Case of Mining Development in Dullstroom, Mpumalanga, South Africa." 19 (1) *Journal of Environmental Assessment Policy and Managemen*t (2017): 1750002.

Luning, Sabine. "Liberalisation of the Gold Mining Sector in Burkina Faso." 35 (117) *Review of African Political Economy* (2008): 387–401.

Marara, Madeleine et al. "The Importance of Context in Delivering Effective EIA: Case Studies from East Africa." 31 (3) *Environmental Impact Assessment Review* (2011): 286–296.

Murphy, Daniel J. "Going on *Otor*: Mobility, 'Natural' Disaster, and the Political Ecology of Vulnerability in Mongolia." PhD Dissertation, University of Kentucky. 2011. Available at https://uknowledge.uky.edu/cgi/viewcontent.cgi?referer=https://www.startpage.com/&httpsredir=1&article=1168&context=gradschool_diss.

Namjim, Tumuriin, and William Rozyci, *Economy of Mongolia: From Traditional Times to the Present*. Mongolia Society, 2000.

Nutley, Sandra M. et al. *Using Evidence: How Research Can Inform Public Services*. The Policy Press, 2007.

Nyame, Frank K. and Joseph Blocher. "Influence of Land Tenure Practices on Artisanal Mining Activity in Ghana." 35 (1) *Resources Policy* (2010): 50.

Partidario, Maria Rosario and William R. Sheate. "Knowledge Brokerage-Potential for Increased Capacities and Shared Power in Impact Assessment." 39 *Environmental Impact Assessment Review* (2013): 26–36.

Partidario, Mario R. "Does SEA Change Outcomes?" 31 *OECD/ITF Joint Transport Research Centre Discussion Papers* (2009): 1–25.

Pawson, Roy, and Nick Tilley. *Realistic Evaluation*. Sage Publications, 1997.
Pelkmans, Mathijs. "On Transition and Revolution in Kyrgyzstan." 46 *Focaal, European Journal of Anthropology* (2005): 147–157.
Pritchett, Lant, et al. *Looking Like a State: Evidence, Analysis, Action*. Oxford Scholarship, 2017.
Radchenko, Sergey, and Mendee Jargalsaikhan. "Mongolia in the 2016–17 Electoral Cycle. The Blessings of Patronage." 57 (6) *Asian Survey* (2017): 1032–1057.
Raymond, Christopher M. et al. "Integrating Local and Scientific Knowledge for Environmental Management." 91 (8) *Journal of Environmental Management* (2010): 1766–1777.
Ribot, Jesse C. and Nancy L. Peluso. "A Theory of Access." 68 (2) *Rural Sociology* (2009): 153–181.
Robertson, David Brian, and Jerold Waltmann. "The Politics of Policy Borrowing," 2 (2) *Oxford Studies in Comparative Education* (1992): 25.
Rossabi, Morris. *Modern Mongolia from Khans to Commissars to Capitalists*. University of California Press, 2005.
Satybaldieva, Elmira. "Working Class Subjectivities and Neoliberalisation in Kyrgyzstan: Developing Alternative Moral Selves." 31 *International Journal of Politics, Culture, and Society* (2018): 31–47.
Schueler, Vivian et al. "Impacts of Surface Gold Mining on Land Use Systems in Western Ghana." 40 (5) *AMBIO: A Journal of the Human Environment* (2011): 528.
Sheate, William R. and Maria Rosári Partidário. "Strategic Approaches and Assessment Techniques—Potential for Knowledge Brokerage towards Sustainability." 30 (4) *Environmental Impact Assessment Review* (2010): 278–288.
Sinclair et al. "Conceptualizing Learning for Sustainability through Environmental Assessment: Critical Reflections on 15 Years of Research" 28 (7) *Environmental Impact Assessment Review* (2008): 415–428.
Sneath, David. "Transacting and Enacting: Corruption, Obligation and the Use of Monies in Mongolia." 71 (1) *Ethnos* (2006): 89–112.
Spiegel, Samuel. "EIAs, Power and Political Ecology: Situating Resource Struggles and the Techno-Politics of Small-Scale Mining." 87 *Geoforum* (2017): 95–107.
Steiner-Khamsi, Gita and Ines Stolpe. *Educational Import: Local Encounters and Global Forces in Mongolia*. Palgrave MacMillan, 2006.
Strange, Susan. *The Retreat of the State*. Cambridge University Press, 1996.
Teegen, Hildy, et al. "The Importance of Nongovernmental Organizations (NGOs) in Global Governance and Value Creation: An International Business Research Agenda." 35 (6) *Journal of International Business Studies* (2004): 463–483.
Vandangombo, Danaasuren. *Democratising the Environmental Impact Assessment in Mongolian Mining*. Ph.D. Victoria University of Wellington, 2012.
Whitty, Geoff et al. "The Assisted Places Scheme: Its Impact and Its Role in Privatization and Marketization." 13 (2) *Journal of Education Policy* (1998): 237–250.
Zahariadis, Nikolaos. "Ambiguity and Choice in Public Policy: Political Manipulation in Democratic Societies." Georgetown University Press, 2003.

3 Extra-territorial litigation remedies

A case study of the East African Crude Oil Pipeline in Uganda

Xi Yu[1]

3.1 Introduction

Whether corporations must take on the task to generate social utility has been an ongoing debate for more than a century.[2] And rightfully so. After all, corporations are some of the most powerful entities in the world. To offer a few examples, General Electric's annual revenue surpasses New Zealand's G.D.P.; Chevron and ExxonMobil, respectively, outrank the Czech Republic and Thailand in terms of gross income; and Walmart would dethrone Norway as the twenty-fifth wealthiest nation in the world if it were a country.[3] Because their activities engender a systemic impact upon society, multinational business enterprises (M.B.E.s) should be held to a higher standard of duty of care.[4]

Amidst the current ecological crises that the world is facing, this question has become even more pertinent, especially when looking at the environmental impact of multinational business enterprises in the Global South. Whilst foreign investments undeniably bring development opportunities to

1 Xi Yu graduated from Paris II Pantheon-Assas University and holds an LL.M. in Environmental Law and Policy from U.C.L. Passionate about social entrepreneurship, he has previously advised social entrepreneurs in the creation and management of their impact-focused projects in France and in Europe. He is currently a researcher at the U.C.L. Centre for Commercial Law.

2 In 1901, President Theodore Roosevelt urged corporations to recognize their responsibility towards the community at large and called for tighter federal regulations over interstate commerce; see Henry William Brands, *TR: The Last Romantic*, (New York: Basic Books, 1998), Chap. 16, IV. For an overview of the Berle-Dodds debate; see William W. Bratton and Michael L Watcher, "Shareholder Primacy's Corporatist Origins: Adolf A. Berle and the Modern Corporation," 34 (1) *Journal of Corporation Law* (2008), pp. 99–152; see also Adolf A. Berle, "Corporate Powers as Powers in Trust," 44 (7) *Harvard Law Review* (1931), pp. 1049–1074; Edwin Merrick Dodds, "For Whom Are Corporate Managers Trustees?," 45 (7) *Harvard Law Review* (1932), pp. 1145–1163.

3 Vincent Trivett, "25 US Mega Corporations: Where They Rank If They Were Countries," *Business Insider*, June 27, 2011, available at https://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?IR=T. (retrieved 7 January 2021).

4 Oliver Krackhardt, "Beyond the Neem Three Conflict: Questions of Corporate Behaviour in a Globalised World," 21 (3) *New Zealand University Law Review* (2005), pp. 347–284.

DOI: 10.4324/9781003160236-5

host countries, the harm caused to local communities and to the environment arguably outweighs the economic benefits by far.[5] In Southeast Asia, the establishment of multinationals has been associated with child labor, unsafe working environments, and unsanitary living conditions. Security guards working for Chevron and Total S.A. (Total) in Myanmar allegedly murdered local activists and forced local residents into unpaid labor.[6] For twenty years in rural Ecuador, Texaco deposited millions of gallons of toxic waste inside natural pits of the Amazon rainforest.[7] In the Niger Delta region where Royal Dutch Shell has been operating for over five decades, drinkable water sources are contaminated with a high volume of hydrocarbons including benzene.[8] Oil slicks up to 3 inch in thickness can be found floating in underground aquifers. Mangrove roots are coated with a bitumen-type bisque. And the population of fish has substantially depleted over the years.

Particularly in Africa, from chronic diseases to cases of torture and rape, the history of oil extraction on the continent has been marked by several instances of human rights abuses. In 1998, the Nigerian subsidiary of Chevron allegedly hired, transported, and instructed Nigerian security forces to remove protestors from an offshore platform, resulting in the killing of two civilians.[9] One year later, the same subsidiary launched an assault on the villages of Opia and Ikenya with the help of governmental military forces, shooting civilians and setting houses on fire.[10] More recently, a series of reports commissioned by the Security Council identified 157 corporations who have either directly or indirectly financed war crimes, crimes against humanity, and the illegal exploitation of natural resources in the Democratic Republic of the Congo through their operations.[11]

Against this background, a series of global efforts has been made to regulate multinationals operating abroad. The O.E.C.D. Guidelines,[12] the U.N.

5 Uchechukwu Nwoke, "Two Complementary Duties under Corporate Social Responsibility Multinationals and the Moral Minimum in Nigeria's Delta Region," 58 (1) *International Journal of Law and Management* (2016), pp. 2–25.

6 David C. Korten, *When Corporations Rule the World*, (London: Earthscan Publications, 1995).

7 *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

8 Tineke Lambooy and Marie-Eve Rancourt. "Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility," 2 (2) *Human Rights & International Legal Discourse* (2008), pp. 229–276.

9 *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004).

10 Ibid.

11 United Nations Security Council Expert Panel Reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, *Letters from the Secretary General to the President of the Security Council*, U.N. Docs S/2001/49 (16 January 2001); S/2001/357 (12 April 2001); S/2002/565 (22 May 2002); S/2002/1146 (16 October 2002); S/2003/1027 (23 October 2003); Addenda; see also U.N. Docs S/2001/1072 (13 November 2001); S/2003/1146/Add.1 (20 June 2003).

12 Organization for Economic Co-operation and Development, "Guidelines for Multinational Enterprises," O.E.C.D. Publishing, 2011, available at http://dx.doi.org/10.1787/9789264115415-en. (retrieved 7 January 2021).

Global Compact,[13] and the U.N. Guiding Principles on Business and Human Rights[14] all impose upon multinationals the duty to mitigate environmental harm and to respect applicable environmental regulations. As a matter of fact, the industry itself has been keen on developing self-regulatory frameworks such as the Equator Principles.[15] From reporting schemes to unilateral codes of conduct, the market purports to have grasped the importance of adopting a more socially and environmentally conscious behavior. Although private persons possess no legal personhood under international law and are thus not subject to the rules thereof,[16] the theory of global environmental law as developed by Yang and Percival claims that even soft law initiatives can help hold M.B.E.s accountable.[17] More so, it should participate in the expansion of the rule of law in the Global South.

To offer an illustration, host countries such as Nigeria, South Africa, and Zimbabwe are progressively enacting legislation to restrict the operations of oil and gas companies at the national level.[18] Yet, the results have been underwhelming so far. At best, businesses comply by the minimum legal standard or resort to what is known as "creative compliance" by taking advantage of legal loopholes. At worse, host governments are willing to deregulate the exploitation of natural resources in order to attract foreign investments from the extractives sector. Simply put, whilst legal controls exist on paper, host

13 United Nations Global Compact, "Our Missions," available at https://www.unglobalcompact.org/what-is-gc/mission/principles. (retrieved 7 January 2021).

14 United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (21 March 2011), available at https://undocs.org/en/A/HRC/17/31; United Nations Human Rights Council Res. 17/4, *Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/RES/17/4 (16 June 2011), available at https://undocs.org/A/HRC/RES/17/4.

15 The Equator Principles, *Equator Principles*, July 2020, available at https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf. (retrieved 29 December 2020).

16 Though one may argue otherwise as M.B.E.M.be are subject to increasing scrutiny due to the growing popularity of State-Investor dispute settlement procedures. For a discussion on the Trans-Pacific Partnership (T.P.P.), see Ai-Li Chiong-Martinson, "Environmental Regulations and the Trans-Pacific Partnership: Using Investor-State Dispute Settlement to Strengthen Environmental Law," 7 (1) *Seattle Journal of Environmental Law* (2017), pp. 76–105; Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," 7 (2) *Transnational Environmental Law* (2018), pp. 229–250; Jingfan Wang, "Trans-Pacific Partnership and Domestic Environmental Protection: Seeking an Alternative Standard of Review in Investor-State Dispute Settlement," 8 (2) *George Washington Journal Energy and Environmental Law* (2017), pp. 163–173.

17 Tseming Yang and Robert V. Percival, "The Emergence of Global Environmental Law," 36 *Ecology Law Quarterly* (2009), pp. 615–664.

18 Tumai Murombo, "Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation," 9 (1) *Law, Environment and Development Journal* (2013), pp. 31–49.

countries lack the means and the leverage to impose sanctions upon oil and gas companies.[19]

As a result of a weak rule of law, the right to a clean environment—notably enshrined under the International Bill of Human Rights—lapses.[20] The quality of adjudication and concerns for solvency therefore push claimants to initiate proceedings against the parent company of M.B.E.s in the home jurisdictions of the parent company, situated in the Global North.[21] However, victims of environmental injuries and the N.G.O.s pleading on their behalf face two significant challenges. The first issue pertains to jurisdiction, as claimants must argue that the home jurisdiction is the natural or most appropriate forum to rule on the merits of the case in lieu of the host jurisdiction.[22] The second issue concerns direct liability. In effect, M.B.E.s usually operate abroad through subsidiaries with a corporate entity distinct from that of the parent company.[23] Hence, the court must also be willing to pierce the corporate veil and allow the recognition of the parent company's liability.

To overcome this impediment and recalibrate the law on the economic reality of multinationals, some States in Continental Europe have enacted new substantive rules.[24] Paving the way for a new duty of care at the group level, the French National Assembly passed the Duty of Vigilance Law in March 2017 applicable to parent and outsourcing companies.[25] Adopted four months after the first French anti-bribery legislation,[26] both statutes make

19 Peter Utting, "Corporate Social Responsibility and the Evolving Standards Regime: Regulatory and Political Dynamics," in *Corporate Social Responsibility in a Globalizing World*, (Cambridge: Cambridge University Press, 2015), pp. 73–106.

20 General Assembly Resolution 3/217, *International Declaration of Human Rights*, A/RES/3/217(III) (10 December 1948), available at https://undocs.org/en/A/RES/217(III). For a discussion arguing in favour of creating enforceable environmental rights, see Jan Hancock, *Environmental Human Rights, Power Ethics and Law*, (London: Routledge, 2019); Eghosa O. Ekhator, "Regulating the Activities of Oil Multinationals in Nigeria: A Case for Self-Regulation?" 60 (1) *Journal of African Law* (2016), pp. 1–28.

21 John W. Meyer et al., "Legitimating the Transnational Corporation in a Stateless World Society," in *Corporate Social Responsibility in a Globalizing World*, (Cambridge: Cambridge University Press, 2015), pp. 27–72.

22 Jennifer A. Zerk, "Multinationals under National Law: The Problem of Jurisdiction," in *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, (Cambridge: Cambridge University Press, 2006), pp. 104–142.

23 Jennifer A. Zerk, "Private Claims for Personal Injury and Environmental Harm," in *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, (Cambridge: Cambridge University Press, 2006), pp. 198–240.

24 Matthias Weller and Alexia Pato, "Local Parents as 'Anchor Defendants' in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends," 23 (2) *Uniform Law Review* (2018), pp. 397–417.

25 *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1), JORF n° 0074 du 28 mars 2017.* (Vigilance Law).

26 *Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, JORF n° 0287 du 28 mars 2017.*

up the new compliance regime for large companies incorporated in France[27] Endowed with extraterritorial applicability, the Vigilance Law is the first piece of legislation conferring enforceability to principles of corporate social responsibility (C.S.R.) and business and human rights. In this context, six non-profit organizations commenced a civil action against Total for violation of the Vigilance Law with respect to the East African Crude Oil Pipeline (E.A.C.O.P.) in October 2019.

The remainder of this chapter will discuss the existence of global access to remediation for victims of environmental injuries located in host countries. It offers an analysis of the E.A.C.O.P. project and the remit of the new Vigilance Law regarding the access to remediation. This case study demonstrates that no effective grievance mechanism exists for victims of environmental harm sustained in the Global South. Using the latter as a benchmark, this chapter compares the courtroom implementation of the Vigilance Law to foreign direct liability cases brought under claims of the tort of negligence. English courts entertain an abundance of foreign direct liability claims for environmental damage and physical injury. The United Kingdom also houses most of the multinational groups in Europe.[28] Hence, English case law on the matter of group liability inevitably carries a significant normative impact on M.B.E.s operating in the extractives industry.

As this discussion primarily focuses on the E.A.C.O.P. project and the Vigilance Law, it will only briefly expose the rules of jurisdictions and those relating to piercing the corporate veil. Further, the case study is analyzed through the lens of access to remediation, rather than the lenses of public participation or environmental democracy in the Global South. As the discussion is concerned with courtroom implementation, it will not analyze the implementation of self-regulated or voluntary initiatives. Mapping out this chapter, it is logical to begin by exposing the background of the E.A.C.O.P. project, then move to analyzing the state of environmental justice in Uganda, before moving on to foreign direct liability claims and the ongoing lawsuit against Total.

3.2 Overview of the E.A.C.O.P. project

Given the significant scale of the project, particular attention should be given to its impact on the local population and the surrounding ecological system. The following section provides a summary of the applicable legal framework to oil extraction in Uganda and offers material information about the E.A.C.O.P. project.

27 Xavier Boucobza and Yves-Marie Serinet, "Loi 'Sapin 2' et devoir de vigilance: l'entreprise face aux nouveaux défis de la compliance," *Recueil Dalloz* (2017), pp. 1619.

28 Fortune, "Fortune 500," 2021, available at https://fortune.com/fortune500/ (retrieved 15 January 2021).

3.2.1 Oil exploitation under Ugandan law

The current Constitution of Uganda makes several mentions of the environment.[29] Among the National Objectives and Directive Principles of State Policy, Number XIII explicitly places a duty upon the State to protect natural resources. Number XXVII stipulates that the government shall promote sustainable development and adhere to principles such as intergeneration equity. By virtue of Article 39, the Constitution recognizes the right of every Ugandan to a "clean and healthy environment," whilst Article 245 vests in Parliament the power to legislate on environmental issues. The National Environment Act 1995 established the National Environmental Management Authority (N.E.M.A.) with the power to oversee projects with environmental impacts by assessing environmental and social impact assessments (E.S.I.A.s) and ensuring public participation.[30] Section 3 of the Act reiterates the right to a clean and healthy environment. In addition, the Act imposes on every person a duty to "create, maintain and enhance the environment," which encompasses the prevention of pollution. Along with its other duties, the N.E.M.A. must ensure that natural resources be conserved "for the common good of the people of Uganda."[31]

Oil exploitation is governed by two main pieces of legislation. The Petroleum (Exploration and Production) Act 2013 established the National Oil Company and provides for a licensing process by which developers may obtain exploration and exploitation permits.[32] Under the Act, the Petroleum Authority of Uganda (P.A.U.) also monitors the extraction, production, and transportation of oil throughout the country. Accordingly, oil companies must prevent and mitigate degradation to the environment. Meanwhile, the Petroleum (Refining, Conversion, Transmission, and Midstream Storage) Act 2013 aims to regulate midstream operations.[33] In Uganda, the P.A.U. issues the necessary licenses pertaining to oil projects. The Water Act 1997 requires that polluters obtain prior authorization before undertaking any projects that may pollute water or hinder human health. [34] As for compensation, expropriation in Uganda is regulated under the Land Acquisition and Resettlement Framework (L.A.R.F.).[35]

29 *Constitution of the Republic of Uganda*, September 22, 1995, available at https://statehouse.go.ug/sites/default/files/attachments/Constitution_1995.pdf (retrieved 15 January 2021).

30 Cap. 153.

31 Constitution of the Republic of Uganda, *supra* note 29, Article 52.

32 "The Petroleum Exploration and Production Act 2013," *The Uganda Gazette*, Vol. 16, No. CVI, 4 April 2013.

33 "Petroleum (Refining, Conversion, Transmission, and Midstream Storage) Act 2013," *The Uganda Gazette*, Vol. 38, No. CVI, 26 July 2013.

34 Cap. 152.

35 Petroleum Authority of Uganda, "Land Acquisition and Resettlement Framework 2015," December 2016, available at https://www.pau.go.ug/download/land-acquisition-and-resettlement-framework-2015/ (retrieved 15 January 2021).

Among international instruments, the government has ratified the following agreements pertaining to the environment: the International Covenant on Economic, Social and Cultural Rights,[36] the Ramsar Convention on the Protection of Wetlands and Watercourses,[37] and the Nile Basin Cooperative Agreement,[38] which has yet to enter into force. Uganda is also a Contracting Party to the African Charter on Human and Peoples' Rights, which states that "all peoples shall have right to a general satisfactory environment favorable to their development."[39] Subsequently, in *Social Economic Rights Action Centre (S.E.R.A.C.) and The Centre for Economic and Social Rights v. Nigeria*, the African Commission on Human and Peoples' Rights (A.Cm.H.P.R.) found the Nigerian government liable due to the harm caused to the Ogoni people by oil extraction in the Niger Delta region.[40] The Commission ruled that the right to a clean environmental was essential to the enjoyment of other human rights. It thus ordered the government to clean up polluted sites and carry out environmental impact assessments before pursuing future oil operations. Though the case concerned gas flaring in Nigeria, the interpretation handed down by the A.Cm.H.P.R. is applicable to all contracting states under the Charter. In February 2019, the government also joined the Extractive Industries Transparency Initiatives under which the state must implement easy-access and accountable management of oil, gas, and other natural resources.[41] The E.A.C.O.P. was introduced in the legal landscape discussed above and was regulated by the rules thereof.

3.2.2 Background of the E.A.C.O.P. project

Interest in West Uganda initially began in 2006 when the British exploration company Tullow discovered approximately 1.2 billion barrels of recoverable

36 *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, *United Nations Treaty Series*, Vol. 993, No. 14531, p. 3, available at https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf (retrieved 15 January 2021).

37 *Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)*, Ramsar 2 February 1971, United Nations Treaty Series, Vol. 996, No. 14583, p. 245, available at https://treaties.un.org/doc/Publication/UNTS/Volume%20996/volume-996-I-14583-English.pdf (retrieved 15 January 2021).

38 *Agreement on the Nile River Basin Cooperative Framework*, Entebbe, 14 May 2010, available at https://nilebasin.org/images/docs/CFA%20-%20English%20%20FrenchVersion.pdf (retrieved 15 January 2021), ratified by Ethiopia, Rwanda, Tanzania and Uganda until 15 August 2019.

39 *African Charter on Human and Peoples' Rights*, Banjul, 27 June 1981, in force since 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at https://www.achpr.org/public/Document/file/English/banjul_charter.pdf (retrieved 15 January 2021).

40 Comm. No. 155/96 (2001).

41 Extractives Industries Transparency Initiative, "The EITI Standard 2019," October 15, 2019, available at https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf (retrieved 15 January 2021).

oil under Lake Albert.[42] In 2019, the World Bank ranked Uganda as the fifteenth poorest country by G.D.P. per capita. Hence, the Ugandan government had hoped that this discovery would quickly lead the country toward energy self-sufficiency. However, to be exploitable, the project necessitated a pipeline linking Lake Albert to the East African coast via Tanzania, where the oil would be exported.[43] In May 2017, a joint venture between the Uganda National Oil Company, the Tanzania Petroleum Development Corporation, Total E&P Uganda, the China National Offshore Oil Company Uganda (C.N.O.O.C.), and Tullow took on a U.S. $3.5 billion project known as the E.A.C.O.P.[44] One should note that Tullow agreed to sell the entirety of its stake to Total for U.S. $575 million in July 2020.[45] Officially the world's longest crude oil pipeline, the 900-mile route starts near Lake Albert, goes through the drainage basin of Lake Victoria and its shoreline for 21 miles, before heading east towards Tanzania.[46] Operating seven days a week and twenty-four hours a day, the pipeline requires more than eighty managing stations along with a constant heating temperature of 50 degrees Celsius.[47]

The E.A.C.O.P. will evidently have a consequential impact upon the environment and the local population. Once completed, the 24-inch-wide pipeline will pass through between 9,500 to 14,500 farmlands in Tanzania alone.[48] On the Ugandan side, the pipeline will cross 10 districts, 178 villages, and eight regions. The portion running through Tanzania will bisect two natural reserves, and likely affect the natural habitats of elephants

42 Fédération internationale pour les droits humains (F.I.D.H.) et al., "Oil in East Africa: Communities at Risk," September 10, 2020, available at https://www.fidh.org/IMG/pdf/oil_in_east_africa_oxfam-fidh_nv_090920.pdf (retrieved 15 January 2021).

43 Fred Pearce, "A Major Oil Pipeline Project Strikes Deep at the Heart of Africa," *Yale Environment 360*, 21 May 2020, available at https://e360.yale.edu/features/a-major-oil-pipeline-project-strikes-deep-at-the-heart-of-africa (retrieved 15 January 2021).

44 Andrew Bogrand et al., "Empty Promises Down the Line? A Human Rights Impact Assessment of the East African Crude Oil Pipeline," September 2020, available at https://oxfamilibrary.openrepository.com/bitstream/10546/621045/1/rr-empty-promises-down-line-101020-en.pdf (retrieved 15 January 2021).

45 Tullow Oil plc, "Tullow Agrees Sale of Its Entire Stake in the Lake Albert Development Project in Uganda to Total," April 23, 2020, available at https://www.tullowoil.com/media/press-releases/tullow-agrees-sale-its-entire-stake-lake-albert-development-project-uganda-total/ (retrieved 15 January 2021).

46 Netherlands Commission for Environmental Assessment (N.C.E.A.), "Review of the Environmental and Social Impact Assessment (E.S.I.A.) for the Kingfisher Project," March 8, 2019, available at https://www.eia.nl/docs/os/i73/i7308/7308_ncea_review_of_esia_report_for_kingfisher_project_-_uganda_-_signature_left_out.pdf (retrieved 15 January 2021).

47 Fred Pearce, *supra* note 43.

48 Digby Wells Environmental, "Social and Resettlement Services for the East African Crude Oil Pipeline, Tanzanian Section: Resettlement Policy Framework," September 2018, available at http://eacop.com/publication/view/eacop-resettlement-policy-framework-tz-full-report-english/ (retrieved 15 January 2021).

and chimpanzees as well as a marine park.[49] Overall, the Albertine Rift houses an incredible amount of biodiversity, including 52 percent of bird species present on the continent, along with 39 percent of mammals that are native to Africa.[50] Along with the E.A.C.O.P., the joint venture agreed on the exploitation of two oil extraction sites: the Tilenga project operated by Total E&P Uganda, and the Kingfisher project operated by C.N.O.O.C. Uganda. The two exploitation sites are expected to produce 216,000 barrels of crude oil per day and entail the sinking of 400 wells, most of which are located within Murchison Falls National Park.[51] In total, the oil drilling sites will affect up to 17,293 hectares of land.[52] It was estimated that the carbon footprint of the E.A.C.O.P. together with Tilenga and Kingfisher will approximately equate that of Denmark.[53]

The land surrounding the water basins is mostly used for human settlement and, notably, agriculture.[54] As a result, population displacement is inevitable. E.S.I.A.s conducted for Uganda indicated disturbances to the local economy, namely activities such as cattle grazing, fishing, and farming.[55] In addition, N.G.O.s in the field identified risks of pipeline explosion, oil spillage, and deforestation.[56] These are critical risks as local communities rely on groundwater sources to meet their daily needs. The E.S.I.A. also estimated that the well-testing and gas flaring needed for the projects will tremendously affect air quality, access to clean water, and the ecological environment in a physical manner.[57] Due to the economic attractiveness of the project, an immigration wave of people seeking jobs may present a threat of disease spreading or water contamination, or both.[58] The population surveyed by local N.G.O.s also feared that increased traffic and industrial operation would cause an increase in crimes and social unrest.[59] Thus, given the impact of the E.A.C.O.P., ensuring due process throughout the development of the project is key in ensuring access to justice for local communities.

49 Total East Africa Midstream BV, "Tanzania: Environmental Impact Assessment – Non-Technical Summary," August 2019, available at http://eacop.com/wp-content/uploads/2020/01/EACOP_NTS_English.pdf (retrieved 15 January 2021).
50 Netherlands Commission for Environmental Assessment (N.C.E.A.), *supra* note 46.
51 Fred Pearce, *supra* note 43.
52 Foundation for Human Rights Initiatives (F.H.R.I.), "New Oil, Same Business? At a Crossroads to Avert Catastrophe in Uganda," September 2020, available at https://www.fidh.org/IMG/pdf/new_oil_same_business-2.pdf (retrieved 15 January 2021).
53 Fred Pearce, *supra* note 43.
54 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.
55 Total East Africa Midstream BV, *supra* note 49.
56 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.
57 Andrew Bogrand et al., *supra* note 44.
58 *Fédération internationale pour les droits humains* (F.I.D.H.) et al., *supra* note 42.
59 Andrew Bogrand et al., *supra* note 44.

3.3 The state of environmental justice in Uganda

Theoretically, case law development in the past twenty years has considerably ameliorated access to courts in Uganda with the judiciary acknowledging the importance of public interest litigation. However, the planning and development of the E.A.C.O.P. shows a rather disparate experience for local populations affected by the infrastructure and local activists. The following section discusses the possibility for local communities and N.G.O.s to obtain remediation in their home country.

3.3.1 Public participation in the early planning stage

Environmental justice refers to the "equitable distribution of environmental risks and benefits; fair and meaningful participation in environmental decision-making; recognition of community ways of life, local knowledge, and cultural difference; and the capability of communities and individuals to function and flourish in society."[60] In this context, "justice" calls for the equitable distribution of "social goods."[61] Access to justice begins with the public's right to know and the right to voice their concerns and objections.[62] To fully give rise to the essence of public participation, there must be transparency. Uganda formally recognizes the right to access information under Article 41 of the Constitution. Both Section 15 of the Petroleum (Exploration, Development and Production) Act 2013 and Section 146 of the National Environment Act 2019 provide for the completion of E.S.I.A.s before the N.E.M.A. can greenlight any project. Moreover, the right to public participation is further enshrined by virtue of Schedule 3 of the National Environmental Statute (N.E.S.) as well as the Environmental Impact Assessment Regulation promulgated in 1998.[63] In practice, access to information in Uganda is laborious, mostly due to technical obstacles such as limited access to the Internet, but illiteracy in English, difficult access to unbiased advice, and most importantly, the lack of awareness and knowledge concerning environmental issues are also substantial.[64] The decentralization of natural resource management from 1996 onwards granted broad discretion

60 David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature*, (Oxford: Oxford University Press, 2007).

61 Andrew Light and Avner De-Shalit, *Moral and Political Reasoning Environmental Practice*, (Cambridge: MIT Press, 2003).

62 See Onyeka K Anaebo and Eghosa O. Ekhator, "Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation," 17 (2) *Environmental Law Review* (2015), pp. 82–99.

63 No. 13 of 1998.

64 Peter Eddie Aldinger, "Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana," 26 (4) *Georgetown International Environmental Law Review* (2014), pp. 345–388.

in exempting mandatory procedures as well as retaining critical information from the public.[65]

With respect to the E.A.C.O.P., public consultation in Uganda lasted only twenty-one days for individuals affected by the construction of the project and twenty-eight days for all parties with legitimate interest.[66] The consultation process in Tanzania took even less time. In effect, the assessment was considered to be complete after only fourteen days.[67] The E.S.I.A. for Uganda estimated that over 200 households would have to be relocated.[68] Between 3,200 to 3,500 households would also be affected financially due to the disruption of local informal economic activities.[69] In addition to the estimated numbers, activists in the region reported numerous cases of expropriation *de facto*.[70] Indeed, N.G.O.s denoted many irregularities with the land acquisition process, which effectively began in early 2017.[71] Namely, local organizations pointed that the E.A.C.O.P. consortium had failed to identify significant ecological, health, and safety risks concerning its E.S.I.A.[72] By the time Total was summoned to court, the project had already caused the displacement of roughly 5,000 people in Uganda alone.[73] Siding with the E.A.C.O.P., the Ugandan government was alleged to have harassed and threatened villagers who tried to seek help from local non-profits.[74] Witnesses testified in court that they had received threats from local authorities telling them not to seek help from N.G.O.s.[75] Members of the press later reported that they had received several death threats from the government throughout the week during which the hearing in Paris took place.[76] Harassment continued upon return to Uganda

65 Peter Oosterveer and Bas van Vliet, "Environmental Systems and Local Actors: Decentralizing Environmental Policy in Uganda," 45 (2) *Environmental Management* (2010), pp. 284–295.

66 Andrew Bogrand et al., *supra* note 44.

67 Ibid.

68 Total East Africa Midstream BV, *supra* note 49.

69 Andrew Bogrand et al., *supra* note 44.

70 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.

71 Les Amis de la Terre, "Manquement graves à la loi sur le devoir de vigilance : le cas Total en Ouganda, Les Amis de la Terre & Survie, " June 2019, available at https://www.amisdelaterre.org/publication/manquements-grave-a-la-loi-sur-le-devoir-de-vigilance-le-cas-total-en-ouganda/ (retrieved 15 January 2021).

72 Ibid.

73 Kevin Mwanza, "Marked for Demolition? Ugandans on Pipeline Route Fear Land Loss," August 15, 2018, available at https://www.reuters.com/article/us-uganda-landrights-oil/marked-for-demolition-ugandans-on-pipeline-route-fear-land-loss-idUSKBN1L01D2 (retrieved 15 January 2021).

74 Agnès Faivre, "Le groupe français Total mis à l'index pour ses activités en Ouganda," June 30, 2019, available at https://www.lepoint.fr/afrique/le-groupe-francais-total-epingle-pour-ses-activites-en-ouganda-28-06-2019-2321558_3826.php# (retrieved 15 January 2021).

75 Les Amis de la Terre, *supra* note 71.

76 International Federation for Human Rights (F.I.D.H.), "Two Defenders Who Testified in the Trial Against Total Are at Risk in Uganda," December 26, 2019, available at

and eventually resulted in activists and witnesses being detained for several hours upon return to Kampala.[77]

In addition to the unwillingness of the government to address irregularities during the consultation process, the system is deeply underfunded and the staff is untrained. This assessment is that of Andrew Plumptre, conservationist and head of the Key Biodiversity Areas Secretariat, who has done extensive work with governments and corporations in the East African Great Lakes region.[78] Similar to its neighboring countries, Uganda simply does not have the necessary means and reflexive process to handle projects with scales as large as the E.A.C.O.P.[79] Instead, corporations that are supposed to be applicants in the licensing process are expected to fill in for the absence of government.[80]

Evidently, in the particular case of the E.A.C.O.P., privatizing the submission and review of E.S.I.A.s has led to unfortunate results. Namely, in terms of mitigation measures, the consortium omitted to communicate multiple management plans in their E.S.I.A.s, such as the environmental and social management plan, the biodiversity management plan, and the stakeholder communication plan.[81] In a subsequent statement, the developers refused to communicate these mitigation plans, claiming reasons of security and business secret.[82] Rather than rendering their emergency protocols open access, the consortium confirmed that these will only be translated into local dialects and communicated to locals whenever pertinent.[83] Upon conducting their interview in villages affected by the project, Oxfam reported that citizens felt that they had not been given sufficient information and were excluded in the project's planning and development.[84]

Despite the completion of an E.S.I.A. for each company and each site, public engagement faltered. Most respondents to the survey had no knowledge of the compensation process or the precise timeline, nor were they aware of the societal and ecological effects of the pipeline.[85] Vulnerable groups such

https://www.fidh.org/en/issues/human-rights-defenders/two-defenders-who-testified-in-the-trial-against-total-are-at-risk-in (retrieved 15 January 2021).

77 Ibid.

78 Andrew Plumptre, Personal Interview, 8 October 2020.

79 For an assessment of the state of environmental regulations in Uganda; see Christine Echookit Akello, "Environmental Regulation in Uganda: Successes and Challenges," 3 (1) *Law, Environment and Development Journal* (2007), pp. 20-25. For an analogous discussion about the regulation of the mining sector in Zimbabwe; see Tumai Murombo, "The Effectiveness of Initiatives to Promote Good Governance, Accountability and Transparency in the Extractives Sector in Zimbabwe," 60 (2) *Journal of African Law* (2016), pp. 230–263.

80 Andrew Plumptre, *supra* note 78.

81 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.

82 Andrew Bogrand et al., *supra* note 44.

83 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.

84 Andrew Bogrand et al., *supra* note 44.

85 Ibid.

as women, the elderly, and disabled people reported that they had no meaningful voice during discussions and meetings with local officials and the corporations. Non-adherence to local social conventions resulted in gender inequality during meetings and defective public communication.[86] Indeed, several N.G.O.s reported that information meetings and consultations were held at hours where women would be either farming or attending house chores.[87] Where women did participate, the respondents believed that their comments were not taken into account, or at least that theirs were afforded much less weight than issues raised by the men.[88] This disparate treatment was also reflected in the process of land acquisition and compensation.

3.3.2 Land acquisition and access to effective remediation

In theory, the L.A.R.F. guarantees that affected members of the population be justly compensated in due time and be provided with sufficient food supply during resettlement.[89] However, as discussed above, there was a significant lack of public participation with almost no effective access to information. In the case of the E.A.C.O.P. project, the marginalization of minority groups was further exacerbated by the state of gender inequality, which in many cases led to women being deprived of any compensation whatsoever.[90]

Whilst the 1995 Constitution guarantees women's right to land ownership,[91] the Land Act 1998 fostered the survival of customary rules of property. It is estimated that 80 percent of private land in Uganda today is held through customary law.[92] Under those rules, women cannot own property. In addition, respondents to N.G.O. inquiries revealed that they were left with no copy of assessment forms and that the subcontractors had instructed them to sign the forms with pencils.[93] In response, Total responded that government regulations forbid developers to leave copies of land assessment before these were approved by the chief government valuer.[94] Although the consortium had put in place a grievance mechanism for households contesting the compensation sum, applicants nevertheless had to sign the assessment form.

86 For a discussion on the importance of adhering to local culture when soliciting public input; see Matthew J. Rowe et al., "Accountability or Merely 'Good Words'? An Analysis of Tribal Consultation under the National Environmental Policy Act and the National Historic Preservation Act," 8 *Arizona Journal of Environmental Law and Policy* (2018), pp. 1–47.
87 Andrew Bogrand et al., *supra* note 44.
88 Andrew Bogrand et al., *supra* note 44.
89 L.A.R.F., *supra* note, 35, Principles 6, 7, 8, 10.
90 Andrew Bogrand et al., *supra* note 44.
91 Article 25.
92 Cap. 227.
93 Andrew Bogrand et al., *supra* note 44.
94 Ibid.

The local population also voiced their anger and confusion as to the valuate rate.[95] Activists also reported cases of corruption where officials sitting on village councils asked for ten percent of the compensation sum in exchange for endorsing and expediting the household's assessment form[96] Delayed payments, in some cases, caused households who had chosen cash compensation being unable to meet their daily needs, leading to starvation and health deterioration.[97] In-cash compensation was calibrated at a government rate that had undervalued market prices.[98] This prevented affected households from re-purchasing land elsewhere. For compensation in nature, relocation to areas far from their original domicile made it significantly more difficult for children to attend school.[99] Based on these facts, the plaintiffs contended that Total's violation of the Vigilance Law resulted in the neglect of human rights.[100]

The U.N. Guiding Principles identify three pillars outlining the duties of public and private entities.[101] The first pillar imposes an obligation upon states to respect, protect, and fulfill human rights and fundamental freedoms. The second pillar affirms the responsibility of private businesses to comply with applicable laws on human rights, contribute to human rights protection, and conduct due diligence to mitigate risks of human rights abuse during business. The third pillar underlines the need to provide effective grievance mechanisms for victims of human rights abuse.

Although businesses need not remediate damages themselves, Principle 22 dictates that they must cooperate in the recovery process. By virtue of Principle 25, an effective grievance mechanism should be comprised of seven characteristics: it must be legitimate, accessible, predictable, equitable, transparent, able to offer outcomes compatible with human rights, and a source for improving future access to reparation. Under this standard, both the Ugandan government and consortium operating the E.A.C.O.P. must respectively give full effects and respect the environmental rights enshrined under the Constitution and national laws. On paper, environmental rights are enforceable via public interest litigations by the virtue of Article 50(2) of the Constitution. In *The Environmental Action Network Ltd. v. Attorney General & N.E.M.A.*, the High Court held that an organization had locus standi to bring suit on behalf of the Ugandan people irrespective of personal direct

95 Les Amis de la Terre, *supra* note 71.
96 Andrew Bogrand et al., *supra* note 44.
97 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.
98 Ibid.
99 Portia Crowe, "Ugandan Farmers Take on French Oil Giant in Game Changer Case for Multinationals," January 10, 2020, available at https://www.pri.org/stories/2020-01-10/ugandan-farmers-take-french-oil-giant-game-changer-case-multinationals (retrieved 15 January 2021).
100 *Les Amis de la Terre et al. v. Total SA*, *infra* note, 165.
101 United Nations Human Rights Council, *supra* note 14.

interest.[102] In *Rev. Christopher Altikila v. The Attorney General*,[103] a Tanzanian case, the court explained that most of the population does not have the financial means to litigate on its own behalf. Therefore, group litigation presented itself as an adequate way to redistribute financial burden whilst also ensuring that environmental rights can be asserted. *Greenwatch v. Attorney General and N.E.M.A.* established the state's obligation to ensure that the right to a clean and healthy environment is fulfilled.[104] In *Greenwatch*, the court found the government to have contravened this obligation as it had failed to regulate the production and distribution of plastic bags. In *obiter dicta*, the court admitted that most Ugandan citizens, even the elites, lack environmental literacy and the proper knowledge to defend their own rights. As the Constitution places a duty upon each citizen to promote Constitutional rights, the court's interpretation was that N.G.O.s made up for this deficiency by acting on behalf of citizens, thus discharging members of the public from their constitutional duty.[105]

N.G.O.s on the field, however, have reported a somewhat different experience with the Judiciary. According to Juliette Rénaud, General Counsel for Amis de la Terre (Friends of the Earth France), one of the N.G.O. plaintiffs in the present case, access to courts has proven difficult due to the travel distance and the costs of litigation.[106] Despite the Constitution guaranteeing a right to a fair and speedy trial, proceedings are slow and paved with technical and procedural irregularities.[107] As a matter of fact, the International Federation for Human Rights denotes that it can take up to seven years before litigants could obtain a final judgment.[108]

The World Justice Project suggests that Uganda is one of the worst countries in the world as of 2020 with respect to the rule of law. Out of 128 States, Uganda ranks as number 118 with an overall score of 0.40/1.[109] Similarly, Freedom House categorizes Uganda as a "Not Free" country, denoting the lack of freedom of assembly, lack of an independent judiciary, lack of due process, and lack of freedom from torture and extrajudicial repression.[110] Local communities view the judiciary not as a tool or a protector but rather

102 High Court Miscellaneous Application No. 39 of 2001.
103 Civil Case No. 5 of 1993.
104 [2012] U.G.H.C. 205.
105 Ben Kiromba Twinomugisha, "Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda," 3 (3) *Law, Environment and Development Journal* (2007), pp. 244–258.
106 Juliette Rénaud, Personal Interview, 7 October 2020.
107 Ibid.
108 Foundation for Human Rights Initiatives (F.H.R.I.), *supra* note 52.
109 The World Justice Project, "World Justice Project Rule of Law Index 2020," 2020, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf (retrieved 15 January 2021).
110 Freedom House, "Uganda," 2019, available at https://freedomhouse.org/country/uganda/freedom-world/2020 (retrieved 15 January 2021).

as a source of threat working against them.[111] According to local respondents, the developers and the government itself have been resorting to legal actions in order to coerce them into signing unfair compensation agreements and land-grabbing.[112]

Uganda is hardly the only developing country giving in to the pressure of globalization under a self-interested leadership[113] Theoretically, Article 25(2) of the Constitution supposedly prohibits expropriation notwithstanding two exceptions. The first exception is in the case of public use or for matters of defense, public safety, public order, public morality, or public health. The second exception provides that expropriation shall be framed by legislation and answer to two characteristics: prompt, fair, and adequate compensation' and the right to remediation for any parties with "an interest or right over the property." To render itself more attractive to foreign investment, host countries often deliberately resort to self-deregulation by lowering their environmental regulations.[114] The public use exception—also referred as "eminent domain" in some countries such as South Africa—has been heavily used by governments to sponsor land grabbing and land dispossession by foreign investors.[115] Land grabbing often comes under the guise of an opportunity to better the living conditions in local communities, to increase government revenue, or to reduce unemployment. In reality, these government-sponsored concessions to private corporations are often made at the ultimate expense of the population affected by the project.[116]

A powerful tool of neoliberalism, the public use discourse allows for the mass privatization of land and natural resources, which in turn contributes to the underdevelopment and marginalization of local communities.[117] In the long term, developing nations progressively abandon their customary social and environmental management systems—which may be more in line with ecological systems—for wealth maximization.[118] More so, it could be that the colonial past of African countries has a direct influence on the way in which

111 See Taiwo Ajala, "Examining the Legal Safeguards against the Environmental Impact of Land Grabbing in African Countries: A Critical Review of Nigerian Environmental Law" 20 (1) *Environmental Law Rev*iew (2018), pp. 3–15.

112 Andrew Bogrand et al., *supra* note 44.

113 Emeka Duruigbo, "The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa." 20 (1) *University of Pennsylvania Journal of International Economic Law* (2005), pp. 1–68.

114 Edwin C. Mujih, "'Co-deregulation' of Multinational Companies Operating in Developing Countries: Partnering against Corporate Social Responsibility?," 16 (2) *African Journal of International and Comparative Law* (2008), pp. 249–26

115 Issah Moshood et al., "Eminent Domain, 'Public Use' and Mineral Resource Exploitation in South Africa," 19 (1) *African Studies Quarterly* (2020), pp. 1–22.

116 Michael Levien, *Dispossession Without Development: Land Grabs in Neoliberal India*, (Oxford: Oxford University Press, 2018).

117 David Harvey, *The New Imperialism*, (Oxford: Oxford University Press, 2003).

118 Vandana Shiva, "Recovering the Real Meaning of Sustainability," in *Environment in Question*, (London: Routledge, 1992).

their current legal systems tend to favor M.B.E.s and foreign investors.[119] Unfortunately, the E.A.C.O.P. merely falls within a recurring theme under the current administration.[120] In 2011, President Yoweri Kaguta Museveni had announced his intention to transform part of the Mabira rainforest into a sugarcane plantation to be exploited by a private sugar manufacturer.[121] More recently in 2016, the government declassified Bugala Island located within Lake Victoria to increase the culture and production of palm oil.[122]

The involvement of C.N.O.O.C. is also a reflection of the spreading of neoliberalism on the continent. From the perspective of African nations, the presence of Chinese corporations makes up for an attractive alternative to Western actors. In effect, foreign investments coming from Western countries may require host countries to update their environmental and human rights performance to international standards—at least for the sake of greenwashing.[123] However, this is not the case of the Chinese Communist Party (C.P.C.), which began to entertain strong relations with African countries since its founding.[124] Having adopted the principle of non-interference, Beijing can willfully turn a blind eye on human rights issues while operating in host countries, particularly during periods of conflict or civil unrest.[125]

The C.P.C. also claims to uphold a different set of human rights that consists of economic freedom, cultural and social development, and people's health.[126] Chinese M.B.E.s strongly abide by the "no political strings at-

119 For a thorough analysis of Nigeria's History with multinationals; see Olufemi O. Amao, "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States," 52 (1) *Journal of African Law* (2008), pp. 89–113.

120 For a discussion on Uganda's political statement and its deal-making process with private investors; see Badru Bukenya and Jacqueline Nakaiza, "Closed but Ordered: How the Political Settlement Shapes Uganda's Deals with International Oil Companies," in *Oil Wealth and Development in Uganda and Beyond*, (Leuven: Leuven University Press, 2020), pp. 103–124.

121 Catherine Nampewo, "Saving Mabira Rainforest: Using Public Interest Litigation in Uganda to Save Mabira and Other Rainforests," 40 *Environmental Affairs* (2013), pp. 523–552.

122 African Press Organisation, "Uganda Court Clears Bidco of Deforestation: Judge Dismisses 'Unnecessary' Lawsuit by Environmental Activists," *African Press Organisation – Database of Press Releases Related to Africa*, September 27, 2016, available at https://search-proquest-com.libproxy.ucl.ac.uk/wire-feeds/uganda-court-clears-bidco-deforestation/docview/1824625987/se-2?accountid=14511 (retrieved 15 January 2021).

123 M. Sornarajah, "Good Corporate Citizenship and the Conduct of Multinational Corporations," 21 *Law in Context: A Socio-Legal Journal* (2003), pp. 224–250.

124 Qingxiu Bu, "Chinese Multinational Companies in Africa: The Human Rights Discourse." 8 (1–2) *African Journal of Legal Studies* (2015), pp. 33–86.

125 Suisheng Zhao, *China in Africa: Strategic Motives and Economic Interests*, (London: Routledge, 2015).

126 For a more detailed discussion about the concept of human rights in China; see Paolo Farah and Elena Cima, *China's Influence on Non-Trade Concerns in International Economic Law*, (London: Routledge, 2016).

tached" policy as they are either State-owned or indirectly controlled by the government and thus could be said to advance Beijing's diplomatic strategies. Again, beneath this so-called economic empowerment of the people lies the fact that the current Sino-African partnership remains inequitable and unsustainable for Africa.[127] China's mass extraction of natural resources only ends up profiting the ruling elites who have no long-term economic plan for the countries and citizens from whom the resources were extracted.[128] In the end, not only does the population not receive the development benefits advertised by the C.P.C., they must also bear the social and environmental burden that their government placed upon them. Considering the E.A.C.O.P., it is fair to conclude that environmental justice has yet to reach a mature stage in Uganda. Coupled with restricted access to court and mistrust in the judicial system, local victims of injuries caused by foreign M.B.E.s must seek justice elsewhere.

3.4 Relying on home jurisdictions to deliver justice

Faced with a deficient or non-existent grievance mechanism, victims of environmental harm often bring suit in the developers' home jurisdiction. The following section looks into foreign direct liability claims heard by courts in the Global North. In England, cases directed at parent companies of multinationals operating abroad are brought under the tort of negligence. Conversely, France adopted an alternative strategy by enacting a compliance statute that acknowledges the economic realities of multinational business enterprises.

3.4.1 Foreign direct liability cases brought under English law

International law has yet to invent an effective solution to hold M.B.E.s accountable for their conduct abroad.[129] Whilst attempting to bring a claim against a developer, foreign victims of environmental harm face two difficulties: asserting jurisdiction and piercing the corporate veil.[130] Concerning the matter of jurisdiction, until the Civil Jurisdiction and Judgment Act

127 Courage Mlambo et al., "China-Africa Relations: What Lies Beneath?"49 (4) *The Chinese Economy* (2016), pp. 257–276. Conversely, a review of academic research published in the last decade shows a lack of objectivity when describing the Sino-African partnership; see Abdoulkadre Ado and Zhan Su, "China in Africa: A Critical Literature Review," 12 (1) *Critical Perspectives on International Business* (2016), pp. 40–60; Deborah Brautigam, *Will Africa Feed China?*, (Oxford: Oxford University Press, 2015); Ward Warmerdam and Meine Pieter van Dijk, "China-Uganda and the Question of Mutual Benefits," 20 (2) *The South African Journal of International Affairs* (2013), pp. 271–295.

128 Obert Hodzi, "China and Africa: Economic Growth and a Non-Transformative Political Elite," 36 (2) *Journal of Contemporary African Studies* (2018), pp. 191–206.

129 Cristina Baez et al., "Multinational Enterprises and Human Rights," 8 *University of Miami International and Comparative Law Review* (1999–2000), pp. 183–338.

130 Jennifer A. Zerk, *supra* note 23.

1982, English courts could not rule over matters affecting immovable property located outside of England and Wales.[131] Courts usually have personal jurisdiction solely over corporations incorporated or having sufficient presence within the forum borders—for instance, through an agent or a local branch.[132] For tort cases, courts have jurisdiction where the damage was suffered in England and Wales.[133] As subsidiaries solely operate abroad, home courts cannot overextend their jurisdiction due to the principle of comity.[134]

Beyond mere courtesy, English courts have a long history of refusing to recognized the existence of enterprise groups as a matter of law.[135] This poses as a significant impediment as it enables the defendant to successfully have the case thrown out by pleading *forum non conveniens*.[136] Courts will grant the defendant's motion to dismiss if there is another more appropriate forum to rule over the claim with regard for the interests of the parties but also for the ends of justice.[137]

Strong connecting factors to host countries could signify that, theoretically, in the instance of the E.A.C.O.P., Uganda should be the natural forum competent to rule over the claim had the plaintiffs chosen to initiate proceedings in England. However, as demonstrated above, plaintiffs cannot even reasonably be expected to obtain a fair and speedy trial in Uganda. The usual solution to overcome those different and variable factors is to enjoin the parent company as a defendant and to argue that the host jurisdiction would be unable to deliver a just and fair outcome.[138] The House of Lords admitted this concern to be fundamental in *Conelly v. R.T.Z. Corporation Plc.* where Namibian workers who had developed throat cancer due to exposure to uranium brought a claim for breach of duty of care against the employer's

131 *British South Africa Co. v Companhia de Mocambique* [1893] A.C. 602.

132 See *Saab v Saudi American Bank* [1998] 1 WLR 937; *Sea Assets v PT Garuda Indonesia* [2000] 1 All ER 371; *Adams v Cape Industries plc* [1990] Ch 433.

133 *Metal Und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc.* [1990] QB 391.

134 *Airbus Industrie G.I.E. v Patel* [1999] 1 AC 119.

135 Veltrice Tan, "The Corporate Veil: Will the Court Pierce the Veil on Grounds of Justice and Modern Business Realities?" 39 (12) *Company Law* (2018), pp. 387–400.

136 *Moses Fano Sithole and others v Thor Chemical Holdings Limited and Desmond John Cowley* [1999] EWCA Civ 706.

137 *Lubbe v Cape Plc* [2000] UKHL 41 (*Lubbe v Cape*).

138 It should be noted that the Court of Justice of the European Union held that staying proceedings on the ground of "*forum non conveniens*" contravened Article 2 of the Brussels Convention irrespective of the alternative forum not being located within a Contracting State or that the case has no connecting factors with a Member State. However, it is assumed that this rule shall no longer apply once the United Kingdom leaves the European Union on 1 January 2021. See Case C-281/02 *Owusu v Jackson* [2005] ECLI:EU:C:2005:120; Consolidated version of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299, p. 32–42.

parent company.[139] The Lords considered the cost of litigation in Namibia and found that it would result in a denial of justice.

The second obstacle is the corporate veil. Past cases show that national courts are reluctant to lift the corporate veil between parent companies and subsidiaries. Although rare, *Lubbe v. Cape Plc.* found that a parent company could owe a duty of care to any third parties injured by its subsidiary.[140] Similar to *R.T.Z.*, the claimant had been exposed during the period of employment under the defendant's subsidiary. However, the Supreme Court recently reiterated in *Prest v. Petrodel Resources Ltd.* that the corporate veil shall be disregarded only as a last resort.[141]

Another concern is the choice of law. Under the Private International Law (Miscellaneous Provisions) Act 1995, courts must not apply foreign law if the outcome would contravene the public policy doctrine, also known as *ordre public*. As for the merits, the courts have developed a legal threshold derived from the three-fold test established by *Caparo*.[142]

The following cases best illustrate foreign direct liability litigation in England and Wales. In *Lungowe v. Vedanta*[143] and *Okpabi v. Royal Dutch Shell*,[144] the claimants argued that the parent company owed them a duty of care distinct from that of their subsidiary. In the first case, the defendant, operating in Zambia, discharged significant amounts of toxic waste into watercourses used for drinking and crop irrigation. Lord Biggs wrote that liability depends on the way the parent company took over the management of the subsidiary such as commands, advice, or even staff training. There is a duty of care where the parent company behaves in a way such as to give the impression that it exercises effective control over the operations of its subsidiary even if it does not do so in actuality. The opinion took care to mention that this duty of care does not arise from a mere relationship between parent and subsidiary. There must either be effective control or assumption of responsibility.

In the second case, Nigerian claimants alleged that Shell had breached its duty of care by not preventing environmental harm and physical injury caused by its subsidiary. However, the High Court of England and Wales distinguished *Okpabi* from *Vedanta*, ruling that the involvement of Shell was minimal at best. Compared to Vedanta, Shell had no operational control over the subsidiary that was run as a joint venture with other Nigerian entities. The Court of Appeal further held that justice is not a satisfying ground for lifting the corporate veil. Though a failure to recognize the reality of

139 [1997] UKHL 30.
140 *Lubbe v Cape*, *supra* note 137.
141 [2013] UKSC 34.
142 *Caparo Industries PLC v Dickman* [1990] UKHL 2.
143 *Lungowe v Vendata Resources plc* [2016] EWHC 975, affirmed [2019] UKSC 20.
144 [2012] EWHC 89, affirmed [2018] EWCA Civ 191.

multinational business enterprises, both academics and legal practitioners welcomed this decision for upholding the principle of legal personality.[145]

It is worth noting that in *Okpabi*, the court dismissed the claims before full disclosure of corporate documents, holding that no additional documents would change the outcome of the judge's assessment.[146] However, contrary to Zambia, Nigeria has enacted legislation regulating environmental pollution. A similar suit was brought against Shell for an oil spill before the District Court of the Hague in *Akpan*, also ruled under English law.[147] In addition to monetary damages, the claimants were asking for full environmental restoration. Here, the court also dismissed the allegations against the parent company, though it admitted liability for the subsidiary.

In both cases involving Shell, the company denied the allegations and asserted that the environmental harms were a result of sabotage. Both forums relied on *Chandler v. Cape*, which established a four-prong test to hold parent companies liable for industrial injury caused to victims during their employment by a subsidiary.[148] Under the test, (i) the activities of the parent company and the subsidiary had to be essentially the same; (ii) the parent had or should have had more knowledge of a safety or health hazard than its subsidiary; (iii) the parent knew or should have known that working conditions were not proper; and (iv) the parent knew or should have foreseen that the subsidiary would rely on its knowledge to protect employees. Analyzing the facts, both courts found that there was a lack of proximity between Shell and its Nigerian subsidiary.

In recent development, the Hague Court of Appeal overturned the district court's judgment, ordering Shell to provide full access to its corporate documents.[149] Although the court did not rule on the substantive issue at hand, it nevertheless identified six salient features that should be taken into account when determining the liability of the parent company: (i) the standard for pipeline maintenance instructed by Shell; (ii) whether these standards were respected by the subsidiary; (iii) if they were not met, whether Shell had or should have had knowledge of this non-compliance; (iv) whether an adequate reporting scheme would have prevented the leakage; (v) the reasons explaining that Shell and its subsidiary failed to detect the damaged equipment; and (vi) whether Shell had sufficient knowledge and the material means to intervene in place of its subsidiary when the latter proved to be negligent. Following the landmark decision in the *Urgenda Climate Case*, which ruled

145 Veltrice Tan, *supra* note 135.

146 The U.K. Supreme Court has since overturned the Court of Appeal's decision and ruled that further disclosure of corporate documents was needed to assess the probability of the appellant's claim. The court remanded the case for retrial. See *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2021] UKSC 3.

147 Rb. Den Haag 30 January 2013, ECLI:NL:RBDHA:2013:BY9845.

148 *Chandler v Cape plc* [2012] EWCA Civ 525.

149 Gh. Den Haag 18 December 2015, ECLI:NL:GHDHA:2015:3586.

that the government had a duty to protect its citizens from environmental damage,[150] Dutch N.G.O.s reintroduced the claim against Shell before the district court.[151] This brief study has shown that the prospects of success for any foreign direct liability litigations brought under tort remains uncertain. Although good for business,[152] the current law misses the opportunity to consider parent companies and subsidiaries as one single entity on matters of human rights. This is what the new Vigilance Law in France aims to achieve.

3.4.2 The Duty of Vigilance Law

The Duty of Vigilance Law is the first compliance statute ever enacted to regulate C.S.R. performance of private businesses at group level with extra-territorial application. The Law is said to be a milestone in terms of human and environmental rights protection, and the first statute to implement the U.N. Guiding Principles.[153] The provisions apply to all companies that, at the end of two consecutive fiscal years, have (a) at least 5,000 employees working for the parent or any subsidiary on French soil, or (b) at least 10,000 employees working directly or indirectly in France and abroad.

The law requires firms to draw up an annual Vigilance Plan with the consultation of "stakeholders."[154] The Vigilance Plan must comply with five attributes: (i) mandatory risk mapping, (ii) periodical assessment of subsidiaries and supply chains, (iii) a duty to mitigate risks of human rights abuse and environmental harm, (iv) the implementation of protocols for internal whistle-blowers, and (v) performance tracking.[155] Where a firm fails to comply with these duties and takes no diligent action within 30 days after being formally

150 HR 20 December 2019, ECLI:NL:HR:2019:2006.

151 David Vetter, "Shell Oil Accused of 'Climate Wrecking' in Historic Lawsuit," December 2, 2020, available at https://www.forbes.com/sites/davidrvetter/2020/12/02/shell-oil-accused-of-climate-wrecking-in-historic-lawsuit/?sh=58366e6b14be (retrieved 15 January 2021).

152 Andrew Sanger, "Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries," 78 (3) *The Cambridge Law Journal* (2019), pp. 486–490.

153 Sandra Cossart, "What Lessons Does France's Duty of Vigilance Law Have for Other National Initiatives?" *Business & Human Rights Resource Centre*, June 27, 2019, available at https://www.business-humanrights.org/en/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives (retrieved 15 January 2021).

154 The Duty of Vigilance Law incorporated the term "*les parties prenantes de la société*" by taking the English term "stakeholder" and translating it. Article 1(4) stipulates that the vigilance plan must be drawn up with "stakeholders" of the company (*les parties prenantes de la société*). The Law distinguishes stakeholders from interested persons, in French insofar as, for example, Articles 1(5) (enforcement of the plan) and 2(2) (liability claim) confer legal standing to any plaintiff provided the plaintiff has an "interest" to pursue a claim (*toute personne justifiant d'un intérêt à agir*). Thus, although the entire concept of "stakeholder" raises many problems (see, for example, Lucian A. Bebchuk and Roberto Tallarita, "The Illusory Promise of Stakeholder Governance," 106 *Cornell Law Review* (2020), pp. 91–178, it was the intended term used is this legislation.

155 Vigilance Law, *supra* note 25, Article 1.

notified, Article 1 allows "all interested parties" to initiate civil enforcement proceedings. The court may order specific performance with a late penalty fine.

Of course, one issue with the recurring use of "stakeholder" is the absence of outer boundaries for this term. The Law does not provide any guidance on the sustenance of "stakeholders." Theoretically, stakeholders could consist of employees, subcontractors, supply chains, but it could also include consumers, local communities affected by business operations, or even interest groups such as environmental N.G.O.s. Article 2 provides that interested parties may initiate proceedings for liability arising from the violation of the Vigilance Law. Where found liable, the court will order restoration of the harm caused or compensation in monetary damages. This is where the legislation's principal flaw become apparent. To establish liability, the claimant must show that the company's non-compliance caused the damage, essentially making this a mere tort (delict) claim.[156]

Interestingly, vicarious liability in case of harm was proposed in the initial bill alongside the tort (delict) claim but was struck down during constitutional review.[157] Articles 1.II-2, 2.2, and 3 of the Law initially stipulated that where damages occurred, and the company had not been compliant, civil penalties would incur. Courts could fine corporations up to €5 million. The sum increased up to €10 million if the subsequent injury could have been avoided had the company abided by the requirements of Article 1. The Constitutional Council ruled that the five obligations mentioned above failed to specify the threshold at which companies would be discharged from their duties. The legislature provided no guidance, benchmarks, nor thresholds. The Council found that the necessity to consider all human rights and environmental impacts at group level was too broad, and that there was no precise definition for firms to determine whether they were included within the scope of the statute. In addition, the bill failed to explain whether penalties would be inflicted for each breach of duties or only once irrespective of the counts of breaches.

Article 2 originally deferred to the State Council the power supplement disclosure requirements. Since the bill intended to inflict sanctions, it was unconstitutional for the Executive to be able to modify the conditions that would trigger liability. Hence, sanction for non-compliance was found to contravene Article 8 of the Declaration of the Rights of Man and the Citizen of 1789, which enshrines the principle of legality and necessity of all criminal offences. It ought to be mentioned that although the bill provided

156 C Civ [Civil Code of France], art. 1240, 1241.

157 Cons Const 23 March 2017, Decision No. 2017-750 DC; under Subparagraph 2 of Article 61 of the French Constitution, 60 Members of the National Assembly or 60 Senators may refer a bill to the Constitutional Council for constitutional review before its signing into law. For a comparative study of constitutional reviews, see Erin F. Delaney and Rosalind Dixon, *Comparative Judicial Review*, (Cheltenham: Edward Elgar Publishing, 2018).

for civil penalties, the Constitutional Council regards all punitive measures—be they criminal, civil, or administrative—as included within the purview of Article 8 of the 1789 Declaration.[158] For these reasons, the strict liability framework of the initial bill was found to be incompatible with the French Constitution. As a result, the Vigilance Law now stipulates that the claimant needs to prove that the company's behavior amounted to delict—which is an approximate equivalent to tortious negligence in common law jurisdictions.[159]

The constitutional review had a chilling effect on the impact of the Law. Requiring that there be damage, knowledge, or reasonable foreseeability, and causation that defeats the purpose of the initial bill, which was to allow for strict liability in case of non-compliance and injury.[160] Hence, the effective version of the statute relies on public engagement to enforce its provisions. The implementation of the Vigilance Law shows that once again, citizens have to take on the fight against industrial pollution and human rights abuse while corporations, supposedly citizens as well, are able to bask in the weaknesses and omissions of the law.[161] Two years post-enactment, empirical research showed that reporting behavior had slightly increased for 55 percent of the 20 largest companies in France. Disclosure on policy commitments and governance was the most developed, whereas performance tracking and remediation process was still negligible.[162]

Another study reported that while the majority of firms complied with the Law, only one-fourth of them had implemented C.S.R. compliance programs for their subsidiaries abroad and only one-third of companies had consulted with their stakeholders in drafting the Plan.[163] Duty of Vigilance Radar, a tracker created by several local N.G.O.s, concluded in its first report that most Plans lacked clarity and contained no precise information regarding

158 Cons Const, 28 July 1989, Decision No. 89-260 DC, [17–18].

159 For a comparative study of negligence in common law and delicts in civil law; see James Plunkett, *The Duty of Care in Negligence*, (Oxford: Hart Publishing, 2018).

160 Charley Hannouh, "Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017" *Droit social*, *Dalloz* (2017), p. 806.

161 An assessment of the Vigilance Law commissioned by the French Ministry of Economy and Finances called on N.G.O.s and citizens to enforce Article 2 of the Law. See Anne Duthilleul and Matthias de Jouvenel, "Évaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre," January 2020, available at https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf (retrieved 15 January 2021).

162 Michelle Langlois, "Human Rights Reporting in France – Two Years In: Has the Duty of Vigilance Law Led to More Meaningful Disclosure?," December 2019, available at https://shiftproject.org/wp-content/uploads/2019/11/Shift_HumanRightsReporting-inFrance_Nov27.pdf (retrieved 15 January 2021).

163 Entreprises pour les droits de l'Homme, "Vigilance Plans 2018–2019: Application of the Law on the Duty of Vigilance," June 14, 2019, available at https://www.e-dh.org/userfiles/Edh_2018_Etude_EN_1.pdf (retrieved 15 January 2021).

mitigating factors nor the piloting of compliance programs.[164] Despite the criticisms that the Law has attracted, no definitive conclusion should be drawn before seeing the enforcement of Article 2 in court.

3.4.3 Les Amis de la Terre et al. v. Total SA[165]

In this case, arguing urgency, the plaintiffs had petitioned for an interim order that would have compelled the company (i) to reassess its Vigilance Plan coupled with a penalty of €50,000 per day for non-compliance, and (ii) to remediate the injuries that the defendant has caused in Uganda through its subsidiary. The company refuted the allegations, claiming to have consulted with 58,000 people while conducting the E.S.I.A.s.[166] Aurélien Hamelle, general counsel for Total, also asserted that the holding company had completed its due diligence process and was not aware of its subsidiary's alleged behavior.[167] The defendant moved to transfer venue from the Civil Court to the Commercial Court of Nanterre.[168] Total argued the statute was effectively consolidated into the Commercial Code, under a chapter providing rules for shareholders assemblies of joint stock companies.[169] According to the defendant, the Vigilance Plan is thus an annual report certified by the board of directors and approved by the shareholders. As such, the claim pertained to the management of a commercial company, which is under the jurisdiction of commercial courts irrespective of the fact that the Law gives standing to third parties.[170]

The Civil Court delivered a ruling in January of 2020, denying the claimants' request for an interim order, and affirming improper venue. In that ruling, the Court ruled that the Vigilance Law, comparable to the requirements of the Non-Financial Disclosure Directive, constituted integrated

164 Juliette Rénaud et al., "The Law on Duty of Vigilance of Parent and Outsourcing Companies – Year One: Companies Must Do Better," February 2019, available at https://vigilance-plan.org/wp-content/uploads//2019/06/2019.06.14-EN-Rapport-Commun-Companies-must-do-better.pdf (retrieved 15 January 2021).

165 TGI Nanterre, 30 juin 2020, n° 19/02833. (*Les Amis de la Terre et al. v. Total SA*).

166 Total, "Tilenga & EACOP: Projects with a Socio-Economic Interest for Uganda and Tanzania," September 2019, available at https://www.total.com/sites/g/files/nytnzq111/files/atoms/files/uganda-projects_introduction.pdf (retrieved 15 January 2021).

167 Aurélien Hamelle, Personal Interview, 31 January 2020. Hamelle assured that Total Group was fully committed to implement the U.N. Guiding Principles, I.S.O. 26000, and I.S.O. 14000s. He did provide further information regarding the legal actions taken against Total Group.

168 The statutory seat of Total is in Nanterre, France, a suburban area of Paris.

169 C Com [Commercial Code of France], art. L.225-102-4 et. seq.; The term "société" [company] refers to corporate vehicles, limited companies, and partnerships. Under French company law, the commercial nature of a company is either determined by its form (the legal entity or business structure) or acquired due to the company's operational purpose; *see* C Com [Commercial Code of France], art. L.210-1.

170 C Com [Commercial Code of France], art. L.721-3.

frameworks of the internal governance and organization of commercial companies. The court construed the purpose of the statute to be aligned with the enlightened shareholder value enshrined under the P.A.C.T.E. Law. The mere fact that the Law requires the Plan to be created in consultation with stakeholders, to be publicized, and provides that third parties have standing to enforce its provisions does not change the corporate nature of the documents involved in the claim.

The decision followed a longstanding *jurisprudence constant*, dictating that commercial courts have jurisdiction over matters concerning the management of commercial companies.[171] In their brief, the plaintiffs had argued that due to the several instances of human rights and environmental rights abuse, a commercial court would be the incorrect forum to hear the matter as it is a specialized forum with a panel of lay judges consisting of business professionals.[172] Hence, civil courts should have jurisdiction to ensure that justice be administered.[173] However, the Civil Court dismissed this contention, relying on the fact that the subparagraph providing details on jurisdiction and civil penalties had been declared unconstitutional by the Constitutional Council. Finally, the ruling asserted that the Vigilance Law created two distinct actionable claims. Article 1 seeks to enforce the provisions thereof regarding the Plan, whereas Article 2 aims at recovering for injuries caused due to the company's non-compliance. In this instance, the N.G.O.s had based their action on Article 1, which rendered their argument on human rights abuse and environmental harm inadmissible.

The Court of Appeal of Versailles later affirmed the trial decision in December 2020.[174] Although the court dismissed the argument, it is nevertheless interesting to note that the plaintiffs contended that Total should be bound by its Vigilance Plan. The N.G.O.s had indeed argued that the Plan should be construed as a unilateral engagement with similar binding legal effects, equivalent to those of an estoppel. However, siding with the trial judge, the Court dismissed the appeal. The Court also denied the plaintiffs' request to rule on the merits and refused to issue an injunction ordering Total to put a halt on the construction of the E.A.C.O.P. The merits of the case have yet to be ruled upon.

171 Com, 27 October 2009, n° 08-20.384.

172 *Les Amis de la Terre et al. v. Total SA*, *supra* note 163.

173 Les Amis de la Terre France, "Total Ouganda: le Tribunal de Grande Instance se déclare incompétent au profit du tribunal de commerce," February 3, 2020, available at https://www.amisdelaterre.org/communique-presse/total-ouganda-le-tribunal-de-grande-instance-se-declare-incompetent-au-profit-du-tribunal-de-commerce/ (retrieved 15 January 2021).

174 Versailles, 10 décembre 2020, n° 20/01692.

3.5 Conclusion

One might well argue that by virtue of globalization, multinationals contribute to a new wave of colonialism by subjugating local communities to neoliberalism, which ultimately leads to social and environmental decay.[175] This chapter has shown that victims of environmental injuries from the Global South are muzzled. In effect, the absence of an actionable transnational tort claim makes it easy for M.B.E.s to evade liability.[176] As just one example, the current Ugandan administration, like many host countries, lacks the means and the will to protect its citizens against environmental damage caused by the extractives sector. In addition, the fora that are home to M.B.E.s easily dismiss the liability of parent companies.[177] As a result, the plaintiffs are effectively deprived of any prospective remedy. Although the trial court merely ruled on an ancillary issue in the case against Total, this decision nevertheless offered a first clarification as to the impact of the Vigilance Law. Thus far, the implementation of the putatively first C.S.R. compliance legislation ever enacted has been disappointing. By construing Article 1 as a mere shareholder information requirement, the Court significantly inhibited the range of action of the French Vigilance Law.

Additionally, the deference to commercial courts also depletes the social normativity of the statute. As the plaintiffs argued, the Law initially sought to prevent harm caused by corporations abroad *ex ante* and to remediate potential damages. Issues of human rights and environmental degradation have more connection to citizens and local communities than they do to trade practices. The very concept of C.S.R. and the U.N. Guiding Principles is to anchor corporations back into society and re-establish the estranged relation between businesses and individuals.[178] Ordering the proceedings to move forward in a forum where businesspeople are entrusted to judge their peers defeats the primary purpose of enacting compliance legislation. Should this decision be followed by other appellate courts, the Vigilance Law will become devoid of sustenance. A statute that should have compelled the largest

175 See Daniel Kindermann, "Free Us Up So We Can Be Responsible! The Co-Evolution of Corporate Social Responsibility and Neo-Liberalism in the UK, 1977–2010," 10 (1) *Socio-Economic Review* (2011), pp. 29–57.

176 Michael I Jeffry, "Transboundary Pollution and Cross-Border Remedies," 18 *Canadian-United States Law Journal* (1992), pp. 173–194.

177 See Rebecca M. Bratspies and Russel A. Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, (Cambridge: Cambridge University Press, 2006).

178 See Paddy Ireland, "Limited Liability, Rights of Control and the Problem of Corporate Irresponsibility," 35 (5) *Cambridge Journal of Economics* (2010), pp. 837–856; Rakesh Khurana, *From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession*, (Princeton: Princeton University Press, 2007); Simon Deakin, "The Coming Transformation of the Shareholder Value," 13 (1) *Corporate Governance an International Review* (2005), pp. 11–18; Blanche Segrestin et al., *La "Société à Objet Social Étendu,"* (Paris: Presses des Mines, 2015).

corporations of France to increase their level of public transparency and duty of care will be reduced to the status of yet another reporting scheme.

The efficacy of the Vigilance Law has a systemic effect. One should not forget that France houses thirty-one of the largest firms in the world as of 2019.[179] The E.A.C.O.P. case study has also proven that N.G.O.s play—and will probably continue to play—a key role in monitoring the industry's conduct as well as summoning M.B.E.s to court for abuse of human rights and environmental destruction.[180]

As for Total, the energy giant confirmed its ambition to reach carbon neutrality by 2050.[181] Looking at the example of the £55 million extrajudicial settlement between Shell and the Bodo community, in which Shell agreed to complete an extensive environmental restoration of Ogoniland, one might see the future of environmental litigation in the Global South heading towards alternative dispute resolution.[182]

Bibliography

Ado, Abdoulkadre, and Zhan Su. "China in Africa: A Critical Literature Review." 12 (1) *Critical Perspectives on International Business* (2016): 40–60.

Ajala, Taiwo. "Examining the Legal Safeguards against the Environmental Impact of Land Grabbing in African Countries: A Critical Review of Nigerian Environmental Law." 20 (1) *Environmental Law Rev*iew (2018): 3–15.

Aldinger, Peter Eddie. "Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana." 26 (4) *Georgetown International Environmental Law Review* (2014): 345–388.

Amao, Olufemi O. "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States." 52 (1) *Journal of African Law* (2008): 89–113.

Anaebo, Onyeka K. and Eghosa O. Ekhator. "Realising substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation." 17 (2) *Environmental Law Review* (2015): 82–99.

Baez, Cristina, et al. "Multinational Enterprises and Human Rights." 8 *University of Miami International and Comparative Law Review* (1999–2000): 183–338.

Bebchuck, Lucian A., and Roberto Tallarita. "The Illusory Promise of Stakeholder Governance." 106 *Cornell Law Review* (2020): 91–178.

179 Fortune, *supra* note 28.

180 For a discussion about the role of N.G.O.s in the Niger Delta region; see Eghosa O. Ekhator, "Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of N.G.O.s in Nigeria," 22 (1) *African Journal of International and Comparative Law* (2014), pp. 63–79.

181 Total, "From Net Zero Ambition to Total Strategy," September 30, 2020, available at https://www.total.com/media/news/news/2020-strategy-outlook-presentation (retrieved 15 January 2021).

182 John Vidal, "Shell Announces £55m Payout for Nigeria Oil Spills," January 7, 2015, available at https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills (retrieved 15 January 2021).

Bratspies, Rebecca M., and Russel A Miller. *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*. Cambridge University Press, 2006.

Brautigam, Deborah. *Will Africa Feed China?* Oxford University Press, 2015.

Bu, Qingxiu. "Chinese Multinational Companies in Africa: The Human Rights Discourse." 8 (1–2) *African Journal of Legal Studies* (2015): 33–86.

Bukenya, Badru, and Jacqueline Nakaiza. "Closed but Ordered: How the Political Settlement Shapes Uganda's Deals with International Oil Companies," in *Oil Wealth and Development in Uganda and Beyond*. Eds. Arnim Langer et al. Leuven University Press, 2020: 103–124.

Chiong-Martinson, Ai-Li. "Environmental Regulations and the Trans-Pacific Partnership: Using Investor-State Dispute Settlement to Strengthen Environmental Law." 7 (1) *Seattle Journal of Environmental Law* (2017): 76–105.

Deakin, Simon. "The Coming Transformation of the Shareholder Value." 13 (1) *Corporate Governance an International Review* (2005): 11–18.

Delaney, Erin F., and Rosalind Dixon. *Comparative Judicial Review*. Edward Elgar Publishing, 2018.

Duruigbo, Emeka. "The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa." 20 (1) *University of Pennsylvania Journal of International Economic Law* (2005): 1–68.

Echookit Akello, Christine. "Environmental Regulation in Uganda: Successes and Challenges." 3 (1) *Law, Environment and Development Journal* (2007): 20–25.

Ekhator, Eghosa O. "Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria." 22 (1) *African Journal of International and Comparative Law* (2014): 63–79.

Ekhator, Eghosa O. "Regulating the Activities of Oil Multinationals in Nigeria: A Case for Self-Regulation?" 60 (1) *Journal of African Law* (2016): 1–28.

Farah, Paolo, and Elena Cima. *China's Influence on Non-Trade Concerns in International Economic Law*. Routledge, 2016.

Hancock, Jan. *Environmental Human Rights, Power Ethics and Law*. Routledge, 2019.

Hannouh, Charley. "Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017." *Droit Social*, *Dalloz* (2017): 806.

Harvey, David. *The New Imperialism*. Oxford University Press, 2003.

Hodzi, Obert. "China and Africa: Economic Growth and a Non-Transformative Political Elite." 36 (2) *Journal of Contemporary African Studies* (2018): 191–206.

Ireland, Paddy. "Limited Liability, Rights of Control and the Problem of Corporate Irresponsibility." 35 (5) *Cambridge Journal of Economics* (2010): 837–856.

Jeffrey, Michael I. "Transboundary Pollution and Cross-Border Remedies." 18 *Canadian-United States Law Journal* (1992): 173–194.

Khurana, Rakesh. *From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession*. Princeton University Press, 2007.

Kindermann, Daniel. "Free Us Up So We Can Be Responsible! The Co-Evolution of Corporate Social Responsibility and Neo-Liberalism in the UK, 1977–2010." 10 (1) *Socio-Economic Review* (2011): 29–57.

Korten, David C. *When Corporations Rule the World*. Routledge, 1995.

Krackhardt, Oliver. "Beyond the Neem Three Conflict: Questions of Corporate Behaviour in a Globalised World." 21 *New Zealand Universities Law Review* (2005).

Levien, Michael. *Dispossession Without Development: Land Grabs in Neoliberal India*. Oxford University Press, 2018.

Light, Andrew, and Avner De-Shalit. *Moral and Political Reasoning Environmental Practice*. MIT Press, 2003.

Meyer, John W., et al. "Legitimating the Transnational Corporation in a Stateless World Society," in *Corporate Social Responsibility in a Globalizing World*. Eds. Kiyoteru Tsutsui and Alwyn Lim. Cambridge University Press, 2015: 27–72.

Mlambo, Courage, et al. "China-Africa Relations: What Lies Beneath?" 49 (4) *The Chinese Economy* (2016): 257–276.

Moshood, Issah, et al. "Eminent Domain, 'Public Use' and Mineral Resource Exploitation in South Africa." 19 (1) *African Studies Quarterly* (2020): 1–22.

Mujih, Edwin C. "'Co-deregulation' of Multinational Companies Operating in Developing Countries: Partnering Against Corporate Social Responsibility?." 16 (2) *African Journal of International and Comparative Law* (2008): 249–326.

Murombo, Tumai. "Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation." 9 (1) *Law, Environment and Development Journal* (2013): 31–49.

Murombo, Tumai. "The Effectiveness of Initiatives to Promote Good Governance, Accountability and Transparency in the Extractives Sector in Zimbabwe." 60 (2) *Journal of African Law* (2016): 230–263.

Nampewo, Catherine. "Saving Mabira Rainforest: Using Public Interest Litigation in Uganda To Save Mabira and other Rainforests." 40 *Environmental Affairs* (2013): 523–552.

Nwoke, Uchechukwu. "Two Complementary Duties under Corporate Social Responsibility Multinationals and the Moral Minimum in Nigeria's Delta Region." 58 (1) *International Journal of Law and Management* (2016): 2–25.

Oosterveer, Peter, and Bas van Vliet, "Environmental Systems and Local Actors: Decentralizing Environmental Policy in Uganda." 45 (2) *Environmental Management* (2010): 284–295.

Plunkett, James. *The Duty of Care in Negligence*. Hart Publishing, 2018.

Sanger, Andrew. "Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries." 78 (3) *The Cambridge Law Journal* (2019): 486–490.

Schlosberg, David. *Defining Environmental Justice: Theories, Movements, and Nature*. Oxford University Press, 2007.

Segrestin, Blanche et al. *La "Société à Objet Social Étendu."* Presses des Mines, 2015.

Shiva, Vandana. "Recovering the Real Meaning of Sustainability," in *Environment in Question*. Eds. David E. Cooper and Joy A. Palmer, Routledge, 1992.

Sornarajah, M. "Good Corporate Citizenship and the Conduct of Multinational Corporations." 21 *Law in Context: A Socio-Legal Journal* (2003): 224–250.

Tan, Veltrice. "The Corporate Veil: Will the Court Pierce the Veil on Grounds of Justice and Modern Business Realities?" 39 (12) *Company Law* (2018): 387–400.

Tienhaara, Kyla. "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement." 7 (2) *Transnational Environmental Law* (2018): 229–250.

Tineke Lambooy, and Marie-Eve Rancourt. "Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility." 2 (2) *Human Rights & International Legal Discourse* (2008): 229–276.

Twinomugisha, Ben Kiromba. "Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda." 3 (3) *Law, Environment and Development Journal* (2007): 244–258.

Utting, Peter. "Corporate Social Responsibility and the Evolving Standards Regime: Regulatory and Political Dynamics," in *Corporate Social Responsibility in a Globalizing World*. Eds. Kiyoteru Tsutsui and Alwyn Lim. Cambridge University Press, 2015: 73–106.

Wamerdam, Ward, and Meine Pieter van Dijk. "China-Uganda and the Question of Mutual Benefits." 20 (2) *The South African Journal of International Affairs* (2013): 271–295.

Wang, Jingfan. "Trans-Pacific Partnership and Domestic Environmental Protection: Seeking an Alternative Standard of Review in Investor-State Dispute Settlement." 8 (2) *George Washington Journal Energy and Environmental Law* (2017): 163–173.

Weller, Matthias, and Alexia Pato. "Local Parents as 'Anchor Defendants' in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends." 23 (2) *Uniform Law Review* (2018): 397–417.

Yang, Tseming and Robert V. Percival. "The Emergence of Global Environmental Law." 36 *Ecology Law Quarterly* (2009): 615–664.

Zerk, Jennifer A. "Multinationals under National Law: The Problem of Jurisdiction," in *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Cambridge University Press, 2006.

Zerk, Jennifer A. "Private Claims for Personal Injury and Environmental Harm," in *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Cambridge University Press, 2006.

Zhao, Suisheng. *China in Africa: Strategic Motives and Economic Interests*. Routledge, 2015.

Part II

Interfaces between developed and developing countries in environmental law

4 Sustainable development through environmental federalism in the case of Ethiopia

Tsegai Berhane Ghebretekle[1]

4.1 Introduction

In general, the term "sustainable development" has become so ubiquitous, that like the word "democracy," it can mean so many different things that it is almost without any particular meaning. For countries in the Global South, sustainable development can mean the legal term used to indicate a relationship between those countries and other regions of the world. Despite its many and varied meanings, when used as a legal term, "sustainable development" can be a guiding concept in environmental legislation. However, to play this guiding role, countries need to incorporate the concept in their environmental policies and laws. Environmental policymaking and lawmaking take place at different levels of government. The core questions in the examination of environmental lawmaking ask how decisions affecting the environment are made, and who has the authority to make these decisions.[2] Professor of International Law Jeffrey Dunoff put it clearly: "the fundamental question is which political community should govern which environmental issue, and, more specifically, when should responsibility over particular environmental issue be vested at the local, national, regional, or global level?"[3]

It should be noted that allocation of authority over environmental issues is a complicated exercise due to the fact that environmental governance addresses a complex set of environmental issues intersecting various branches of law such as pollution control, natural resource management, public health, and taxation.[4] Consequently, there is debate among scholars regarding the best ways in which authority should be allocated among different institutions or

1 Tsegai Berhane Ghebretekle, LL.B. (Addis Ababa University), LL.M. (University of Oslo), Ph.D. (University of Warwick); Associate Professor of Law, Mekelle University School of Law; former Post-Doctoral Research Fellow at the Institute for Dispute Resolution in Africa (I.D.R.A.), University of South Africa.

2 Jeffrey L Dunoff, "Levels of Environmental Governance," in Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), p. 86.

3 Ibid.

4 Ibid. p. 87.

DOI: 10.4324/9781003160236-7

groups of institutions in environmental decision-making. Some of the reasons favoring de-centralized environmental governance are that decentralization permits regulation to better reflect localized knowledge, and it enables different jurisdictions to experiment with diverse environmental policies.[5] In most countries where it is found, decentralization is enabled by constitutional and legal norms. Dunoff says that in federal states including Australia, Canada, Germany, Switzerland, and the United States, "national constitutions provide that sub-national jurisdiction have authority over all matters not constitutionally delegated to the national government."[6] The main justifications provided to transfer environmental governance from sub-national to national authorities are the presence of interjurisdictional externalities and the need to minimize transaction costs related to monitoring and enforcement.[7]

The concept of environmental federalism addresses "the existence of real tensions and a certain ambivalence about the roles of the different levels of government in environmental management."[8] Even if there are certain common features of federalism, different states take different approaches in adopting federalism, and this leads to variances in implementation.[9] Moreover, federalism is a "model undergoing a perpetual process of evolution and adaptation, rather than . . . a static system."[10] This chapter therefore examines whether the state structure of federalism is beneficial to sustainable development, and particularly if that is the case for the Federal Democratic Republic of Ethiopia (F.D.R.E.), where federalism divides responsibilities between the central state and regional states.

The F.D.R.E. is a land-locked republic located in the horn of Africa. With an estimated population of more than 113 million,[11] Ethiopia ranks thirteenth in the world and is the second most populous country in Africa after Nigeria. Ethiopia is also a biodiversity hotspot.[12] The F.D.R.E. currently faces several environmental challenges such as decreasing soil fertility and water quality, deforestation, and loss of biodiversity.[13] A large section of the Ethiopian population is dependent on the natural environment as the principal source of income.[14] The use of the environment for subsistence results in a cycle of environmental

5 Ibid. p. 88.
6 Ibid. p. 89.
7 Ibid. p. 90.
8 Wallace E. Oates, "A Reconsideration of Environmental Federalism," Discussion Paper 01–54 (Washington: Resources for the Future, 2001), p. 22.
9 Raoul Blindenbacher and Arnold Koller, *Federalism in a Changing World: Learning from Each Other* (McGill–Queen's University Press, 2003), p. 323.
10 Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?," 54 *Supreme Court Law Review* (2011), p. 632.
11 U.S. Census Bureau, "World Population Prospects," available at http://worldpopulationreview.com/ (retrieved 8 March 2021).
12 Colby Environmental Policy Group, "Environmental Policy Review 2011: Key Issues in Ethiopia (2011)," available at http://web.colby.edu/eastafricaupdate/ (retrieved 8 March 2021).
13 Ibid.
14 Jonathan McKee, "Ethiopia: Country Environmental Profile," 2007, available at https://europa.eu/capacity4dev/file/32979/download?token=EazR1zHt (retrieved 8 March 2021).

degradation and poverty. Political scientist Daniel Ogbaharya and hydrologist Aregai Tecle together noted that "recurrent droughts, famines, poor infrastructure and periods of political unrest serve as additional challenges for environmental management within Ethiopia."[15] The welfare of the Ethiopian people, not unlike its neighbors, is determined by the health of its environment.[16] But, because poverty can also lead to the need to engage in environmentally destructive behaviors for survival, "the poor are both victims and agents of environmental damage."[17]

Considering this environmental scenario, this chapter examines the nexus between the F.D.R.E.'s federal structure and its goal of sustainable development. The following section discusses the origins of the legal principle of sustainable development, and its location within Ethiopian environmental law. Section 3 then discusses environmental federalism both conceptually and using examples from national experiences before narrowing the discussion down to environmental federalism within Ethiopian law and drawing brief conclusions regarding the nexus between sustainable development and Ethiopia's environmental federalism.

4.2 Sustainable development in Ethiopia

Most nations are constantly faced with the tradeoff between economic growth and environmental protection, and for developing countries like Ethiopia, this tradeoff is starker, given that economic growth is paramount for poverty alleviation. The concept of sustainable development was introduced into the international community in 1992 through the Brundtland Report,[18] which first articulated this tradeoff by creating a legal principle.[19] Among the different meanings given to the term "sustainable development," the earliest definition given by the Brundtland Report is "development that meets the needs of the present generation without compromising the ability of future generations to

15 Daniel Ogbaharya and Aregai Tecle, "Community-based Natural Resources Management in Eritrea and Ethiopia: Toward a Comparative Institutional Analysis," 4 *Journal of Eastern African Studies* (2010), p. 490.

16 Ibid.

17 Asit K. Biswas et al., *Water as a Focus for Regional Development*, (Oxford: Oxford University Press, 2004).

18 Dryzek defines Paradigm as: "a type of inter-subjective understanding that condition individual action, and social outcomes, in the international system no less than elsewhere. It has no formal existence resembling that of organizations, constitutions, laws, and treaties. Yet they can be nonetheless effective in coordinating the behaviour of large numbers of actors..." See, John S. Dryzek "Paradigms and Discourses," in Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *Oxford Handbook of International Environmental Law*, (Oxford: Oxford University Press, 2008), p. 45.

19 Daniel Barstow Magraw and Lisa D. Hawke, "Sustainable Development," in Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., *Oxford Handbook of International Environmental,* (Oxford: Oxford University Press, 2008), p. 637.

meet their own needs."[20] With that formulation in mind, Susan Baker, Emerita Professor at Cardiff University, and a leading expert in sustainable development, noted that "the concept opens up debates about our relationship with the natural world, what constitutes social progress and what the character of development should be."[21] Professor Sonny Nwankwo of Nigeria stressed that "concerns about sustainable development mirror our collective anxiety about the sort of society we wish to create and how we wish to live in it."[22]

The concept of sustainable development has also been criticized "as an ambiguous and politically fabricated concept designed to accommodate irreconcilable interest."[23] Nwankwo's research shows that "perceivably, much of the orthodox knowledge [on sustainable development] reflects axioms that are inextricably linked to the idiosyncrasies of the developed world."[24] It is important to note that African regions have not been able to occupy the forefront of the discourse on sustainable development despite bearing the consequences of the lack of sustainable development.[25] Nwankwo concludes that "sustainable development is a clear indication of the epistemological crisis of modern knowledge that perpetuates the relations of colonial inequality, giving shape to a monoculture of knowledge in which local, indigenous or traditional knowledges are regarded as valid only to the extent that they serve global capitalism."[26]

The concept of sustainable development is explicitly included as a right in the F.D.R.E. Constitution.[27] Article 43(1) provides that "the people of Ethiopia as a whole, and each nation, nationality and people in Ethiopia in

20 World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report),* A/42/427, (20 March 1987), available at https://digitallibrary.un.org/record/139811/files/A_42_427-ES.pdf (retrieved 13 November 2020).

21 Susan Baker, *Sustainable Development*, (London: Routledge, 2016), p. 20.

22 Sonny Nwankwo et al., "Sustainable Development in Sub-Saharan Africa: Issues of Knowledge Development and Agenda Setting," 8 *International Journal of Development Issues* (2009), p. 120.

23 Sharachandra Lele, "Sustainable Development: A Critical Review," 19 (6) *World Development* (1991), p. 613. See also Dick Richardson, "The Politics of Sustainable Development," in Susan Baker, Maria Kousis, Stephen Young, Dick Richardson, eds., *The Politics of Sustainable Development-Theory, Policy and Practice within the European Union*, (London: Routledge, 1997), p. 41.

24 Nwanko Chaharbaghi and Derick Alexander Campbell Boyd, "Sustainable Development in Sub-Saharan Africa: Issues of Knowledge Development and Agenda Setting," 8 *International Journal of Development Issues* (2009), pp. 119–133.

25 Ibid.

26 Ibid.

27 Of course, taking the constitution at its face value, considering sustainable development as a specific right is a bit difficult. After all, if we are to consider it as a right, it should be interpreted as a very broad right which includes political, economic, social, cultural, and environmental issues. However, the main issues in this broad interpretation is when the elements in this broad interpretation of sustainable development are in conflict which one prevails? What would be the way out? Constitution of the Federal Democratic Republic of Ethiopia (F.D.R.E. Constitution), 21 August 1995, available at: https://www.refworld.org/docid/3ae6b5a84.html (retrieved 1 May 2021).

particular have the right to improved living standards and to sustainable development."[28] The Constitution in Article 43(3) also provides that "all international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development."[29]

The constitution also contains principles and objectives in Chapter 10, Articles 85–92, that are designed to help in the implementation of sustainable development.[30] For implementation, these principles and objectives rest on the authority of Article (1), which emphasizes that "any organ of government [federal or state] shall, in the implementation of the constitution or other laws and public policies, be guided by the principles and objectives specified under this chapter."[31] The implication of Article 85(1) is that in the Ethiopian context objectives are elevated to the status of principles. If properly utilized, these principles and objectives promote sustainable development in the country and can help to implement it as a legal tool as well.

In addition to the above-indicated broad sustainable development right, the Constitution also incorporates specific substantive and procedural rights. The specific substantive right is included in Article 44(1) as the environmental right of all persons to a "clean and healthy environment."[32] The procedural right is included in Article 92(2) as a right of participation: "people have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly."[33] One may presume that the procedural right of participation is designed to promote green democracy.[34]

The Brundtland Commission's concept of sustainable development is incorporated into the official Environmental Policy of Ethiopia, where the stated policy is:

> To improve and enhance the health and quality of life of all Ethiopians and to promote sustainable social and economic development through the sound management and use of natural, human-made and cultural resources and the environment as a whole so as to meet the needs of the present generation to meet their own needs.[35]

The Environmental Policy of Ethiopia contains specific policy objectives and key guiding principles, such as the right to live in a healthy environment, sustainability, the precautionary principle, and the polluter pays principle.[36]

28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid.
34 See, Douglas Torgeson, "Constituting Green Democracy: A Political Project," 17 *Good Society* (2008).
35 F.D.R.E., 1997. *Environmental Policy of Ethiopia*, E.P.A./MoEDC, Addis Ababa, Ethiopia.
36 Ibid.

As to the importance of these guiding principles, the Environmental Policy of Ethiopia emphasizes that:

> Establishing and clearly defining these guiding principles is very important as they will shape all subsequent policy, strategy and programme formulations and their implementation. Sectoral and cross-sectoral policies and environmental elements of other macro policies will be checked against these principles to ensure consistency.[37]

After the adoption of Environmental Policy, the Ethiopian government also passed three pieces of legislation that are considered to be the core of the Ethiopian environmental law regime to protect the environment and thereby promote sustainable development. This legislation consists of the Environmental Protection Organs Establishment Proclamation (E.P.O.E.P.) No. 295/2002;[38] the Environmental Pollution Control Proclamation No. 300/2002;[39] and the Environmental Impact Assessment Proclamation No. 299/2002.[40]

The E.P.O.E.P. promotes sustainable development by introducing two separate organizations: one for environment protection, regulation, and monitoring; and the other for environmental development and management.[41] By doing so, the Proclamation aims to avoid conflicts of interest between organs designated for economic development and those established for the protection of the environment. This is also done to implement the principles of separation of power and checks and balances consistent with two distinct pillars of sustainable development. The Proclamation further subdivides the environmental protection, regulation, and monitoring bodies into federal[42] and regional[43] bodies. Federal and regional environment protection bodies

37 Ibid.

38 F.D.R.E., (2002). *Environmental Protection Organs Establishment Proclamation (E.P.O.E.P.),* No. 295, Federal Negarit Gazeta, 9th year No. 7, Addis Ababa, Ethiopia.

39 F.D.R.E., (2002). *Environmental Pollution Control Proclamation (E.P.C.P.),* No. 300, Federal Negarit Gazeta, 9th year No. 12, Addis Ababa, Ethiopia.

40 F.D.R.E., (2002). *Environmental Impact Assessment Proclamation (E.I.A.P.),* No. 299, Federal Negarit Gazeta, 9th year No. 11, Addis Ababa, Ethiopia.

41 F.D.R.E., 2002, *supra* note 37.

42 Currently, the lead organization at the federal level is the Environment, Forest & Climate Change Commission (F.E.F.C.C.C.) which is directly accountable to the Prime Minister. It was formerly established as the Ministry of Environment, Forest and Climate Change (M.E.F.C.C.). At the federal level, there are also sectorial environment units established in all ministries to mainstream environmental issues in the development agenda of the country.

43 To protect the environment, all regional states in Ethiopia are obliged to establish environment protecting, regulating, and monitoring bodies. Accordingly, all the regions have established environmental organs though they have established them under different names and statuses. Some of them are established as an authority, some of them as a bureau and some of them as agency. The responsibilities of the regional environmental

were subdivided to promote coordinated but differentiated responsibilities within the spirit of environmental federalism. However, it is important to note that though environmental institutions are established in Ethiopia, their implementation capacity remains weak due to inadequate budgets, lack of expertise, lack of coordination, and lack of adequate facilities to test environmental conditions.[44]

The Environment Pollution Control Proclamation is also meant to promote sustainable development in the country. Its priority is to avoid pollution, and if that is not possible, its secondary goal is to minimize it. Accordingly, in its preamble, the Proclamation states that, "It is appropriate to eliminate or when not possible, to mitigate pollution as an understandable consequence of social and economic development activities."[45]

Another important step to promote sustainable development in Ethiopia has been the passing of the Environment Impact Assessment Proclamation. The Proclamation is meant to integrate environmental concerns into the development agenda of the country. The Proclamation is based on the premise that assessing environmental impacts before approving a public instrument "provides an effective means of harmonizing and integrating environmental, economic, cultural and social considerations into a decision-making process in a manner that promotes sustainable development."[46]

4.3 Environmental federalism

An important reason for establishing federal structures generally has been effective distribution of power and implied self-government, which includes respecting territorial minority populations. Giorgio Grimaldi, a researcher at the Centre for Studies on Federalism in Turin, Italy, says that the system of federalism wherein the federal government is entrusted "with the duties necessary to prevent the disintegration of the federal system (in particular the organization of defense, single currency and the administration of justice), thus allowing for integration among its components" is a principle derived from the Catholic Church.[47] The principle developed as part of the Catholic Church's social doctrine to imply cooperation and with the goal to make

bodies are to: coordinate the formulation, implementation, review and revision of regional conservation strategies; monitor, protect and regulate the environment; ensure the implementation of federal environmental standards or as may be appropriate, issue and implement their own no less stringent standards; prepare reports on their respective state of the environment and sustainable development to the F.E.F.C.C.C.

44 Colby Environmental Policy Group, *supra* note 11.

45 F.D.R.E., 2002, *supra* note 38.

46 F.D.R.E., 2002, *supra* note 38.

47 Giorgio Grimaldi, "Prospects for Ecological Federalism," 1 *L' Europe en Formation* (2012), p. 301, available at https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-301.htm (retrieved 8 March 2021).

"the individual levels of government responsible, efficient and suited for all purposes according to the powers constitutionally attributed to them."[48]

These origins of the principle of federalism, and their dispersion through the past several centuries through colonialism, have marked the development of federal states in the industrial age. Federalism, when represented by a centralized State, can therefore be seen as nationalist and antithetical to autonomous development. Grimaldi describes federalism as representing "the path to the unification of mankind through the extension of spatial techno-systems and the aggregation and reconciliation of peoples as well as autonomous and free territories, within which the relationship between human beings and the environment also plays an important role in characterizing the specificity and diversity of the federal units."[49]

Unlike the creation of modern developing countries with federal systems forged from colonial power structures, such as India or Nigeria, Ethiopia's federalism has evolved through a unique trajectory. Ethiopia maintained its freedom from colonial rule with the exception of a short-lived Italian occupation from 1936 to 1941. Before the popular movement, which led to a group of military officers known as "the Derg" assuming power in 1974, Ethiopia was run by a monarchical system. The latest monarch in Ethiopian history is Emperor Haile Selassie. He is mostly credited for introducing modernization in the country in general and in the legal system in particular. Emperor Haile Selassie once stated that:

> The necessity of resolutely pursuing our programme of social advancement and integration in the larger world community ... make[s] inevitable the closer integration of the legal system of Ethiopia with those of other countries with whom we have cultural, commercial and maritime connections. To that end We have personally directed the search for the outstanding jurists of the continent of Europe to bring to us the best that centuries of development in allied and compatible systems of law have to offer.[50]

Consequently, the legal system of Ethiopia was "integrated" during the Emperor's era (1950s and 1960s), by copying and enacting different laws from different countries. These included the Penal Code in 1957; Maritime, Commercial, and Civil Codes in 1960; a Criminal Procedure Code in 1961;

48 Ibid.

49 Ibid.

50 Emperor Haile Selassie, as quoted by Norman J. Singer, "A Traditional Legal Institution in Modern Legal Setting: The Atbia Dagna of Ethiopia," 18 *U.C.L.A. Law Review* (1970/71), p. 308.

and another Civil Procedure Code in 1965.[51] Prior to the enactment of these codes, applicable law was mostly dominated by customs, tradition, and some legislation in the form of statutes and decrees. Emperor Haile Selassie is also credited generally in Africa for his contribution to the establishment of the Organization of African Union in 1963.

The Derg military regime, famous for its many human rights violations, was overthrown in 1991 by the Ethiopian Peoples' Revolutionary Democratic Front (E.P.R.D.F.). After the change of government, the E.P.R.D.F. convened a National Conference to establish a Transitional Government. The Conference also resulted in producing a Transitional Charter that served as an interim constitution. Following a brief transition period, Ethiopia adopted a new constitution that established the F.D.R.E. in 1995. It is a federation consisting of ten[52] regional states and two city administration councils—Addis Ababa and Diredawa. The F.D.R.E. is comprised of states that are delimited based on settlement patterns, language, identity, and the consent of the peoples concerned.[53]

In light of these origins of federalism in Ethiopia, the next question that must be examined is to what extent environmental federalism is implemented within Ethiopia's federal structure, and towards sustainable development. Environmental federalism has been defined as "the study of the normative and positive consequences of the shared role of national and subnational units of government in controlling environmental problems."[54] The basic aim of environmental federalism is to provide guidelines for assigning responsibility to different tiers of government—central, state, local, or concurrent. The assumption in environmental federalism is that for an effective regulatory solution, multiple layers of government should regulate environmental problems.[55]

One of the criticisms of environmental federalism has been that it encourages a "race to the bottom," assuming that regional states and local governments will be tempted to adopt lax environmental standards and such things as lower pollution taxes in order to attract investors to their jurisdiction.[56] This thesis of the race to the bottom also emphasizes that if similar measures are taken by

51 John H. Beckstrom, "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia," 21 (3) *American Journal of Comparative Law* (1973), p. 559.

52 Sidama Regional State is the one that most recently joined the federation.

53 F.D.R.E. Constitution Art. 46 (2).

54 William Shobe and Burtraw Dallas, "Rethinking Environmental Federalism in a Warming World," Resources for the Future Discussion Paper 12-04 (2012), available at https://media.rff.org/documents/RFF-DP-12-04.pdf (retrieved 8 March 2021).

55 Elliot Bulmer, "Federalism: International IDEA Constitution Building Primer 12," 2017, available at https://www.idea.int/sites/default/files/publications/federalism-primer.pdf (retrieved 8 March 2021).

56 Kirsten H. Engel, "State Environmental Standard-Setting: Is There a 'Race' and Is It 'To the Bottom,'" 48 (2) *Hastings Law Journal* (1997), pp. 321–337.

different states within the same federation, environmental destruction is inevitable.[57] These same proponents argue that the centralized federal government should "save the states from themselves"[58] through acts of centralized standard-setting. Exactly that idea can, however, be countered with the important point that the differences in state environmental policies—lax standards and taxation—may not necessarily result in a race to the bottom. Rather, the differences may result in "spill-over effects such as a lesson-drawing from state to state and even the adopting of respective policies."[59] It has also been found using hypothetical models that there is no tendency towards a race to the bottom unless there is either tax or market distortion.[60]

4.3.1 Sustainable development through environmental federalism

The centralization debate within environmental federalism has led to strong arguments for both decentralized and centralized approaches to environmental regulation, with the proponents of decentralization justifying it, among other reasons, because it benefits from diversity and "diseconomies of regulatory scale" and allowing for greater representativeness in decision-making.[61] As discussed above, sustainable development is promoted as an important concept in modern Ethiopian environmentalism.[62] However, if one looks to actual practice, it appears to be a phrase devoid of legal effect. In practice, there is insufficient evidence that sustainable development has functioned as a guiding concept for policymakers and regulators. The concept is inflated with moral overtones. At most, one might say that sustainable development is an inspirational concept rather than an implementable right as announced in the Ethiopian Constitution, despite there being platforms for implementing sustainable development in both state and federal jurisdictions. Hence, with no practices toward sustainability being implemented, unsustainable practices persist.

Daniel C. Esty, Professor of Law and Director of the Yale Center for Environmental Law and Policy, has defined unsustainability as "a circumstance

57 Ibid.

58 Peter D. Enrich, "Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 *Harvard Law Review* (1996), p. 378.

59 Kirsten Jörgensen, 'Climate Initiatives at the Subnational Level of the Indian States and Their Interplay with Federal Policies', 2011,<https://www.polsoz.fu-berlin.de/polwiss/forschung/systeme/ffu/publikationen/2011/11_joergensen_montreal/isa11_joergensen_draft.pdf> (retrieved 1 May 2021).

60 Wallace E. Oates and Robert M. Schwab, "Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?" 35 (3) *Journal of Public Economy* (1988), p. 350.

61 Binnyam Idris, "Environmental Constitutionalism in Ethiopia," 2019, available at https://ssrn.com/abstract=3456113 (retrieved 8 March 2021), p. 14.

62 See e.g., *Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development,* U.N. Doc. A/CONF.151/26 (1992); and Edith Brown Weiss, "Environmentally Sustainable Competitiveness: A Comment," 102 *Yale Law Journal* (1993), p. 2123.

in which the private and social costs of any activity (fully tabulated across space and over time) exceeds its (comprehensively considered) benefits."[63] He argues that unsustainability is the result of "intentional narrow vision from the side of polluters" and due to "ignorance, jurisdiction and intent" on the part of environmental regulators. The polluters' intentional narrow vision justified by short-term benefits, is expressed by the desire not to pay for waste disposal and simply dumping or releasing their waste and pollution into the environment. The ignorance of the environmental regulators stems from their unawareness of certain harms, from the jurisdictional excuse of intentionally ignoring problems that affect people outside their constituency; and from giving greater weight to the costs and benefits of some subsets of their constituency. Esty concludes that unsustainability is the result of failed government regulation.[64] To rectify this regulatory failure, which results in unsustainable development, the shared competencies of environmental federalism have been introduced.

Environmental federalism assumes that given the magnitude and different types of environmental problems, it is not feasible to solve all the problems at the same level of government. This implies the need to maintain some regulatory powers at all levels, central (federal), state, and local. For instance, to detect some environmental problems, a sophisticated technology may be required. In such cases, "centralized environmental research efforts can concentrate resources and take advantage of scale economies to produce better results."[65] Local problems such as "the pollution of a lake by emissions from a drainpipe, should be managed locally"[66] since it involves the effort of local actors such as municipalities, counties, and states. Thus, in theory, environmental federalism "holds some of the keys to sustainable development."[67]

4.3.2 Insights gained from national experiences of environmental federalism

The inclusion of environmental protection within constitutional law is a foundational way of establishing the division of powers between different tiers of the government. Tim Hayward, Professor of Environmental Political Theory at the University of Edinburgh, argues that:

> Providing environmental protection at the constitutional level has a number of potential advantages: it entrenches a recognition of the importance of environmental protection; it offers the possibility of unifying principles

63 Daniel C. Esty, "Sustainable Development and Environmental Federalism," 3 *Widener Law Symposium Journal* (1998), p. 1.
64 Ibid, p. 2.
65 Ibid.
66 Ibid.
67 Ibid.

> for legislation and regulation; it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making process.[68]

Most of the world's oldest constitutions do not have provisions on the environment.[69] The practice of incorporating environmental considerations in national constitutions started in newer constitutions or was more recently introduced into older ones through amendments.[70] A look at experiences of environmental federalism from around the world will help to put the Ethiopian structure into context. The earliest federation to incorporate an environmental mandate as a concurrent power was Brazil. In its Constitution in 1988, Brazil allocated common powers "to the Union, the States, the Federal District and the municipalities to protect the environment and to fight pollution; and to preserve the forests, fauna and flora."[71] In India, the environment was not a recognized constitutional concern before or at the time of independence.[72] The environment does not feature in the Indian Constitution as a separate concern, but environmental protection is provided in the Constitution as a directive principle of state policy and to aid in judicial interpretation.[73] In India "some of the most important domains of environment, such as water, waste, forest, etc. are assigned to either the Center or to the State or both."[74] By comparison, and from the African perspective, South Africa put detailed provisions and clear demarcations for the environment in its 1996 Constitution. The South African Constitution includes, for example, environment, nature conservation, disaster management, and pollution control as concurrent powers,[75] although marine resources and botanical gardens are treated separately.[76]

In the 1960s and 1970s in the United States (U.S.), there was a shift to federalizing environmental law owing to states' failures in protecting national interests over the environment. Similar to how "states' rights" were used as a euphemism by states to continue with segregation during the Civil Rights Movement, state autonomy in environmental law was perceived as a way to

68 Tim Hayward, *Constitutional Environmental Rights*, (Oxford: Oxford University Press, 2005), p. 7.

69 The Energy and Resources Institute, "Environmental Federalism in India: Forests and Compensatory Afforestation Project Report No. 2012IA03," 2014, available at https://www.kas.de/c/document_library/get_file?uuid=41401796-317a-ad8c-8d1e-ff85c9060ac2&groupId=252038 (retrieved 8 March 2021), p. 6.

70 Ibid.

71 Ibid.

72 Ibid., p. 7.

73 Ibid.

74 Ibid.

75 Schedule 4, Part A, Constitution for the Republic of South Africa.

76 Ibid.

decrease environmental protections.[77] Then, under the Presidency of Ronald Reagan (1981–1989), under pressure to reduce the federal government's enforcement of environmental law, including the cutting of federal funds for state-level pollution control programs, a reverse shift occurred. Contrary to the assumption that decentralization leads to a race to the bottom, and in keeping with the aforementioned hypothetical models, the decentralization during the Reagan years did actually lead to "a race to the top in pollution control expenditures by the mid-1980s when the financial position of states improved. Nitrogen oxide and sulfur dioxide emissions results are less conclusive but suggest that environmental decentralization may have halted the deterioration of air quality that began in the 1970s."[78]

Environmental federalism in the U.S. functions as a type of "cooperative federalism," which preserves state autonomy, because federal environmental standards are minimum standards that States can then exceed if they wish to do so. In that system, rather than the norms being dictated from the center, the States are permitted to submit their own regulatory packages for approval. If the centrally-approved program is not locally enforced, the center can withhold funding from any centrally-funded program in that state.[79] Economics professor Daniel L. Millimet states that in the US, "as the burden of environmental expenditures increasingly falls on financially-strapped state and local governments, the quality of state administration of federal programs has become even more variable."[80] A benefit of a cooperative federal structure can be what Georgetown University law professor William W. Buzbee refers to as the "learning function," wherein federal and state actors learn from each other's experiences, and allow for trials and experiments in implementation of environmental law; [81] along with federal and state actors benefiting from the innovation of particular states.[82] This learning function, however, needs the support of sophisticated information-sharing systems, especially because state and local agencies do not often think of how innovation can also benefit the residents in other places in the country, which provides an important space for the federal government to step in, such as in the case of environmental emission trading schemes in the U.S.[83]

77 Robert V. Percival, "Environmental Federalism: Historical Roots and Contemporary Models," 54 *Maryland Law Review* (1995), p. 1144.

78 Daniel L. Millimet, "Assessing the Empirical Impact of Environmental Federalism," 43 (4) *Journal of Regional Science*, (2003), p. 731.

79 Kirk W. Junker and Michael J. Heilman, "United States' Environmental Law as Foreign Law," in *U.S. Law for Civil Lawyers: A Practitioner's Guide* (Baden-Baden: Nomos/C. H. Beck/Hart, 2021), pp. 312–317.

80 Robert V. Percival, *supra* note 77, p. 1175.

81 William W. Buzbee, "Contextual Environmental Federalism," 14 *New York University Environmental Law Journal* (2005), p. 122.

82 Ibid, p. 123. See also Jonathan H. Adler, "Jurisdictional Mismatch in Environmental Federalism," 14 *New York University Environmental Law Journal* (2005), p. 177.

83 Wallace E. Oates, "On Environmental Federalism," 83 *Virginia Law Review* (1997), p. 1329.

In China, environmental governance is highly decentralized, with enforcement and implementation powers being concentrated in the local Environmental Protection Boards (E.P.B.s), which report to the Ministry of Environmental Protection (M.E.P.). Local government officials exercise control over the recruitment of E.P.B. officials, and E.P.B.s are subject to political pressure. There have been instances of local governments, through the E.P.B.s, designating polluting enterprises with protected status. The M.E.P. is responsible for creating regulations, while the implementation and enforcement rests with the E.P.B.s. It is then difficult to ensure uniform application of environmental laws if local E.P.B. officials lack enforcement capacity.[84] The funding structure of the E.P.B. has also presented problems. Much of E.P.B. funding came from fines that it collected. Thus, the E.P.B. are caught in the situation of being responsible to enforcing M.E.P. regulations, but if the regulations are obeyed well by operators, then the E.P.B. would receive less funding.

In another example of environmental federalism, Australia is home to the National Heritage Trust, a federal fund set up to conserve Australia's natural capital, including partnership-based funding of environmental initiatives at the local and federal levels. However, it has been criticized for inefficient distribution of funds between states and failure to cooperatively establish prior needs assessment for environmental initiatives, inter alia.[85]

Similarly, experiences with the Ecological Fund in Nigeria have shown that local governments complained that federal funds for ecological protection were not equitably distributed among states and regions; whereas the federal government complained that many state and local governments have used the designated funds for other purposes. This mismatch in expectation between the federal and local governments can be resolved through greater capacity-building of local personnel and building transparent and accountable institutions that can independently monitor the use of the funds.[86]

4.3.3 The F.D.R.E. Constitution, and environmental federalism in Ethiopia

During much of the twentieth century, Ethiopia followed a path of predominately assimilationist nation-building that undermined the building of peace and stability.[87] But beginning in the early 1990s, the Ethiopian government

84 Huiyu Zhao and Robert Percival, "Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China," 6 *Transnational Environmental Law* (2017), pp. 535–536.

85 Kate Crowley, "Effective Environmental Federalism? Australia's Natural Heritage Trust," 3 (4) *Journal of Environmental Policy and Planning* (2001), pp. 271–272.

86 J. Isawa Elaigwu and Ali A. Garba, "Green Federalism: The Nigerian Experience," in *Green Federalism. Experiences and Practices* (Forums of Federations, 2015), pp. 82–83.

87 Christophe van der Beken, *Unity in Diversity: Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia,* (Münster: L.I.T. Verlag, 2012), pp. 16–24.

introduced a new state-building approach that was manifested in the adoption of the 1995 Constitution. The major change in the state-building approach is "the considerable autonomy, or subnational constitutional space, the federal constitution reserved for the constituent units or regions to draft, adopt, and amend a constitution."[88] It is believed that this constitutional autonomy could enable the federal system to accommodate diversity in the country.[89] The subnational constitutional autonomy provided by the 1995 constitution allows the regional states in Ethiopia:

> to express the historical narratives and traditions of the empowered ethnic group or people; to protect their identity; to embed regional human rights sensitivities; to design a government structure adapted to region-specific features; to determine the structure, powers, and responsibilities of subregional or local governments; and to formulate region-specific policy objectives.[90]

Article 1 of the 1995 Constitution establishes a Federal and Democratic state structure.[91] Accordingly, the Ethiopian state is known as "the Federal Democratic Republic of Ethiopia" with federalism being a core founding principle. Conceptually, federalism is defined as assigning government authority to the right organs as established by the Constitution. Specifically, the Ethiopian concept of federalism allocates authority between the federal government and the regional states as indicated in Articles 51 and 52 of the Constitution.[92] This allocation of authority also pertains to legislative and regulatory issues on the environment. The type of federalism adopted in Ethiopia is dual federalism, where the executive powers of the federal government and regional states are coexistent with their legislative powers. Specifically, Article 50(2) of the Constitution states that "the Federal Government and the States shall have legislative, executive and judicial powers."[93] According to Article 51 of the Ethiopian Constitution, the Federal Government shall:

> formulate and implement environmental policy; establish and implement national standards and basic policy criteria for public health; preserve

88 Jonathan L. Marshfield, "Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution," 41 *Vanderbilt Journal of Transnational Law* (2008), p. 585.

89 F.D.R.E. Constitution, *supra* note 26.

90 Christophe Van Der Beken, *supra* note 87.

91 F.D.R.E. Constitution, *supra* note 26. Under the Constitution, all Ethiopian languages enjoy official state recognition. However, Amharic is the "working language" of the federal government. The Constitution was published in the Federal Negarit Gazeta in Amharic and English simultaneously.

92 Ibid.

93 Ibid.

> cultural and historical legacies; enact laws for utilization and conservation of land and other natural resources, historical sites and objects; be responsible for the development, administration and regulation of air, rail, waterways and sea transport and major roads linking two or more states; and determine and administer the utilization of the waters or rivers and lakes linking two or more states or crossing the boundaries of the national territorial jurisdiction.[94]

Further, according to Article 52(1) of the Ethiopian Constitution, "all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States; and to administer land and other natural resources in accordance with the Federal Laws."[95]

Although federalism in general concerns allocation of authority, in case of *environmental* federalism, this allocation of power in Ethiopia requires collaboration of both federal and regional states in regulating the environment. A special feature of the Ethiopian Constitution is that it provides both substantive environmental rights[96] and procedural environmental objectives[97] to protect the environment. Unlike India or even the U.S., Ethiopia allows only minimal lawmaking through judicial interpretation of the Constitution and creating precedent, owing to its civil law legal system. Yenehun Birlie, lecturer at Addis Ababa University School of Law, suggests that "the likelihood of the judiciary emerging as a protector of the public interest against other branches is very minimal." [98] Therefore, the Executive and Legislature enjoy decision-making powers over the protection of the public interest to the environment to a far greater degree than the judiciary, which calls for a greater need to ensure appropriate federal and local power-sharing over environmental matters.

The geography of Ethiopia allowed for independence and isolation for Ethiopia's regions, and historically it was extremely difficult to centralize the rule of law, and different customary laws and cultural differences remained. The diversity of languages and dialects also serves as an impediment in harmonizing and creating a uniform legal system.[99] After the Derg regime in Ethiopia ended in 1991, the transitional constitution created provinces based on ethnic identities, allowing provinces to secede if they so decided (a right exercised by the province of Eritrea which seceded in 1991). The 1995

94 Ibid.
95 Ibid.
96 Ibid, Art. 44.
97 Ibid, Art. 92.
98 Yenehun Birlie, "Public Interest Environmental Litigation in Ethiopia: Factors for Its Dormant and Stunted Features," 11 (2) *Mizan Law Review* (2017), p. 337.
99 Tsegaye Beru and Kirk W. Junker, "Constitutional Review and Customary Dispute Resolution by the People in the Ethiopian Legal System," 43 *North Carolina Journal of International Law* (2018), pp. 1–65.

constitution "formalized the construct of ethnic federalism as an organizing principle of government and remains Ethiopia's existing constitution."[100]

The modern ten regional states (*"Killiloch")* in Ethiopia have been conceived based on tribal identities, and are not sound in terms of geographic demarcation, particularly with respect to how the topography, settlement clusters, historical geographic divisions, or the occurrence of environmental problems are located. Professor of Geography at Michigan State University, Assefa Mehretu, states: "Preoccupied with a single objective of dividing Ethiopia into tribal territories, the government failed to consider a myriad of intractable national problems that are difficult to resolve with *killil* covenants" pointing to how pan-*killil* problems, such as transportation, infrastructure, commodity markets, and the environment, are thus negatively affected due to the governance structure.[101] Mehretu states that this has led to important areas of law being subject to regional bureaucracies, wherein local bureaucrats act out of regional self-interest even if it may come at the cost of macroeconomic national objectives. For example, regions that grow coffee or wheat are divided across *killils*, resulting in their welfare, environmental protection, and agricultural health as a whole being compromised due to them splitting across different *killil* jurisdictions. Mehretu argues in favor of centralization for the protection of the national interest of sustainable development, arguing against the division of authority over national natural resources like watersheds and agro-climatic zones. [102]

Taxation, specifically environmental taxation is a key avenue where environmental federalism can be constructive in Ethiopia. While the authority to tax is derived from the F.D.R.E. Constitution's Article 9(1), which makes the Constitution the supreme law of the land, there is no explicit provision for federal taxes on the environment. The Constitution grants the federal and state legislatures the power to impose taxes as appropriate, and the power to ensure that the tax is commensurate with services that taxes will help deliver. The scope of taxation under the Constitution then forms the basis for the federal and state governments' imposition of environmental taxes.[103]

There have been instances of federal environmental legislation in Ethiopia including provisions creating obligations for the regional states to implement the federal environmental legislation through the establishment of certain agencies or the enforcement of federal standards.[104] However, it is unclear

100 Berhanu Mengistu and Elizabeth Vogel, "Bureaucratic Neutrality among Competing Bureaucratic Values in an Ethnic Federalism: The Case of Ethiopia," 66 (2) *Public Administration Review* (2006), p. 206.

101 Assefa Mehretu, "Ethnic Federalism and Its Potential to Dismember the Ethiopian State," 12 *Progress in Development Studies* (2012), pp. 113, 119.

102 Ibid. at 120.

103 Merhatbeb Teklemedhn Gebregiorgs, "Towards Sustainable Waste Management through Cautious Design of Environmental Taxes: The Case of Ethiopia," 10 *Sustainability* (2018), p. 8.

104 Gedion T. Hessebon and Abduletif K. Idris, "The Supreme Court of Ethiopia: Federalism's Bystander," in *Court in Federal Countries: Federalists or Unitarists*?, (Toronto: Toronto University Press, 2017), p. 174.

whether this federalism can be considered truly cooperative, given that delegation to the states is often not based on state consent, or whether there is adequate funding for additional implementation by the states.[105]

In Ethiopia, the Federal Police Commission, established in 2000 with the mandate to control and investigate crimes under the federal jurisdiction, is also responsible for the control of environmental crimes. However, the lack of knowledge that the police forces have with respect to environmental crimes has led to environmental crimes being investigated very minimally compared to other kinds of crime.[106] It is possible that the federal structure in Ethiopia also led to this disparity because certain regions have police officers trained in investigating environmental crime, and the other regions do not, leading to lack of coordination and information-sharing at the national level, which could effectively combat environmental crime.[107]

In light of these challenges posed by environmental federalism within Ethiopia, a primary concern for the developing nature of its economy requires focus on the allocation of authority to the federal and regional states in order to positively impact the country's economic development. As we saw in Chapter 1, regarding public-private partnerships in Nigeria, assigning authority on environmental protection could impose costs on business along with strengthening or loosening environmental standards. An important balance that needs to be struck then is between the economic interest of the country and the protection of the environment, as is mandated by the principle of sustainable development.

4.4 Conclusion

Since its inception, the concept of sustainable development has been popularized as an environmental goal by the international community. Over the years, it has progressed from an international principle to a vague term with little direct policy guidance. This vagueness is also reflected in Ethiopia. This chapter sought to understand the nexus between environmental federalism and sustainable development and discussed how assigning clearly differentiated powers to different tiers of government is crucial to ensuring that development can be environmentally sustainable. This assignment of power should be informed by the nature, magnitude and complexity of the environmental problems, and federalism should be permitted, if not encouraged, to operate in a dynamic and flexible manner as opposed to an archaic and inflexible complex of power sharing.

105 Ibid, p. 176.

106 Rose Mwebaza et al., "Situation Report: Environmental Crimes in Ethiopia," 2009, available at https://media.africaportal.org/documents/EnvironCrimesEthioJul08.pdf (retrieved 10 March 2021).

107 Ibid, p. 27.

The chapter discussed how environmental or green federalism in Ethiopia as it currently stands is heavily dependent on regional decision-making at the *killil*-level for the implementation of environmental policies, and promoting sustainable development, which can be inefficient and in worst case scenarios, dangerous when there are competing interests over environmental problems that affect the country as a whole. The practice of environmental federalism may be rooted in tension between conflicting governmental authorities, but it can also serve as an opportunity for innovation within environmental governance as it allows federal, state, and local government bodies to design and implement different policies and laws that fit their contexts.

Bibliography

Adler, Jonathan H. "Jurisdictional Mismatch in Environmental Federalism." 14 *New York University Environmental Law Journal* (2005): 130–178.

Baker, Susan. *Sustainable Development*. Routledge, 2006.

Beckstrom, John H. "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia." 21 (3) *American Journal of Comparative Law* (1973): 557–583.

Beru, Tsegaye, and Kirk W. Junker. "Constitutional Review and Customary Dispute Resolution by the People in the Ethiopian Legal System." 43 *North Carolina Journal of International Law* (2018): 1–65.

Birlie, Yenehun. "Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features." 11 (2) *Mizan Law Review* (2017): 304.

Biswas, A. K. and C. Tortajada O. Ünver. *Water as a Focus for Regional Development*. Oxford University Press, 2004.

Blindenbacher, Raoul and Koller, Arnold. *Federalism in a Changing World: Learning from Each Other*. Montreal: McGill–Queen's University Press, 2003.

Boyd, Derick Alexander Campbell, et al. "Sustainable Development in Sub-Saharan Africa: Issues of Knowledge Development and Agenda Setting." 8 *International Journal of Development Issues* (2009): 119–133.

Brouillet, Eugenie. "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" 54 *Supreme Court Law Review* (2011): 601–632.

Bulmer, Elliot. "Federalism: International IDEA Constitution Building Primer 12." 2017, available at https://www.idea.int/sites/default/files/publications/federalism-primer.pdf.

Buzbee, William W. "Contextual Environmental Federalism." 14 New *York University Environmental Law Journal* (2005): 108.

Crowley, Kate. "Effective Environmental Federalism? Australia's Natural Heritage Trust." 3 (4) *Journal of Environmental Policy and Planning* (2001): 255–272.

Dryzek, John S. "Paradigms and Discourses," in *Oxford Handbook of International Environmental Law*. Eds. Daniel Bodansky et al. Oxford University Press, 2008.

Duoff, Jeffrey L. "Levels of Environmental Governance," in *International Environmental Law*. Eds. Daniel Bodansky et al. Oxford University Press, 2007.

Elaigwu, J. Isawa, and Ali A. Garba. "Green Federalism: The Nigerian Experience," in *Green Federalism. Experiences and Practices*. Eds. P. G. Chakrabarti and Nidhi Srivastava. (Forums of Federations, 2015).

Engel, Kirsten H. "State Environmental Standard-Setting: Is There a 'Race' and Is It 'To the Bottom.'" 48 (2) *Hastings Law Journal* (1997): 271–398.

Enrich, Peter D. "Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business." 110 *Harvard Law Review* (1996): 378seq.

Esty, Daniel C. "Sustainable Development and Environmental Federalism." 3 *Widener Law Symposium Journal* (1998).

Gebregiorgs, Merhatbeb Teklemedhn. "Towards Sustainable Waste Management through Cautious Design of Environmental Taxes: The Case of Ethiopia." 10 *Sustainability* (2018): 3088.

Grimaldi, Giorgio. "Prospects for Ecological Federalism," 1 *L' Europe en Formation* (2012), available at https://www.cairn.info/revue-l-europe-en-formation-2012-1-page-301.htm.

Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005.

Hessebon, Gedion T. and Abduletif K. Idris. "The Supreme Court of Ethiopia: Federalism's Bystander," in *Court in Federal Countries: Federalists or Unitarists*? Toronto University Press, 2017.

Idris, Binnyam. "Environmental Constitutionalism in Ethiopia." 2019, available at https://ssrn.com/abstract=3456113.

Jörgensen, Kirsten. *Climate Initiatives at the Subnational Level of the Indian States and their Interplay with Federal Policies*. Montreal: Paper presented at the 2011 I.S.A. Annual Convention, 16–19 March 2011.

Junker, Kirk W. and Michael J. Heilman, "United States' Environmental Law as Foreign Law," in *U.S. Law for Civil Lawyers: A Practitioner's Guide*. Nomos/C. H. Beck/Hart, 2021.

Lele, Sharachandra. *Sustainable Development: A Critical Review*. World Development. 1991.

Magraw, Daniel B. and Lisa D. Hawke. Sustainable Development, in the *Oxford Handbook of International Environmental Law*, Eds. Daniel Bodansky et al. Oxford University Press. 2007.

Marshfield, Jonathan L. "Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution." 41 *Vanderbilt Journal of Transnational Law* (2008): 585–638.

McKee, Jonathan. "Ethiopia: Country Environmental Profile. European Commission (EC) Delegation. Addis Ababa, 25 Nov. 2011," available at https://europa.eu/capacity4dev/file/32979/download?token=EazR1zHt.

Mehretu, Assefa. "Ethnic Federalism and Its Potential to Dismember the Ethiopian State." 12 *Progress in Development Studies* (2012): 113–133.

Mengistu, Berhanu, and Elizabeth Vogel. "Bureaucratic Neutrality among Competing Bureaucratic Values in an Ethnic Federalism: The Case of Ethiopia." 66 (2) *Public Administration Review* (2006): 206.

Millimet, Daniel L. "Assessing the Empirical Impact of Environmental Federalism." 43 (4) *Journal of Regional Science* (2003): 731.

Mwebaza, Rose, et al. "Situation Report: Environmental Crimes in Ethiopia." 2009, available at https://media.africaportal.org/documents/EnvironCrimesEthioJul08.pdf.

Oates, Wallace E. and Robert M. Schwab. "Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?" 35 *Journal of Public Economics* (1988): 333.

Oates, Wallace E. "On Environmental Federalism." 83 (7) *Virginia Law Review* (1997): 1321–1329.

Oates, Wallace E. "A Reconsideration of Environmental Federalism," Discussion Papers 10460 (Washington: Resources for the Future, 2001), 1–35.

Ogbaharya, Daniel, and Tecle, Aregai. "Community-based Natural Resources Management in Eritrea and Ethiopia: Toward a comparative Institutional Analysis." 4 (3) *Journal of Eastern African Studies* (2010): 490–509.

Percival, Robert V. "Environmental Federalism: Historical Roots and Contemporary Models." 54 (4) *Maryland Law Review* (1995): 1141.

Richardson, Dick. "The Politics of Sustainable Development,' in *The Politics of Sustainable Development-Theory, Policy and Practice within the European Union*. Eds. Susan Baker et al. Routledge, 1997.

Shobe, William, and Dallas Burtraw. "Rethinking Environmental Federalism in a Warming World." Washington: *Resources for the Future - RFF DP* 12–04, 2012, available at https://www.rff.org/publications/working-papers/rethinking-environmental-federalism-in-a-warming-world/.

Singer, Norman J. "A Traditional Legal Institution in Modern Legal Setting: The Atbia Dagna of Ethiopia," 18 *UCLA Law Review* (1970/71).

Torgeson, Douglas. "Constituting Green Democracy: A Political Project," 17 (2) *Good Society* (2008): 18–24.

Van Der Beken, Christophe. *Unity in Diversity-Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia*. Lit Verlag, 2012.

Zhao, Huiyu and Robert Percival. "Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China." 6 *Transnational Environmental Law* (2017): 531.

5 Diversification of mono-economies

How legislation manages the environmental impact of foreign investments in Nigeria

Chidebe Matthew Nwankwo and George Nwangwu[1]

5.1 Introduction

The Nigerian legal landscape is replete with legislation that addresses the environmental impact of infrastructure projects. Chief among them are the National Environmental Standards and Regulations Enforcement Agency (N.E.S.R.E.A.) Act, 2007[2] and the Environmental Impact Assessment Act, 1992.[3] The adequacy of these laws *vis-à-vis* the environmental hazards that various phases of these megaprojects pose, is examined in order to make clear the areas that require improvement. Furthermore, the pronouncements of Nigerian courts on critical aspects of Nigerian environmental law are reported for their theoretical implications on the subject matter in focus. The approach in this chapter is to combine the provisions of the law and the jurisprudence of the courts to develop the praxis of megaprojects and their socio-economic implications in the future.

The adverse impacts of megaprojects include resource depletion, biological diversity losses due to raw material extraction, landfill problems due to waste generation, lower worker productivity, adverse human health due to poor air quality, lack of supply of potable water, and lack of proper sanitation facilities.[4] The environmental impacts of the construction processes of megaprojects generally consist of ecosystems impact, natural resources impact, and public impact. Consequently, this chapter supports a shift from the focus on the environmental hazards of oil and gas exploration towards greater attention to

1 Chidebe Nwankwo is a Senior Lecturer at the Faculty of Law, University of Nigeria Enugu Campus. George Nwangwu is a P.P.P. consultant, author, and principal officer of Ratio Legal, Abuja Nigeria.

2 National Enforcement Standards Regulatory and Enforcement Agency (Establishment) Act of 2007, Laws of the Federation of Nigeria 2004, cN164.

3 Environmental Impact Assessment Act 1992, Cap 12, Laws of the Federation of Nigeria, 2004.

4 See for instance, Navarro Ferronato and Vincenzo Toretta "Waste Mismanagement in Developing Countries: A Review of Global Issues," 16 *International Journal of Environmental Research and Public Health* (2019), p. 1060.

DOI: 10.4324/9781003160236-8

the environmental impact of other major infrastructural projects such as rail, power, and real estate projects.[5] This chapter adopts a historical stance from which to contribute a Nigerian perspective to the conversation on fundamental practices from developing countries and how they compare to emergent global standards in the quest to curb climate change and enable sustainable development. It traces the history of environmental legislation in Nigeria to ascertain the adequacy of Nigeria's laws for regulating the environmental impact of mega infrastructural projects. It also examines other important aspects of the national legal system while borrowing crucial lessons from other jurisdictions.

5.2 Background and history of environmental regulation in Nigeria

Nigeria like every other developing country grapples with balancing the race to create development for its growing population with the need to ensure that such development is sustainable.[6] Amidst the task to development in a globalized world, developing countries must also contend with the commodity trap problem. The growth of most developing countries depends on one or two primary commodities, the prices of which continue to decline. This puts pressure on foreign exchange earnings, frustrates investment-led recoveries, and adds to the debt burden. To overcome this problem, developing countries have been advised to promote structural transformation and productive capacities, including economic diversification. It is therefore imperative that the Nigerian state prioritizes the development of critical infrastructure with economic diversification as the most viable means to becoming an important economic force in the current global market.

Nigeria has witnessed her share of environmental disasters, the most notable of which have been the decades of destruction of the flora and fauna in the oil-rich Niger Delta region that provides the major source of revenue for the country.[7] The country is also endowed with a vast array of solid

5 Some ongoing megaprojects in Nigeria include:

1) Lagos-Calabar Railway Project – U.S. $11 billion
2) Lagos Light Rail Project – U.S. $1.12–$30 billion
3) World Trade Centre – U.S. $1 billion
4) Lekki Free Trade Zone – U.S. $1.2 billion
5) Mambilla Hydroelectric Power Project – U.S. $5.8 billion.

See "Ongoing megaprojects in Nigeria" available at https://constructionreviewonline.com/biggest-projects/top-ongoing-mega-projects-in-nigeria/ (retrieved 12 February 2021).

6 See, U.N.C.T.A.D., "Escaping Commodity Trap for Landlocked Developing Countries," 29 November 2019, available at https://unctad.org/news/escaping-commodity-trap-critical-landlocked-developing-countries (retrieved 12 February 2021).

7 As at the time of writing, official statistics show that Nigeria's oil sector contributes 8.73% of the total real G.D.P. Over 90% of Nigeria's export value was generated by mineral fuels, oils, and distillation products sector accounting to US$58 billion over the same

mineral resources of various categories ranging from precious metals such as gold, silver, and platinum, to precious stones and also industrial minerals such as baryte, gypsum, kaolin, marble, limestone, columbite, and granite.[8] The process of extracting these minerals often has unsustainable impacts on the environment such as earth tremors, gully erosion, land cracks, and flooding.

In addition to solid minerals exploitation, poor regulation of manufacturing and construction activities has resulted in several environmental damages, including ozone depletion, pollution of water resources through the discharge of harmful effluents, and dumping of solid wastes. These effects of manufacturing and construction militate against sustainable development. Some of the worst affected cities in the country are Lagos, Ibadan, Kano, Port Harcourt, Warri, and Kaduna.[9]

In addition to the environmental problems listed above, Nigeria suffers from deforestation. Nigeria loses approximately 350,000 to 400,000 hectares of forest annually to a combination of factors such as illegal logging, agricultural expansion, accelerated urbanization, and industrialization.[10] The Sahara desert continues to expand southward due to the drought in the Sahel that is induced by climate change.[11] This desertification has so far had grave consequences on the quality of the environment and human life.[12] At this rate, if national policies on afforestation are not implemented urgently, continuous deforestation and desertification will lead to complete destruction of forest resources and the extinction of rare forest-dwelling animal species.

The reality remains that despite these extant environmental problems, Nigeria is in desperate need of modern infrastructure to spur growth and facilitate her development. As things stand, Nigeria's infrastructure is poor even by developing country standards.[13] According to the National Integrated Infrastructure Master Plan (N.I.I.M.P.), Nigeria's infrastructure deficit

---

period. See Statista, "Nigeria: Contribution of Oil Sector to GDP 2018–2020," available at https://www.statista.com/statistics/1165865/contribution-of-oil-sector-to-gdp-in-nigeria/ (retrieved 12 February 2021).

8 There are approximately 33 solid minerals in 450 locations nationwide and at various stages of exploration and exploitation. See H. O. Adebiyi et al., "Prevention of Environmental Degradation in Nigeria: A Strategy Towards Sustainable Development," 2 (3) *International Journal of Sciences, Engineering & Environmental Technology* (2017), p. 18.

9 See H. O. Adebiyi, *supra* note7.

10 Food and Agriculture Organisation of the United Nations, "Global Forest Resources Assessment 2005, Progress towards Sustainable Forest Management,'" (Rome, 2006).

11 The Sahara Desert has expanded by 10% since 1920. See *Science Daily*, "The Sahara Desert Is Expanding," March 29, 2018 available at https://www.sciencedaily.com/releases/2018/03/180329141035.htm (retrieved 4 December 2020); see also Natalie Thomas and Sumant Nigam, "Twentieth-Century Climate Change over Africa: Seasonal Hydroclimate Trends and Sahara Desert Expansion," 31 *Journal of Climate* (2018), p. 3349 ff.

12 Experts have opined that the drought in the Sahel has resulted in mass migration of nomadic groups and this has sparked an intense competition for resources in affected Sahelian states. See Natalie Thomas and Sumant Nigam, *supra* note 10.

13 70% of 193,000km of roads in the country are in very bad shape; 60% of the population lack constant electric power supplies, and there are no fully functional railways.

will require a total investment of about US$3 trillion over the next thirty years to build and maintain infrastructure for the country.[14] It then becomes clear that despite being bedeviled by insecurity and rising poverty, Nigeria must develop in a world that is intrinsically linked by globalization. Consequently, the near future will be marked by an increased desire for mega infrastructural projects that enable economic growth.

The history of environmental legislation in Nigeria has given environmental protection a certain form. Initially there was no systematic effort to provide an inclusive system for managing its natural resources. Nigeria's colonial past arguably delayed the presence of established structures of environmental management and regulation.[15] Some argue that since the priority of the colonial administration was to enjoy unhindered access to the exploration of natural resources in the colonies for the industrialization drive in the West, there was no incentive for the enactment of legislation to regulate the environment or to protect the natives from the polluting effects of exploratory activities.[16] It was not until the discovery of crude oil that the Nigerian state started to fashion laws to regulate human behavior toward the environment.

The trajectory of environmental legislation in Nigeria has been divided into four distinct stages.[17] The first stage is the Colonial Period (1900–1956), marked by the dearth of environmental legislation, except for brief provisions in public health legislation and in torts and nuisance law. The second stage is the Petroleum Focused Environmental Legislation Period (1957–early 1970s), when the discovery of crude oil and the commercial boom that followed led to sector-specific legislation that addressed the "national fixation" with oil. The third stage was the Rudimentary and Perfunctory Legislation Period (1970s–Koko crisis) that witnessed an awakening in the establishment of legal and political mechanisms to battle pollution in respective economic sectors. The final stage is the Contemporary Period (post-1987–present), the most

14 See Federal Republic of Nigeria, "National Integrated Infrastructure Master Plan," National Planning Commission, March 2015, available at https://nesgroup.org/storage/app/public/policies/National-Intergrated-Infractructure-Master-Plan-2015-2043_compressed_1562697068.pdf (retrieved 12 February 2021).

15 Colonial administrators who were involved in national governance between 1861 and 1960 were merely interested in harnessing the economic potential of the regions that constituted the colony and as such did not prioritize environmental protection. The major motive for colonialism was to secure access to natural resources of the colonies. Since exploitation centered on the colonial interests rather than the welfare of the indigenous people, there was little attention to the environmental cost of exploitation. See Rebecca Bratspies, "Do We Need a Human Right to a Healthy Environment?" 13 (1) *Santa Clara Journal of International Law* (2015), p. 46.

16 Nnadozie conjectures that laws which may have limited colonial commercial activities may have been considered counterproductive. See Kent C. Nnadozie, "Pollution Control in Nigeria: The Legal Framework," (Apr. 1994) cited in Adebola Ogunba, "An Appraisal of the Evolution of Environmental Legislation in Nigeria," 40 *Vermont Law Review* (2016), p. 676.

17 Adebola Ogunba, *supra* note 15, p. 674.

important period in Nigeria's environmental legislative history, characterized by more nuanced legislation, awareness, and sophistication.[18] However, the implementation of these mechanisms is by no means a given. Legislative gaps, a lack of strict adherence to these laws, and institutional incapacity still plagues their implementation.

The first period in the history of Nigeria's environmental legislation does not warrant further analysis primarily because the regulations obtainable at that time were mostly dictated by the British colonial government and primarily influenced by the economic interest of European businesses operating in the country. This continued until Nigeria's economic fortunes took a turn with the discovery of oil in commercial quantities in Oloibiri in present day Bayelsa State in 1956. From that moment, Nigeria's erstwhile agro-dependent economy switched focus to petroleum exploration. This second period was marked by a national fixation on petroleum exploitation.[19] Consequently, a considerable amount of legislation followed that was focused on environmental regulation of petroleum sector activities. In hindsight, this showed a zealous but limited strategy that led to the neglect of other crucial sectors.[20] During this period, the lone non-petroleum focused environmental legislation was the enactment of the Agricultural Act 1964 created to regulate agricultural imports in order to control the spread of plant diseases and pests.[21]

The third period contributed substantially to the change in the regulation of the environment in Nigeria. Although direct environmental legislation was few and far between, other legislation enacted during this period had far-reaching consequences on the environment. Important environmental legislation at the time included the 1978 Land Use Act;[22] the 1979 Energy Commission of Nigeria Act;[23] the 1958 Endangered Species (Control of International Trade and Traffic) Act;[24] the Sea Fisheries Act;[25] and the 1986 River Basins Development Authorities Act.[26]

The Land Use Act merits particular mention because it sought to liberalize land, which is the most important natural resource from which every

18 Ibid, p. 675.
19 Ibid, p. 679.
20 A scholar describes the approach at the time as being marked by limited sectorial legislation centered solely on "economically important natural resources." See Adegoke Adegoroye, "The Challenges of Environmental Enforcement in Africa: The Nigerian Experience" in *Third International Conference on Environmental Enforcement: Conference Proceedings,* 1994, p. 43.
21 Agricultural (Control of Importation) Act (1964) Cap. A13.
22 The Nigerian Land Use Act, (Cap L5, Laws of the Federation of Nigeria, 2004).
23 Energy Commission of Nigeria Act, 1979. (Cap E10 Laws of the Federation of Nigeria, 2004).
24 Endangered Species (Control of International Trade and Traffic) Act, 1958 (As amended), (Cap. E9, Laws of the Federation of Nigeria, 2004).
25 The Sea Fisheries Act, 1992. (Cap S4, Laws of the Federation of Nigeria, 2004).
26 River Basins Development Authorities Act 1986. (Cap R9 Laws of the Federation of Nigeria, 2004).

economic activity springs. It radically altered the system of landholding nationwide. Before the advent of the Act, the country operated different land tenure systems based on diverse customary laws. In the South, families mainly owned land and acquisition was by inheritance, conveyance, gift, outright possession, or long possession.[27] The only interface between landholders and the government was the requirement to obtain the consent of the government before transferring rights to aliens. Because the land use management system lacked a proper system of registration, abuse became rampant, and multiple sales of the same land to different buyers took place. In the northern part of the country, the land tenure system differed due to agreements reached with the colonial administration. Under this system, only the right to occupancy was granted to northern land holders under the Land and Native Rights Ordinance, and subsequently under the Land Tenure Law.[28]

By far the most important provision of the Land Use Act is Section 1, which vests all land interests in a state in the Governor. The land interests are understood to be held in trust and administered for the use and common benefit of all Nigerians. In effect, the Act swept away all the doctrines of estates and tenures, particularly fee simple or absolute ownership. The law was introduced to reduce unequal access to land and land resources, a situation that hitherto caused a great deal of hardship to the citizenry. It was envisaged that massive and unfettered access to land and land resources by the citizens could stimulate the needed economic growth in an economy that depends heavily on agriculture and mineral resources. However, after more than three decades of the implementation of the law, the act has failed to realize most of its objectives, and instead has created more confusion in the process. Most of those old problems have resurfaced and certain provisions of the law have themselves worked hardship on the citizens and tended to impede economic development.[29]

Some scholars view the Land Use Act as particularly detrimental to the realization of environmental justice in Nigeria.[30] In order to understand the peculiar effect of the Act on the oil rich Niger Delta, one should first consider the process of land appropriation, enabled by Section 28, which provides

27 See generally, Innocent A. Umezulike, *ABC of Contemporary Nigerian Land Law*, (Enugu: Snaap Press Nigeria Ltd., 2013).

28 Akin L. Mabogunje, "Land Reform in Nigeria: Progress, Problems and Prospects," November 7, 2019, available at http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/mabogunje.pdf (retrieved 4 December 2020).

29 See Matthew Enya Nwocha, "Impact of the Nigerian Land Use Act in Economic Development in the Country," 8 (2) *Acta Universitatis Danubius. Administratio (*2016), pp. 117–128.

30 See, Rhuks T. Ako, "Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice," 53 *Journal of African Law* (2009), p. 289; Kaniye S. A. Ebeku, "Oil and the Niger Delta People: The Injustice of the Land Use Act," 35 *Law and Politics in Africa* (2002), p. 201.

that land may be appropriated for "overriding public interests."[31] Overriding public interests is defined as "the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith."[32] In essence, indigenous people may be dispossessed of their land whenever their land is required for oil exploration, making them tenants-at-will of the oil industry on land they have owned and inhabited for centuries.[33]

A further effect of the Act was the deprivation of the host communities of certainty in landholding rights. The Act was instrumental in depriving these communities from owning land within the region. Land in the oil-rich region was appropriated for the benefit of oil companies, government officials and their associates to the detriment of the original (traditional) landholders. Furthermore, the Act also diminished the authority of traditional rulers whose original powers are intrinsically linked to the power to manage and control the use of land under customary law. The erosion of the powers of the traditional rulers is also attributed to violence and youth militancy in the region. The absence of traditional authority and the violence in the region has then been attributed to a direct result of the "loss of land rights."[34]

Another noteworthy piece of legislation that relates to the environment and infrastructure during this period is the Energy Commission of Nigeria Act.[35] The Act established the Energy Commission to strategically plan and coordinate national policies and to systematically develop the various energy resources in all of their ramifications in Nigeria.[36] The Commission is constituted from the Ministers of the Ministries of Mines, Power and Steel, Petroleum Resources, Agriculture, and Water Resources and Rural Energy, among others.[37]

Events in the third period of Nigeria's legislative history were arguably the most momentous, and this led to greater emphasis on environmentally friendly laws and institutions. It was also during this period that greater attention began to be paid to the environmental impact of building infrastructure for national development. In August 1987, an environmental crisis hitherto not envisaged occurred in Nigeria. An Italian company shipped several tons of toxic industrial waste, including P.C.B. oil, dimethyl formaldehyde, and asbestos fibers for deposit in the town of Koko, Delta State, in Nigeria's oil-rich Niger Delta region, for the outrageously small fee of US$100 per month.[38] The waste leaked into the surrounding environment and resulted

31 Land Use Act, Section 28.
32 Ibid.
33 Rhuks T. Ako, *supra* note 29, p. 296.
34 See, Charles Ukeje "Youths, Violence and the Collapse of Public Order in the Niger Delta Region of Nigeria," (26) 2 *Africa Development* (2001), p. 342.
35 ECN Act, *supra* note 22.
36 Ibid, Sections 1, 5.
37 Ibid, Section 2.
38 See Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades after the Koko Incident," 15 *Annual Survey of International & Comparative Law* (2009), p. 1.

in the endangerment of the community. The seriousness of the incident and the egregious nature of it influenced international law[39] as well as bringing about the enactment of the Harmful Waste (Special Criminal Provisions) Act.[40] The Act criminalizes activities involving the sale, purchase, transportation, importation, deposit, or storage of harmful waste, either individually or in conjunction with others on Nigeria's soil, air, or sea. It defines harmful waste as injurious, poisonous, noxious, or toxic substances particularly nuclear waste that emits any radioactive substances.[41] This Act remains valuable to present realities.

As Nigeria transitions into an economy that frequently constructs modern-age infrastructure laws, it creates the possibility that the laws, if implemented, will check adverse environmental impacts of large-scale projects, and thereby engender safe engineering. Engineers agree that there is a link between engineering and sustainable development because they play a crucial role in creating infrastructure in the world. Engineers are problem solvers who apply their knowledge and experience to building projects that meet human needs, and to cleaning up environmental problems. Engineers can contribute to sustainable development along the entire chain of modern production and consumption, including for example, extracting and developing natural resources, designing and building transportation infrastructure, recovering and reusing resources, and producing and distributing energy.[42]

In the same year, the government established the Federal Environmental Protection Agency (F.E.P.A.) Act.[43] The Act established a federal agency with broad powers to manage and protect environmental resources and to develop environmental research technology. In addition to creating a national environmental agency, the Act also empowered states within the Federation to establish their respective state environmental protection agencies with the aim to maintain good environmental quality in relation to pollutants within the control of a state.[44] The F.E.P.A. Act empowered the Agency to prescribe national guidelines, criteria, and standards for water quality, air quality and

39 Media coverage of the event led indeed to the development of cutting-edge international agreements concerning the international trade of hazardous waste, such as the Basel Convention (1989) and the Bamako Convention (1991).

40 Harmful Waste (Special Criminal Provisions, etc.) Act, 1988 (Cap H1 Laws of the Federation of Nigeria, 2004).

41 Ibid, Section 15.

42 See World Federation of Engineering Organizations' Committee on Technology, "Engineer and Sustainable Development Report," August 2002, available at https://www.researchgate.net/profile/Arvind_Singh56/post/How_engineers_can_play_their_role_in_the_sustainable_development4/attachment/5abcdd5b4cde269658663419/AS%3A609497244520449%401522326875408/download/2.pdf (retrieved 4 December 2020).

43 Federal Environmental Protection Agency Act, 1988 (repealed by the National Environment Standards and Regulations Enforcement Agency, (Establishment) Act, 2007. [Cap, F10 Laws of the Federation of Nigeria, 2004]).

44 Ibid, Section 25.

atmospheric protection, noise levels, gaseous emissions, and effluent limits; to monitor and control hazardous substances; and to supervise and enforce compliance. Under this law, the Agency enjoys broad enforcement powers, and may, without warrants, enter premises, inspect, and seize property, and arrest offenders who obstruct the enforcement officers in the discharge of their duties.[45]

The existence of F.E.P.A. propelled the formulation of the first and current National Policy on the Environment. The policy has been described as "perhaps the most positive achievement Nigeria has ever recorded in the area of environmental management."[46] The Policy's overall objective is sustainable development through proper management of the environment in order to meet the needs of present and future generations.[47] It aims to secure a quality environment adequate for the health and well-being of all Nigerians, "raise public awareness and promote understanding of the…essential linkages between the environment and development," and to "encourage individual and community participation in environmental protection and improvement efforts."[48] This lofty goal is far from the reality in present day Nigeria, as there still exists constitutional and policy impediments to the participation of the public in the decision-making and enforcement processes of environmental protection.

A number of institutional and socio-political factors hampered F.E.P.A.'s efforts and this led to its underachievement during this period.[49] In 1992, the Environmental Impact Assessment (E.I.A.) Act was enacted.[50] This marked the first generally applicable law to mandate prior appraisals of likely environmental impacts of intended projects.[51] The E.I.A. Act requires that any project, whether it belongs to the private or public sector, is required to undergo an initial early assessment to determine its environmental impact.[52]

45 Ibid, Sections 1–25.

46 Layi Egunjobi, "Issues in Environmental Management for Sustainable Development," 13 (1) *Environmentalist* (1993), p. 37.

47 Ibid.

48 Ibid.

49 Among the challenges plaguing F.E.P.A. were inadequate waste disposal facilities within industrial estates; inadequate finding for F.E.P.A.; powerful political groups that countered F.E.P.A.'s activities; a negative public perception of F.E.P.A.; and political instability. Thus, the agency under achieved despite its robustness of its staff profile dominated by academics and its spirited effort to make a serious impact. In 1999, the Federal Ministry of Environment took over F.E.P.A.'s function but was unable to perform effectively due to bureaucratic bottlenecks and unfocused regulatory standards. See Adegoke Adegoroye, *supra* note 19, and Adebola Ogunba, *supra* note 15, pp. 21, 23.

50 Environmental Impact Assessment Act (1992) Cap. (E12).

51 Ibid.

52 Before the E.I.A. Act, projects had to undergo assessment under two separate laws: The Petroleum Act and the Urban and Regional Planning Act. Thus, three laws now operate in this area. Scholars have criticized the concurrent application of three independent and unrelated E.I.A. mechanisms, citing a lack of coordination between them and unnecessary overlap. They argue that this has resulted in replication of efforts and substantial costs

Perhaps one of the most important acts of legislation of the current period is the establishment of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act in 2007. This law created a new federal agency: the National Environmental Standards and Regulations Enforcement Agency (N.E.S.R.E.A.) to succeed F.E.P.A. The N.E.S.R.E.A. Act is the major federal environmental legislation in Nigeria, and has been hailed as "a new dawn in environmental compliance and enforcement" because of its holistic mandate to address and safeguard all aspects of the environment.[53] These laws now form the center of the regulatory space over the environment in Nigeria.[54] Thus, they regulate environmental aspects of infrastructure projects in Nigeria. The following sections examine the adequacy of these laws in the building, regulation, and enforcement of environmental-friendly megaprojects in Nigeria.

5.3 Legal system for managing megaprojects in Nigeria: legal loopholes or institutional ineffectiveness?

Global megaprojects[55] often involve significant levels of cross-institutional complexity because they are driven by participants and outside groups from

in time and money. They further argue that due to multiple authorities designated for the E.I.A. approval process leaves permit seekers with no option but to seek approval from all three agencies. They however acknowledge that the provisions under the E.I.A. are perhaps preferable for its proactivity than those under the Petroleum Act. See Olusegun A. Ogunba, "EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings," 24 (6) *Environmental Impact Assessment Review* (2004), p. 648.

53 Muhammed T. Ladan, "Review of NESREA Act 2007 and Regulations 2009–2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria," 8 (1) *Law, Environment & Development Journal* (2012), pp. 119, 121.

54 States appreciate the reality that the current crisis of biodiversity and climate change requires immediate global action. Thus, the growing importance of issues related to the global environment is evidenced by frequency of negotiations, which often require concerted political and economic action by states. International environmental cooperation and sustainable development are intended to strengthen the capacity of developing countries to participate in environmental negotiations, to contribute to the preservation and production of global public goods and enforce action plans of large environmental conventions. In this regard, we should note the increase in the number of acts adopted by the United Nations in this field in the last few years, particularly in 2015, the year in which states agreed to achieve the Millennium Development Goals (M.D.G.s) drawn up in 2000. The better known of these acts being the Addis Ababa Action Agenda, the Sustainable Development Goals (S.D.G.s), and the Paris Agreement on Climate Change. See di Gianfranco Tamburelli, "International Cooperation for the Protection of the Environment and Sustainable Development: Real or Supposed Innovations?" 6 *Gazetta Ambiente* (2016), p. 127.

55 There appears to be a lack of consensus on the definition of the term "megaprojects." Also use of the label is not universal in describing projects of large scale. Grün refers to them as the "giants" among the projects; he puts emphasis on the aspect of multi-organizational enterprises (M.O.E.s) and characterizes these by (i) singularity, (ii) complexity, (iii) goal-orientation (technical, financial, time), and (vi) the nature and the number of project

multiple countries with differing languages and institutions. Some scholars view megaprojects in terms of coordination difficulty. Thus, the level of difficulty, outcome variability, and non-linearity, and (non)governability are central complexity features of megaprojects. This approach has led to proposals for a "House of Project Complexity," a combined structural and procedural theory framework for understanding variables of complexity.[56]

An alternate perspective is that while global megaprojects may be analyzed by their cross-jurisdictional complexity, large scale projects at national level such as roads, railroads, and pipelines are themselves also megaprojects if the socio-economic realities of the country in question are considered. They may be referred to as "national megaprojects." Often these projects warrant the importation of expertise from other jurisdictions, involve millions of dollars, are often subjected to complex technical analysis, require stages of legal and regulatory approval, and have the potential to positively impact the lives of millions.[57] The sheer amount of legislation governing these

owners. Megaprojects are also called large scale engineering projects as described by Hassan et al. based on five attributes: (i) "high" capital cost, (ii) "long" duration but program urgency, (iii) technologically and logistically demanding, (vi) requiring multidisciplinary inputs from many organizations, and (v) leading to a "virtual enterprise" for the execution of the project. While these definitions try to describe the scale and complexity of large-scale modern infrastructure projects, it fails to take into cognizance the social impact of these projects. Ruuska et al. define megaprojects as significant undertakings which are characterized by multi-organizations, seeking success on different objectives, subject to socio-political impacts. See Tarek M. Hassan et al., "Emerging Clients' Needs for Large Scale Engineering Projects," 6 (1) *Engineering Construction and Architectural Management* (1999), pp. 21–29; Oskar Grün, *Taming Giant Projects: Management of Multi-Organization Enterprises*, (Berlin: Springer, 2004), pp. 3-19; Inkeri Ruuska et al., "Dimensions of Distance in a Project Network: Exploring Olkiluoto 3 Nuclear Power Plant Project," 27 (2) *International Journal of Project Management* (2009), pp. 142–153.

56 Donald Lessard et al., "House of Project Complexity – Understanding Complexity in Large Infrastructure Projects," 4 (4) *Engineering Project Organization Journal* (2014), pp. 170–192.

57 Since the 1980s, strong transnational protest movements opposed megaprojects or "prestige projects." These protests questioned the negative environmental impact of these projects. These protests have halted some projects and have often generated policy and institutional innovations as a result. The creation of the World Commission on Dams, of the World Bank's Extractive Industries Review, or of the recent Roundtable on Sustainable Palm Oil are all examples of this dynamic. Protest movements often targeted financiers of megaprojects projects for criticism, and financiers as a result were the first who attempted to control negative project impacts by means of regulation. The first international institution to adopt "safeguards," meaning standards requiring project financiers to assess and mitigate environmental and social impacts of proposed projects, was the International Bank for Reconstruction and Development or the World Bank (hereinafter referred to simply as "the Bank"). From the Bank, the standards proliferated to other multilateral development banks (M.D.B.s), to many national development and export finance institutions and even to commercial banks that, in recent years, increasingly took over the business branch of project finance from public lenders. See Annegret Flohr, *Self-Regulation and Legalization: Making Global Rules for Banks and Corporations*, (Basingstoke: Palgrave Macmillan, 2014), pp. 145–160.

projects demonstrates the "mega" status they occupy in the local context of most developing countries. One may refer to the "interwovenness" of this legislation, particularly in regards to Public-Private Partnerships (P.P.P.s) in Nigeria, which produce a complex web in need of untangling.[58] The following section examines the Environmental Impact Assessment (E.I.A.) regime in Nigeria and related issues. An analysis of the E.I.A. mechanism can determine the level of preparedness of relevant institutions in assessing the environmental and the social impact of these projects before they are commenced.

5.4 E.I.A. and N.E.S.R.E.A. Act

E.I.A. is a process for analyzing the positive and negative effects a proposed project plan or activity has on the environment.[59] The central idea of E.I.A. is to take into account socio-economic, cultural, and human-health impacts of a project.[60] Among other things, an E.I.A. process aims for example to bring together diverse strands of knowledge in a way that is useful for decision making, establish the importance of the issue being assessed, and provide an authoritative analysis of policy-relevant scientific questions and options for technical solutions. The process also demonstrates the risks and costs of different policy options, and influences the goals, interests, beliefs, strategies, resources, and actions of interested parties, which can lead to institutional change and to changes in the discourse about the issue being assessed.[61]

E.I.A. processes may vary among countries, but there are fundamental components of the process that are common to all jurisdictions, including screening, scoping, assessment, and evaluation of impacts and development alternatives, drafting the Environmental Impact Statement (E.I.S.) or E.I.A. report, review of the E.I.S., decision-making, monitoring, compliance, enforcement, and environmental auditing.[62] At the international level, a

58 See George Nwangwu, "The Legal Framework for Public-Private Partnerships in Nigeria: Untangling the Complex Web," 7 (4) *European Procurement and Public Private Partnership Law* (2012), p. 268.

59 Damilola S. Olawuyi, *The Principles of Nigerian Environmental Law*, (Ado Ekiti: Afe Babalola University Press, 2015), p. 208.

60 Mantu J. Ishaku, "NESREA and the Challenge of Enforcing the Provision of Environmental Impact Assessment Act in Nigeria," June 27, 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410104 (retrieved 4 December 2020).

61 United Nations Environment Programme (U.N.E.P.), "Overview of the Environmental Assessment Landscape at the Global and Regional Levels," U.N.E.P. information note: UNEP/GC.25/ INF/12; presented at the 25th session of the Governing Council/Global Ministerial Environment Forum, Nairobi, 16–20 February, 2009 available at https://www.sprep.org/att/irc/ecopies/global/287.pdf (retrieved 4 December 2020).

62 See Convention on Biological Diversity, "What Is Environmental Impact Assessment?," April 27, 2010, available at https://www.cbd.int/impact/whatis.shtml (retrieved 4 December 2020).

handful of instruments contain standards and declarations on the importance of an E.I.A. Three decades ago, the World Charter for Nature[63] provided for the control of activities that might impact nature significantly by using the best of technologies in mitigating risks.[64]The Charter also provides for avoidance of activities that are likely to cause irreversible damage to nature. It further provides for exhaustive examination of activities that are likely to pose a significant risk to nature. Proponents of the charter suggest that expected benefits outweigh potential damage to nature, and where the potential adverse effects are not fully understood, such activities are halted.[65]

In addition to the World Charter for Nature, the United Nations in 1987 published the Goals and Principles of Environmental Impact Assessment. The World Bank also contributed the Environmental Assessment Operational Directive in 1989 to serve as a requirement for screening of projects funded by the World Bank with potential domestic, transboundary, and global adverse effect on the environment. While neither document can bind a state, they nonetheless serve as normative standards for measuring environmental impacts of development projects.[66]

The 1992 Rio Declaration on Environment and Development[67] ("Rio Declaration") is a momentous declaration on the environment and may arguably be considered a departure point for environmental law scholarship. It also marked one of the platforms where the environmental cum economic demands of the developing and developed countries were discussed, albeit without concrete resolutions. Pertaining to E.I.A., the Rio Declaration provides that "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[68]

In similar vein, the United Nations Convention on the Law of the Sea's[69] Article 206 states:

> When states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or

63 U.N. General Assembly Resolution 37/7, *World Charter for Nature*, A/RES/37/7, October 28, 1982, available at https://www.refworld.org/docid/3b00f22a10.html (retrieved 4 December 2020).

64 Mantu J. Ishaku, *supra* note 59, p. 211.

65 Ibid.

66 Ibid.

67 U.N. General Assembly, "Report of the United Nations Conference on Environment and Development," A.CONF.151.26 (Vol. 1), August 12, 1992, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (retrieved 4 December 2020).

68 *Convention on Biodiversity*, Rio de Janeiro, 29 December 1993, *United Nations Treaty Series*, Vol. 1760, Principle 17.

69 *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, *United Nations Treaty Series*, Vol. 1833, No. 31363, p. 937.

> significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.[70]

Also, provisions exist in the Convention on Biodiversity[71]and in the Convention on Environmental Impact Assessment in a Transboundary Context,[72] with respect of environmental impact assessment. These provisions in international instruments demonstrate a widely accepted truism that environmental impact assessments form the centerpiece of development projects. Thus, a nation serious about sustainable development should prioritize the establishment of an effective E.I.A. mechanism.

As mentioned earlier, the N.E.S.R.E.A. Act established N.E.S.R.E.A. to take over from F.E.P.A. Section 1 of the Act empowers N.E.S.R.E.A. as the paramount enforcement agency for environmental standards, regulations, rules, laws, policies, and guidelines.[73] The Act provides that the agency shall have responsibility for the protection and development of the environment, biodiversity conservation, and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant standards, regulations, rules, laws, policies, and guidelines.[74] The functions and powers of the agency are wide ranging so as to ensure compliance with environmental rules, laws, regulations, policies, and guidelines.[75]

Flowing from the above, it can then be understood that the E.I.A. Act will enjoy little to no regulatory force without an agency with a mandate as wide as N.E.S.R.E.A. It is worth noting that key provisions of the E.I.A. Act *vis-à-vis* the functions of N.E.S.R.E.A. in maintaining environmental standards. The E.I.A. Act provides that an environmental impact assessment shall include at least the following minimum matters:

a) a description of the proposed activities;
b) a description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;
c) a description of the practical activities, as appropriate;
d) an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and long-term effects;

70 Ibid, Art. 206.
71 *Convention on Biodiversity*, Rio de Janeiro, 29 December 1993, *United Nations Treaty Series*, Vol. 1760, p. 79.
72 *Convention on Environmental Impact Assessment in a Transboundary Context*, Espoo, 25 February 1991, *United Nations Treaty Series*, Vol. 1989, p. 309.
73 S. 1(2) of the N.E.S.R.E.A. Act, 2007.
74 S. 2 of the N.E.S.R.E.A. Act.
75 Ss. 7 and 8 of N.E.S.R.E.A. Act.

e) an identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measures;
f) an indication of gaps in knowledge and uncertainly, which may be encountered in computing the required information;
g) an indication of whether the environment of any other State, Local Government Area, or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives; and
h) a brief and non-technical summary of the information provided under paragraphs (a) to (g) of this section.[76]

It is the function of N.E.S.R.E.A. to provide a degree of detail in an assessment of environmental effects that is commensurate with their likely environmental significance.[77] In Section 7 of the E.I.A. Act, comments of government agencies, members of the public, experts in the relevant discipline, and groups interested in the environmental assessment of an activity are guaranteed to be made part of the E.I.A. process. The E.I.A. prohibits the agency from giving a decision on an activity subjected to environmental assessment where sufficient time is not given to entertain comments from interested parties.[78] The essence of this provision is to ensure public participation in decision-making of the development process, which is a central value in the concept of environmental justice.[79]

In addition, the agency's report on any proposed activity must be in writing and must state the reason and include the provisions, if any, to prevent, reduce, or mitigate damage to the environment.[80] The agency must make available the E.I.A. report to interested persons or groups, and even where there is no request from the public, the agency is to ensure the publication of its decision in a manner by which members of the public are

76 Section 4 (a-h) of the E.I.A. Act.
77 Section 5 of the E.I.A. Act.
78 Section 7 of the E.I.A. Act.
79 Environmental justice is built on the distributive and procedural aspects of delivering justice as regards the environment. Distributive environmental justice recognizes that the human right to a dignified life is fundamental, and everyone has a right to a healthy and safe environment. On the other hand, procedural environmental justice requires that for distributive justice to be present, citizens deserve to be informed about and involved in decision making in order to identify laws and remedy environmental injustices. In a nutshell, procedural justice is concerned with how and by whom decisions are made, and encompasses participation and legitimacy as common concepts. Kariuki Muigua and Francis Kariuki, "Towards Environmental Justice in Kenya," September 1, 2017 available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/towards_environmental_justice_in_kenya_kariuki_muigua__francis_kariuki.pdf (retrieved 3 December 2020); See also Friends of the Earth Scotland, "Environmental Justice" available at http://www.foescotland.org.uk/environmentalrights, accessed 5 October 2019.
80 Section 9 of the E.I.A. Act.

notified.[81] This particular democratic provision of the E.I.A. Act encapsulates the Sustainable Development Goals,[82] particularly Goal 16, which focuses on promoting peaceful and inclusive societies for sustainable development to provide access to justice for all and build effective, accountable, and inclusive institutions at all levels.

The E.I.A. Act stipulates the manner of projects that require environmental assessment and those that do not. Where an agency is of the opinion that an environmental assessment is required before the commencement of a project, the E.I.A. Act outlines the assessment process. Section 16 of the Act requires a screening or mandatory study and the preparation of a screening report, a mandatory assessment by a review panel as provided in Section 25, the preparation of a report, and the design and implementation of a follow-up program.

The E.I.A. Act provides for Mandatory Study Activities in nineteen project areas: agriculture, airport, drainage and irrigation, land reclamation, fisheries, forestry, housing, industry, infrastructure, ports, mining, petroleum, power generation and transmission, quarries, railways, transportation, resort and recreational development, waste treatment and disposal, and water supply. This provision further underlines the all-encompassing nature of the E.I.A. in ensuring strict adherence to safe environmental standards in infrastructure building.

Despite the robustness of the E.I.A. Act in environmental assessment, N.E.S.R.E.A., as the primary agency mandated to enforce these laws, suffers from a variety of institutional challenges. To enforce compliance in this area involves high levels of technical and scientific proficiency and professionalism. This is due to the complex nature of these projects and the diverse expert knowledge required. The agency appears to lack sufficient personnel in assessing some of these complex projects.[83] While Section 18 of the E.I.A. Act permits the agency to delegate any part of screening or mandatory study of a project, the agency cannot delegate any of its functions in taking any course of action under Section 16(1), which concerns the process of environmental assessment, or Section 34(1), which addresses mediation. This is ambiguous given the fact that delegation of powers may be the surest way to hire professional expertise when it is in urgent demand.

81 Section 11 of the E.I.A. Act provides for notification to an affected State or Local Government by the State or Local Government Area proposing an activity where environmental impact assessment indicates that the Environment within the other State in the Federation or a Local Government Area is likely to be significantly affected by the proposed activity.

82 U.N. General Assembly Resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development,* "Sustainable Development Goals," A/RES/70/1 (21 October 2015), available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (retrieved 4 December 2020).

83 U.N.E.P., *supra* note 60, p. 14.

It is therefore imperative, given the circumstances above, for N.E.S.R.E.A. to maintain personnel who are highly trained and skilled in areas that cannot be delegated. It has been noted that this remains a great challenge for N.E.S.R.E.A. because expertise required is either inadequate, lacking or expensive to hire and keep.[84] In addition to the shortage of competent personnel, N.E.S.R.E.A., like all other Nigerian institutions, is subjected to corrupt practices. Enforcement officers of N.E.S.R.E.A. are easily bribed and compromised.[85]

As highlighted earlier, public participation is a *sine qua non* to environmental justice. But more importantly an E.I.A. process that is democratic in nature further strengthens the enforcement process. Public participation is instrumental in ensuring compliance with Environmental Assessment because the more that people are aware of the environmental standards and its benefits, the more they are keen to ensure that these projects do not adversely impact their environment. They become direct and active participants. In practice, while N.E.S.R.E.A. has a mandate to make available its report on environmental assessment to the public for further scrutiny and comments of experts and interested public individuals and groups, many of the E.I.A. reports are not made available to the public for comments. This was the main kernel of the claims in *Baytide (Nig) Ltd. v. Adenirokun*.[86] Although the decision of the trial court was overturned on appeal, it held that the failure to give the respondents or any other interest groups the opportunity to comment on the Environmental Impact Assessment report prepared by the appellant, in respect of the construction of the petrol station, rendered invalid and ineffectual any approval given by any authority to construct the petrol station on the parcel of land.

The E.I.A. Act permits state or local governments to create agencies for the environment. This provision is understandably to encourage regulation at all levels for appreciable development. However, the same provision creates leeway for conflicts and affects monitoring and compliance with the provision of the E.I.A. Act. If not properly coordinated by the federal government, this may lead to replication of effort at both levels without effectiveness. As it stands, there is a lack of synergy between N.E.S.R.E.A. and the subnational agencies in ensuring adequate and comprehensive compliance with environmental assessment.

Overall, the E.I.A. and N.E.S.R.E.A. Acts contain many reformatory provisions that, if implemented, may achieve the desired results of the

84 Ibid.

85 See Joseph A. Adelegan, "The History of Environmental Policy and Pollution of Water Sources in Nigeria," 2006, available at http://www.nigerianlawguru.com/articles/environmental%20law/THE%20HISTORY%20OF%20ENVIRONMENTAL%20POLICY%20AND%20POLLUTION%20OF%20WATER%20SOURCES%20IN%20NIGERIA.pdf (retrieved 4 December 2020).

86 (2014) 4 NWLR (Pt.1396) 164 C.A.

acts. However, issues such as a lack of technical expertise, lack of funding, and other cultural practices hamper the E.I.A. and N.E.S.R.E.A. regimes. Efforts by Nigeria to get technical assistance in environmental protection from advanced and developed countries have yet to yield substantial results. This is mainly due to institutional challenges already bedeviling key institutions like N.E.S.R.E.A. and the lack of government seriousness in environmental protection. Financially, the agency is at the whims and caprices of the Executive, mainly because there is no mechanism to ensure effective finance for the regime.[87] An institution as crucial to environmental regulation as N.E.S.R.E.A. should exercise some financial autonomy to effectively function as an apex regulator. However, with the federal government still exercising budgetary control over the organization, the extent to which it can utilize resources to meet its mandate remains very minimal. It is therefore the case that Nigerian environmental legislation is not insufficient. While more is required to bring certain legislation in line with current realities, the overarching challenges facing the E.I.A. regime are implementation of the legislation and institutional ineffectiveness.

In short, and before concluding this section, it is worth noting that the following steps could be taken to strengthen regulatory powers of N.E.S.R.E.A. and the E.I.A. systems in Nigeria:

a) increasing the capacity of N.E.S.R.E.A. through adequate manpower, training, and procurement of tools and equipment;
b) expanding the scope for public participation using the advantage of technology. Workshops and seminars should be organized in educating the public on greater participation in environmental assessments;
c) ensuring the availability of all information generated during environmental assessments to the public through an online registry. Information as post-construction monitoring and enforcement should be posted to the public as well. This will enable the public to also keep track of the project strict adherence to the E.I.A. report;
d) N.E.S.R.E.A. should be allowed to compel expertise from federal scientists and retain external scientists to provide technical expertise; and
e) more collaborative efforts between the proponent, government, and interested parties at the early stage of the regulatory process through collaborative multi-stakeholder committees. Amending the E.I.A. Act to ensure increase in penalties and sanctions for defaults by individuals and corporations.[88]

87 Mantu J. Ishaku, *supra* note 59, p. 19.
88 Ibid, pp. 20-21.

5.5 Attitude towards environmental justice in Nigeria

Perhaps the biggest deterrent to effective environmental protection is the judicial attitude to environmental justice in Nigeria. Despite the provisions of the E.I.A. and N.E.S.R.E.A. Acts, as outlined above, without concrete judicial means of enforcement, these systems will be largely ineffective. Access to justice and public interest litigation in environmental matters still suffer severe limitations in Nigeria.[89] Why this is so, in spite of the fact that the African Charter on Human and Peoples Rights[90] is part of the *corpus* of Nigerian law, is not so clear. Scholars have suggested that some states are reluctant to grant procedural rights to individuals because it may constitute a barrier to foreign investments.[91] Often, such suits are expensive and time consuming. Perhaps the greater concern is that granting individuals' direct access to courts to challenge environmental breaches may open the proverbial "floodgates" of litigation in an already overburdened justice system.

Nigerian courts have tread with caution in matters of environmental rights. This is evident in the number of high-profile cases before African human rights bodies emanating from Nigeria. The history of environmental degradation in the oil-rich Niger Delta region caused by multinational business enterprises and supported by complicit governments has enriched the jurisprudence of the African human rights system.[92]To an extent, the lack of judicial activism in this area is arguably an effect of the statutory inadequacies of the extant sources of law in Nigeria. First, environmental rights fall within the Fundamental Objectives and Directive Principles of State Policy under the Chapter II of the Nigerian Constitution. As a statement of policy, these provisions are unenforceable and merely aspirational.[93] In addition to

89 Muhammed T. Ladan, "Access to Environmental Justice in Oil Pollution and Gas Flaring Cases as a Human Rights Issue in Nigeria," paper presented at Workshop for Federal Ministry of Justice Lawyers, 28–30 November 2011," available at https://www.researchgate.net/publication/272304529_Access_to_Environmental_Justice_in_Oil_Pollution_and_Gas_Flaring_Cases_as_a_Human_Right_Issue_in_Nigeria (retrieved 9 December 2020).

90 African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M 58. Article 24 of the African Charter.

91 Ibibia L. Worika, *Environmental Law and Policy of Petroleum Development. Strategies and Mechanisms for Sustainable Management in Africa*, (Port Harcourt: Anpez Centre for Environment and Development, 2002), p. 233–253.

92 The Niger Delta conundrum has been the source of several cases at the African Commission for Human Rights and the E.C.O.W.A.S. Community Court of Justice. See *Registered Trustees of Socio-Economic Rights and Accountability Projects v. Federal Republic of Nigeria* [Suit No: ECW/CCJ/APP/08/09]; *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* [Communication 155/96].

93 The Nigerian Constitution in Chapter 2 on Fundamental Objectives and Directive Principle of State Policy lists environmental protection as a state objective. Section 20 provides that the State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife in Nigeria. Unfortunately, Chapter 2 of the constitution is not enforceable but only operates as guidelines which the Nigerian state should ideally follow.

this, Section 6(6)(c) of the Nigerian Constitution bars Nigerian courts from making any pronouncement on the enforceability or lack of Chapter II provisions. The section provides that:

> The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this constitution, extend to any issue as to whether any act or omission by any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in Chapter II of this constitution.

This exclusion clause appears to play on the mind of judges of national courts, as they have so far been very restrictive in their judgments on environmental rights. In *Gbemre v. Shell Petroleum Development Company of Nigeria Limited,*[94] the Federal High Court opted to purposively interpret the right to life in order to enforce environmental rights.[95] The plaintiffs were indigents from the aggrieved Iwehereken community in Delta State, who instituted an action in representative capacity against Shell Nigeria, the Nigerian National Petroleum Corporation, and the Attorney General of the Federation. The application prayed *inter alia* for a declaration that actions of the defendants violate the right to life,[96] the right to the dignity of the person,[97] and to enjoy the best attainable state of physical and mental health, as well as the right to a general satisfactory environment favorable to personal development.[98]The applicants alleged that the first and second respondents failed to carry out environmental impact assessments concerning their gas flaring activities in the applicants' community as required by Section 2(2) of the Environmental Impact Assessment Act,[99] and this resulted in unrestrained, mindless flaring of gas by the respondents in their community in violation of their said fundamental right.[100] The first and second respondents were also alleged to be in contravention of Section 21(1) and (2) of the F.E.P.A. Act.[101]

94 (2005) AHLHR 151 (NgHC 2005).

95 Abdulkadir B. Abdulkadir, "The Right to Healthful Environment in Nigeria: A Review of the Alternative Pathways to Environmental Justice in Nigeria," 3 (1) *AfeBabalola Journal of Sustainable Development Law and Policy* (2014), p. 129.

96 Section 33 of the Nigerian Constitution 1999.

97 Section 34 of the Nigerian Constitution 1999.

98 Section 7 of the E.I.A., par.4.

99 Cap E12 Volume 6 Laws of the Federation of Nigeria, 2004.

100 Section 9 of the E.I.A., par.3.

101 Cap F10 Vol. 1 Laws of the Federation Nigeria, 2004. Section 21(1) of the Act provides that "the discharge in such harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shorelines is prohibited, except where such discharge is permitted or authorized under any law in Nigeria. Section 21(2) stipulates a fine of N100.000 or 10 years' imprisonment as punishment for breach of the preceding subsection.

The court found for the applicants and declared that by continuously flaring gas in their oil exploration and production operations, the first defendants violated the fundamental right to life (including healthy environment) and dignity of human persons enshrined by the Constitution and the African Charter.[102] The court further declared that Shell Nigeria and the Nigerian National Petroleum Corporation were to be restrained from further flaring gas in the applicants' community and were to take instantaneous measures to end the further flaring of gas in the applicants' community.[103] The court relied on the right to life as the most basic right from which all other generations of right flow. This is perhaps an indication that the constitutional inadequacies greatly inhibit the prospects of judicial activism and further limit the delivery of justice.

Nigeria's fortunes in environmental justice delivery, particularly as it affects infrastructural projects and the requirement to conduct environmental assessment, markedly contrast with other jurisdictions. In South Africa for instance, the Constitution guarantees that "everyone has the right (a) to an environment that is not harmful to their well-being; and (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures."[104] The directness and unambiguity of this provision provides the normative framing for legislative measures relevant to the existential problem of climate change, and for the interpretation of these measures by the judiciary.[105] Many consider access to justice to be "a cornerstone of the South African constitutional state."[106]

In *Earthlife Africa Johannesburg v. Minister of Environmental Affairs et al. (Thabametsi),*[107] the Government's plan to procure a 1200MW coal-fired power station near the town of Lephalale in South Africa's water-stressed Waterberg region was the center of public scrutiny. The central issue in contention was the degree of detail of the climate change impact assessment that is required when the competent authority considers an application for environmental authorization. The case was brought as a judicial review claim, and the Gauteng High Court, Pretoria, handed down its decision in March 2017, securing South Africa's position among the nations in which climate change cases have been filed and adjudicated.

The High Court upheld the judicial review claim filed by the applicant, an N.G.O. focused on the protection of the environment. It found that the Chief Director failed to carry out his mandate in Section 240 of the National

102 Section 9 of the E.I.A., par. 5.

103 Ibid, par.6.

104 Constitution of the Republic of South Africa 1996, Section 24(a) and (b).

105 Tracy-Lynn Humby, "The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs," 30 (1) *Journal of Environmental Law* (2018), p. 146.

106 Louis J. Kotzé and Anél du Plessis, "Some Brief Observations on 15 Years of Environmental Rights Jurisprudence in South Africa," 3 *Journal of Court Innovation* (2010), p. 162.

107 (Unreported Case No 65662/16) Gauteng High Court Pretoria, 8 March 2017 (hereafter *Thabametsi*).

Environment Management Act (N.E.M.A.) by jettisoning relevant climate change considerations. The Court also found that he had taken a decision that was not rationally connected to the information presented to him.[108] The Court ordered the Minister to reconvene the appeal process afresh and take into consideration the evidence set forth in the second set of reports.[109] In deciding the appeal, the Minister would need to consider whether the environmental authorization should be granted in light of the potential climate change impacts, and also exercise the power to set the authorization aside.[110]

The Court's review contained poignant pronouncements linking environmental impact assessment with sustainable development, intergenerational justice, and the precautionary principle.[111] The Court's submission deserves quotation to better appreciate its message. It posited thus:

> Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures [to] protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change.[112]

The Court held that the constitutional right enshrined in Section 24 balances environmental and socio-economic considerations through the principle of sustainable development. The Court established, unambiguously, that climate change falls within the "business of the courts."[113] The impact of the Court's judgment affirms that the climate change impact report is necessary for a competent authority to properly consider the granting of an environmental authorization under N.E.M.A., as well as for the broader normative framing of a climate change impact assessment, as outlined above.[114]

The constitutional history of Nigeria remains a source of concern in the quest for environmental justice. In comparison to the South African Constitution, which was properly negotiated, the Nigerian Constitution seems to be a product of years of military rule in the country. Several military

108 Ibid, par. 101.
109 Ibid, par. 107.
110 Ibid, par. 122.
111 The precautionary principle is reflected in s. 2(4)(a)(vii) N.E.M.A., which provides that "Sustainable development requires the consideration of all relevant factors including . . . that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions."
112 *Supra* note 92, par. 82.
113 Elisabeth Fisher and Eloise Scotford, "Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment," 28 (1) *Journal of Environmental Law* (2016), p. 3.
114 Tracy-Lynn Humby, *supra* note 104, p. 150.

incursions into government, often characterized by centralization of power and exaggerated presidential powers, have shaped the 1999 Constitution.[115] It should therefore come as no surprise that Section 6(6)(c) of the Constitution inadvertently operates to oust the power of judicial review of the apex courts over environmental rights, which the Constitution relegates to mere policy directions in Chapter 2.

5.6 Conclusion

The Nigerian experience has shown that the legislative history was largely driven by the discovery of oil in the 1950s and this had a significant effect on the trajectory of environmental legislation that followed. However, a combination of socio-economic factors and other global events led to a change in legislative approach. As Nigeria continues its path towards development, it must pay greater attention to the potential environmental effects of these megaprojects. It is also observed that the legislation emanating from Nigeria has created some mechanisms through which megaprojects can be assessed to ensure that its social and environmental impact is positive. However, institutional gaps impede the effective implementation of these mechanisms.

Nevertheless, the Nigerian state must undertake the diversification of her economy by providing infrastructure while ensuring that her economic activities are pursued in a manner that ensures sustainable development. So far, the seriousness that is required to ensure that development is pursued in a sustainable manner is lacking. But this balance must be struck if the objectives contained in these laws are to be met. Economic development, environmental justice, and the existential challenge of climate change are intrinsically linked. An effective national approach is one that constitutionally binds all three.

The South African example is worthy of emulation. The jurisprudence emanating from South Africa is so because not only is the Constitution unambiguous in protection of environmental rights and sustainable development, but also because the courts are willing to hold the government accountable. This normalizes access to justice for issues pertaining to climate change and the environment. It will therefore be of significant import that other jurisdictions borrow a leaf from the South African courts for the activism shown so far. The lesson for Nigerian courts is that the issue of the environment is crucial to national development. Therefore, any attempt to side with an unwilling government will frustrate the quest for sustainable development. The laws are not insufficient; the courts can bravely plug the gap that other institutions have created to ensure that development is pursued side-by-side with sustainable development.

115 See Rotimi Suberu, "Nigeria's Permanent Constitutional Transition: Military Rule, Civilian Instability and 'True Federalism' in a Deeply Divided Society," 34 *Occasional Paper Series, Forum of Federations* 2019, available a thttp://constitutionnet.org/sites/default/files/2019-06/Nigeria_35.pdf (retrieved 4 December 2020).

Bibliography

Abdulkadir, Abdulkadir. "The Right to Healthful Environment in Nigeria: A Review of the Alternative Pathways to Environmental Justice in Nigeria." 3 (1) *Afe Babalola Journal of Sustainable Development Law and Policy* (2014): 129.

Adebiyi, H. O. "Prevention of Environmental Degradation in Nigeria: A Strategy Towards Sustainable Development." 2 (3) *International Journal of Sciences, Engineering & Environmental Technology* (2017): 18.

Adegoroye, Adegoke. "The Challenges of Environmental Enforcement in Africa: The Nigerian Experience." *Third International Conference on Environmental Enforcement: Conference Proceedings* (1994): 43.

Adelegan, Joseph. "The History of Environmental Policy and Pollution of Water Sources in Nigeria," (2006). http://www.nigerianlawguru.com/articles/environmental%20law/THE%20HISTORY%20OF%20ENVIRONMENTAL%20POLICY%20AND%20POLLUTION%20OF%20WATER%20SOURCES%20IN%20NIGERIA.pdf.

Adeyemo, Adesola. *Assessing Environmental Protection and Management Systems in West Africa: A Case Study of Nigeria*. Unpublished M.S. Thesis at Southern Illinois University at Carbondale, 2008.

Ajimotokan, Olawale, and Udora Orizu. "Nigeria Requires $3trn to Solve Infrastructure Deficit, Says FCDA." *This Day News Online* (5 August 2019). https://allafrica.com/stories/201908050055.html

Ako, Rhuks T. "Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice." 53 *Journal of African Law* (2009): 289.

Bratspies, Rebecca. "Do We Need a Human Right to a Healthy Environment?" 13 (1) *Santa Clara Journal of International Law* (2015): 46.

Ebeku, Kaniye S. A. "Oil and the Niger Delta People: The Injustice of the Land Use Act." 35 *Law and Politics in Africa* (2002): 201.

Egunjobi, Layi. "Issues in Environmental Management for Sustainable Development." 13 (1) *Environmentalist* (1993): 37.

Ferronato, Navarro and Vincenzo Toretta. "Waste Mismanagement in Developing Countries: A Review of Global Issues." 16 *International Journal of Environmental Research and Public Health* (2019): 1060.

Fisher, Elisabeth, and Eloise Scotford. "Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment." 28 (1) *Journal of Environmental Law* (2016): 3.

Flohr, Annegret. *Self-Regulation and Legalization: Making Global Rules for Banks and Corporations*. Palgrave Macmillan, 2014.

Grün, Oskar. *Taming Giant Projects: Management of Multi-Organization Enterprises*. Springer, 2004.

Hassan, Tarek. "Emerging Clients' Needs for Large Scale Engineering Projects." 6 (1) *Engineering Construction and Architectural Management* (1999): 21–29.

Humby, Tracy-Lynn. "The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs." 30 (1) *Journal of Environmental Law* (2018): 146.

Ishaku, Mantu. "NESREA and the Challenge of Enforcing the Provision of Environmental Impact Assessment Act in Nigeria." (27 June 2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410104.

Kotzé, Louis, and Anél du Plessis. "Some Brief Observations on 15 Years of Environmental Rights Jurisprudence in South Africa." 3 *Journal of Court Innovation* (2010): 162.

Ladan, Muhammed. "Access to Environmental Justice in Oil Pollution and Gas Flaring Cases as a Human Rights Issue in Nigeria, paper presented at Workshop for Federal Ministry of Justice Lawyers," (28 November 2011). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336093.

Ladan, Muhammed. "Review of NESREA Act 2007 and Regulations 2009–2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria." 8 (1) *Law, Environment & Development Journal* (2012): 119, 121.

Lessard, Donald. "House of Project Complexity – Understanding Complexity in Large Infrastructure Projects." 4 (4) *Engineering Project Organization Journal* (2014): 170–192.

Mabogunje, Akin. "Land Reform in Nigeria: Progress, Problems and Prospects." (7 November 2019). http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/mabogunje.pdf.

Muigua, Kariuki, and Francis Kariuki. "Towards Environmental Justice in Kenya." (1 September 2017). https://profiles.uonbi.ac.ke/kariuki_muigua/files/towards_environmental_justice_in_kenya_kariuki_muigua__francis_kariuki.pdf.

Nnadozie, Kent C. "Pollution Control in Nigeria: The Legal Framework" (Apr. 1994) cited in Adebola Ogunba, "An Appraisal of the Evolution of Environmental Legislation in Nigeria," 40 *Vermont Law Review* (2016): 676.

Nwangwu, George. "The Legal Framework for Public-Private Partnerships in Nigeria: Untangling the Complex Web." 7 (4) *European Procurement and Public Private Partnership Law* (2012): 268.

Nwocha, Matthew Enya. "Impact of the Nigerian Land Use Act in Economic Development in the Country." 8 (2) *Acta Universitatis Danubius Administratio* **(**2016).

Odiete, Dan. "Estate Surveying and Valuation and the Solid Mineral Industry." *31st Annual Conference of Nigerian Institution of Estate Surveyors and Valuers* (2001).

Ogbodo, S. Gozie. "Environmental Protection in Nigeria: Two Decades After the Koko Incident." 15 *Annual Survey of International & Comparative Law* (2009): 1.

Ogunba, Adebola. "An Appraisal of the Evolution of Environmental Legislation in Nigeria." 40 *Vermont Law Review* (2016): 676.

Ogunba, Olusegun. "EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings." 24 (6) *Environmental Impact Assessment Review* (2004): 648.

Olawuyi, Damilola. *The Principles of Nigerian Environmental Law.* AfeBabalola University Press, 2015.

Ruuska, Inkeri et al. "Dimensions of Distance in a Project Network: Exploring Olkiluoto 3 Nuclear Power Plant Project." 27 (2) *International Journal of Project Management* (2009): 142–153.

Suberu, Rotimi. "Nigeria's Permanent Constitutional Transition: Military Rule, Civilian Instability and 'True Federalism' in a Deeply Divided Society." 34 *Occasional Paper Series, Forum of Federations* (2019). http://constitutionnet.org/sites/default/files/2019-06/Nigeria_35.pdf.

Tamburelli, Gianfranco. "International Cooperation for the Protection of the Environment and Sustainable Development: Real or Supposed Innovations?" 6 *Gazetta Ambiente* (2016): 127.

Thomas, Natalie, and Sumant Nigam. "Twentieth-Century Climate Change over Africa: Seasonal Hydroclimate Trends and Sahara Desert Expansion." 31 *Journal of Climate* (2018): 3349.

Ukeje, Charles. "Youths, Violence and the Collapse of Public Order in the Niger Delta Region of Nigeria." (26) 2 *Africa Development* (2001): 342.

Umezulike, Innocent. *ABC of Contemporary Nigerian Land Law*. Snaap Press, 2013.

Worika, Ibibia L. *Environmental Law and Policy of Petroleum Development. Strategies and Mechanisms for Sustainable Management in Africa*, Anpez Centre for Environment and Development, Port Harcourt, Rivers State, Nigeria (2002): 233–253.

6 Transformation of sustainable development goals in regional international organizations

Vertical effects, contested indicators, and interlinkages for the formation of environmental law

Winfried Huck[1]

6.1 Introduction

The 17 Sustainable Development Goals (S.D.G.s) and the associated 169 targets were unanimously adopted by all 193 United Nations (U.N.) Member States in New York based on the U.N. resolution of 25 September 2015 entitled "Transforming Our World: The 2030 Agenda for Sustainable Development."[2] The Global Agenda 2030, consisting of preamble, declaration, the S.D.G.s, and a set of rules for implementation and voluntary reviews, is not directly legally binding as a resolution, but reflects a normative concept anchored in international law on the basis of existing international agreements.[3] Many S.D.G.s are closely linked to human rights,[4] which at the same time embody the fundamental approach of the S.D.G.s[5] to do such things as

1 Winfried Huck is Professor of European and International Economic Law at the Faculty of Law - Brunswick European Law School (B.E.L.S.) of the Ostfalia University of Applied Sciences, Germany.

2 U.N. General Assembly Resolution 70/1, *Transformation of Our World: Agenda 2030 for Sustainable Development*, A/RES/70/1 (25 September 2015), available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (retrieved 20 November 2020).

3 Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law,* 2nd ed. (Cambridge: Cambridge University Press, 2018), p. 21; Winfried Huck and Claudia Kurkin, "The UN Sustainable Development Goals (SDGs) in the Transnational Multilevel System," 2 *Heidelberg Journal of International Law (HJIL)/Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2018), p. 423.

4 Markus Kaltenborn et al., *Sustainable Development Goals and Human Rights*, (Basel: Springer International Publishing, 2020).

5 Selected literature dealing with S.D.G.s: Emmanuella Doussis, "Does International Environmental Law Matter in Sustainable Development?," 28 *Yearbook of International Environmental Law* (2017), pp. 3 ff.; Duncan French and Louis J. Kotzé, *Sustainable Development Goals, Law, Theory and Implementation*, (Cheltenham: Edward

DOI: 10.4324/9781003160236-9

empower girls and women by guaranteeing them a fair chance for participation and equality.[6]

The S.D.G.s are successively being converted into new legal formats within and outside the European Union (E.U.) (e.g., in the form of modern E.U. free trade agreements),[7] but not only there.[8] The S.D.G.s can thus be seen as a universal response to the global pattern of political, economic, and environmental development[9] that has gone off the rails and of which, according to the U.S., "climate change is one of the greatest challenges of our time."[10] The criticism directed against the S.D.G.s is that the postulate of economic growth inevitably leads to a disregard and violation of planetary boundaries. This criticism raises an important issue for the transformation process. However, the current and future results of science, technology, and innovation should not be ignored to define a basis for economic growth that successfully connects growth and the S.D.G.s. It should also not be overlooked that the S.D.G.s emphasize inclusive and sustainable economic

---

Elgar Publishing, 2018); Norichika Kanie and Frank Biermann, *Governing through Goals: Sustainable Development Goals as Governance Innovation*, (Cambridge: MIT Press, 2017), pp. 555 ff.; Macharia Kamau et al., *Transforming Multilateral Diplomacy, The Inside Story of the SDGs*, (London: Routledge, 2018); Marie-Claire Cordonier Segger and H. E. Judge C. G. Weeramantry, *Sustainable Development Principles in the Decisions of International Courts and Tribunals*, (London: Routledge, 2017); Felix Dodds et al., *Negotiating the Sustainable Development Goals: A Transformational Agenda for an Insecure World,* (London: Routledge, 2017); Paloma Durán y Lalaguna et al.*, International Society and Sustainable Development Goals*, (Toronto: Thomson Reuters, 2016); Koh Kheng-Lian et al., *ASEAN Environmental Legal Integration, Sustainable Goals?*, (Cambridge: Cambridge University Press, 2016).

6 U.N. General Assembly Resolution 70/1, *supra* note 2*,* paras. 5, 8, 15, 20; SDG 4.1, 4.2, 5.1, 5.3, 6.2; critical of the S.D.G.s from a human rights perspective such as Lynda M. Collins, "Sustainable Development Goals and Human Rights: Challenges and Opportunities," in *Sustainable Development Goals - Law, Theory and Implementation*, (Cheltenham: Edward Elgar Publishing, 2018), pp. 66, 87 f.

7 James Harrison et al., Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda, 18 (4) *World Trade Review* (2018)*,* pp. 1 ff; Emily Rebecca Hush, "Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements," 43 *Columbia Journal for International Environmental Law* (2018), pp. 93 ff; Marco Bronckers and Giovanni Gruni, "Improving the Enforcement of Labour Standards in the EU's Free Trade Agreement," in *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche*, (Oxford: Hart Publishing, 2018), available at SSRN: https://ssrn.com/abstract=3255041 (retrieved 26 November 2020).

8 Marie-Claire Cordonier Segger, "Sustainable Development in Regional Trade Agreements," in *Regional Trade Agreements and the WTO Legal System*, (Oxford: Oxford University Press, 2006), pp. 313 ff; On S.D.G.s and Standards in Transnational Commodity Law*,* see Winfried Huck, "The Integration of Sustainable Development Goals into the Raw Materials Sector," 7 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2018), p. 266.

9 Werner Scholtz and Michelle Barnard, "The Environment and the Sustainable Development Goals: 'We Are on a Road to Nowhere,'" in *Sustainable Development Goals - Law, Theory and Implementation*, (Cheltenham: Edward Elgar Publishing, 2018), p. 248.

10 U.N. General Assembly Resolution 70/1, *supra* note 2, para. 14.

growth very clearly[11]: "[I]nternational trade is an engine for inclusive economic growth and poverty reduction."[12] It is a basis for all further efforts that involve significant expenditure and that can hardly be replaced by other economic systems in a short time worldwide.

The S.D.G.s are to be welcomed, but they must be brought into an equilibrium with pre-drawn biophysical and planetary boundaries, in proportion to the underlying social, ecological and economic dimensions.[13] The S.D.G.s, as described above, were concluded as a resolution by the General Assembly (G.A.) as political goals, according to Article 13, paragraph 1 of the U.S. Charter.[14] However, Member States, regional international organizations such as the E.U.,[15] the Association of Southeast Asian Nations (A.S.E.A.N.),[16] or the Caribbean Community and Common Market (CARICOM),[17] as well as international organizations[18] are not prevented from taking measures to integrate the S.D.G.s on a legal basis in a horizontal and vertical system by laws, regulations, decisions or agreements.[19]

11 U.N. General Assembly Resolution 70/1, *supra* note 2, paras. 3, 9, 13, 21, 27, Goal 8 "[P]romote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All," 8.1, 8.4, 66, 67, 68.

12 U.N. General Assembly Resolution 70/1, *supra* note 2, para. 68.

13 U.N. General Assembly Resolution 70/1, *supra* note 2; UN A/RES/66/288 of 27/7/2012, The Future We Want, Annex para. 1.

14 Winfried Huck and Claudia Kurkin, *supra* note 3, p. 383.

15 Winfried Huck and Claudia Kurkin, *supra* note 3, p. 394; Winfried Huck, "The EU and the Global Agenda 2030: Reflection, Strategy and Legal Implementation," 1 *C-EENRG Working Papers* (2020), pp. 1–26.

16 Winfried Huck, "Informal International Law-Making in the ASEAN: Consensus, Informality, and Accountability," 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2020), pp. 101–138.

17 The Caribbean Community (CARICOM) is an international organization of fifteen Caribbean nations and dependencies, whose main objective is to promote economic integration and cooperation among its members, to ensure that the benefits of integration are equitably shared, and to coordinate foreign policy. The organization was established in 1973; see Francesco Seatzu, "The Caribbean Community (CARICOM)," in *Latin American and Caribbean International Institutional Law*, (Den Haag: T.M.C. Asser Press, 2015), p. 219 et seqq; S.D.G.s are mentioned widely here: A.C.P. Group, "ACP Negotiating Mandate for a Post-Cotonou Partnership Agreement with the E.U., Adopted on 30 May 2018 by the 107th Session of the A.C.P. Council of Ministers, held in Lomé, Togo, ACP/00/011/18," May 30, 2018 available at http://www.acp.int/sites/acpsec.waw.be/files/acpdoc/public-documents/ACP0001118_%20ACP_Negotiating_Mandate_EN.pdf (retrieved 26 November 2020); Alicia Elias Roberts et al., *EU and CARICOM. Dilemmas versus Opportunities on Development, Law and Economics*, (London: Routledge, 2020).

18 The Executive Committee of Economic and Social Affairs Plus (E.C.E.S.A. Plus) brings together 50 plus U.N. entities (including Funds and Programmes, Regional Commissions, Convention Secretariats, Specialized Agencies, International Financial Institutions, the W.T.O. and I.L.O.), as well as U.N. research institutes. It is convened and supported by the Department of Economic and Social Affairs (U.N.-D.E.S.A.), building on E.C.E.S.A., see https://sustainabledevelopment.un.org/unsystem (retrieved 18 October 2020).

19 Winfried Huck and Claudia Kurkin, *supra* note 3, p. 398.

An inter-agency coordination mechanism called the "Executive Committee of Economic and Social Affairs Plus" brings together on the horizontal plane more than fifty U.S. entities.[20]As vertical approaches, one finds examples for an integration of the S.D.G.s in different kinds of agreements between the E.U. and other states, such as the Japan-E.U. Free Trade Agreement[21] or the Comprehensive Economic and Trade Agreement, and even the Political Dialogue and Cooperation Agreement between Cuba and the E.U., demonstrate direct effect of the S.D.G.s.[22] Therefore, the S.D.G.s could be qualified as an expression of a materially uncodified value system causing indirect effects located in the context of global governance.[23]

This chapter analyses the extent to which the S.D.G.s can contribute to the formation of (global) environmental law. Of particular interest are the connections created by regional organizations, most notably A.S.E.A.N., CARICOM, and the African, Caribbean, and Pacific (A.C.P.) Group of States. With these, it might at least prove to be possible to develop new legal obligations. Therefore, the steering function of the indicators assigned to the S.D.G.s will first be analyzed on a formal level. The findings are then juxtaposed with the implementation of the S.D.G.s in A.S.E.A.N., CARICOM, and A.C.P. Using this approach, applicable vertical and horizontal legal matrices reveal connections and opportunities for new or revised environmental law.

6.2 Indicators as a formal control element of the substantive content of the S.D.G.s

A formal control instrument to monitor progress has also been included in the system of material S.D.G.s.[24] The state of implementation of the S.D.G.s by the Member States is measured by indicators,[25] albeit only on a voluntary

20 For a detailed list see E.C.-E.S.A. Plus Members available at https://sustainabledevelopment.un.org/unsystem/ecesaplus (retrieved 26 November 2020).

21 Winfried Huck and Claudia Kurkin, *supra* note 3, p. 402.

22 E.U. Commission, "EU-Cuba: New Landmark Agreement Entering into Force on 1 November 2017, IP/17/4301," October 31, 2017 available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_17_4301/IP_17_4301_EN.pdf (retrieved 26 November 2020); Winfried Huck: "EU und Kuba: Wirtschafts- und Nachhaltigkeitsdimensionen im ersten Political Dialogue and Cooperation Agreement," 7 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2017), pp. 249 et seqq.

23 Ernst Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods*, (Oxford: Hart Publishing, 2017), p. 190; Benoit Frydman, "From Accuracy to Accountability: Subjecting Global Indicators to the Rule of Law," *International Journal of Law in Context* (2017), pp. 450–464.

24 U.N. General Assembly Resolution 70/1, *supra* note 2, para. 61.

25 Ibid., paras. 48, 61, 75, 83; Winfried Huck, "Measuring Sustainable Development Goals (SDGs) with Indicators: Is Legitimacy Lacking?," January 31, 2019, available at https://ssrn.com/abstract=3360935 (retrieved 26 November 2020); Sally Engle Merry et al., *The Quiet Power of Indicators, Measuring Governance, Corruption, and the Rule of Law*, (Cambridge: Cambridge University Press, 2015), pp. 1 ff.

basis.[26] Indicators are tools of statistics, economics, and management, known there as Key Performance Indicators (K.P.I.s),[27] and have also been the starting point for considerable legal research over a certain period of time.[28] The U.S. General Assembly has adopted therefore a global indicator framework (GIF) with 231 different indicators.[29] These indicators cover all the 169 targets of the 2030 Agenda[30] (as some indicators are used to monitor more than one target, the list overall contains 247 indicators). The G.I.F. for the S.D.G.s and targets was developed by the Inter-Agency and Expert Group on S.D.G. Indicators.[31] In particular, reliable disaggregated data will be needed to conduct the process of measurement.[32] Disaggregated data concerning the S.D.G.s should differ between income, sex, age, race, ethnicity, migratory status, disability. and geographic location, or other characteristics.[33]

Critics state, among other things, that the different and inconsistent published results may cause severe misunderstanding or doubts on the capability of assessing S.D.G. implementation.[34] If this framework of agreed global indicators is used inconsistently, as when, for example, only arbitrarily selected indicators are used, or when additional indicators are used only with some targets, then the results will be commensurately inconsistent, incomprehensible, or even dubious.[35] However, who is responsible for the creation of global indicators? Who is steering the process on different national, regional, and

26 U.N. General Assembly Resolution 70/1, *supra* note 2, para. 74a.

27 Federal Government of Germany, *German Sustainability Strategy - Update 2018, BT-Drs. 19/5700*, 53 "Key Indicators," available at https://dip21.bundestag.de/dip21/btd/19/057/1905700.pdf (retrieved 29 January 2021).

28 Stephen Morse, "Analysing the Use of Sustainability Indicators," in *The Palgrave Handbook of Indicators in Global Governance*, (Basingstoke: Palgrave Macmillan, 2018); Mathias Siems and David Nelken, "Global Social Indicators and the Concept of Legitimacy," 13 (4) *International Journal of Law in Context* (2017), pp. 434 ff; Benoit Frydman, *supra* note 23, p. 461 f; Marta Infantino, "Global Indicators," in *Research Handbook on Global Administrative Law*, (Cheltenham: Edward Elgar Publishing, 2017), pp. 348 ff.; Sally Engle Merry et al., *supra* note 25, pp. 1 ff.

29 U.N. General Assembly Resolution 71/313, *Resolution Adopted by the General Assembly on 6 July 2017: Work of the Statistical Commission Pertaining to the 2030 Agenda for Sustainable Development*, A/RES/71/313 (10 July 2017) available at http://ggim.un.org/documents/A_RES_71_313.pdf (retrieved 26 November 2020).

30 U.N. General Assembly Resolution 71/313, *supra* note 31, S.D.G. Indicators, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, available at https://unstats.un.org/sdgs/indicators/indicators-list/ (retrieved 26 November 2020).

31 Ibid.

32 U.N. General Assembly Resolution 70/1, *supra* note 2, para. 48.

33 U.N. General Assembly Resolution 71/313, *supra* note 30; U.N. General Assembly Resolution 68/261, *Fundamental Principles of Official Statistics*, A/RES/68/261 (3 March 2014), available at https://unstats.un.org/unsd/dnss/gp/FP-New-E.pdf (retrieved 26 November 2020).

34 Svatava Janoušková et al., "Global SDGs Assessments: Helping or Confusing Indicators?," 10 (5) Sustainability, M.D.P.I*., Open Access Journal* (2018), pp. 1–14.

35 Ibid.

transnational levels? The whole process is anything but free of criticism[36] and difficulties.[37] A frequent criticism is that global indicators usually reflect only the internal and ethnocentric biases of their designers,[38] so that the designers, for example from the Global North, are biased against the Global South.[39] The main problem and challenge is the lack of a global attempt to practice sound comparative environmental law,[40] despite the fact that humankind is itself an influence to shape the global system.[41]

To measure any progress in the field of the Global Agenda 2030,[42] global S.D.G. indicators[43] are being developed in order to assist the S.D.G.s.[44] The indicator framework was, as the S.D.G.s itself, developed in an open process to gain the most relevant input from Member States, U.S. agencies, and relevant stakeholders, and is further developed on an annual basis. The framework includes global indicators that have never before been called upon in the international sphere. Although this was perceived as an important and progressive opportunity during the negotiation process, the political nature and the many tensions between the understanding of a development agenda and that of a value-based human rights agenda were decisive for the promulgated

36 Armin von Bogdandy and Matthias Goldmann, "Taming and Framing Indicators: A Legal Reconstruction of the O.E.C.D.'s Programme for International Student Assessment (P.I.S.A.)," in *Governance by Indicators: Global Power through Classification and Rankings*, (Oxford: Oxford University Press, 2015), pp. 52, 54, 85: "PISA Thus Needs to Be Framed by Public Law – More Precisely, by International Law–in Order to Ensure Its Legitimacy and Address Any Conflicts and Contestations."

37 U.N. General Assembly Resolution 71/1*, New York Declaration for Refugees and Migrants*, A/RES 71/1, (25 September 2019), available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf (retrieved 26 November 2020), para. 57; Joseph E. Stiglitz et al., *Beyond GDP, Measuring What Counts for Economic and Social Performance*, (Paris: O.E.C.D., 2018), pp. 60 ff.

38 Marta Infantino, *supra* note 28, p. 361.

39 Ibid; see further Shawkat Alam et al., *International Environmental Law and the Global South,* (Cambridge: Cambridge University Press, 2015).

40 Kirk W. Junker, "Why Compare? The Biological, Cognitive, and Social Functions of Comparison for the Human," in *Environmental Law Across Cultures: Comparisons for Practice*, (London: Earthscan-Routledge, 2020), p. 3–14.

41 Jorge E. Viñuales, "Comparative Environmental Law: Structuring a Field," in *The Oxford Handbook of Comparative Environmental Law*, (Oxford: Oxford University Press, 2019), p. 31.

42 U.N. Economic and Social Counsel, *Progress towards the Sustainable Development Goals, Report of the Secretary-General,* E/2018/64, (10 May 2018), available at https://digitallibrary.un.org/record/1627573/files/E_2018_64-EN.pdf (retrieved 26 November 2020).

43 Sally Engle Merry et al., *supra* note 27 , p. 1 ff.; see United Nations Department of Economic and Social Affairs, "UN Global SDG Database," November 25, 2020 available at https://unstats.un.org/sdgs/indicators/database/ (retrieved 26 November 2020).

44 Good overview provides the E-Handbook on Sustainable Development Goals Indicators, available at https://unstats.un.org/wiki/display/SDGeHandbook (retrieved 26 November 2020).

version of the G.I.F., which now contains different tiers and thus a different quality of indicators.[45]

Additionally, the G.I.F. uses "extreme simplification of often complex areas of societal behaviour" which all the more perpetuates differing (political) notions and interpretations.[46] This complex challenging situation is completed by the considerable gaps in data supply in both developing and developed countries, the filling of which requires "financial resources as well as knowledge sharing and investment in human capital."[47] The High-level Group for Partnership, Coordination, and Capacity-Building for statistics for the 2030 Agenda for Sustainable Development has been tasked to provide strategic leadership for the sustainable development goal implementation process as it concerns statistical monitoring and reporting.[48]

Although standards and indicators have for years attracted a high level of academic interest,[49] only a general conclusion can be drawn for practice. A more differentiated conclusion would require the provision and exchange of highly developed and generally operational data that are consistent and accessible regarding methods and quality between interconnected States. Furthermore, there is a need for enhancing the understanding of developing indicators and their utilization.[50]

6.3 Implementation of the S.D.G.s by A.S.E.A.N.

In 2020, A.S.E.A.N. looked back on the 53 years that had passed since its formation on 8 August 1967. Initially, there were only five Member States—Indonesia, Malaysia, the Philippines, Singapore, and Thailand—whose Foreign Ministers[51] agreed on just five articles in a political document, signed in the entrance hall of the Ministry of Foreign Affairs in Bangkok, Thailand, as the so-called Bangkok Declaration of 8 August 1967.[52] The Association was first enlarged when Brunei was admitted on 7 January 1984 after

45 Felix Dodds et al., *supra* note 5, p. 125; see also Karen Morrow, "Gender and the SDGs," in *Sustainable Development Goals, Law, Theory and Implementation*, *supra* note 7, p. 163 f.

46 See Karen Morrow, *supra* note 45, p. 164.

47 Winfried Huck, *supra* note 25.

48 United Nations Department of Economic and Social Affairs, "High-level Group for Partnership, Coordination and Capacity-Building for Statistics for the 2030 Agenda for Sustainable Development, HLG-PCCB," available at https://unstats.un.org/sdgs/hlg/ (retrieved 26 November 2020).

49 Juan Carlos Botero et al., "Indices and Indicators of Justice, Governance and the Rule of Law: An Overview," 3 (2) *Hague J Rule Law* (2011), pp. 153–169; Sabino Cassese and Lorenzo Casini, "Taming Honey Birds? The Regulation of Global Indicators," January 24, 2012, available at https://ssrn.com/abstract=1991396 (retrieved 26 November 2020).

50 Stephen Morse, *supra* note 28, p. 446, 509.

51 A.S.E.A.N., "History, The Founding of ASEAN," 2012, available at http://asean.org/asean/about-asean/history/ (retrieved 26 November 2020).

52 A.S.E.A.N., "The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967," 2016, available at https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/ (retrieved 26 November 2020).

attaining independence from the United Kingdom.[53] One of the most significant developments has been the adoption of the A.S.E.A.N. Charter on the occasion of the 40th Anniversary of A.S.E.A.N. at the 13th A.S.E.A.N. Summit on 20 November 2007.[54] The A.S.E.A.N. Charter entered into force on 15 December 2008,[55] conferring upon A.S.E.A.N. a legal personality[56] as an intergovernmental organization and serving as a constitutional basis for A.S.E.A.N., according to Article 3 of the A.S.E.A.N. Charter.[57]

The ten A.S.E.A.N. Member States[58] have very different cultures, religions, ethnic groups, languages, colonial history, and respective underlying national constitutional foundations, as well as current states of development, as one can observe by comparing Laos to Singapore, for example.[59] The A.S.E.A.N. motto, "One Vision, One Identity, One Community,"[60] reflects the broad diversity among the Member States, which are symbolized in the A.S.E.A.N. flag as ten bundled rice panicles enclosed in a circle characterizing the unity of A.S.E.A.N.[61] The creation of the A.S.E.A.N. Charter in 2008 is seen as an essential step towards global constitutionalism, as it promotes legal norms,[62] although these norms are subject to constraints reflecting the different constitutions of the A.S.E.A.N. Member States and their specific approaches to decision-making.[63]

53 Daniel Seah, "I. The ASEAN Charter," 58 (1) *International and Comparative Law Quarterly* (2009), p. 197.

54 A.S.E.A.N., "Singapore Declaration on the ASEAN Charter, Adopted in Singapore on 20 November 2007," June 13, 2012, available at https://asean.org/?static_post=-singapore-declaration-on-the-asean-charter (retrieved 26 November 2020).

55 A.S.E.A.N., "Charter of the Association of Southeast Asian Nations," 2007, available at https://asean.org/asean/asean-charter/charter-of-the-association-of-southeast-asian-nations/ (retrieved 26 November 2020).

56 Carlos Closa and Lorenzo Casini, *Comparative Regional Integration*, (Cambridge: Cambridge University Press, 2016), p. 167, 169; A.S.E.A.N. is a treaty based I.G.O., but it also displays elements of transgovernmental and transnational networks.

57 Imelda Deinla, *The Development of the Rule of Law in ASEAN: The State and Regional Integration*, (Cambridge: Cambridge University Press, 2017), p. 1.

58 According to Art. 4 of the A.S.E.A.N. Charter, the Member States of A.S.E.A.N. are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

59 Ingo Venzke and Li-ann Thio, *The Internal Effects of ASEAN External Relations*, (Cambridge: Cambridge University Press, 2016), p. 7.

60 Art. 36 A.S.E.A.N. Charter.

61 Art. 37 and Annex 3 A.S.E.A.N. Charter.

62 Dimitri Vanoverbeke, "Are We Talking the Same Language, The Sociohistorical Context of Global Constitutionalism in East Asia as Seen from Japan's Experiences," in *Global Constitutionalism from European and East Asian Perspectives*, (Cambridge: Cambridge University Press, 2018), p. 221.

63 Gloria Loo Jing Xi, "ASEAN and Janus-faced Constitutionalism: The Indonesian Case," 17 (1) *International Journal of Constitutional Law* (2019), pp. 177 ff. Analysing that the Indonesian president can constitutionally ignore the views of the Constitutional Court and the House of Representatives regarding energy policy and that Indonesia's energy policies

On 31 December 2015, the Heads of A.S.E.A.N. states proclaimed the formal establishment of the A.S.E.A.N. Community through Declaration,[64] which was prepared by the "Roadmap for an A.S.E.A.N. Community: 2009–2015" endorsed by A.S.E.A.N. leaders at their 14th A.S.E.A.N. Summit in Cha-am, Thailand, from 26 February to 1 March 2009.[65] As a result, A.S.E.A.N.'s architecture evolved and was newly declared to be "ASEAN 2025: Forging Ahead Together," by the leaders of A.S.E.A.N. Member States at their 27th Summit in 2015.[66] This Declaration is comprised of all the efforts of A.S.E.A.N. to achieve a Community that is "politically cohesive, economically integrated, and socially responsible."[67] Therefore, the heads of A.S.E.A.N. Member States agreed that "ASEAN 2025: Forging Ahead Together" encompasses the following:

a) the Kuala Lumpur Declaration on A.S.E.A.N. 2025: Forging Ahead Together,
b) the A.S.E.A.N. Community Vision 2025 Agreement,
c) the A.S.E.A.N. Political-Security Community Blueprint 2025,
d) the A.S.E.A.N. Economic Community (A.E.C.) Blueprint 2025, and
e) the A.S.E.A.N. Socio-Cultural Community Blueprint 2025.[68]

Today, A.S.E.A.N. rests on three pillars: the A.S.E.A.N. Political-Security Community, the A.S.E.A.N. Socio-Cultural Community, and a "market driven economy,"[69] which, in 2015, found expression in the A.S.E.A.N. Economic Community.[70]

---

ultimately converge with "soft" A.S.E.A.N. norms and diverge from its own constitution, jurisprudence and legislation.

64 A.S.E.A.N., "Kuala Lumpur Declaration on the Establishment of the ASEAN Community, in Kuala Lumpur, 22 November 2015," available at https://www.asean.org/wp-content/uploads/images/2015/November/KL-Declaration/KL%20Declaration%20on%20ASEAN%202025%20Forging%20Ahead%20Together.pdf (retrieved 26 November 2020).

65 A.S.E.A.N., "Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015)," May 10, 2012, available at https://asean.org/?static_post=cha-am-hua-hin-declaration-on-the-roadmap-for-the-asean-community-2009-2015 (retrieved 26 November 2020).

66 A.S.E.A.N., *supra* note 64.

67 A.S.E.A.N., "ASEAN 2025 at a Glance, para. 2, Statement from 24 November 2015," November 24, 2015 available at https://asean.org/asean-2025-at-a-glance/ (retrieved 26 November 2020).

68 A.S.E.A.N., *supra* note 65, para 1 and 2; for the organisational aspects see Imelda Deinla, *supra* note 58, pp. 137 ff.

69 Jacques Pelkmans, *The ASEAN Economic Community, A Conceptual Approach*, (Cambridge: Cambridge University Press, 2016), pp. 18 and 75; Sanchita Basu Das, *The ASEAN Economic Community and Beyond*, (Singapore: I.S.E.A.S. – Yusof Ishak Institute, 2016), p. 12.

70 For the bodies of the A.E.C., see A.S.E.A.N. Charter, Annex I A.S.E.A.N. Sectoral Ministries Bodies, II A.E.C. No. 1-16.

In the A.S.E.A.N. Community Vision 2025 Declaration, it is stated that implementation of the United Nations' Agenda 2030 for Sustainable Development and the S.D.G.s[71] has begun in A.S.E.A.N. and that the work continues.[72] As a member of the global community, A.S.E.A.N. has committed to the realization of the S.D.G.s,[73] and efforts are being made to improve living standards and implement these S.D.G.s.[74] The E.U. and A.S.E.A.N., as well as A.S.E.A.N. and China, are working together on this implementation within A.S.E.A.N.[75] For instance, S.D.G. localization strategies by subnational and local governments help support the implementation. Since these are "the closest to people" and ready to translate "the aspirations of the goals and targets into implementable plans and programs on the ground," they share experiences and case studies to jointly overcome challenges with integrated approaches, but all the more create a policy and institutional environment that embrace the S.D.G.s.[76]

Other measures include, for example, the establishment of S.D.G. Pilot Zone Initiatives, synergy mappings, or policy and expert-level meetings. In particular, the cooperation with U.S. Economic and Social Commission for Asia and the Pacific (E.S.C.A.O.) and the U.S. Development Programme (U.N.D.P.) support these processes. Additionally, joint financial instruments have been and are being agreed upon (e.g., during the A.S.E.A.N.-China-U.N.D.P. Symposium on Financing the Implementation of the Sustainable

71 U.N. General Assembly Resolution 70/1, *supra* note 2.

72 A.S.E.A.N., "Declaration on ASEAN Post-2015 Environmental Sustainability and Climate Change Agenda, 21 November 2015," available at https://www.asean.org/wp-content/uploads/images/2015/November/27th-summit/ASCC_documents/Declaration%20on%20Post%202015%20Environmental%20Sustainability%20and%20Climate%20Change%20AgendaAdopted.pdf (retrieved 26 November 2020), para. 2: "Continue our efforts to establish a balance among economic growth, social development and environmental sustainability as well as to strengthen ASEAN's commitments for the realization of the Post 2015 Development Agenda and the attainment of the Sustainable Development Goals (SDGs)"; Pasha L. Hsieh and Byran Mercurio, "ASEAN Law in the New Regional Economic Order: An Introductory Roadmap to the ASEAN Economic Community," in *ASEAN Law in the New Regional Economic Order*, (Cambridge: Cambridge University Press, 2019), p. 12; A.S.E.A.N., "ASEAN Secretariat, ASEAN Community Progress Monitoring System (ACPMS) 2017," 2017, available at https://www.aseanstats.org/wp-content/uploads/2017/09/ACPMS_2017.pdf (retrieved 26 November 2020), p. 125.

73 A.S.E.A.N. Secretariat, "Annual Report 2017–2018, A Resilient and Innovative ASEAN Community," 2018, available at https://asean.org/wp-content/uploads/2018/08/ASEAN-Annual-Report-2017-2018.pdf (retrieved 26 November 2020), p. 29.

74 A.S.E.A.N., "ASEAN Community Vision 2025," 2015, available at http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf (retrieved 26 November 2020), No. 6, 12.3.

75 Paavani Reddy et al., "SDG Localization in ASEAN: Experiences in Shaping Policy and Implementation Pathways," 2019, available at https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/sustainable-development/RBAP-DG-2019-SDG-Localization-in-ASEAN.pdf (retrieved 26 November 2020), p. 6 ff.

76 Paavani Reddy et al., *supra* note 75, pp. 9, 28.

Development Goals in A.S.E.A.N., which took place from 21–22 August 2017 in Chang Rai, Thailand). Chinese investments in A.S.E.A.N. countries could also offer an opportunity to create sustainable structures and regulations in line with the S.D.G.s.[77]

Regional cooperation on rural development and poverty eradication, comprised of different activities like the 13th A.S.E.A.N.-China Forum on Social Development and Poverty Reduction in Guangxi, China, on 26–28 June 2019, and the A.S.E.A.N.-China-U.N.D.P. Symposium on Innovation in Achieving the S.D.G.s and Eradicating Poverty in Ha Noi on 4–5 September 2019, are worth noting[78] All those activities are embedded in a wider A.S.E.A.N.-China Dialogue Relation covering a vast array of topics, including the A.S.E.A.N.-China Environmental Cooperation Week.[79]

The global commitment to Agenda 2030 and its S.D.G.s[80] form an integral part of the E.U.'s ongoing integration process as well as that of A.S.E.A.N.[81] The E.U. recognizes that action on climate change and the environment is an urgent priority as can be seen in the announced Green Deal of the E.U. Commission.[82] The E.U. has announced support related to climate change and biodiversity for A.S.E.A.N. and its Member States.[83] As a result, an A.S.E.A.N.-E.U. Dialogue on Sustainable Development was announced by the E.U. and A.S.E.A.N. on 17 November 2017 and focuses on the question

77 Ibid, pp. 47, 107, 109 ff.

78 A.S.E.A.N., Secretariat, Overview of A.S.E.A.N.-China Dialogue Relations, 2020, para. 39, available at https://asean.org/storage/2012/05/Overview-of-ASEAN-China-Relations-22-Apr-2020-00000002.pdf (retrieved at 21 December 2020).

79 A.S.E.A.N., Secretariat, Overview of A.S.E.A.N.-China Dialogue Relations, 2020, para. 35, available at https://asean.org/storage/2012/05/Overview-of-ASEAN-China-Relations-22-Apr-2020-00000002.pdf (retrieved at 21 December 2020).

80 U.N. General Assembly Resolution 70/1, *supra* note 2.

81 E.U. External Action, Mission of the European Union to A.S.E.A.N., "EU-ASEAN Blue Book 2018," August 8, 2018. available at https://eeas.europa.eu/delegations/-association-southeast-asian-nations-asean/48898/eu-asean-blue-book-2018_en (retrieved 26 November 2020), p. 14; A.S.E.A.N., "ASEAN-European Union, Dialogue Relations, ASEAN Secretariat's Information Paper as of July 2018," available at http://asean.org/storage/2018/07/Overview-of-ASEAN-EU-Relations-as-of-July-2018-For-Website.pdf (retrieved 26 November 2020); Maria-Gabriela Manea, "The Institutional Dimensions of EU-ASEAN/ASEAN Plus Three Inter-regional Relations," in *The Palgrave Handbook of EU-Asia Relations*, (Basingstoke: Palgrave Macmillan, 2013), p. 313; Reuben Wong, "Model Power or Reference Point? The EU and the ASEAN Charter," 25 (10) *Cambridge Review of International Affairs* (2012), p. 669; E.U. External Action, Mission of the European Union to A.S.E.A.N., "40 Years of EU-ASEAN, Partnership & Prosperity," 2017, available at https://eeas.europa.eu/sites/eeas/files/eu_asean_trade_investment_2017.pdf (retrieved 26 November 2020), p. 2.

82 E.U. Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal," (11 December 2019) COM (2019) 640 final.

83 E.U. External Action, Mission of the European Union to A.S.E.A.N., "EU-ASEAN Blue Book 2020," April 2020, available at https://euinasean.eu/wp-content/uploads/2020/04/EU-ASEAN-Blue-Book-2020-eDocument.pdf (retrieved 27 November 2020), p. 40.

of how S.D.G.s[84] can be implemented effectively.[85] Key issues are the promotion of gender equality and, in particular, the empowerment of women and girls[86] as keys to change, as well as the promotion of green growth[87] and recycling,[88] including environmentally[89] sustainable and climate-resilient cities,[90] sustainable consumption[91] and production,[92] and the fight against climate change.[93] These issues also include finding ways to effectively involve the private sector, civil society, and science to promote sustainable development.[94]

The E.U. and A.S.E.A.N. agreed that a strong commitment to community building, sustainable development, and rule-based integration was the best way to offer their citizens security and prosperity. The A.S.E.A.N.-E.U. Plan of Action, which does not create any legal obligations,[95] aims to promote sustainable development and tries to solve environmental problems. The A.S.E.A.N.-E.U. Dialogue on Sustainable Development serves as an additional platform from which to discuss and foster development and sustainability issues, as well as a way to include Agenda 2030 and S.D.G.s.[96]

The A.S.E.A.N. Vision 2025 agreement emphasized that Agenda 2030[97] and the enshrined S.D.G.s[98] are complementary to A.S.E.A.N. community-building efforts intended to uplift the standards of living for all people in the A.S.E.A.N. community.[99] A.S.E.A.N. has committed-itself to implementing two parallel but interrelated processes: the A.S.E.A.N.

84 Winfried Huck and Claudia Kurkin, *supra* note 3, p. 375.
85 E.U. External Action, Mission of the European Union to A.S.E.A.N., *supra* note 81, p. 14.
86 S.D.G. 5.1, 5a.
87 S.D.G. 8.4.
88 S.D.G. 12.3 and 12.4.
89 See Koh Kheng-Lian et al., *supra* note 7, p. 13.
90 S.D.G. 11.3, 11.6, 11.b.
91 S.D.G. 12a.
92 S.D.G. 2.4, 8.4, 12.3.
93 S.D.G. 13.
94 E.U. External Action, Mission of the European Union to A.S.E.A.N., *supra* note 81, p. 14.
95 No. 6 (d) of A.S.E.A.N., "ASEAN-EU Plan of Action (2018–2022), Final," August 6, 2017 available at https://asean.org/storage/2017/08/ASEAN-EU-POA-2018-2022-Final.pdf (retrieved 27 November 2020).
96 No. 3.5. (a) of A.S.E.A.N., *supra* note 95.
97 U.N. General Assembly Resolution 70/1, *supra* note 4.
98 Selected literature dealing with SDGs: Emmanuella Doussis, *supra* note 5, pp. 3 ff.; Ducan French and Louis J. Kotzé, *supra* note 5; Winfried Huck and Claudia Kurkin, *supra* note 3, p. 375; Norichika Kanie and Frank Biermann, *supra* note 5, 2016, pp. 555 ff.; Macharia Kamau et al., *supra* note 5; Marie-Claire Cordonier Segger and H. E. Judge C. G. Weeramantry, *supra* note 5; Felix Dodds et al., *supra* note 5; Paloma Durán y Lalaguna et al., *supra* note 5; Koh Kheng-Lian et al., *supra* note 5.
99 A.S.E.A.N., "ASEAN 2025: Forging Ahead Together Jakarta," November 2015, available at https://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf (retrieved 26 November 2020), p. 13.

Community Vision 2025 and Agenda 2030.[100] Only five priorities out of seventeen goals and 169 sub-goals have been identified: poverty eradication, infrastructure and connectivity, sustainable management of natural resources, sustainable production and consumption, and resilience.[101]

All of the mentioned processes and goals contained in A.S.E.A.N. Community Vision 2025 are subject to accountability but organized based on reviews and global indicators[102] or business-related K.P.I.s.[103] But indications are that Member States of A.S.E.A.N. are currently not moving very successfully towards their goals. A report released by the U.S. E.S.C.A.P. revealed that A.S.E.A.N. and its Member States will probably not achieve any of the S.D.G.s by the 2030 target date. It has been reported that the situation is deteriorating when it comes to providing clean water and sanitation (S.D.G. 6), ensuring decent work and economic growth (S.D.G. 8) and supporting sustainable consumption and production (S.D.G. 12).[104]

6.4 CARICOM and A.C.P.

The CARICOM,[105] A.C.P.,[106] Caribbean Forum (CARIFORUM),[107] Community of Latin American and Caribbean States (*Comunidad de Estados*

100 U.N. Economic and Social Commission for Asia and the Pacific (E.S.C.A.P.), "Complementarities between the ASEAN Community Vision 2025 and the United Nations 2030 Agenda for Sustainable Development: A Framework for Action," 2017, available at https://www.unescap.org/sites/default/files/publications/UN%20ASEAN%20Complementarities%20Report_Final_PRINT.pdf (retrieved 26 November 2020), p. 10.

101 U.N. Economic and Social Commission for Asia and the Pacific (E.S.C.A.P.), *supra* note 100, p. 11.

102 See A.S.E.A.N. Secretariat, "ASEAN Sustainable Development Goals Indicators Baseline Report–2020," 2020, available at https://www.aseanstats.org/wp-content/uploads/2020/11/ASEAN-Sustainable-Development-Goals-Indicators-Baseline-Report-2020-web.pdf (retrieved 26 November 2020).

103 A.S.E.A.N., *supra* note 95, pp. 55, 121, 122 (Key Performance Indicators); for KPIs, see David Restrepo *Amariles*, "Supping with the Devil? Indicators and the Rise of Managerial Rationality in Law," 13 (4) *International Journal of Law in Context* (2017), p. 468.

104 U.N. Economic and Social Commission for Asia and the Pacific (E.S.C.A.P.), "Asia and the Pacific SDG Progress Report 2020," 2020 available at https://www.unescap.org/sites/default/files/publications/ESCAP_Asia_and_the_Pacific_SDG_Progress_Report_2020.pdf (retrieved 26 November 2020); The A.S.E.A.N. Post, "ASEAN Falling Behind on SDG Targets," March 26, 2020, available at https://theaseanpost.com/article/asean-falling-behind-sdg-targets (retrieved 27 November 2020); The A.S.E.A.N. Post, "ASEAN not on track for SDG goals", May 29, 2029 available at https://theaseanpost.com/article/asean-not-track-sdg-goals; Paavani Reddy et al., *supra* note 75, p. 6 ff.

105 See Francesco Seatzu, *supra* note 17, p. 219 ff.

106 The African, Caribbean and Pacific Group of States (A.C.P.) is an organisation created by the Georgetown Agreement in 1975: Georgetown Agreement on the Organisation of the African, Caribbean and Pacific Group of States (A.C.P.), done at: Georgetown, Date enacted: 1975-06-06, in force: 1976-02-12.

107 "Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part," *Official Journal*

Latinoamericanos y Caribeños) (C.E.L.A.C.),[108] and the new attempt of bridging from the "English" Caribbean to the Spanish speaking Caribbean are phenomena through which to understand regional matters and their common environmental challenges in a more holistic way. The E.U. and C.E.L.A.C. both endorse the Agenda 2030 for Sustainable Development. They are already engaged in collaborative efforts in some of the target areas of the S.D.G.s, each in recognition of the Global Agenda 2030 and the requirements of sustainable development.[109]

The Euro-Latin American Parliamentary Assembly (EuroLat) concluded a resolution combatting poverty as a part of the S.D.G.s on 22 September 2016.[110] In 2019, the Co-Presidents of EuroLat called for "the implementation of the Global Agenda 2030 at international, national, regional and local level and for the implementation of programs designed by all levels of the public administration to ensure inclusive and sustainable development." Thereby, EuroLat stressed the paramount importance of the provisions on sustainable development in the E.U.-Mercosur Free Trade Agreement.[111]

Moreover, many of the E.U.- C.E.L.A.C. discussions concern climate change.[112] Joseph Borell recently stated, that "the agreements…are almost finalised. And finally, the most difficult, the broadest, the newest, because it was never signed, is the Mercosur agreement, where we have had to overcome

---

of the EU, L 289/I/3, October 30, 2008, available at http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf (retrieved 27 November 2020).

108 Community of Latin American and Caribbean States: represent 61 countries – around one-third of the U.N. membership – and over a billion people – 15% of the world's population.

109 Roadmap for E.U. – C.E.L.A.C. S&T cooperation (2018), available at https://ec.europa.eu/research/iscp/pdf/policy/celac_roadmap_2018.pdf (retrieved 19 December 2020); European Parliament, "EU Development Cooperation with Latin America," 2017, available at https://eulacfoundation.org/en/system/files/eprs_bri2017599423_en_eu_develom_coop.pdf (retrieved 19 December 2020); José E. Durán Lima et al., "Latin America-European Union Cooperation: A Partnership for Development," 2014, available at https://eulacfoundation.org/en/system/files/doc_172.pdf (retrieved 19 December 2020); José Antonio Sanahuja, "The EU and CELAC: Reinvigorating a Strategic Partnership," 2015, available at https://eulacfoundation.org/en/system/files/Published_versionEN.pdf (retrieved 19 December 2020).

110 E.U.R.O.L.A.T., Resolution of 22 September 2016 – Montevideo, "Combating Poverty as Part of the Sustainable Development Goals (SDGs) in the 2030 Agenda for Sustainable Development," available at https://www.europarl.europa.eu/intcoop/eurolat/assembly/plenary_sessions/montevideo_2016/adopted_docs/poverty/1105474en.pdf (retrieved 21 December 2020).

111 Declaration by the Co-Presidents of the Euro-Latin American Parliamentary Assembly (EuroLat) of 13 December 2019, Panama City, Panama, paras. 4, 13.

112 European Commission: Overview to Latin America and the Caribbean, available at https://ec.europa.eu/clima/policies/international/cooperation/latin-america_caribbean_en (retrieved 21 December 2020).

protectionist stances on the part of both Europe and Latin America." He sees Latin America and the Caribbean as "the new transatlantic relationship."[113]

CARICOM and A.C.P. have also been important movers of the Paris Agreement on climate change.[114] Leaving policies behind, what is needed today is a more normative concept that addresses inequalities to shape a deeper humanized future. But are the S.D.G.s heralding a new and better world? The deep and mostly fragmented impact of the S.D.G.s is clearly to be seen in different international trade and investment agreements. But it also has a strong impact on the agreement between A.C.P. and the E.U. Finally, a vertical legal effect from the international level to the interregional level of the E.U. can be observed in the E.U. Commission's Green Deal and the legislative measures associated with it, like the proposal on a European Climate Law and plans—among many others—that will comprise the "Greening the Common Agricultural Policy/'Farm to Fork' Strategy."[115]

The A.C.P. is comprised of 79 African, Caribbean, and Pacific states, all of which, except Cuba, are signatories to the Cotonou Agreement, also known as the "A.C.P.-EC Partnership Agreement" consisting of 48 countries from Sub-Saharan Africa, 16 from the Caribbean, and 15 from the Pacific.[116] The Cotonou Partnership Agreement, signed in 2000 for a period of 20 years, unites more than one hundred countries (28 E.U. Member States + 79 A.C.P. countries) and represents over 1.5 billion people. The Cotonou Partnership Agreement, governing relations between the E.U. and 79 members of the A.C.P., was due to expire in February 2020, but has been prolonged on a transitional basis until a new agreement comes into force and remains provisionally applied while it is being renegotiated since 2018.[117]

The E.U.-A.C.P. partnership focuses on the eradication of poverty and inclusive sustainable development for A.C.P. and E.U. countries. It is divided into three key action areas: development co-operation, political dialogue, and trade.[118] The world has changed considerably since the Cotonou Agreement

113 Europe, Latin America, and the Caribbean. The other transatlantic partnership, available at https://eeas.europa.eu/headquarters/headquarters-homepage/90882/europe-latin-america-and-caribbean-other-transatlantic-partnership_en (retrieved 21 December 2020).

114 European Council, "EU - CELAC Ministerial Meeting, 16–17 July 2018," July 16, 2018, available at http://www.consilium.europa.eu/en/meetings/international-ministerial-meetings/2018/07/16-17/ (retrieved 27 November 2020).

115 E.U. Commission, *supra* note 79, Annex.

116 African, Caribbean and Pacific Group of States, "Secretariat ACP," 2011, available at http://www.acp.int/content/secretariat-acp (retrieved 27 November 2020).

117 European Parliamentary Research Service (E.P.R.S.), "Briefing, International Agreements in Progress, after Cotonou: Towards a New Agreement with the African, Caribbean and Pacific States," October, 2020, available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)659274 (retrieved 27 November 2020), pp. 2, 8.

118 Jeff Kenner, "Labour Clauses in EU Preferential Trade Agreements – An Analysis of the Cotonou Partnership Agreement," in *Preferential Trade Agreements: A Law and Economics Analysis*, (Cambridge: Cambridge University Press, 2011), pp. 180–209; Stephen Kingah,

was adopted two decades ago. Global and regional contexts (in Europe, Africa, the Caribbean, and the Pacific) have evolved. Therefore, the core objectives of the partnership must be reviewed to adapt to the new realities.[119] Established in 1992, CARIFORUM serves as a subgroup of the A.C.P. and provides a base for the economic dialogue with the E.U.[120]

Based on a previous evaluation of the Cotonou Agreement, the European Commission and the European External Action Service published a joint communication at the end of 2016 outlining their vision for the future of the partnership. The envisaged scenario, set out in December 2017 in the recommendation for a Council decision authorizing the opening of negotiations, calls for a more general agreement—also referred to as a "foundation"—between the E.U. and all A.C.P. states, complemented with specific protocols for Africa, the Caribbean, and the Pacific. The regional protocols take account of the diverging interests of each of the three regions and the E.U.'s strategic interests in each of them. The proposed "foundation" covers issues of common interest as well as those issues that do not require geographical differentiation, such as climate change, human rights, respect for democratic principles, and the rule of law.[121]

At the A.C.P. Summit in 2012, the A.C.P. Heads of State and Government have affirmed that they are determined to "stay united as a group" in the Sipopo Declaration.[122] The A.C.P.'s view of its relation with the E.U. after 2020 is particularly addressed in the Waigani communiqué of Papua New Guinea Summit with three key messages. The communiqué states that the A.C.P.-E.U. partnership provides a good basis that should be consolidated through an established, comprehensive, and legally binding framework. It further expresses specific commitment to the principles of subsidiarity,

"The Revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility," 50 (1) *Journal of African Law* (2006), pp. 59–71.

119 E.U. Commission, "Factsheet: European Commission Ready to Start Negotiations for a New Ambitious Partnership with 79 Countries in Africa, the Caribbean and the Pacific, Memo 17/5225," June 22, 2018, available at https://eeas.europa.eu/delegations/mali/47131/european-commission-ready-start-negotiations-new-ambitious-partnership-79-countries-africa_ko (retrieved 27 November 2020).

120 EUROPEAID, "Monitoring the Implementation & Results of the CARIFORUM – E.U. E.P.A. Agreement (EUROPEAID/129783/C/SER/multi - Lot 1: Studies and Technical Assistance in All Sectors)," 2014, available at https://trade.ec.europa.eu/doclib/html/152825.htm (retrieved 27 November 2020).

121 European Parliamentary Research Service (E.P.R.S.), *supra* note 117, p. 4.

122 Organisation of African, Caribbean and Pacific States (A.C.P.), "Sipopo Declaration of the 7th Summit of the ACP Heads of State and Government, ACP/28/065/12 (final)," December 14, 2012, available at http://www.acp.int/sites/acpsec.waw.be/files/Final%20ACP2806512%20Rev%208%20Draft_Sipopo_Declaration.pdf (retrieved 27 November 2020).

complementarity and proportionality, and commitment to regional integration organizations in the pursuit of sustainable development.[123]

In light of existing provisions, negotiations between the parties on the achievement of the S.D.G.s and the implementation of the Global Agenda 2030 are universally seen as key priorities.[124] The specific objectives that should underpin a Cotonou partnership agreement with the E.U. from the A.C.P. perspective include, in particular:

a) the adaptation to the Agenda 2030 as the overarching development framework, explicitly incorporating the Addis Ababa Agenda for Action[125] (A.A.A.A.),
b) the Paris Convention on Climate Change,
c) the United Nations Declaration on the Right to Development,
d) continental and regional agendas such as Agenda 2063[126] in Africa, and
e) the deepening and broadening of regional integration in the Caribbean and the Pacific.[127]

On 22 June 2018, the E.U. Council adopted the negotiating mandate for the future agreement between the E.U. and A.C.P. Formal negotiations started by the end of August 2018, as provided by the current Cotonou Agreement.[128] At its annual meeting on 23 and 24 May 2019, the E.U. and the A.C.P.'s Council of Ministers decided[129] to delegate powers to the A.C.P.-E.U.

123 E.U. Commission and High Representative of the Union for Foreign Affairs and Security Policy," Joint Staff Working Document Impact Assessment, accompanying the document Joint Communication to the European Parliament and the Council. A renewed partnership with the countries of Africa, the Caribbean and the Pacific," November 11, 2016, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0380&from=EN (retrieved 27 November 2020), p. 23.

124 E.U. Commission and High Representative of the Union for Foreign Affairs and Security Policy, *supra* note 115, p. 3; European Parliamentary Research Service (E.P.R.S.), *supra* note 117, pp. 4, 7.

125 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda). The final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

126 The African Union Commission, Agenda 2063, "The Africa We Want, A Shared Strategic Framework for Inclusive Growth and Sustainable Development, First Ten-Year Implementation Plan 2014–2023," September 2015, available at http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (retrieved 27 November 2020).

127 A.C.P. Negotiating Mandate for a Post–Cotonou Partnership Agreement with the European Union, adopted on 30 May 2018 by the 107th Session of the A.C.P. Council of Ministers, held in Lomé, Togo, ACP/00/011/18 FINAL, para. 21.

128 Council of the E.U., "EU – African, Caribbean and Pacific Countries Future Partnership: Council Adopts Negotiating Mandate," Press Release 375, 22/06/2018.

129 Council of the E.U., "Cotonou Agreement," 2020, available at https://www.consilium.europa.eu/en/policies/cotonou-agreement/ (retrieved 27 November 2020).

Committee of Ambassadors to adopt transitional measures pending the entry into force of a new A.C.P.-E.U. Partnership Agreement.

Negotiation results are expected for the identified crosscutting themes that the A.C.P. will include in the post-Cotonou Agreement such as:

a) Capacity Building (required by S.D.G. 17, 8, 9),[130]
b) Vulnerability and Resilience Building (required by Samoa Pathway, A.A.A.A., Paris Agreement on Climate Change),[131]
c) Ocean and Seas (required by S.D.G. 14),[132]
d) Climate Change (required by S.D.G. 13),[133]
e) Gender Equality (required by S.D.G. 5),[134]
f) Health (required by S.D.G. 3),[135]
g) Youth and Demographic Dividend (required by S.D.G. 8),[136]
h) Culture and Development,[137] and
i) Peace, Security and Democracy (required by S.D.G. 16).[138]

6.5 Interlinkages for the formation of environmental law

It is without any doubt that the interregional institutions mentioned above have manifested their political will to implement the Global Agenda 2030 and the S.D.G.s even when the provision of sufficient financial aid is lacking, which is the situation as reported by the A.A.A.A. What is interesting here is the question of whether international environmental law can inspire links to be established.[139] The foundation of an interlinkage between the

130 A.C.P. Group, Mandate, *supra* note 122, para. 29.
131 Ibid, para. 31.
132 Ibid, paras. 32–36.
133 Ibid, para. 38.
134 Ibid, para. 40.
135 Ibid, para. 42.
136 Ibid, para. 46.
137 A.C.P. Group, Mandate, *supra* note 122, para. 27.
138 A.C.P. Group, Mandate, *supra* note 122, para. 58.
139 European Commission, "The European Green Deal," (11 December 2019), COM (2019) 640 final: "[T]he Green Deal Is a Response […] to Tackling Climate and Environmental-Related Challenges;" p. 2; U.N. Economic and Social Commission for Asia and the Pacific (E.S.C.A.P.), see Environment and Development Division, August 2018, available at https://www.unescap.org/contact-person/environment-and-development-division (retrieved 18 November 2020); A.S.E.A.N. Agreement on Transboundary Haze Pollution, June 10, 2002, available at https://haze.asean.org/?wpfb_dl=32 (retrieved 18 November 2020); A.S.E.A.N.-E.U. Dialogue on Sustainable Development: "Towards Achieving the Sustainable Development Goals," February 10, 2020, available at https://ec.europa.eu/international-partnerships/news/asean-eu-dialogue-sustainable-development-towards-achieving-sustainable-development-goals_en (retrieved 18 November 2020); see the articles concerning climate change, in *The ASEAN*, Issue 05, September 2020; Tim Strawson et al., "Financing the Sustainable Development Goals in ASEAN," 2018, available at

different topics can be identified in the multifaceted concept of sustainable development itself, especially if one accepts that "the concept of sustainable development has been broadened and deepened over time."[140]

At least seven different dimensions of sustainable development have been counted, and in particular, the dimension of environmental protection[141] seems to be crucial to create connections for the formation of new environmental law or even to broaden and deepen existing regulations and laws. In practice, entanglements come about during convergences of specific outcomes and mostly appear as a convergence of the application of sub-goals and goals of the S.D.G.s. The convergence in the outcome in A.S.E.A.N. and in A.C.P. can be identified on a case-by-case basis when global or interregional indicators have demonstrated a specific outcome of the application of the S.D.G.s in practice. Consequently, "a very important element of the concept of Sustainable Development is the integrated approach of environmental and development concerns."[142]

Connections that point to a broader scheme, namely as to how principles and concepts, in particular those that are encompassed by the S.D.G.s, are building an architecture of international environmental law and to a certain extent, of national law as well.[143] Therefore, interlinkages are by definition convergent expressions of the application of S.D.G.s, regardless of whether they are an application of laws, regulations, or international agreements such as in the A.C.P., or soft goals measured by indicators as it happens in A.S.E.A.N. Furthermore, interlinkages create a powerful expression of the national and international architecture of environmental law based on the S.D.G.s.

All the connections are based on the set of global indicators elaborated by Member States and the U.S.[144] These measurements, with indicators, are of utmost importance for the political will-building process that provides information on whether the goals will be achieved and to which extent. The indicators and their specific outcomes create patterns of applicable environmental regulations that may be clustered together in a group of countries, disclosing areas of similar outcomes. These outcomes, which should be transparent, can

---

https://asean.org/wp-content/uploads/2012/05/Report-on-Financing-SDGs-in-ASEAN1.pdf (retrieved 18 November 2020); Federal Government of Germany, "Policy Guidelines for the Indo-Pacific," September 2020, available at https://rangun.diplo.de/blob/2380824/a27b62057f2d2675ce2bbfc5be01099a/policy-guidelines-summary-data.pdf (retrieved 18 November 2020), p. 12: "Tackling Climate Change and Protecting the Environment"; Paris Agreement, Green Deal and further regional ambitions see African Union (A.U.), available at https://au.int/en/directorates/environment-climate-change-water-land-and-natural-resources (retrieved 18 November 2020).

140 Nico J. Schrijver, "The Evolution of Sustainable Development in International Law: Inception, Meaning and Status," 2 *Hague Academy of International Law* (2008), p. 208.

141 Nico J. Schrijver, *supra* note 140, pp. 208, 216 ff.

142 Ibid.

143 Pierre-Marie Dupuy and Jorge E. Viñuales, *supra* note 3, pp. 58, 62.

144 U.N., E-Handbook on Sustainable Development Goals Indicators, August 25, 2005, available at https://unstats.un.org/wiki/display/SDGeHandbook (retrieved 23 November 2020).

be compared and analyzed against extant national environmental statutes and regulation. The comparison will reveal that many of modern challenges in the environmental field must be solved in a horizontal relationship. One will observe common approaches and common regulations of differing depths and differing scopes of environmental issues covered, by comparing different national systems. One will also likely notice different national laws as well with a lesser coherent content and scope and probably even omissions. The whole process described would fit in an approach of comparative environmental law based on the outcomes of the indicators.[145]

6.6 Conclusion

The U.S. resolution on the Global Agenda 2030 and the 17 S.D.G.s and 169 subgoals are soft law and not legally binding. However, the effect of the S.D.G.s going through the vertical and horizontal legal matrix is quite powerful. The horizontal matrix can be characterized by bilateral or multilateral agreements, which has given birth to the E.U., A.S.E.A.N., the U.S. and derived legal acts in form of hard, soft and informal law from these institutions. The vertical matrix describes the normative impact in a multi-layered international system starting with the U.S. and other international institutions, followed by the E.U., A.U. and others, and then moves to the national level of countries and their transnational reception of law, as created for instance in the field of private law.

Numerous effects of S.D.G.s through adoption in international, interregional, European, national, and transnational law are visible. The voluntary measurement of the outcome of the S.D.G.s by global indicators provides decision makers with a transparent basis and a legitimate basis for political and legal action, or for intentionally undertaken omissions unless corrosive corruption prevents it. The ongoing discussion about indicators in international law provides valuable insights into the development, use and legitimacy of indicators for collecting substantial valid facts upon which to rely for further action. Indicators are not only statistical tools but quite often terms and value-based instruments reflecting a normative core.

For the ten Southeast Asian States, the adoption of the A.S.E.A.N. Charter in 2008 has been one of the most significant developments. A.S.E.A.N. is committed to the realization of the S.D.G.s, although there is room for improvement. The E.U. and A.S.E.A.N., as well as China and A.S.E.A.N., are working on the implementation of the S.D.G.s within A.S.E.A.N. Key issues are the promotion of gender equality and, in particular, the empowerment of women and girls as keys to change things like the promotion of green growth and recycling, as well as environmentally sustainable and climate-resilient cities, sustainable consumption and production, and the fight against climate change.

145 Jorge E. Viñuales, *supra* note 41, pp. 28 ff. to the methods of comparative environmental law.

Bibliography

Alam, Shawkat et al. *International Environmental Law and the Global South*. Cambridge University Press, 2015.

Bronckers, Marco, and Giovanni Gruni. "Improving the Enforcement of Labour Standards in the EU's Free Trade Agreement." *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche*. Eds. D Prévost, I Alexovičová and J Hillebrand Pohl. Hart Publishing, 2018.

Botero, Juan Carlos et al. "Indices and Indicators of Justice, Governance and the Rule of Law: An Overview." 3 (2) *Hague Journal on the Rule of Law* (2011): 153–169.

Cassese, Sabino, and Lorenzo Casini. "Taming Honey Birds? The Regulation of Global Indicators." *SSRN Electronic Journal* (24 January 2012). https://ssrn.com/abstract=1991396

Closa, Carlos, and Lorenzo Casini. *Comparative Regional Integration*. Cambridge University Press, 2016.

Collins, Lynda M. "Sustainable Development Goals and Human Rights: Challenges and Opportunities." *Sustainable Development Goals – Law, Theory and Implementation*. Eds. Duncan French and Louis J. Kotzé. Edward Elgar Publishing, 2018: 66–87.

Cordonier Segger, Marie-Claire. "Sustainable Development in Regional Trade Agreements." *Regional Trade Agreements and the WTO Legal System*. Oxford University Press, 2006: 313.

Cordonier Segger, Marie-Claire, and H. E. Judge C. G. Weeramantry. *Sustainable Development Principles in the Decisions of International Courts and Tribunals*. Routledge, 2017.

Das, Sanchita Basu. *The ASEAN Economic Community and Beyond*. ISEAS–Yusof Ishak Institute, 2017.

Deinla, Imelda. *The Development of the Rule of Law in ASEAN: The State and Regional Integration*. Cambridge University Press, 2017.

Dodds, Felix et al. *Negotiating the Sustainable Development Goals: A Transformational Agenda for an Insecure World*. Routledge, 2017.

Doussis, Emmanuella. "Does International Environmental Law Matter in Sustainable Development?" 28 *Yearbook of International Environmental Law* (2017): 3 ff.

Dupuy, Pierre-Marie, and Jorge E. Viñuales. *International Environmental Law*. Routledge, 2018.

Durán Lima, José E. et al. "Latin America-European Union Cooperation: A Partnership for Development." *Documentos de Proyectos No. 546*, 19 December 2020.

Engle Merry, Sally. *The Quiet Power of Indicators, Measuring Governance, Corruption, and the Rule of Law*. Cambridge University Press, 2015.

French, Duncan, and J. Louis Kotzé. *Sustainable Development Goals, Law, Theory and Implementation*. Edward Elgar Publishing, 2018.

Frydman, Benoit. "From Accuracy to Accountability: Subjecting Global Indicators to the Rule of Law." *International Journal of Law in Context* (2017): 450–464.

Harrison, James et al. "Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda." 18 (4) *World Trade Review* (2018): 1 ff.

Hsieh, Pasha L., and Bryan Mercurio. "ASEAN Law in the New Regional Economic Order: An Introductory Roadmap to the ASEAN Economic Community," in *ASEAN Law in the New Regional Economic Order*. Cambridge University Press: 2019: 12.

Huck, Winfried. "EU und Kuba: Wirtschafts- und Nachhaltigkeitsdimensionen im ersten Political Dialogue and Cooperation Agreement." 7 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2017): 249 ff.

Huck, Winfried. "The Integration of Sustainable Development Goals into the Raw Materials Sector." 7 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2018): 266.

Huck, Winfried, and Claudia Kurkin, "The UN Sustainable Development Goals (SDGs) in the Transnational Multilevel System," (2) *Heidelberg Journal of International Law (HJIL)/Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2018): 423.

Huck, Winfried. "Measuring Sustainable Development Goals (SDGs) with Indicators: Is Legitimacy Lacking?" (31 January 2019). Forthcoming, M. Iovane, F. Palombino, D. Amoroso, G. Zarra, The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry, https://ssrn.com/abstract=3360935 or http://dx.doi.org/10.2139/ssrn.3360935.

Huck, Winfried. "Informal International Law-Making in the ASEAN: Consensus, Informality, and Accountability." 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2020): 101–138.

Huck, Winfried. "The EU and the Global Agenda 2030: Reflection, Strategy and Legal Implementation." 1 *C-EENRG Working Papers* (2020): 1–26.

Hush, Emily Rebecca. "Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements." 43 *Columbia Journal for International Environmental Law* (2018): 93 ff.

Infantino, Marta. "Global Indicators," in *Research Handbook on Global Administrative Law*. Edward Elgar Publishing, 2017: 348 ff.

Janoušková, Svatava et al. "Global SDGs Assessments: Helping or Confusing Indicators?" 10 (5) *Sustainability. MDPI, Open Access Journal* (2018): 1–14.

Jing Xi, Gloria Loo. "ASEAN and Janus-faced Constitutionalism: The Indonesian Case." 17 (1) *International Journal of Constitutional Law* (2019): 177 ff.

Junker, Kirk W. "Why Compare? The Biological, Cognitive, and Social Functions of Comparison for the Human," in *Environmental Law Across Cultures: Comparisons for Practice*. Earthscan-Routledge, 2020.

Kaltenborn, Markus et al. *Sustainable Development Goals and Human Rights*. Springer International Publishing, 2020.

Kamau, Macharia et al. *Transforming Multilateral Diplomacy: The Inside Story of the SDGs*. Taylor & Francis Ltd., 2018.

Kanie, Norichika, and Frank Biermann. *Governing through Goals: Sustainable Development Goals as Governance Innovation*. MIT Press, 2017.

Kenner, Jeff. "Labour Clauses in EU Preferential Trade Agreements – An Analysis of the Cotonou Partnership Agreement," in *Preferential Trade Agreements: A Law and Economics Analysis*. Eds. Kyle W. Bagwell and Petros C. Mavroidis. Cambridge University Press, 2011: 180–209.

Kheng-Lian, Koh et al. *ASEAN Environmental Legal Integration, Sustainable Goals?* Cambridge University Press, 2016.

Kingah, Stephen. "The Revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility." 50 (1) *Journal of African Law* (2006): 59–71.

Manea, Maria-Gabriela. "The Institutional Dimensions of EU-ASEAN/ASEAN Plus Three Interregional Relations," in *The Palgrave Handbook of EU-Asia Relations*. Eds. Emil Kirchner et al. Palgrave Macmillan, 2013: 313–329.

Morse, Stephen. "Analysing the Use of Sustainability Indicators," in *The Palgrave Handbook of Indicators in Global Governance*. Eds. Debora Valentina Malito et al. Palgrave Macmillan, 2018.

Morrow, Karen. "Gender and the SDGs," in *Sustainable Development Goals – Law, Theory and Implementation*. Eds. Duncan French and Louis J. Kotzé. Edward Elgar Publishing, 2018

Pelkmans, Jacques. *The ASEAN Economic Community: A Conceptual Approach*. Cambridge University Press, 2016.

Petersmann, Ernst Ulrich. *Multilevel Constitutionalism for Multilevel Governance of Public Goods*. Bloomsbury USA, 2017.

Restrepo Amariles, David. "Supping with the Devil? Indicators and the Rise of Managerial Rationality in Law." 13 (4) *International Journal of Law in Context* (2017): 468.

Roberts, Alicia Elias et al. *EU and CARICOM. Dilemmas versus Opportunities on Development, Law and Economics*. Routledge, 2020.

Sanahuja, José Antonio. "The EU and CELAC: Reinvigorating a Strategic Partnership." (19 December 2020). https://eulacfoundation.org/en/system/files/Published_versionEN.pdf.

Scholtz, Werner, and Michelle Barnard. "The Environment and the Sustainable Development Goals: 'We Are on a Road to Nowhere.'" *Sustainable Development Goals – Law, Theory and Implementation*. Eds. Duncan French and Louis J. Kotzé. Edward Elgar Publishing, 2018: 248.

Schrijver, Nico J. "The Evolution of Sustainable Development in International Law: Inception, Meaning and Status." 2 *Hague Academy of International Law* (2008): 208.

Seah, Daniel. "I. The ASEAN Charter." 58 (1) *International and Comparative Law Quarterly* (2009): 197.

Seatzu, Francesco. "The Caribbean Community (CARICOM)." *Latin American and Caribbean International Institutional Law* (2015): 219 ff.

Siems, Mathias, and David Nelken. "Global Social Indicators and the Concept of Legitimacy." 13 (4) *International Journal of Law in Context* (2017): 434 ff.

Vanoverbeke, Dimitri. "Are We Talking the Same Language, The Sociohistorical Context of Global Constitutionalism in East Asia as Seen from Japan's Experiences," in *Global Constitutionalism from European and East Asian Perspectives*. Eds. Takao Suami et al. Cambridge University Press, 2018: 221.

Venzke, Ingo, and Li-ann Thio. *The Internal Effects of ASEAN External Relations*. Cambridge University Press, 2016.

Viñuales, Jorge E. "Comparative Environmental Law: Structuring a Field," in *The Oxford Handbook of Comparative Environmental Law*. Eds. Emma Lees and Jorge E. Viñuales. Oxford University Press, 2019: 28 ff.

von Bogdandy, Armin, and Matthias Goldmann. "Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA)," in *Governance by Indicators: Global Power through Classification and Rankings*. Eds. Kevin Davis et al. Oxford University Press, 2015: 52 ff.

Wong, Reuben. "Model Power or Reference Point? The EU and the ASEAN Charter." 25 (10) *Cambridge Review of International Affairs* (2012): 669 ff.

7 The implementation of the Paris Agreement through tax law

Examples from South Africa, India, China, and Brazil

Mrinalini Shinde[1]

7.1 Introduction

In December of 2015, Parties to the United Nations Framework Convention on Climate Change (U.N.F.C.C.C.) adopted the Paris Agreement. One of the goals of the Paris Agreement is "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[2] Under Article 4, the Paris Agreement states that while developed country Parties "should continue taking the lead by undertaking economy-wide absolute emission reduction targets," those Parties which are developing countries "should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."[3]

This characterization of developed and developing countries in the Paris Agreement is a graduation from the terminology of Annex I and non-Annex I countries that was used in the U.N.F.C.C.C. parent convention. Under the Paris Agreement, developing countries increase their ambition over time, independent of whether they subsequently are classified Annex I countries.[4] When the goals of the Paris Agreement are read together with the means that it mentions, such as economy-wide emission reduction targets, it is evident that there is tremendous scope for Parties to deploy a variety of legislative and

1 Mrinalini Shinde is an Indian lawyer, and researcher in comparative environmental law at the Chair of U.S.-American Law, and Environmental Law Centre at the University of Cologne in Germany.

2 Art. 2. 1.(a), Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 ("Paris Agreement").

3 Art. 4.4, Paris Agreement.

4 Pieter Pauw et al., "Subtle Differentiation of Countries' Responsibilities under the Paris Agreement," 5 (86) *Palgrave Communications,* July 30, 2019, available at https://doi.org/10.1057/s41599-019-0298-6 (revised 15 December 2020).

DOI: 10.4324/9781003160236-10

executive reform to realistically have the opportunity to achieve the targets they may set, and fiscal measures including carbon taxes can offer a pathway towards emission reduction.

Economic experts have made a strong case for the role of carbon pricing in the reduction of carbon emissions.[5] This could be achieved through creating a fixed price on carbon through the introduction of carbon taxes on fossil fuels that exceeds the cost of curbing emissions; or through the introduction of cap-and-trade mechanisms such as the European Union's Emission Trading System (E.U. E.T.S.) where the limited number of emission permits are traded among emitters.[6] The implementation of carbon taxes can be strengthened through the removal of exemptions, by increasing rates to maintain revenue, or by increasing the scope and sectors of emissions that come within their purview.[7]

This chapter will analyze the value of carbon taxes in the reduction of emissions, including observations from the data on public support for carbon taxes, and evaluate whether taxes can be deployed in a manner that ensures revenue for environmental protection and renewables infrastructure.

The chapter then goes on to shed light on the five economies—Brazil, Russia, India, China and South Africa—that are organized together under the banner of "B.R.I.C.S.,"[8] and their respective approaches in using taxes to achieve their nationally determined contributions (N.D.C.) under the Paris Agreement. The discussion on international climate change cooperation often focuses on the transfer of technology or finance flows between the Global North and Global South, and the B.R.I.C.S. coalition provides an insight into South-South cooperation on climate action. The South-South cooperation under the B.R.I.C.S.'s umbrella has led to further deepening of cooperation across the Global South, according to the United Nations Office for South-South Cooperation when "member countries cooperate within the parameters of this form of cooperation, namely mutual benefit, non-interference and respect to the different national priorities—equality and

5 Alex Bowen, "The Case for Carbon Pricing," The Grantham Research Institute in Climate Change and the Environment & The Centre for Climate Change Economics and Policy, *Policy Brief,* 2011, available at https://www.cccep.ac.uk/wp-content/uploads/2015/09/PB_case-carbon-pricing_Bowen.pdf (revised 15 December 2020); See Easwaran Narassimhan et al., "Carbon Pricing in Practice: A Review of Existing Emissions Trading Systems," 18 (8) *Climate Policy* (2018), pp. 967, 984.

6 Hugh William Compston and Ian Bailey, "Climate Policy Strength Compared: China, the U.S., the E.U., India, Russia, and Japan," 16 (2) *Climate Policy* (2016), p. 148.

7 Ibid, p. 149.

8 "B.R.I.C.S. is not an ordinary international intergovernmental organization. It is not based on a constituent treaty, has no headquarters, secretariat, budget, etc. B.R.I.C.S. is an advanced form of institutional international cooperation and is on a par with the Group of Eight, the Group of Seventy-Seven and the Arctic Council." Aslan Abashidze et al., "Legal Status of BRICS and Some Trends of International Cooperation," 9 (36) *Indian Journal of Science and Technology* (2016), DOI: 10.17485/ijst/2016/v9i36/102004.

non-conditionality."[9] Research demonstrates that the South-South cooperation offered by the B.R.I.C.S. countries has offered an alternative model of international development cooperation that has been labelled the "B.R.I.C.S. effect," described as "an effect that ultimately destabilizes established positions and interaction patterns between agents, and even between traditional donors and recipients."[10]

The B.R.I.C.S. nations, despite their association, differ greatly in terms of their cultures, histories, languages, and governmental structures. The one feature that they *prima facie* have in common is their developing economies, exhibiting economic growth greatly exceeding industrialized nations.[11] This chapter will develop the findings regarding carbon tax implementation by using the B.R.I.C.S. nations as a sample, highlighting their policy goals on reduction of emissions, both as members of B.R.I.C.S. and as Parties to the Paris Agreement; followed by a discussion on the kinds of tax legislation and reform that have been enacted in the five jurisdictions.

7.2 Taxation and climate change

As with any regulatory decisions, especially fiscal provisions that involve multiple trade-offs, carbon taxes have both positive and negative effects. Positive effects include the generation of state revenue for reinvestment into environmental spending, and the reduction of emissions by emitters so as to cut their carbon taxes. Negative impacts include lowering incomes among the lowest earners through increased utility prices.[12] Analysis of fiscal interactions within climate policy reveals that, with environmental benefits counted, raising new state revenues through emissions pricing is the most efficient solution, be it through a carbon tax or cap-and-trade system with auctioned allowances, as long as the requirement of generating state revenue is not too great or burdensome on the emitters' income.[13]

There is significant agreement among economists that climate change should be treated as a negative externality and that greenhouse gases

9 United Nations Office for South-South Cooperation, "UN Envoy: BRICS Can Take Lead on Development," 2019, available at https://www.unsouthsouth.org/2019/11/14/un-envoy-brics-can-take-lead-on-development/ (retrieved 18 December 2020).

10 Geovana Zoccal Gomes and Paulo Esteves, "The BRICS Effect: Impacts of South–South Cooperation in the Social Field of International Development Cooperation," 49 (3) *IDS Bulletin* (2018), available at https://bulletin.ids.ac.uk/index.php/idsbo/article/view/2984/Online%20article (retrieved 18 December 2020).

11 Zakarya Ghouali et al., "Factors Affecting CO_2 Emissions in the BRICS Countries: A Panel Data Analysis," 26 *Procedia Economic and Finance* (2015), p. 114.

12 Craig McLaughlin et al., "Accounting Society's Acceptability of Carbon Taxes: Expectations and Reality," 131 *Energy Policy* (2019), p. 309.

13 Lawrence H. Goulder, "Climate Change Policy's Interactions with the Tax System," 40 *Energy Economics* (2013), p. S10.

(G.H.G.s) should be priced—or more specifically, taxed[14]—so that the social cost of carbon is calculated based on the incremental impact of emitting an additional ton of carbon dioxide (or the benefit of slightly reduced emissions), and a Pigouvian tax is applied according to this social cost of carbon, thus imposing a tax on G.H.G.s in accordance with the maximization of welfare.[15] Taxes on G.H.G.s have been criticized on one hand as being insufficient due to failures to account for harms associated with loss of life or loss of species, and on the other hand for not accounting for the health and efficiency impact of the green economy.[16] Revenue generated from the tax can then be directed towards innovation in green energy.[17] The imposition of carbon taxes can lead to adoption of the cheapest emission mitigation strategies, and allow for greater ease of administration, as compared to cap and trade schemes.[18]

However, proponents of cap and trade emission auction systems argue that carbon taxes are an inferior method of generating revenue because environmental spending does not offset the distorting effects of a carbon tax on labor supply, and that the imposition of carbon taxes must be accompanied by reduced income tax.[19] This is especially relevant in emerging economies where tax evasion rates are generally high, but where carbon taxes in particular have been found to have lower rates of evasion than income tax, thereby allowing governments to raise revenue and reduce emissions more efficiently.[20]

Due to the inherent risk associated with irreversible climate tipping points in the future,[21] and the potential damages arising at these tipping points, even the purest market-based approach would logically require increased carbon prices, independent of the social, political, or legal case for reducing G.H.G.s, and without accounting for the climate change mitigation benefits, such as enhanced energy security and cleaner air.[22] Carbon taxes are also found to be "superior to the capital tax with respect to social welfare in the resource-importing countries" owing to the ownership of fossil resources resulting in a scarcity rent, which capital does not attract. The imposition of

14 See Richard S. J. Tol, "The Economic Impacts of Climate Change," 12 *Review of Environmental Economics and Policy* (2018), p. 4.

15 Ibid, p. 13.

16 See Felix R. FitzRoy and Elissaios Papyrakis, *An Introduction to Climate Change Economics and Policy*, (London: Routledge, 2016), p. 2.

17 Ibid.

18 Gabriela Steier, "The Carbon Tax Vacuum and the Debate about Climate Change Impacts: Emission Taxation of Commodity Crop Production in Food System Regulation," 35 (2) *Pace Environmental Law Review* (2017), p. 356.

19 Yoram Margalioth, "Tax Policy Analysis of Climate Change," 64 *Tax Law Review* (2010), pp. 88–89.

20 M. Burke et al., "Opportunities for Advances in Climate Change Economics," 352 (6283) *Science* (2016), p. 293.

21 See Timothy M. Lento et al., "Climate Tipping Points-Too Risky to Bet Against," 57 (7784) *Nature* (2019), pp. 592–595.

22 See Thomas S. Lontzek et al., "Stochastic Integrated Assessment of Climate Tipping Points Indicates the Need for Strict Climate Policy," 5 *Nature Climate Change* (2015), p. 444.

carbon taxes on fossil fuels delays extraction, reducing overall emissions.[23] Along with the climate change mitigation that taxation can achieve, there is a very strong case for taxation to be included as part of adaptation efforts, using the polluter-pays principle as a guide. Ideally, taxes to promote adaptation would be applied retroactively for past emissions, but since that is not a feasible approach,[24] current and future emissions are taxed, and their revenue is directed towards adaptation. Thus, there is scope for building adaptation endowments in order to address the exponential needs of adaptation.[25]

Carbon pricing should be based on the revenue it can generate. Since the taxes are intended to reduce carbon emissions, the state revenue will also be reduced if the tax is successfully deployed. The reduced state revenue can be counteracted by increasing carbon tax rates, as overall emissions decline over the years. Fiscal reforms including carbon taxes can be combined with lowered labor costs, lower income taxes, and increased state revenue used to improve public infrastructure and decrease public debt, and with direct transfers to households as dividends.[26]

Carbon price signals are stronger in road transport, mostly because of relatively high excise taxes on fuel. A review of global taxation of energy use in 2019 by the Organization for Economic Cooperation and Development (O.E.C.D.) revealed that since 2015, when Parties adopted the Paris Agreement, the "average effective carbon tax rates on non-road emissions increased by more than €10 per ton of CO_2 in only three countries: Denmark, the Netherlands, and Switzerland" and that carbon price signals were more prominent in the road transportation sector owing to relatively high excise taxes on fuel. However, the emissions tax does not extend to the international maritime and air transport sectors, even though the fuels used in those sectors are sometimes taxed at a lower-end price, and are often not subject to emission trading systems.[27]

In its Assessment Report in 2014, prior to the adoption of the Paris Agreement, the Intergovernmental Panel on Climate Change (I.P.C.C.) when discussing the scope for the promotion of cleaner and more efficient vehicles, stated that "sliding-scale vehicle tax systems, or 'feebate' systems with a variable tax based on fuel economy or CO_2 emissions may be needed."[28] However, it has been found that "consumers respond more strongly to changes to the carbon tax rate than equivalent market-driven gasoline

23 Max Franks et al., "Why Finance Ministers Favor Carbon Taxes, Even If They Do Not Take Climate Change into Account," 68 *Environmental and Resource Economics* (2017), p. 463.

24 Janet E. Milne, "Storms Ahead: Climate Change Adaptation Calls for Resilient Funding," 39 *Vermont Law Review* (2015), p. 848.

25 Ibid, p. 849.

26 O.E.C.D., "Taxing Energy Use," October 22, 2019, available at https://www.oecd.org/tax/tax-policy/brochure-taxing-energy-use-2019.pdf (retrieved 10 December 2020), p. 9.

27 Ibid, pp. 4–5.

28 Ralph Sims et al., "Chapter 8: Transport," in *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report (AR5) of the Intergovernmental Panel on Climate Change*, 2014, available at https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_full.pdf (retrieved 10 December 2020).

price changes," which has implications on whether carbon pricing should be factored into the sale price of fuel, or should be deployed as an increase in a carbon tax rate at the consumer end.[29]

The imposition of taxes and pricing of carbon can attract resistance from the public, and this resistance can prove to be a major hindrance in the use of taxation towards reducing G.H.G.s. Increased pricing of carbon also has a directly proportional impact on clean innovation, including in the energy and transportation sectors. Car manufacturers, for example, have demonstrated an increase in innovation towards cleaner technology when confronted with greater taxes on fuels.[30] Research shows that the perception among the public towards accepting carbon taxes, is dependent on the perceived environmental effectiveness and expectation of local co-benefits, making it essential that primary and ancillary benefits of the taxes are communicated clearly to the public, and prioritize environmental spending with revenue generated from carbon taxes.[31]

Canadian researchers have found that the effectiveness of carbon taxes can be enhanced by a number of different efforts including "closer monitoring of user behavior, further increases of the tax over time, continuous consideration of social impact fairness, ongoing public consultation, and pursuing efforts for a more elaborate system of nested enterprises and interjurisdictional cooperation"[32] There is also a case to be made for combining carbon tax implementation with subsidies for research and development to nudge innovation towards low carbon technologies, since such combined policies lead to carbon intensive industries reducing their emissions to respond to higher rates of carbon tax.[33] To improve the perception of carbon taxes, carbon tax state revenues can also be distributed as carbon dividends, which helps decrease income inequality. Researchers found that in the United States, distributing "dividends increases the income of 98% of people in the poorest decile."[34] It is crucial therefore that carbon tax imposition be accompanied by clear state revenue allocation policy, although the choices of allocation will continue to be "politically salient."[35]

29 Julius Andersson, "Cars, Carbon Taxes and CO_2, Emissions," *Centre for Climate Change Economics and Policy Working Paper No. 238, Grantham Research Institute on Climate Change and the Environment Working Paper No. 212* (2017).

30 See Andrea Baranzini et al., "Carbon Pricing in Climate Policy: Seven Reasons, Complementary Instruments, and Political Economy Considerations," 8 (4) *Wires Climate Change* (2017), p. 3.

31 Andrea Baranzini and Stefano Carattini, "Effectiveness, Earmarking and Labeling: Testing the Acceptability of Carbon Taxes with Survey Data," 19 *Environmental Economics and Policy Studies* (2017), p. 214.

32 Karine Lacroix and Garrett Richards, "An Alternative Policy Evaluation of the British Columbia Carbon Tax Broadening the Application of Elinor Ostrom's Design Principles for Managing Common-Pool Resources," 20 (2) *Ecology and Society* (2015), pp. 38 ff.

33 Jong-Soo Lim and Yong-Gun Kim, "Combining Carbon Tax and R&D Subsidy for Climate Change Mitigation," 34 (3) *Energy Economics* (2012), p. S501.

34 Anders Fremstada and Mark Paul, "The Impact of a Carbon Tax on Inequality," 163 *Ecological Economics* (2019), p. 96.

35 Jeremy Carl and David Fedor, "Tracking Global Carbon Revenues: A Survey of Carbon Taxes Versus Cap-and-trade in the Real World," 96 *Energy Policy* (2016), p. 60.

The introduction of carbon pricing and taxation must also take into account unique geographic and demographic indicators, as opposed to one-stop solutions, owing to the variance in the effects of carbon pricing on different sections of the population. Predictably, analysis of survey data from the National Sample Survey Office (N.S.S.O.) in India shows that carbon taxes negatively affect lower-expenditure households in greater proportion than the economic elite, and affect rural households more severely than urban households.[36] Households depending on "coal, liquefied petroleum gas (L.P.G.), kerosene, firewood and dung cake for cooking" display strong regressivity by carbon pricing, whereas the use of petrol and diesel in transportation display progressivity. The authors suggest that "regressivity of carbon tax should be taken into account by way of targeted revenue recycling measures like lump-sum transfers among poor households and cut in other distortionary taxes."[37]

Research also suggests that public support for carbon taxes could be established if global carbon tax systems were harmonized, and a global tax system could be created. The researchers surveyed citizens in Australia, India, South Africa, the United Kingdom, and the United States, who were questioned on different methods of carbon taxation to gauge their support. In the experiment, three designs received over 50% approval, namely "lowering income taxes, redistributing revenues domestically to each citizen, and earmarking funds for mitigation projects in all countries." The researchers suggest that an international climate fund that generates revenue from global carbon taxes and that allocates dividends globally and not just to developing or emerging economies, might ensure public support, and that a global system of harmonized taxes where countries retain sovereignty over revenue allocation would be more likely achievable, as compared to a single global tax.[38] In light of these findings regarding the efficacy of carbon taxation, the next section will focus on how the five B.R.I.C.S. economies have expressed their goals towards reduction of emissions under the Paris Agreement, and as members of the B.R.I.C.S. group.

7.3 Focus: B.R.I.C.S. economies and climate change

The five B.R.I.C.S. nations are not demographically, racially, socially, economically, or politically similar. Historically, they have been part of different regional and global pressure groups, and there is little homogeneity among them as a group of nations. They do not necessarily act as a unified negotiating bloc in international fora, including at the international climate negotiations. However, except for Russia, it must be noted that the B.R.I.C.S. nations are

36 Aaqib Ahmad Bhat and Prajna Paramita Mishra, "Are Carbon Taxes Regressive in India? Evidence from NSSO Data," 67 (1–2) *The Indian Economic Journal* (August 24, 2020), pp. 30–44.

37 Ibid.

38 Stefano Carattini et al., "How to Win Public Support for a Global Carbon Tax," January 16, 2019, available at https://www.nature.com/articles/d41586-019-00124-x (retrieved 2 October 2020).

excluded from Annex I of the U.N.F.C.C.C. (industrialized countries and those with economies in transition); and all B.R.I.C.S. countries are excluded from Annex II of the U.N.F.C.C.C. (countries "required to provide financial resources to enable developing countries to undertake emissions reduction activities under the Convention and to help them adapt to adverse effects of climate change").[39] However, India, China, South Africa, and Brazil are part of the Group of seventy-seven countries and China (G77 and China) through which developing countries work to take unified negotiating positions across the United Nations system. However, there can be divergences among the group from smaller groups within it such as the African Group, the Small Island Developing States, and the group of Least Developed Countries.[40] The B.R.I.C.S. group has often taken unified positions within the U.N.F.C.C.C. negotiations.[41] Despite these differences, it is true that the B.R.I.C.S. nations did come together to form the B.R.I.C.S. group, given their similar status as emerging economies, and their collective influence on the global economy, making them a non-random and self-selected group of nations, outside of the existing negotiating blocks or regional groups within international fora.

Despite the evident lack of similarities and unifiers for the B.R.I.C.S. group, this chapter focuses on these nations for two important reasons: First these five countries together contribute 24.07% of the global G.D.P. as of 2019.[42] Second, they cumulatively contribute to 44.44% of carbon dioxide (CO_2) emissions as of 2019[43] and 38.66% of global G.H.G. emissions as of 2016.[44] The countries' respective G.D.P., CO_2 emissions, and G.H.G. emissions are compiled in Table 7.1. This contribution both to the global production process and global G.H.G. emissions makes the B.R.I.C.S. economies an extremely relevant group to study when exploring tax relief and reforms towards emissions reduction, given the potential impact that decarbonization of these economies will have on global emissions as well as on global economic growth.

39 U.N. Climate Change, "Parties & Observers," available at https://unfccc.int/parties-observers (retrieved 18 December 2020).

40 U.N. Climate Change, "Party Groupings," available at https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/parties/party-groupings (retrieved 18 December 2020).

41 Deborah Davenport, "BRICs in the Global Climate Regime: Rapidly Industrializing Countries and International Climate Negotiations," in *Feeling the Heat. The Politics of Climate Policy in Rapidly Industrializing Countries*, (Basingstoke: Palgrave Macmillan, 2012), pp. 38–56.

42 Data extracted from the World Bank, "GDP: Current US$," 2019, available at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD (retrieved 18 December 2020).

43 Data extracted from the Emission Database for Global Atmospheric Research (E.D.G.A.R.), M. Crippa et al., "Fossil CO_2 Emissions of All World Countries – 2020 Report," *EUR 30358 EN, Publications Office of the European Union, Luxembourg,* 2020, available at https://edgar.jrc.ec.europa.eu/overview.php?v=booklet2020 (retrieved 21 December 2020).

44 Data extracted from the Climate Analysis Indicators Tool (C.A.I.T.), Climate Watch, available at https://www.climatewatchdata.org/ghg-emissions (retrieved 18 December 2020).

Table 7.1 B.R.I.C.S. data profiles: G.D.P. and G.H.G. emissions[45]

Country/Group	*G.D.P. in 2019 (US$trillion)*	*CO_2 Emissions in 2019 ($MtCO_2$)*	*G.H.G. Emissions in 2016 ($MtCO_2e$)*
Brazil	1.84	478.15	1 379.38
Russian Federation	1.70	1,792.02	2 391.38
India	2.88	2,597.36	3 235.66
China	14.34	11,535.20	11 576.87
South Africa	3.51	494.86	497.39
Total (B.R.I.C.S.)	**21.11**	**16,897.59**	**19 080.68**
World	**87.70**	**38,016.57**	**49 358.03**

Like Europe or North America, given the size of their economies and the volume of their carbon emissions, regulatory decisions within the B.R.I.C.S. countries not only affect their resident populations, but also have a tremendous impact on global carbon emissions. The adverse impacts of these emissions therefore affects the global population.[46] Moreover, given that the energy sector is the largest source of carbon emissions across all five B.R.I.C.S. nations, understanding the respective taxation approaches within the energy sector among B.R.I.C.S. nations is an important field of inquiry in the study of carbon taxes.[47]

This section seeks to highlight how the B.R.I.C.S. economies have historically discussed climate change as one of its core areas of focus, through consistent commitments towards climate action as a group, as evidenced through the collective declarations and statements issued by the B.R.I.C.S. leaders during their annual summits, starting from the very inception of the group.

In their first-ever joint statement in 2009, leaders of Brazil, Russia, India, and China declared their support for "international cooperation in the field of energy efficiency" and declared their readiness "for a constructive dialogue on how to deal with climate change based on the principle of common but differentiated responsibility, given the need to combine measures to protect the climate with steps to fulfil [their] socio-economic development tasks."[48] In the following summit in 2010, the joint statement acknowledged that "climate change [was] a serious threat which require[d] strengthened

45 Data in the table extracted from World Bank, *supra* note 42; Emission Database for Global Atmospheric Research (E.D.G.A.R.), *supra* note 43; and the Climate Analysis Indicators Tool (C.A.I.T.), *supra* note 44.

46 Najim Azahaf and Daniel Schraad-Tischler, "Governance Capacities in the BRICS-Sustainable Governance Indicators," 2012, available at https://www.sgi-network.org/docs/studies/Governance_Capacities_in_the_BRICS.pdf (retrieved 18 December 2020).

47 Christian Downie and Marc Williams, "After the Paris Agreement: What Role for the BRICS in Global Climate Governance?," 9(3) *Global Policy* (2018), p. 398.

48 B.R.I.C. Countries "Joint Statement of the BRIC Countries Leaders at Yekaterinburg, Russia," June 16, 2009, available at http://brics2016.gov.in/upload/files/document/57566ee059e181stdec.pdf (retrieved 18 December 2020), Nr. 9.

global action" and committed themselves to promote the 16th COP to the U.N.F.C.C.C. in Cancun "to achieve a comprehensive, balanced and binding result to strengthen the implementation of the Convention and the Protocol." The statement declared the belief "that the Convention and the Protocol provide the framework for international negotiations on climate change." The statement went on to reiterate the importance of the principles of equity and common but differentiated responsibilities in the negotiations to be undertaken that year in Cancun, Mexico.[49]

In 2011, in Hainan, B.R.I.C.S. leaders expressed their support for "the development and use of renewable energy resources" and recognized the importance of renewable energy in addressing climate change, including cooperation and exchange of information towards their development.[50] All the B.R.I.C.S. leaders expressed their support for the Cancun Agreement[51] and their willingness to make efforts towards "a successful conclusion to the negotiations at the Durban Conference applying the mandate of the Bali Roadmap and in line with the principle of equity and common but differentiated responsibilities."[52]

At the following summit conducted in New Delhi in 2012, B.R.I.C.S. leaders welcomed the significant outcomes from the 17th Conference of Parties to the U.N.F.C.C.C. hosted in Durban the previous year, and expressed their readiness "to work with the international community to implement its decisions in accordance with the principles of equity and common but

49 B.R.I.C. Information Centre, "2nd BRIC Summit of Heads of State and Government: Joint Statement, Brasília," April 15, 2010, available at http://www.brics.utoronto.ca/docs/100415-leaders.html (retrieved 18 December 2020), Nr. 22.

50 B.R.I.C.S. Leader Meeting, "Sanya Declaration, Sanya, Hainan, China," April 14, 2011, available at https://www.brics2018.org.za/sites/default/files/documents/Sanya%20Declaration.pdf (retrieved 18 December 2020), Nr. 18.

51 The Cancun Agreements are a set of decisions agreed upon by the Conference of Parties to the U.N.F.C.C.C. and the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol in 2010 in Cancun, Mexico. The decision included commitment "to a maximum temperature rise of 2 degrees Celsius above pre-industrial levels, and to consider lowering that maximum to 1.5 degrees in the near future; to make fully operational by 2012 a technology mechanism to boost the innovation, development and spread of new climate-friendly technologies; to establish a Green Climate Fund to provide financing to projects, programs, policies and other activities in developing countries via thematic funding windows; on the Cancun Adaptation Framework, which included setting up an Adaptation Committee to promote the implementation of stronger, cohesive action on adaptation." U.N. Climate Change, "Cancún Climate Change Conference - November 2010," available at https://unfccc.int/process-and-meetings/conferences/past-conferences/cancun-climate-change-conference-november-2010/cancun-climate-change-conference-november-2010-0 (retrieved 18 December 2020).

52 B.R.I.C.S. Leader Meeting, "Sanya Declaration, Sanya, Hainan, China," April 14, 2011, available at https://www.brics2018.org.za/sites/default/files/documents/Sanya%20Declaration.pdf (retrieved 18 December 2020), Nr. 22.

differentiated responsibilities and respective capabilities."[53] Importantly, the statement emphasized the B.R.I.C.S.' commitment to global effort to address climate change, "through sustainable and inclusive growth and not by capping development" and empathized that developed Party countries to the U.N.F.C.C.C. "provide enhanced financial, technology and capacity building support for the preparation and implementation of nationally appropriate mitigation actions of developing countries."[54]

In 2013, the B.R.I.C.S. summit declaration included a call to all Parties of the U.N.F.C.C.C.:

> to build on the decisions adopted in COP18/CMP8 in Doha, with a view to reaching a successful conclusion by 2015, of negotiations on the development of a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, guided by its principles and provisions.[55]

This call to all countries to come together to reach a successful conclusion of negotiations in 2015 on another legal instrument with legal force under the U.N.F.C.C.C. was further emphasized in the declaration by B.R.I.C.S. leaders at the summit in 2014, while stressing the importance of "the principle of common but differentiated responsibilities and respective capabilities."[56] In 2015, too, the declaration at the B.R.I.C.S. summit expressed "readiness to address climate change in a global context and at the national level and to achieve a comprehensive, effective and equitable agreement under the United Nations Framework Convention on Climate Change."[57]

In 2016, leaders at the B.R.I.C.S. summit in Goa, India, welcomed the adoption of the Paris Agreement and emphasized that the Paris Agreement reaffirmed the principles of equity and common but differentiated responsibilities and respective capabilities, in light of different national circumstances (C.B.D.R.-R.C.).[58] They recognized the significance of nuclear energy in

53 Fourth B.R.I.C.S. Summit, "Delhi Declaration, New Delhi," March 29, 2012, available at https://www.brics2018.org.za/sites/default/files/documents/Delhi%20Declaration.pdf (retrieved 18 December 2020).

54 Ibid.

55 Fifth B.R.I.C.S. Summit, "eThekwini Declaration, Durban," March 27, 2013, available at https://www.brics2018.org.za/sites/default/files/documents/eThekwini%20Declaration.pdf (retrieved 18 December 2020), Nr. 37.

56 Sixth B.R.I.C.S. Summit, "Fortaleza Declaration," July 15, 2014, available at https://www.brics2018.org.za/sites/default/files/documents/Fortaleza%20Declaration.pdf (retrieved 18 December 2020), Nr. 52.

57 Seventh B.R.I.C.S. Summit, "VII BRICS Summit Ufa Declaration, Ufa, the Russian Federation," July 9, 2015, available at http://www.brics.utoronto.ca/docs/150709-ufa-declaration_en.pdf (retrieved 18 December 2020), Nr. 67.

58 Eight B.R.I.C.S. Summit, "Goa Declaration," October 16, 2016, available at https://www.brics2018.org.za/sites/default/files/documents/Goa%20Declaration.pdf (retrieved 18 December 2020), Nr. 92.

reducing emissions and meeting the goals of the Paris Agreement, calling for "predictability in accessing technology and finance for expansion of civil nuclear energy capacity which would contribute to the sustainable development of B.R.I.C.S. countries."[59] The declaration also supported greater use of natural gas as a clean fuel in achieving emission goals of the Paris Agreement.[60]

At the B.R.I.C.S. summit in 2017, the declaration included a commitment to "further promote green development and low-carbon economy, in the context of sustainable development and poverty eradication, enhance B.R.I.C.S. cooperation on climate change and expand green financing," and called for countries to fully implement the Paris Agreement, urging "developed countries to provide financial, technological and capacity-building support to developing countries to enhance their capability in mitigation and adaptation."[61] In 2018, the B.R.I.C.S. leaders welcomed the finalization of the Paris Agreement Work Programme, and repeated the previous year's call to countries regarding implementation of the Paris Agreement and mobilization of financial and other support.[62]

At the B.R.I.C.S. summit held in 2019, the declaration echoed previous years' commitment to the implementation of the Paris Agreement with focus on the C.B.D.R.-R.C. and a repeated call to developed country Parties to "scale up the provision of financial, technological and capacity-building assistance to developing countries to support mitigation and adaptation action," in an important development, the declaration stated that leaders "expected that the first replenishment of the Green Climate Fund (G.C.F.) by the end of 2019 will significantly exceed the initial resource mobilization, ensuring that financial contributions by donors match the ambition, needs and priorities of developing countries."[63]

In 2020, B.R.I.C.S. leaders convened virtually, owing to travel restrictions during the COVID-19 pandemic, yet the virtual meeting was able to maintain continued focus on climate change and the environment, despite the primary focus of addressing the impacts of the pandemic. The summit declaration reiterated the B.R.I.C.S.' "commitment to the implementation of the Paris Agreement adopted under the principles of the United Nations Framework Convention on Climate Change (U.N.F.C.C.C.), including the principle of common but differentiated responsibilities and respective

59 Ibid, Nr. 54.

60 Eight B.R.I.C.S. Summit, *supra* note 58, Nr. 70.

61 Ninth B.R.I.C.S. Summit, "BRICS Leaders Xiamen Declaration," September 4, 2017, available at http://www.brics.utoronto.ca/docs/170904-xiamen.pdf (retrieved 18 December 2020), Nr. 16.

62 Tenth B.R.I.C.S. Summit, "Johannesburg Declaration," July 26, 2018, available at http://sabtt.org.za/wp-content/uploads/2018/08/JOHANNESBURG-DECLARATION-26-JULY-2018-as-at-07h11.pdf (retrieved 18 December 2020), Nr. 21.

63 Eleventh B.R.I.C.S. Summit, "Declaration of the 11th BRICS Summit," November 14, 2019, available at http://en.kremlin.ru/supplement/5458 (retrieved 18 December 2020), Nr.10.

capabilities, in the light of different national circumstances" and urged "developed countries included in Annex II to scale up the provision of financial, technical, technological and capacity-building assistance to developing countries to support mitigation and adaptation action."[64] In the meeting of the B.R.I.C.S. environment ministers in 2020, an important part of their joint statement with respect to climate change was the recognition "that COP26 offers an opportunity for countries to collaborate and share knowledge on climate-positive economic recovery packages."[65]

In 2020, the B.R.I.C.S. leaders also put forth the "Strategy for B.R.I.C.S. economic partnership 2025," which outlines their plans to "enhance cooperation on climate change to ensure full and effective implementation of the U.N.F.C.C.C. and its Paris Agreement, reflecting the principles of equity, common but differentiated responsibilities, and respective capabilities, and in the light of different national circumstances" including strategies such as promotion of more sustainable lifestyles, cooperation under the B.R.I.C.S. Environmentally Sound Technology Platform, encouragement of the use of low-carbon technologies, and working "towards energy security and stability in world energy markets.[66]

The evolution of language and advocacy within the B.R.I.C.S. declaration from 2009 onwards leads to certain crucial observations. First, it is clear that despite the various differences among the B.R.I.C.S. economies, they have publicly and consistently acknowledged the threat of climate change, while also committing to international cooperation and action on climate change under the U.N.F.C.C.C. process, the Kyoto Protocol and subsequently under the Paris Agreement. Second, B.R.I.C.S. leaders have used the B.R.I.C.S. platform to present a unified stance regarding cooperation within the U.N.F.C.C.C. process, while particularly trying to generate support towards the successful conclusion and adoption of the Paris Agreement in the years preceding 2015, and calling for implementation of the Paris Agreement since 2015.

Third, the B.R.I.C.S. leaders have used the platform consistently to call on developed country parties (Annex II Parties to the U.N.F.C.C.C., which does not include the Russian Federation) to deliver financial, technological, and capacity-building support to developing country Parties. Fourth, it is evident throughout the operation of the B.R.I.C.S. partnership how crucial

64 Twelfth B.R.I.C.S. Summit, "XII BRICS Summit Moscow Declaration," available at https://eng.brics-russia2020.ru/images/114/81/1148126.pdf (retrieved 3 March 2021), Nr. 82.

65 "Statement of the 6th BRICS Environment Ministers Meeting," July 30, 2020, available at https://eng.brics-russia2020.ru/images/53/20/532001.pdf (retrieved 3 March 2021), Nr. 6.

66 Strategy for B.R.I.C.S. Economic Partnership 2025, November, 2020, available at https://eng.brics-russia2020.ru/images/114/81/1148155.pdf (retrieved 3 March 2021) p. 10–11.

the principle of common but differentiated responsibilities and respective national circumstances (C.B.D.R.-R.C.) was to the five economies, how they emphasized the principle in the run up to the adoption of the Paris Agreement, and how they have continued to stress it in the years since the adoption as a cornerstone of the B.R.I.C.S. approach to the Paris Agreement.

Studying the B.R.I.C.S. joint statements and declaration therefore provides crucial information on how the alliance sees itself and its collective role within international cooperation on climate issues. It is evident that the leaders have used the platform to focus on their similar needs with respect to climate finance, technology transfer, and capacity-building support, while emphasizing the principle of C.B.D.R.-R.C., a way of ensuring that historic polluters who have consumed a majority of the carbon budget are those held accountable for climate action, an economic goal that is shared by the B.R.I.C.S. economies as they continue to develop their economies with consequent increase in emissions. With this evidence of what unites the five B.R.I.C.S. countries with regard to climate action, the next section seeks to describe examples from these jurisdictions regarding the use of taxation, and tax reform in achieving emission reductions and the goals of the Paris Agreement.

7.4 Carbon taxation and carbon pricing: examples from B.R.I.C.S.

In 2020, according to data collected by the World Bank, there were 64 carbon pricing initiatives across the world, covering 46 national jurisdictions and 35 sub-national jurisdictions, and accounting for 22.3% of global greenhouse gas emissions.[67] While carbon pricing includes several kinds of instruments such as fees, fines, or large-scale emission trading systems, this section will focus on tax incentives, or tax relief that is being granted across B.R.I.C.S. jurisdictions towards reduction of carbon emissions.

In order to select examples from the B.R.I.C.S. jurisdictions that ensure there is no bias in selection, the author accessed the policy database of the International Energy Agency (I.E.A.);[68] filtering specifically for the five countries, policies currently in force, and "tax relief" as the type of policy. This combination of search queries resulted in the compilation of 33 examples of enacted policy. In the compilation of this database, the I.E.A. uses the term policy interchangeably with law, act, statute, decree, and regulation. This section will discuss these examples, while highlighting how the tax relief has been incorporated into different regulatory instruments. The examples, three for each of the five jurisdictions have been selected to showcase sectoral diversity.

It must be noted that this selection of examples is not meant to be exhaustive or provide a comprehensive understanding of all fiscal provisions addressing

67 The World Bank, "Carbon Pricing Dashboard," November 1, 2020, available at https://carbonpricingdashboard.worldbank.org/map_data (retrieved 18 December 2020).

68 International Energy Agency, "Policies Database," available at https://www.iea.org/policies (retrieved 18 December 2020).

Table 7.2 Tax relief instruments across the B.R.I.C.S. by topic and technologies, as classified by the I.E.A.

Topic	*No.*	*Technologies*	*No.*
Electricity	12	Transport technologies	6
Generation	11	Passenger vehicles	5
Transport	8	Road transport technologies	5
Road transport	5	Solar	5
Industry	3	Vehicular technologies	5
Multi-sector	3	Wind energy	5
Heating and cooling	1	Multiple renewable technologies	3
Machinery	1	Solar thermal	3
Production	1	Electric battery	2
Upstream	1	Commercial vehicles	2

climate change in the B.R.I.C.S. countries. Instead, it provides an insight based on these regulatory instruments regarding how the countries are deploying tax provisions towards achieving the goals of the Paris Agreement. There were thirty-three tax relief instruments that were generated by the I.E.A. database. Of these, twenty-one address renewable energy, eleven address energy efficiency, and two address methane emissions. The tax reliefs under discussion are spread across topics, and technologies, as tabulated in Table 7.2. Table 7.2 provides an overview of how tax relief primarily in B.R.I.C.S. nations are being used to incentivize renewable energy and greater energy efficiency, especially in the transportation sector. The numbers listed below have been extracted based on the classification in the I.E.A. database, and are used to provide an indication of the sectoral distribution within tax relief instruments.

7.4.1 Brazil

In its intended nationally determined contribution submitted under the Paris Agreement, Brazil committed to reduce greenhouse gas emissions by 37% below 2005 levels in 2025 and reduce greenhouse gas emissions by 43% below 2005 levels in 2030.[69] To reflect this ambition in the years surrounding and since the adoption of the Paris Agreement, Brazil has enacted several tax reforms, including:

a) Rota 2030-Decree 9557/2018:[70] The Rota 2030 program, which was published in 2018 and went into effect in 2019, is directed specifically towards the automotive industry in Brazil, granting tax incentives to companies for up to ten years including a 1–2% reduction of the *Imposto sobre Produtos Industrializados Tax* (I.P.I.), or "the tax on industrialized products," on cars complying with the 2020 energy efficiency criteria,

69 U.N.F.C.C.C. Secretariat, "NDC Registry (Interim)," available at https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx (retrieved 18 December 2020).

70 Decretro Nº 9.557 (Nov. 8, 2018).

and investing revenue in research and development.[71] The Rota 2030 program is intended to run for 15 years, and it "lowers by at least 3 percentage points the tax on industrial products applied to vehicles that have hybrid or 'flex' motors that run both gasoline and ethanol."[72]

b) Wind Turbine Component Tax Exemption (Executive Decree 656):[73] Through an executive decree, the Brazilian government exempted manufacturers from paying *contribuição para o financiamento da seguridade social* (C.O.F.I.N.S.) the social contribution for social security financing, on components purchased for wind turbines production.[74] In a related measure, under Law No. 13.097[75] parts that are used in wind turbines, and classified as such by the government, are exempt from the C.O.F.I.N.S. contributions when imported.

c) Ethanol export tax credit *Regime Especial de Reintegração de Valores Tributários para as Empresas Exportadoras* ("R.E.I.N.T.E.G.R.A."): Law No. 12546/2011 established the R.E.I.N.T.E.G.R.A., which grants tax credits to exporters of *inter alia*, sugar and ethanol.[76] Companies exporting sugar and ethanol form Brazil are eligible for tax credits, equivalent to 3% of the export value, and these tax credits can be either refunded in cash, or offset against the payment of subsequent federal taxes and contributions.[77]

7.4.2 Russia

Russia's Intended Nationally Determined Contribution (I.N.D.C.), states that it has an economy-wide goal to reduce G.H.G emissions by 25–30% compared to 1990 levels by 2030 towards achieving the goals of the Paris

71 Ortevo, "Brazil: R&D Tax Incentives for Automotive Industry," 2018, available at https://www.ortevo.de/insight/brazil-rd-tax-incentives-for-automotive-industry/ (retrieved 18 December 2020).

72 Maria Carolina Marcello, "Brazil Lower House Passes New Auto Industry Incentive Plan Rota 2030," November 8, 2018, available at https://www.reuters.com/article/brazil-autos-idUSL2N1XJ03M (retrieved 18 December 2020).

73 Medida Provisoria (Provisional Measure) Nº 656, (October 7, 2014).

74 International Energy Agency, "Wind Turbine Component Tax Exemption (Executive Decree 656)," August 19, 2015, available at https://www.iea.org/policies/5751-wind-turbine-component-tax-exemption-executive-decree-656?country=Brazil&qs=south&status=In%20force&type=Tax%20relief (retrieved 18 December 2020).

75 Law No. 13.097

76 S2BIOM, "Factsheet: Energising Development EnDev Kenya Country Programme," available at https://s2biom.vito.be/node/2153 (retrieved 18 December 2020).

77 International Energy Agency, "Ethanol Export Tax Credit - Regime Especial de Reintegração de Valores Tributários para as Empresas Exportadoras – REINTEGRA," August 19, 2015, available at https://www.iea.org/policies/5660-ethanol-export-tax-credit-regime-especial-de-reintegracao-de-valores-tributarios-para-as-empresas-exportadoras-reintegra?country=Brazil&qs=south&status=In%20force&type=Tax%20relief (retrieved 18 December 2020).

Agreement. The I.N.D.C. does not elaborate on sectoral division of these reductions or methods through which these will be realized.[78] Legislation both preceding the Paris Agreement, and after 2015 has included several tax-based provisions within its language towards G.H.G. and carbon dioxide reductions.

a) Decree No. 913[79] of the Russian Federation introduced a carbon price through adding a multiplier of 2 to pollution emissions in those areas that enjoy federal protection and progressively increased the base pollution fee for methane.
b) Tax Code of the Russian Federation: Article 259.3 of the Tax Code[80] authorized taxpayers to "to apply a special coefficient, but not higher than 2, to the basic amortization norm: in relation to amortizable fixed assets, which are classified as highly energy-efficient facilities" in accordance with criteria approved by the government. This allows persons owning energy-efficient fixed assets to use the depreciated value of the assets towards greater tax savings in accordance with the coefficient in the year of assessment.
c) Federal Law 261-F3,[81] which addresses energy savings and energy efficiency, explicitly provides for State support towards investment in energy conservation and energy efficiency, particularly through the use of tax incentives including partial reimbursement of costs towards loan interest payments;[82] and investment tax credits for companies investing in energy efficient technology.[83]

7.4.3 India

India's N.D.C. under the Paris Agreement aims to "reduce the emissions intensity of its GDP by 33 to 35% by 2030 from the 2005 level." The N.D.C. makes several references to the use of carbon taxes in lowering emissions.

78 U.N.F.C.C.C. Secretariat, *supra* note 69.
79 Decree no. 913 (1 January 2016, as amended 9 December 2017 and 29 June 2018), about Rates of Fees for Negative Environmental Impact and Additional Ratios (2016).
80 Art. 259.3, Tax Code of the Russian Federation, Part II (Unofficial translation by Ernst and Young), July 1, 2011 available at https://www.nalog.ru/html/sites/www.eng.nalog.ru/Tax%20Code%20Part%20Two.pdf (retrieved 18 December 2020).
81 Federal Law No. 261-F3 of the Russian Federation of November 23, 2009, Concerning Energy Conservation and the Raising of Energy Efficiency and Concerning the Introduction of Amendments to Certain Legislative Acts of the Russian Federation (2009).
82 Ibid at Art. 27(2).
83 Federal Law 261-F3 on Saving Energy and Increasing Energy Efficiency Increase, Grantham Research Institute on Climate Change and the Environment, "Climate Change Laws of the World," available at https://climate-laws.org/geographies/russia/laws/federal-law-261-f3-on-saving-energy-and-increasing-energy-efficiency-increase (retrieved 8 October 2020).

The N.D.C. also mentions the increase of taxes on fossil fuels, particularly petrol and diesel in order to lower emissions; and the introduction of infrastructure bonds for the funding of renewable energy projects that are exempt from taxes.

The N.D.C. contains details of the coal cess introduced by India in 2010, which was progressively increased, forming the corpus of the National Clean Environment Fund.[84] However, between 2010 and 2017, only 37% of the funds collected from the cess have been spent on clean energy projects, and the rest have been allocated to other purposes, such as compensating states that were disadvantaged by the imposition of the government's Goods and Services Tax (G.S.T.), which was introduced in July 2017 (the coal cess was replaced by the G.S.T. Compensation Cess); a decision that will significantly impact the financing of clean energy projects in the coming decade. The corpus in the fund is used to finance clean energy projects, and technology.[85] The following instruments will illustrate the use of taxes by the government of India, through both legislative and executive decisions.

a) Goods and Services Tax: In 2017, the Union government of India introduced the Goods and Services Tax (G.S.T.) to reduce overlaps between the (federal) Union and state governments in taxation. While petroleum products and electricity are not covered by the new tax, fuels such as coal, furnace oil, and liquefied petroleum gas (L.P.G.) are included under its purview. As previously discussed, under the G.S.T., the coal cess was replaced by a compensation cess to pay for imbalances caused by the tax reforms.[86] Therefore the G.S.T. resulted in the closure of the source of funds for the National Clean Energy Fund. The G.S.T. thus serves as an example of how evolving tax regimes can both positively and negatively impact emission reduction goals. However, the G.S.T. Act did introduce certain tax benefits towards cleaner energy, as renewable energy devices and their manufacturing components attract a lower G.S.T. of 5%, whereas components required in thermal generation are charged up to 18%.[87]
b) Section JJA, Income Tax Act, 1961,[88] "Deduction in respect of profit and gains from business of collecting and processing of bio-degradable waste:" The Income Tax Act provides a 100% deduction for the first five years since the commencement of the business where "the gross total income of an assessee includes any profits and gains derived from the

84 U.N.F.C.C.C. Secretariat, *supra* note 69.
85 Deepinder Pal Singh Kanwal, "Feasibility of a Carbon Consumption Tax for Sustainable Development – A Case Study of India," 1 (3) *Contemporary Urban Affairs* (2017), p. 21.
86 International Energy Agency, "India 2020: Energy Policy Review," 2020, available at https://niti.gov.in/sites/default/files/2020-01/IEA-India%202020-In-depth-EnergyPolicy_0.pdf (retrieved 18 December 2020).
87 The Central Goods and Services Tax Act, 2017 [12/2017].
88 The Income Tax Act, 1961 [43/1961].

business of collecting and processing or treating of bio-degradable waste" for inter alia, generating power, or producing biogas, or making pellets or briquettes for fuel. [89]

c) State policies on renewable energy: State governments across India, through executive policy documents have introduced tax reforms, applicable to the territories of their respective states, which address renewable energies and may result in emission reductions. Examples of such state provisions are:

   i) Kerala State Government's Renewable Energy Policy:[90] In as early as 2002, the state of Kerala decided to exempt renewable energy equipment and materials from entry tax or octroi when entering the state.
   ii) Similar to Kerala, the state government of Punjab in its "New and Renewable Sources of Energy (N.R.S.E.) Policy – 2012"[91] created a 100% exemption for "all supplies (including capital goods, structure, and raw materials) made for setting up and trial operations of the projects" for N.R.S.E. projects from state entry tax. In addition, it exempted the manufacture and sale of N.R.S.E. devices, systems, and equipment from value added tax (V.A.T.) and cess; and granted a 100% exemption from payment of fees and stamp duties for registering lease deeds for land required for N.R.S.E. projects.
   iii) Policy for implementation of Small Hydroelectric Power based electricity projects in Madhya Pradesh, 2011:[92] Similar to Kerala and Punjab, there was an exemption from state entry tax introduced by Madhya Pradesh for equipment and machinery brought into the state in the construction of small hydroelectric power stations. In addition, the policy introduced commercial and tax assistance facilities provided by the state for small hydroelectric power project units or industrial units consuming electricity from small hydroelectric plants under the Madhya Pradesh Investment Policy Assistance Scheme, 2010.

89 Randhir Singh and Yog Raj Sood, "Current Status and Analysis of Renewable Promotional Policies in Indian Restructured Power Sector—A Review," 15 (1) *Renewable Sustainable Energy Review* (2011), p. 657.

90 Government of Kerala, "Renewable Energy Policy," 2002, available at https://www.windpro.org/sector-updates/state-government-policies-issued-by-IREDA8-1.pdf (retrieved 18 December 2020).

91 Government of Punjab, "New and Renewable Sources of Energy (NRSE) Policy – 2012," 2012, available at https://www.peda.gov.in/media/pdf/nrse%20pol%202012.pdf (retrieved 18 December 2020).

92 Government of Madhya Pradesh, "Policy for Implementation of Small Hydel-Power based Electricity Projects in Madhya Pradesh," 2011 available at http://www.cbip.org/Policies2019/PD_07_Dec_2018_Policies/Madhya%20Pradesh/5-Small%20Hydro/2%20Order%20MP%20Small-Hydro-Power_POLICY2011(English).pdf (retrieved 18 December 2020).

7.4.4 China

In its N.D.C. submitted under the Paris Agreement, China expressly mentions its intention to "implement preferential taxation policies for promoting the development of new energy and to improve mechanisms of pricing, grid access and procurement mechanisms for solar, wind and hydropower" and to "advance the reform in the pricing and taxation regime for energy and resource-based products." [93] In its N.D.C., China has set a target to achieve the peaking of carbon dioxide emissions around 2030, to reduce carbon dioxide emissions per unit of G.D.P. by 60–65% from 2005 levels, and to increase the share of non-fossil fuels in primary energy consumption to around 20%.[94] In light of these targets and given the volume of carbon emissions produced by China, tax reforms could play a huge role in contributing to global reduction of greenhouse gases in the coming decade.

a) Renewable Energy Law:[95] Article 26 of the law states that the state shall adopt a tax preferential policy for projects that are listed in the renewable energy industry development guidance catalogue.
b) Energy Conservation Law of the People's Republic of China:[96] The Energy Conservation Law includes several provisions linking taxation and energy conservation including stimulus to renewable energy technologies. The law requires the State to apply preferential taxes to energy conservation technology and products along with promotion of energy saving products through subsidies;[97] requires the State to apply taxes to promote conservation of energy sources;[98] and requires the State to use taxes to encourage importing of "advanced energy conservation technologies and equipment and to control the export of highly energy-consuming and serious-pollution products during the process of production."[99]
c) Law on the Prevention and Control of Air Pollution:[100] While this statute addresses air pollution on a broader scale, including listing the penal provisions for violations of air quality standards and permits, an important provision that was introduced by this statute, which can also apply to carbon emissions and G.H.G. pollutants, is that the State shall implement a fee levy system for pollutant emissions based upon the categories and quantities of pollutants emitted.[101]

93 U.N.F.C.C.C. Secretariat, *supra* note 69.
94 Ibid.
95 Art. 26, Renewable Energy Law of the People's Republic of China (2006).
96 Energy Conservation Law of the People's Republic of China (2007).
97 Ibid, Art. 61.
98 Ibid, Art. 62.
99 Ibid, Art. 63.
100 Law on the Prevention and Control of Atmospheric Pollution (2000).
101 Art. 14, Law on the Prevention and Control of Atmospheric Pollution (2000).

7.4.5 South Africa

In its N.D.C. under the Paris Agreement, while South Africa did not set a reduction target with respect to a base year, it committed to emissions between 2025 and 2030 being limited to a range from 398 to 614 $MtCO_2e$ (metric tons of carbon dioxide equivalent).[102] Of the five B.R.I.C.S. nations, South Africa is the only country that has enacted economy-wide carbon tax legislation, the Carbon Tax Act, which was enacted in 2019.[103]

a) Carbon Tax Act[104]: The statute introduced the legal basis for the taxing of G.H.G. emissions within its territory. All taxes collected feed into the National Revenue Fund,[105] and taxpayers under the Act are defined as persons conducting "an activity in the Republic resulting in greenhouse gas emissions above the threshold determined."[106] While the Act sets forth the detailed procedural basis for the collection, payment, and calculation of carbon taxes, it is important to note that the Act grants a tax allowance of up to 5% to taxpayers implementing measures to reduce G.H.G. emissions.[107] Taxpayers defined under the Act submit "environmental levy accounts" and make payments for every tax assessment period.[108]
b) Biofuels Industrial Strategy of the Republic of South Africa:[109] In 2007, South Africa released the executive strategy document that contained the South African Biofuels Industrial Strategy and outlined the Government's approach to policy, regulations and incentives on biofuels. The strategy included a 100% fuel tax exemption for bioethanol.

7.5 Conclusion

This chapter sought to shed light on how tax legislation or executive reforms can be used to implement emission reduction goals under the Paris Agreement. Methods can include the increase of taxes on the production, sale, or purchase of fossil fuels or polluting energy sources, tax incentives, or benefits such as exemptions or credits to those manufacturing or using renewable energies or technologies. Tax benefits can be extended to investors who invest in energy efficient technologies or renewable energy sources, and for

102 U.N.F.C.C.C. Secretariat, *supra* note 69.
103 Act No. 15 of 2019: Carbon Tax Act, 2019, Government Gazette, Republic of South Africa, 647 (42483).
104 Carbon Tax Act, 2019 [15/2019].
105 Ibid, § 2.
106 Ibid, § 3.
107 Ibid, § 11.
108 Ibid, § 17.
109 Department of Minerals and Energy, "Biofuels Industrial Strategy of the Republic of South Africa," December 2007, available at http://www.energy.gov.za/files/esources/renewables/biofuels_indus_strat.pdf(2).pdf (retrieved 18 December 2020).

households operating or using renewable energy sources such as solar, biogas, or wind turbines within their homes.[110]

La Trobe University law lecturer Steven Geroe concludes that the "incremental increase of carbon tax rates has been almost universally adopted as a means to ameliorate commercial impacts of carbon tax introduction."[111] A trajectory of tax rates can help aid predictability in investments. Moreover, consistent use of revenue form carbon taxes towards low-emission projects or community infrastructure, along with direct dividends or pay-outs can generate public support for added taxes on fossil fuel purchase and consumption.

Building on this background as well as findings in economics and tax law in support of carbon taxes, the chapter sought to focus on how a particular set of countries, in this case the B.R.I.C.S. countries, have deployed carbon taxes towards achieving their commitments under the Paris Agreement. The chapter has reviewed executive and legislative tax reforms from the respective B.R.I.C.S. jurisdictions to understand the variety of ways in which carbon taxes, especially tax incentives, have been enacted in the world's biggest economies that also contribute massively to global carbon emissions. We can observe from the diversity of tax instruments from the B.R.I.C.S. jurisdictions that as in other sectors, the B.R.I.C.S. states choose different paths to stimulate renewable energy markets and reduce carbon emissions from the B.R.I.C.S. economies. These paths include an economy-wide carbon tax in South Africa, exemptions granted on state entry tax in state jurisdictions in India, tax benefits through preferential coefficients in calculating depreciation of energy-efficient assets in Russia, sectoral reforms within the transportation and wind turbine manufacturing sectors in Brazil, and statutory requirements on the State to encourage cleaner energy consumption using taxes in China.

The extensive set of statements by B.R.I.C.S. leaders presented in this chapter could lead one to conclude that climate change is a high-priority topic for the group. However, the continued focus on C.B.D.R.-R.C. and emphasis on the responsibilities of developed country Parties, especially relating to finance, makes it clear that combined or joint efforts towards carbon pricing or taxation, or exchange of best practices regarding carbon pricing is not high on the B.R.I.C.S. agenda. Given the nature of the B.R.I.C.S. association, which has nowhere near the level of policy coordination that one finds within the European Union or even the G20,[112] it still remains to be seen whether there will be sufficient B.R.I.C.S. carbon taxation in practice to achieve sustainable development through the implementation of the Paris Agreement for the Global South.

110 Nadezhda V. Ponomareva et al., "Tax Incentives for Use of Alternative Energy Sources in the Russian Federation," 9 (4) *International Journal of Energy Economics and Policy* (2019), p. 147.

111 Steven Geroe, "Addressing Climate Change Through a Low-Cost, High-Impact Carbon Tax," 28 (1) *Journal of Environment and Development* (2019), p. 21.

112 Christian Downie, "Global Energy Governance: Do the BRICs Have the Energy to Drive Reform?" 91 (4) *International Affairs* (2015), p. 808.

Bibliography

Abashidze, Aslan et al., "Legal Status of BRICS and Some Trends of International Cooperation," 9 (36) *Indian Journal of Science and Technology* (2016). DOI: 10.17485/ijst/2016/v9i36/102004

Andersson, Julius. "Cars, Carbon Taxes and CO_2, Emissions." Centre for Climate Change Economics and Policy Working Paper No. 238, Grantham Research Institute on Climate Change and the Environment, Working Paper No. 212, 2017. https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2017/03/Working-paper-212-Andersson_update_March2017.pdf

Azahaf, Najim, and Daniel Schraad-Tischler. "Governance Capacities in the BRICS-Sustainable Governance Indicators." 2012. https://www.sgi-network.org/docs/studies/Governance_Capacities_in_the_BRICS.pdf.

Baranzini, Andrea, and Stefano Carattini. "Effectiveness, Earmarking and Labeling: Testing the Acceptability of Carbon Taxes with Survey Data." 19 *Environmental Economics and Policy Studies* (2017): 197–227.

Baranzini, Andrea et al. "Carbon Pricing in Climate Policy: Seven Reasons, Complementary Instruments, and Political Economy Considerations." 8 (4) *Wires Climate Change*, 2017. https://doi.org/10.1002/wcc.462.

Bhat, Aaqib Ahmad, and Prajna Paramita Mishra. "Are Carbon Taxes Regressive in India? Evidence from NSSO Data." 67 (1–2) *The Indian Economic Journal* (August 24, 2020). https://doi.org/10.1177%2F0019466220941175.

Bowen Alex. "The Case for Carbon Pricing. The Grantham Research Institute in Climate Change and the Environment & The Centre for Climate Change Economics and Policy, Policy Brief," 2011. https://www.cccep.ac.uk/wp-content/uploads/2015/09/PB_case-carbon-pricing_Bowen.pdf.

Burke, M. et al. "Opportunities for Advances in Climate Change Economics." 352 (6283) *Science* (2016): 292–293.

Carattini, Stefano et al. "How to Win Public Support for a Global Carbon Tax." (January 16, 2019). https://www.nature.com/articles/d41586-019-00124-x.

Carl, Jeremy, and David Fedor. "Tracking Global Carbon Revenues: A Survey of Carbon Taxes Versus Cap-and-trade in the Real World." 96 *Energy Policy* (2016): 50–77.

Compston, Hugh W., and Ian Bailey. "Climate Policy Strength Compared: China, the US, the EU, India, Russia, and Japan." 16 (2) *Climate Policy* (2016): 145–162.

Davenport, Deborah. "BRICs in the Global Climate Regime: Rapidly Industrializing Countries and International Climate Negotiations," in *Feeling the Heat: The Politics of Climate Policy in Rapidly Industrializing Countries*. Eds. Ian Bailey and Hugh Compston. 2012: 38–56.

Deepinder Pal Singh, Kanwal. "Feasibility of a Carbon Consumption Tax for Sustainable Development – A Case Study of India." 1 (3) *Contemporary Urban Affairs* (2017): 18–23.

Downie, Christian, and Marc Williams. "After the Paris Agreement: What Role for the BRICS in Global Climate Governance?" 9 (3) *Global Policy* (2018). https://doi.org/10.1111/1758-5899.12550.

Downie, Christian. "Global Energy Governance: Do the BRICs Have the Energy to Drive Reform?" 91 (4) *International Affairs* (2015): 799–812.

FitzRoy, Felix R., and Elissaios Papyrakis. *An Introduction to Climate Change Economics and Policy*. Routledge, 2016.

Franks Max et al. "Why Finance Ministers Favor Carbon Taxes, Even If They Do Not Take Climate Change into Account." 68 *Environmental and Resource Economics* (2017): 445–472.

Fremstada Anders, and Mark Paul. "The Impact of a Carbon Tax on Inequality." 163 *Ecological Economics* (2019): 88–97.

Geroe, Steven. "Addressing Climate Change Through a Low-Cost, High-Impact Carbon Tax." 28 (1) *Journal of Environment and Development* (2019): 3–27.

Ghouali, Zakarya et al. "Factors Affecting CO_2 Emissions in the BRICS Countries: A Panel Data Analysis." 26 *Procedia Economic and Finance* (2015): 114–125.

Gomes, Geovana Zoccal, and Paulo Esteves. "The BRICS Effect: Impacts of South–South Cooperation in the Social Field of International Development Cooperation." 49 (3) *IDS Bulletin* (2018). https://bulletin.ids.ac.uk/index.php/idsbo/article/view/2984/Online%20article.

Goulder, Lawrence H. "Climate Change Policy's Interactions with the Tax System." 40 *Energy Economics* (2013): S3–S11.

Lacroix, Karine, and Garrett Richards. "An Alternative Policy Evaluation of the British Columbia Carbon Tax Broadening the Application of Elinor Ostrom's Design Principles for Managing Common-Pool Resources." 20 (2) *Ecology and Society* (2015): 38.

Lento, Timothy M., et al. "Climate Tipping Points: Too Risky to Bet Against." 57 (7784) *Nature* (2019) available at https://www.nature.com/articles/d41586-019-03595-0

Lim, Jong-Soo, and Yong-Gun Kim. "Combining Carbon Tax and R&D Subsidy for Climate Change Mitigation." 34 (3) *Energy Economics* (2012): S496–S502.

Lontzek, Thomas S. et al. "Stochastic Integrated Assessment of Climate Tipping Points Indicates the Need for Strict Climate Policy." 5 *Nature Climate Change* (2015): 441–444.

Marcello, Maria Carolina. "Brazil Lower House Passes New Auto Industry Incentive Plan Rota 2030." November 8, 2018. https://www.reuters.com/article/brazil-autos-idUSL2N1XJ03M.

Margalioth, Yoram. "Tax Policy Analysis of Climate Change." 64 *Tax Law Review* (2010): 88–89.

McLaughlin, Craig et al., "Accounting Society's Acceptability of Carbon Taxes: Expectations and Reality." 131 *Energy Policy* (2019): 302–311.

Milne, Janet E. "Storms Ahead: Climate Change Adaptation Calls for Resilient Funding." 39 *Vermont Law Review* (2015): 819–866.

Narassimhan, Easwaran, et al., "Carbon Pricing in Practice: A Review of Existing Emissions Trading Systems," 18 (8) *Climate Policy* (2018): 967, 984.

Pauw, Pieter et al. "Subtle Differentiation of Countries' Responsibilities under the Paris Agreement." 5 (86) *Palgrave Communications* (July 30, 2019). https://doi.org/10.1057/s41599-019-0298-6.

Ponomareva, Nadezhda V., et al. "Tax Incentives for Use of Alternative Energy Sources in the Russian Federation." 9 (4) *International Journal of Energy Economics and Policy* (2019): 144–148.

Sims, Ralph, et al., "Chapter 8: Transport," in *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report (AR5) of the Intergovernmental Panel on Climate Change*, 2014. https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_full.pdf .

Singh, Randhir, and Yog Raj Sood. "Current Status and Analysis of Renewable Promotional Policies in Indian Restructured Power Sector—A Review." 15 (1) *Renewable Sustainable Energy Revie*w (2011): 657–664.

Steier, Gabriela. "The Carbon Tax Vacuum and the Debate about Climate Change Impacts: Emission Taxation of Commodity Crop Production in Food System Regulation." 35 (2) *Pace Environmental Law Review* (2017): 346.

Tol, Richard S. J. "The Economic Impacts of Climate Change." 12 *Review of Environmental Economics and Policy* (2018): https://www.econstor.eu/bitstream/10419/50039/1/584378270.pdf.

Part III

Alternatives to globalization in environmental law

8 The contracting state's role in the energy community to build the European Union's envisioned sustainable future

Tamuna Beridze[1]

8.1 Introduction

Economic theories that divide states of the Global South from states of the Global North mainly elaborate upon differences and further the polarization of their relationships, especially when it comes to the issue of environmental protection. Although to some extent that approach may be an accurate assessment of the relationships, this chapter will take an alternative approach and shed light on the similarities. For the purposes of this chapter, the European Union (E.U.) will be treated as being representative of the Global North and states in the Western Balkans (W.B.) and Eastern European Partnership (Ea.P.), due to their socio-economic development status, will be treated as being situated with the Global South. The Energy Community (En.C.) and its institutions will be treated as a bridge connecting the two sides together in the fields of energy, environmental protection, and sustainable development. The chapter analyzes the incentives for building relationships through legal and political institutions and mechanisms, and portrays the practical and real-life issues that are related to the processes through which these worlds come together.

In this respect, this chapter will focus on current developments within the environmental protection aspects of En.C. Contracting Parties (C.P.). Centering on the implementation process of E.U. renewable energy policies in their legal contexts, the chapter will argue that fulfilling commitments under internationally binding targets such as En.C. Treaty have crucial importance for the E.U. to achieve the goals envisaged within its external policies, covering mainly economic advancement through sustainable incentives.

The gap existing between national energy policies (especially in W.B.) and Ea.P. C.P.s, might threaten the full implementation of renewable energy commitments. This chapter aims to examine the challenges considering full implementation of green policies of the E.U. in these countries and elaborates

1 Tamuna Beridze is Doctoral Candidate at the University of Vienna, European Union Law and International Law Department. Her Doctoral thesis concerns the compatibility of E.U.'s external policies in the Free Trade Agreements with the international commitments of the Member States within the field of investment and trade law.

DOI: 10.4324/9781003160236-12

on the importance of the En.C. C.P.s' commitments to the E.U. to achieve 2020 and 2030 Sustainable Development (S.D.) agenda goals. The E.U.'s intention is to achieve de-carbonization goals through meeting the Paris Agreement 2°C objective within and outside of the E.U., along with the aim of externalizing the internal E.U. energy market to the W.B., the Black Sea region, and to Southeastern Europe.

The stated mission of the EnC is to "improve the environmental situation in relation with [sic] energy supply in the region and foster the use of renewable energy and energy efficiency."[2] With the E.U.'s *acquis communautaire* providing the legal basis from which the En.C. operates, such international agreements as E.U. Association Agreements play an important role in implementing environmental legal policy in these countries. Economic advancements for developing countries are mostly the bottom-line incentives when they are setting future policy and international commitment agendas. Some scholars suggest that pure economic theories in international business relations have become outdated and that currently states are trying to transform their trade policies in such agreements in ways that would have positive influences on environmental protection.[3] Although to some extent this might be true, a review of state practices still provides ample evidence to challenge the accuracy of suggestion. On the one hand, the above-mentioned E.U. neighboring countries, which made numerous commitments to transposing environmentally responsible energy production policies in their home jurisdictions, have been working actively to meet obligations, as evidenced by Georgia's attempts to use its rich hydro capacity for producing renewable energy by recently signing more than 120 Hydro Power Plant (H.P.P.) memoranda. Especially featured are Albania and Northern Macedonia from the so-called "Western Balkan 6" states (W.B.6) of Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, and Serbia.

Despite these efforts, several non-governmental organizations (N.G.O.s), have raised complaints regarding allegedly faulty transposition of the commitments made by these states to the En.C. More precisely, these N.G.O.s have challenged the transparency and credibility of the governmental actions when issuing Environmental Impact Assessment (E.I.A.) decisions. They allege that the governments fail to sufficiently examine the E.I.A.s and that they issue operating permits without basing decisions upon credible evidence. Complaints received by the En.C. Secretariat regarding failed commitments of the C.P.s

2 Energy Community Secretariat, "Energy Community Facts in Brief. Fact Sheet," 2020, available at https://www.energy-community.org/dam/jcr:737d594d-e541-4c0e-975b-b7fc937cfad1/EnC_Factsheet_022020.pdf (retrieved 11 November 2020).

3 See Mohamed T. El-Ashry, "Balancing Economic Development with Environmental Protection in Developing and Lesser Developed Countries," 43 *Air & Waste* (January 1993), pp. 18–24; Rashid Faruqee and A. R. Kemal, "Role of Economic Policies in Protecting the Environment: The Experience of Pakistan [with Comments]," 35 *The Pakistan Development Review* (1996), pp. 483–506.

help to illustrate the role of the N.G.O.s and the Secretariat in these countries for ensuring the correct implementation of committed green policies.

Thus, this chapter will:

a) provide an overview to the E.U.'s external relationship approaches to neighboring countries;
b) elaborate on sustainable development as a legal concept in E.U. law, analyzing the commitments made by the C.P.s to building renewable energy sources;
c) examine the role of the En.C. Secretariat as the guardian of the implementation of undertaken commitments, by looking at its findings in the major cases in the En.C.; and
d) elaborate on paths that could lead to a more successful implementation of the undertaken commitments by the C.P.s.

8.2 The E.U.'s external governance approach to neighboring countries

"Europeanization" has been the term used by some scholars when describing the transposition of energy law and policy to E.U. neighboring countries,[4] primarily when referring to countries of Ea.P. and W.B.6. There is no one meaning for this term, and the meaning changes over time. Previously, research and scholarship on the topic was limited to the domestic impacts of the transposition process on the Member States (M.S.) of the E.U.,[5] but now, due to the political developments, European policies, institutional arrangements, rules, beliefs, and normative regulations aligned with building European aptitude[6] apply beyond the E.U. Member State borders. In this newer sense, the best demonstration of Europeanization is perhaps the notion of capacity building with neighboring countries. There, Europeanization is also understood as the process of legislative and regulatory compliance by neighboring states with the E.U. legal order, where the E.U. has demonstrable influence and triggers a number of policy reforms that mirror its own institutional mechanisms.[7] A good example of that sense of Europeanization is the En.C. and its institutions.[8]

4 See Irakli Samkharadze, "Europeanization of Energy Law and Policy beyond the Member States: The Case of Georgia," 130 *Energy Policy* (July 2019), pp. 1–6; Sabine Saurugger and Claudio M. Radaelli, "The Europeanization of Public Policies: Introduction," 10 *Journal of Comparative Policy Analysis: Research and Practice* (2008), pp. 213–219.

5 Irakli Samkharadze, *supra* note 4, p. 2.

6 Simon Bulmer, "Theorizing Europeanization," in *Europeanization* (London: Palgrave Macmillan, 2008), p. 47.

7 Rozeta Karova, "Enforcement Record of the Energy Community," 5 *European Energy Journal* (August 2015), p. 3.

8 Roman Petrov, "Energy Community as a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood," 39 *Legal Issues of Economic Integration* (2012), pp. 334–336.

For the theme of this book, the nature of E.U. leverage, as a representative of the Global North, will help us to more clearly understand the legal outcomes that can be expected for the states with a demonstrated interest in European integration.[9] When it comes to the types of E.U. external relationships in relation to EaP and South-Eastern Europe, scholars have observed two controversial approaches. One approach is that of external governance and the other approach is that of partnership.

The external governance approach is arguably the most commonly applied E.U. tool since 2004.[10] External governance—a "take-by-the-hand"[11] approach—has been found to be favored over the "walk-side-by-side"[12] approach. This strategy of external governance is based on "rule transfer"[13] and effective implementation is achieved by "strict conditionality."[14] Due to lesser normative power, the walk-side-by-side approach is less often applied by the E.U.[15] "Conditionality" means commitment and compliance from the partner states are demanded as a condition of benefits. This type of external governance has been described as a "highly asymmetrical relationship between insiders and outsiders"[16] and employs top-down communication.[17] These strategies of the E.U. have been criticized for several reasons, one of which is the demand for convergence without offering a real membership perspective for the external states.

Unlike the external governance approach, the partnership cooperation approach is based upon more reciprocity, and according to the liberal institutionalist school of thought, it shall be based on "mutual adjustment of behavior to actual or anticipated preferences of the other."[18] Achieving an equivalency of power and cooperation is the main objective of this approach; therefore the stronger power must pay more attention to adjusting its own policies, so that "one-sided-exploitation" of policy transfer is avoided. For achieving this type

9 Rozeta Karova, *supra* note 5, p. 3.

10 Dimitris Bouris and Dimitris Papadimitriou, "The EU and Contested Statehood in Its Near Abroad: Europeanisation, Actorness and State-Building," 25 *Geopolitics* (March 14, 2020), pp. 273–293.

11 Liana Fix et al., "Out of the Shadow? Georgia's Emerging Strategies of Engagement in the Eastern Partnership: Between External Governance and Partnership Cooperation," 7 *Caucasus Survey* (January 2, 2019), p. 2.

12 Ibid.

13 Frank Schimmelfennig and Ulrich Sedelmeier, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe," 11 *Journal of European Public Policy* (January 2004), pp. 670–671.

14 Liana Fix et al., *supra* note 11.

15 Tanja A Börzel, "When Europe Hits … Beyond Its Borders: Europeanization and the Near Abroad," 9 *Comparative European Politics* (September 2011), pp. 398–399.

16 Liana Fix et al., *supra* note 11.

17 Börzel, *supra* note 15, p. 399.

18 Elena A. Korosteleva, "The European Union and Its Eastern Neighbours: Towards a More Ambitious Partnership?", *BASEES/Routledge Series on Russian and East European Studies* 78 (London: New York: Routledge, 2012), p. 21.

of cooperation, strong institutional management is required. However, in practice, critics point out that the weaknesses of joint ownership management lead to a lack of clearly defined targets and monitoring.[19] Although these two described approaches have been employed by name by the E.U. in its external relations, the clear distinguishing line between these *modus operandi* is often very blurred and each approach is connected to the other.[20]

This is also the case within the prism of E.U.'s external energy policy implemented through En.C.'s *aquis communautaire.* The E.U. Commission's Communication paper, "The E.U. Energy Policy: Engaging with Partners Beyond Our Borders,"[21] documents the nature of E.U.'s external policy on energy. It states that EnC's "regulatory scope should be progressively extended and combined with more effective implementation and enforcement, as well as concrete assistance to reform markets."[22] The progression of this process and membership in the EnC is connected to establishing free trade areas between the E.U. and neighboring countries. "Regulatory cooperation and convergence with our neighbors,"[23] though taking into account "the diversity of E.U.'s neighbors and their own energy policy objectives,"[24] play the main role in building a wide energy market.[25]

Despite the criticisms of the E.U.'s external governance strategy mechanisms, it would be unfair not to acknowledge some of the positive features that are connected to them. For example, the inexperienced nature and relatively young political system of the E.U. neighboring states means that the top-down approach for transposing E.U. energy legislation into national legal systems is a good opportunity for a state to systemize a poorly regulated energy sector by establishing modern energy law standards and a set of guiding principles that advance a new path for the study and practice of energy law and policy.[26] This establishment can be achieved though the En.C. Secretariat as the guardian of compliance monitoring with En.C. *aquis communautaire.*

Under the external governance approach, the Europeanization of external states is usually achieved through bilateral and multilateral agreements that

19 Börzel, *supra* note 15, p. 401.

20 Korosteleva, *supra* note 18, p. 51.

21 European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - On Security of Energy Supply and International Cooperation – The EU Energy Policy: Engaging with Partners Beyond Our Borders," (7 September 2011) COM (2011) 539 final.

22 Ibid.

23 Council of the European Union, "Council Conclusions on Strengthening the External Dimension of the EU Energy Policy, 3127th Transport, Telecommunications and Energy Council Meeting (Energy items)," (24 November 2011), p. 2.

24 Roman Petrov, *supra* note 7, p. 334.

25 Ibid, p. 337.

26 Irakli Samkharadze, *supra* note 4, pp. 2–3; Donald N Zillman, "Evolution of Modern Energy Law: A Personal Retrospective," 30 *Journal of Energy & Natural Resources Law* (December 2012), pp. 485–593.

contain several commitments for the contracting countries to implement. Although widening and strengthening the extraterritorial effect of the energy policy might be in the interest of the E.U.,[27] there is no one reason to explain the motivation of third countries to enter voluntary multilateral integration into the E.U.[28] For the majority of the states that are contracting parties with the En.C., it could be argued that the driving force is membership in the E.U., or advancement of their socio-economic and political standing as regards the Global North more generally. Both are confirmed by the developments in evidence when these states have concluded various bilateral agreements with the E.U. in accordance with the necessary stages for E.U. accession. Among these agreements is the Deep and Comprehensive Free Trade Areas of the E.U.-Ukraine Association Agreement as well as more recent developments with some of the EaP countries, such as Georgia,[29] Ukraine,[30] and Moldova.[31]

By comparison, the majority of the WB6 countries are already candidate states for E.U. accession or are potential candidate states. Evidence indicates that Europeanization in these countries is triggered by acknowledging that with the E.U. as a global partner, compliance with the commitments, even on a purely voluntary "soft law" nature, can bring advantages to these states.[32] But to consider the price paid for those advantage, this chapter examines the effects of implementing the En.C. *aquis* as part of the external governance approach by the E.U., with emphasis upon implementation of environmental policies and sustainable development through national renewable energy action plans.

Externalizing the E.U.'s internal energy policies in its neighboring countries is just one policy among many that forms the E.U.'s external relations. Energy security, efficiency, competitiveness, and sustainability form major parts of E.U. energy policy as emphasized in Article 194 of the Treaty on the Functioning of the European Union (T.F.E.U.). Sustainability has been

27 Irakli Samkharadze, *supra* note 4, p. 1.

28 Roman Petrov, *supra* note 8, p. 332.

29 "The Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part," (30 August 2014) L 261/ 4.

30 "The Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Ukraine, of the Other Part," (29 May 2014) L 161/3.

31 "The Association Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Moldova, of the Other Part," (30 August 2014) L 260/4.

32 Carlo Cambini and Alessandro Rubino, *Regional Energy Initiatives: Medreg and the Energy Community,* (London: Routledge, 2014), p. 176.

emphasized in the E.U.'s strategies "E.U. 2020"[33] and "E.U. 2030."[34] The transposition of these policy objectives in the neighboring states of the E.U. serves the purposes of expanding the E.U.'s energy market and pushing the borders for combating climate change outside of the E.U.

The EnC has been called one of the best examples of institutions serving the purpose of Europeanization in neighboring markets of the E.U.[35] As an international organization that thrives to create pan-European energy markets together with E.U. M.S.s and C.P.s of the Community, the En.C. was founded in 2005 by the Treaty establishing the Energy Community, which came into force in 2006.[36] As defined by Article 2 of the Treaty, the main objective of the organization is to extend the E.U. internal energy market rules and principles in order to make it easier to attract investments in energy sectors to countries in South-East Europe, the Black Sea Region and beyond, based upon legally binding regulation.

Unified regulation was meant to promote barrier-free trade and connectivity to trans-boundary energy grids with the M.S.s of the E.U. In that context, regulation will determine the type of preferred energy to be imported in the E.U. M.S.s, based upon principles to combating climate change and upon achieving the E.U.'s set targets.[37] As such, the regulatory framework promotes the use of renewable energy and other environmentally-friendly policies as well as developing internal competition and strengthening the security and efficiency of energy supply.[38] As of now, the organization consists of nine C.P.s—Albania, Bosnia and Herzegovina (BiH), Georgia, Kosovo,[39] North Macedonia, Moldova, Montenegro, Serbia, and Ukraine—and three Observer States: Armenia, Norway, and Turkey.

The En.C. has a quasi-supranational legal nature, modeled after the European Economic Area, but there are also some elements of uniformity among the C.P.s of the En.C.[40] In this respect, the institution is a unique platform for promoting implementation and application of "sectoral" E.U. *acquis* in third

33 European Commission, *Communication from the Commission, Europe 2030, A Strategy for Smart, Sustainable and Inclusive Growth*, (3 March 2010) COM (2010) 2020 final.

34 European Commission, *Reflection Paper Towards a Sustainable Europe by 2030*, (30 January 2019) COM (2019), p. 22.

35 Roman Petrov, *supra* note 8, p. 332.

36 Energy Community, *supra* note 2, p. 1.

37 See Energy Community, "Study on the Potential for Climate Change Combating in Power Generation in the Energy Community," (March 2011), EnC-11-001.

38 Gijs Verhagen, "The Compliance and Dispute Settlement System of the European Energy Community," 46 *Legal Issues of Economic Integration* (2019), p. 150.

39 This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ opinion on the Kosovo Declaration of Independence.

40 Dirl Buschle, "The Energy Community and the Energy Charter Treaty: Special Legal Regimes, Their Systemic Relationship to the EU, and Their Dispute Settlement Arrangements," 12 *Oil, Gas & Energy Law Intelligence* (April 2014), p. 28.

countries' legal systems.[41] Along with the E.U.'s ambitions for sustainability, innovation, and energy security, next to relevant E.U. regulations, and for the purposes of the En.C. C.P.s' additional En.C. Treaty obligations were adopted in fields related to energy, climate, renewables, and competition.[42] The three legal pillars of the En.C. are: Part I: The Treaty Establishing the Energy Community; Part II: The *Aquis Communautaire*; and Part III: The Governing Measures and Procedural Acts by Energy Community Institutions.

8.3 Sustainable development as a legal concept in E.U. law

The T.F.E.U. is the first of the E.U. constitutive treaties to include S.D. Previous attempts of the E.U. to conceptualize the notion of S.D. had been highly criticized.[43] In the Treaty of Maastricht, for example, the concept of S.D. was included through the term "sustainable growth," which presented problems of interpretation.[44] In the Treaties of Amsterdam and Nice, the notion was slightly modified and the terms used to express the concept were "balanced and sustainable."[45] The Treaty on European Union set the goal for the E.U. to become a pioneer in protection of the global environment, through its statement that "in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to … sustainable development of the Earth."[46] In conjunction with Article 3 of the Treaty on European Union, Article 11 of the T.F.E.U. privileged the environment, stating that with the goal of promoting sustainable development the environmental protection requirements shall be integrated in all policies and activities.[47]

Although it troubles some people that the concept of S.D. has not been given an extensive and precise definition, the lack of a singular meaning leaves space for interpretations that trigger broader integration of the development perspectives, as when in 2005 the Council of the European Union adopted

41 Maria Kenig-Witkowska, "The Concept of Sustainable Development in the European Union Policy and Law," 1 *Journal of Comparative Urban Law and Policy* (2017), pp. 64–80.

42 Gijs Verhagen, *supra* note 38, p. 150.

43 Ibid.

44 Anne E., Egelston, *Sustainable Development: A History*, (Berlin/Heidelberg: Springer Science + Business Media, 2013); Deok-Young Park, *Legal Issues on Climate Change and International Trade Law*, (Basel: Springer International Publishing, 2016); Daniel Bodansky et al., *The Oxford Handbook of International Environmental Law*, (Oxford: Oxford University Press, 2008); Kai Peng Gan, "Sustainable Development in International Law," 361-363 *Advanced Materials Research* (October 2011), pp. 1937–1941; Christina Voigt, *Sustainable Development as a Principle of International Law*, (Leiden: Brill/Nijhof, 2009), pp. 145–186.

45 For more detailed analyses of the development of sustainable development see: Kenig-Witkowska, *supra* note 41.

46 "Consolidated Version of the Treaty on European Union," (26 October 2012) C 236/13, Art. 3(5).

47 "Treaty on the Functioning of the European Union," (26 October 2012) C 236/47, Art. 11.

the "Declaration on guiding principles for sustainable development."[48] The integration of a wider public in the decision-making process involving various policies, especially in environmental matters, is a path that contributes to achieving S.D. goals. For example, several years after adopting the Council guidelines, incentives found their way into external policies of the E.U., which also tracked the changes adopted by the Treaty of Lisbon.[49] These changes have impacted upon the exclusive competences of the E.U. regarding S.D., which is a crucial turning point for S.D. to obtain more recognition.[50]

Not long after the Treaty of Lisbon came into force, the Court of Justice of the European Union (C.J.E.U.) located the S.D. principle of the E.U.'s Common Commercial Policy (C.C.P.) under the external exclusive competences of the E.U. The C.J.E.U., in Opinion 2/15, upheld the concept of S.D. to belong to the principles of international law.[51] The Court confirmed that a breach of the S.D. principle amounts to a material breach of the contract and can trigger the termination of the whole international agreement.[52] Further still, obtaining new competences has triggered the adoption of a new structure of the Free Trade Agreements of the E.U., which are the first of their kind to clearly integrate commitments to S.D. and environmental protection,[53] thereby instating the concept as legal norm.

8.3.1 Renewable energy directive as part of sustainable development

Sustainable development and combating climate change are two strongly interconnected concepts. It would be impossible to achieve one without the other. Therefore, it is essential to adopt policies that contribute to S.D. in energy production. Energy producing industries have the greatest emissions share in the E.U. (29.0%), followed by 25.5% for fuel combustion by end-users, and 23.8% for transportation.[54] Employing various renewable energy sources is the best existing alternative to achieve zero carbon emissions by 2050.

48 Council of the European Union, "*Declaration on Guiding Principles For Sustainable Development*, *Presidency Conclusions,*" (6 June 2005).

49 "Consolidated Version of the Treaty on the Functioning of the European Union," (26 October 2012) C 326/47, Art. 207.

50 Kenig-Witkowska, *supra* note 41.

51 Opinion 2/15 of the Court (Full Court), No. ECLI:EU:C:2017:376 (C.J.E.U. May 16, 2017) §§ 139–167.

52 Ibid § 161.

53 Gus Van Harten, "The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and Europe-Vietnam FTA," 1 *University of Bologna Law Review* (September 20, 2016), p. 140; Catharine Titi, "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements," 26 *European Journal of International Law* (August 1, 2015), pp. 639–661.

54 See Eurostat, "How Are Emissions of Greenhouse Gases by the EU Evolving?," April 20, 2020, available at: https://Ec.Europa.Eu/Eurostat/Cache/Infographs/Energy/Bloc-4a.Html (retrieved 11 November 2020).

Currently, the Renewable Energy (R.E.) Directive 2009/28/EC[55] is the main policy and legal framework driving renewables in Europe. The Directive's goal is to promote energy generation and security for Europe by gradually increasing the share of R.E. and achieving an 80–95% decrease in greenhouse gas emissions in the E.U. by 2050.[56] In this respect, the R.E. Directive plays a crucial role within the E.U. for achieving the results providing sustainability through energy production. The mandatory margin was pre-determined by the Article 3 of the R.E. Directive for the E.U., which consisted of a 20% energy share from renewable sources in the E.U.'s gross final consumption of energy in 2020. Article 4(1) of the R.E. Directive made it mandatory for the M.S. to adopt National Renewable Energy Action Plans (N.R.E.A.P.), which needed to have been submitted to the Commission by 2010. Since adoption of the N.R.E.A.P., renewable energy shares have been ranging from as low as 14% in the Netherlands[57] to as high as 49% in Sweden.[58] Article 3(2) of the 2009/28/EC Directive states that the M.S.s have the obligation to meet their N.R.E.A.P.s, while Articles 4(4) and 4(5) address M.S. failures to meet their own N.R.E.A.P.s.

Article 4 of the 2009/28/EC Directive sets the requirement for every C.P. to adopt N.R.E.A.P., which indicates the share of R.E. generated energy that was to have been consumed in transport, electricity, and heating and cooling in 2020. Furthermore, Article 4 obliges the C.P.s to set adequate measures that will lead to the implementation of these targets. Table 8.1 below indicates the N.R.E.A.P. shares in 2018 based upon the Energy Community Annual Implementation Report.[59]

The En.C. *acquis* has a similar structure for the C.P.s. However, the En.C. strives to achieve S.D. by directly employing the R.E. resources in energy generation. Unlike the E.U. RE Directive, the En.C. does not set the unified "Community" target for the gross final consumption. This is instead set by several factors, because the En.C. does not have an implementation structure

55 Directive 2009/28/EC of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, (5 June 2009), L 140/16.

56 Alexander Bürgin, "National Binding Renewable Energy Targets for 2020, but Not for 2030 Anymore: Why the European Commission Developed from a Supporter to a Brakeman," 22 *Journal of European Public Policy* (May 28, 2015), p. 700.

57 See the case study comparing the Netherlands with the U.S.A. presented in Sacha Kathuria, "Economic Choices Enabled by Environmental Law," in Kirk W. Junker, ed., *Environmental Law Across Cultures: Comparisons for Legal Practice* (London: Routledge, 2020) pp. 177–200.

58 Nikos Lavranos and Cees Verburg, "Renewable Energy Investment Disputes: Recent Developments and Implications for Prospective Energy Market Reforms European Energy Law Report XII - 2018," 48 *University of Groningen Faculty of Law Research Paper* (2019) pp. 65–94.

59 Energy Community Secretariat, "Annual Implementation Report," November 1, 2019, available at https://www.energy-community.org/dam/jcr:a915b89b-bf31-4d8b-9e63-4c47dfcd1479/EnC_IR2019.pdf (retrieved 11 November 2020).

Table 8.1 Renewable energy national targets

Contracting party	*National target in renewable energy share generated from H.P.P.s up to 2020*	*Achieved level in 2017 or 2018*
Albania	38%	34.6%
Bosnia and Herzegovina	40%	22.7%
Georgia	⋆	⋆
Kosovo	25%	22.9%
Moldova	17%	27.8%
Montenegro	33%	40%
North Macedonia	23%	19.7%
Serbia	27%	20.6%
Ukraine	11%	5.8%

⋆ Georgia is not required to adopt the National Renewable Energy Action Plan, although it is expected to make efforts to implement the policies to increase the share of the generated energy from renewables.

like the E.U., and C.P.s are not bound to provide unified commitments. For example, socio-economic development of the C.P.s plays a crucial role. One must also remember that the transposition of the E.U. energy *acquis* in C.P.s is fully voluntary.[60] In this respect, the *acquis* leaves the implementation of the national targets to the responsibility of the C.P.s. That said, voluntary compliance with the Directive has been encouraging and the targets have been ranging close to the E.U. national indicators mentioned above, between 11% in Ukraine to 40% in BiH. Despite this performance, a recent report published by the En.C. Secretariat stressed that the absence of En.C. targets has many drawbacks.[61]

8.3.2 The nature of the N.R.E.A.P.s

The dual regimes existing in the E.U. regarding the binding targets causes certain misunderstanding regarding the nature of the M.S. obligations with respect to those R.E. targets.[62] The *Elecdey Carcelen* case,[63] provides an illustration. It involved wind turbine operators in Castilla-La Mancha, Spain. R.E. producers brought a claim against the regional levy which was imposed on wind energy. The R.E. producers maintained that this measure was against the purpose and objectives of the R.E. Directive because the levy discouraged customers to opt for the R.E., thus making it more difficult for

60 Irakli Samkharadze, *supra* note 4, p. 4.

61 Energy Community Secretariat, *supra* note 59, pp. 7–9.

62 Theodoros G. Iliopoulos, "Dilemmas of a New Renewable Energy Directive," 27 *European Energy and Environmental Law Review* (December 2018), p. 212.

63 Directive 2009/28/EC of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, (5 June 2009), L 140/16, Art. 15.

the M.S. to meet national R.E. targets. The claimants also questioned the obligatory nature of the N.R.E.A.P.s.

The C.J.E.U. confirmed the reasoning of the claimant, stating that imposing the additional levy did discourage the use of R.E.s.[64] The C.J.E.U. also deemed the levy to be incompatible with the Directive, and stated that the failure of M.S. to fulfill national targets would be an infringement of the obligation.[65] The C.J.E.U. did not, however, indicate how an M.S. is to design the national supporting schemes for the renewables. In the event an M.S. fails to meet its national targets, under Articles 3(2) and 4(4) the Commission only has an advisory power and the M.S. is only required to review its N.R.E.A.P.s. Thus, even after this case, there is still no legal clarity of what happens if an M.S. fails to implement national targets, leaving the targets somewhere in the realm of policy management.

Non-compliance with the N.R.E.A.P. is even more softly regulated under the En.C. *acquis*. Article 4 of the R.E. Directive provides a two-year period for a C.P. to resubmit an amended N.R.E.A.P. to the Secretariat in case the share of the energy from R.E.s falls below the intended trajectory. In short, compliance with N.R.E.A.P.s remains dependent upon the voluntary compliance of the C.P.s.

8.3.3 Renewable Energy Directive II

Soon after the adoption of R.E. Directive,[66] more ambitious goals for renewable energy were planned for after 2020. In a 2013 communication paper, the Commission proposed the increase of shares up to 27% or more as a binding E.U. target.[67] The incentive for such an approach appeared to be to enable an M.S. to independently provide the assessment of its own economic circumstances, energy mixes, and capacities to produce the renewable energy. Then, with the entry into force of the Paris Agreement,[68] which aimed at limiting the planet's warming below 2°C, the Commission published the proposal for a revised R.E. Directive. This proposal was criticized by the European Parliament, which in turn provided a response to the communication paper

64 *Elecdey Carcelen S.A. and Others V Comunidad Autónoma De Castilla-La Mancha*, C-215/16, C-216/16, C-220/16 and C-221/16, Information on Unpublished Decisions, §39.

65 Dirk Van Evercooren, "The EU Approach to the Regulation of Guarantees of Origin," in *European Energy Law Report XIII*, (Cambridge: Intersentia, 2020) p. 206.

66 Directive 2009/28/EC of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, (5 June 2009), L 140/16.

67 See European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a Policy Framework for Climate and Energy in the Period from 2020 to 2030," (22 January 2014) COM (2014) 15 final.

68 Paris Agreement (December 13, 2015), in 21 *UNFCCC, COP Report*, Addendum, at 21, U.N. Doc. FCCC/CP/2015/L.9/Rev. 1.

in January 2018. The response assessed the aimed target by the Commission as "disappointingly unambitious" [69] and proposed instead an increased target pf 35% by 2030.

As the final outcome of the policy discussions, the E.U. adopted the new revised R.E. Directive 2018/2001/E.U.[70] as part of a "Clean energy for all Europeans" package. Therein, the E.U. set the goal to achieve 32% renewable energy by 2030. The new Directive requires each M.S. to have drafted and adopted a 2021–2030 National Energy and Climate Plan. While the new commitments for the M.S.s of the E.U. are clearly defined, the amendments to the En.C. *acquis* are yet unclear. Renewable energy targets will likely only be adopted after the current Secretariat's term expires in 2026.[71]

8.3.4 Overview of the Guarantees of Origin regulation in the E.U. and EnC

Guarantees of Origin (G.O.s) are one of the most important legal developments in the renewable energy that contribute to consumer awareness of the European energy market. The instrument was introduced in the E.U. as a mechanism to trace electricity from R.E. sources. Originally the G.O.s served the purpose of informing end-consumers of the location of the source of generated energy. It took the E.U. some time to provide unified regulation for the G.O.s and this process is still further developing. Initially, R.E. Directive 2001/77/EC[72] introduced the notion of G.O.s, but it did not provide specific and clear definition of the purpose of the G.O.s. Rather it vaguely stated that G.O.s were electricity tracking instruments. Later, Directive 2003/54/EC[73] required mandatory disclosure of the suppliers' source of electricity, however, this requirement was not linked to Directive 2001/77/EC and thus, G.O.s were

69 See "Amendments Adopted by the European Parliament on 17 January 2018 on the Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (Recast) (COM (2016) 0767 – C8-0500/2016 – 2016/0382(COD))," (17 January 2018), C 458/226.

70 Directive 2018/2001 of the European Parliament ad of the Council of 11 December on the promotion of the use of energy from renewable sources (recast), (21 December 2018), L 328/82.

71 Energy Community, "Protocol Concerning the Accession of Georgia to the Treaty Establishing the Energy Community," October 14, 2016, available at https://www.energy-community.org/dam/jcr:71db75bd-ba91-4e54-8aa1-16ecb8f68d51/PRO_2016_MC_Georgia.pdf (retrieved 12 November 2020), Art. 2.

72 European Commission, "Interpretation of Definitions of Project Categories of Annex I and II of the EIA Directive," January 18, 2017, available at https://ec.europa.eu/environment/eia/pdf/cover_2015_en.pdf (retrieved 12 November 2020), p. 5.

73 See "Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC - Statements Made with Regard to Decommissioning and Waste Management Activities, " (15 July 2003) L 176/56.

exempted from the requirement.[74] With the adoption of the Third Energy Package, including the R.E. Directive, more clarity on G.O.s was provided.

Even prior to the Third Energy Package, the Commission proposed to exempt G.O.s and instead adopted a separate tradable Transfer Accounting Certificate system. This proposal was rejected in 2009 due to the associated high administrative burden.[75] Finally, the R.E. Directive separated the purpose of G.O.s from target compliance and defined the sole function of the G.O.s as the electricity tracking generation instrument responsible for providing reliable disclosure information that the energy supplier would be obliged to provide to energy consumers as targeted by the 2003/54/EC Directive. The Third Energy Package also became an integral part of the EnC *acquis*. The legal regulation of the G.O.s resembles the E.U. regulation. The degree of implementation of the G.O.s differs from country to country depending on their accession date in the EnC.

The increase in any state's R.E. share is very strongly connected to consumer participation in the process. Since public funds are heavily integrated in the national supporting schemes, their support and awareness of the electricity source becomes very important.[76] The future increase of shares also greatly depends on informed decision-making by end-consumers. Information disclosure in the En.C. C.P.s is very crucial because it enables consumers to make informed decisions regarding the energy they receive. The objective of the regulation is to provide increased transparency to consumers, so that they have possibility to purchase the electricity from renewable sources and it thus empowers them to take responsibility for the consequences of their decisions. This is greatly connected not only to the sustainability of the end-result of the generated energy, but also to the process by which the energy source was constructed.

Despite the fact that the disclosed information is mandatory for the E.U. M.S., implementation in national legislation leads to adopting different methods among the M.S., many of which do not strongly support the development of green electricity market. While some countries like Austria and Switzerland included the G.O.s in all electricity generation forms, which is regarded as full disclosure, other MSs still limit themselves to partial disclosure.[77] This issue becomes even more problematic in C.P.s of the En.C., where the full implementation of the regulatory framework of the G.O.s is not achieved, partly due to the differences of accession dates in the Community. Serbia only adopted the regulation on G.O.s in 2017, and Georgia, the last C.P. of the En.C.,[78] has not yet transposed the regulation.[79]

74 Dirk Van Evercooren, *supra* note 65, p. 203.
75 Ibid, p. 203.
76 Dirk Van Evercooren, *supra* note 65, p. 198.
77 Dirk Van Evercooren, *supra* note 65, p. 206.
78 See Protocol Concerning the Accession of Georgia to the Treaty Establishing the Energy Community, *supra* note 71.
79 See "Decree on the Guarantee of Origin," Pub. L. No. No. 82/17, *Official Gazette of the Republic of Serbia* (2017).

Energy transition in the C.P.s remains problematic, involving a variety of issues connected to the correct implementation and enforcement of the *acquis*. The mechanism does not cover the evaluation of the constructing of the plant prior to the R.E. Directive. Due to major transition to R.E. and thus building new plants in C.P.s, the instrument can be used as a tool for the end-customer to challenge the sustainability of the generated electricity, which has close connectivity to the application of the E.I.A. Directive.[80] However, challenging the sustainability of the already constructed plant is a dead issue. Thus, one must consider a more pro-active approach that promotes the sustainability of the energy source by establishing a sustainability assessment of the plant during its construction phase as a criterion in the application of the E.I.A. Directive. Such a criterion also supports the role of En.C. Secretariat as the "supervisor and guardian" of the implementation process.

8.3.5 Relationship of R.E.s and E.I.A. Directive[81]

The E.I.A. Directive forms an essential part of the environmental chapter of *acquis communautaire*, and has been an integral part of the legal framework since 2016 based on Ministerial Council Decision 2016/12/MC-EnC, which stresses the role it plays for the development of certain projects in the C.P.s of the En.C. The main objective of the Directive is that prior to giving consent for the development of the project, the competent authorities are required to conduct adequate E.I.A.[82] to determine the effects of the project on the environment, considering the "nature, size or location" of the projects.[83] The Directive applies to both public and private persons who initiate projects.[84]

C.P.s try to attract foreign investments for more R.E. plant constructions. In doing so, not only the end, but rather also the means to the end, must be sustainable and help to achieve zero CO_2 emission energy generation. Thus, the E.I.A. Directive is closely connected to the impact of the R.E. Directive. Given that environmental protection is the primary intention for promoting renewables in the E.U. as well as in the En.C. legal structure, the sustainability of these sources becomes questionable when they are not built in accordance with environmental standards.

80 See "Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 Amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment," (16 April 2014) L 124/1.

81 Ibid.

82 European Commission, *supra* note 72, p. 5.

83 European Commission, "Environmental Assessments of Plans, Programmes and Projects, Rulings of the Court of Justice of the European Union," October 10, 2017, available at https://ec.europa.eu/environment/eia/pdf/EIA_rulings_web.pdf (retrieved 12 November 2020), p. 2.

84 "Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 Amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment," *supra* note 80, Art. 2 (C).

The application of E.I.A. to industrial processes was already broadly acknowledged at the Stockholm Conference in 1972. Several years after the Stockholm Conference produced the *Brundtland Report*,[85] the Rio Declaration attempted to define and give more detailed explanation to the notion. Under Principle 27 of the Rio Declaration, E.I.A. were acknowledged to be crucial tools for sustainable development, and which are essential when establishing the R.E. sources.[86] The E.I.A. process itself guides decision-makers to adopt the most sustainable option for power plant development.[87] Beside serving the purpose of identifying environmental impacts of various development projects, the E.I.A. Directive also obliges both developers and consenting authorities to consider alternatives to the developed process from the initial point and choose the one that would be less damaging to the environment.

Another E.I.A. sustainability aspect is to open access for wider public participation and include various environmental organizations in the decision-making process, which expands the scope of assessment for possible impacts on the environment.[88] It stresses the obligation of the competent authorities to ensure consistent and continuous accessibility to the information of the public on every step of the process, beginning with development project's submission of an application for review.[89]

The E.U. *acquis* has also adopted new principles over time. Adopted almost twenty-five years ago, the current version of the E.I.A. Directive has had time to embody lessons learned from C.J.E.U. litigation.[90] In the latest version, the E.U. faced the task of removing all possible administrative burdens, while advancing the quality and effectiveness of the Directive. The amended Directive includes incentives to make the whole process more transparent and understandable for the public. Some of the new approaches taken in the Directive more clearly state the process for public consultations, thus providing more clarity during the decision process.

The E.I.A. Directive has found full application in the En.C. *acquis* covering the latest amendments through Directive 2014/52/EU, which offers the

85 World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report), A/42/427, (20 March 1987), available at https://digitallibrary.un.org/record/139811/files/A_42_427-ES.pdf (retrieved 13 November 2020).

86 Sara Bruhn-Tysk and Mats Eklund, "Environmental Impact Assessment—A Tool for Sustainable Development?: A Case Study of Biofuelled Energy Plants in Sweden," 22 *Environmental Impact Assessment Review* (2002), p. 132.

87 Dennis Agelebe et al., "Environmental Impact Assessment Systems," in Kirk W. Junker, ed., *Environmental Law Across Cultures: Comparisons for Legal Practice* (London: Routledge, 2020), pp. 201–241.

88 Yen-Lin Agnes Chiu, "Towards Sustainable Enterprises: The Impact Factor of Climate Change for Corporate Responsibility and Performance," 40 *European Journal of Law and Economics* (October 2015), pp. 343–346.

89 European Commission, *supra* note 76, p. 5.

90 See European Commission, *supra* note 83.

C.P. the best available policy tool to direct projects towards compliance and to advance the sustainability of renewables. Although the C.P.s have fully transposed these Directives, successful implementation still remains questionable, as measured by the content of the complaints submitted to the Secretariat's dispute resolution center regarding the failure of the C.P.s to provide environmental assessment consistent with the national as well as En.C. *acquis*. These complaints most often question the credibility of the E.I.A. reports or allege breaches of requirements for public engagement.

8.4 The role of the Secretariat as the "judicial body"

Articles 90–93, located in Title VII of the En.C. Treaty, establish the structure for implementation of decisions and dispute settlement.[91] The Rules of Procedure of 16 October 2015 on dispute settlement under the Treaty provide more detailed guidance on dispute resolution (D.R.).[92] The Advisory Committee, the En.C. Secretariat, and the Ministerial Council (M.C.) all participate in legal implementation.[93] Under normal circumstances the Secretariat carries out day-to-day activities of the En.C. It acts as the supervisory body for the correct transposition and implementation of En.C. laws and principles.

After a complaint has been submitted to the Secretariat, the Secretariat initiates Preliminary procedure, which aims "to establish the factual and legal background of case of alleged non-compliance"[94] The role of Secretariat is either to act as a body to review the complaint submitted by the regulatory body or private party, or to itself be a "party" to the complaint, by initiating the case *suo motu*. For example, in case of a complaint alleging violation of the *acquis communaitaire* the Secretariat has the authority to initiate preliminary procedure as regulated by Title III of the Procedural Act 2008/01/MC-EnC. But also, under Articles 90 and 11 of the Rules of Procedure, the Secretariat can initiate preliminary procedures in case likely non-compliance has been alleged by a private party, regulatory board, or by the Secretariat *suo motu*.

The scope for allegations of non-compliance by a party are broadly defined under Article 3 of Title II.[95] Article 3(1) states that "A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions)

91 "Treaty Establishing the Energy Community. Title VII - Implementation of Decisions and Dispute Settlement," (20 July 2006) L 198/ 18, Art. 90–93.

92 Energy Community, "Procedural Act 2008/01/MC-Enc on Rules of Procedure for Dispute Settlement under Treaty as Amended by Procedural Act 2015/04/MC-Enc of 16 October 2015 on Amending Procedural Act 2008/01/MC-Enc of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty," October 16, 2015 available at https://energy-community.org/dam/jcr:e2ad3abd-f640-43ed-8150-dc26fdf0021a/PA2008-01C_dispute_rules.pdf (retrieved 12 November 2020), Art. 90–93.

93 Dirk Buschle, *supra* note 40, p. 30.

94 Energy Community, *supra* note 92, Art. 11 (2).

95 Energy Community, *supra* note 92, Art. 3.

are incompatible with a provision or a principle of Energy Community law." Article 3(2) limits the alleged non-compliance to any measures taken by the public authorities of the C.P.[96] Such a broad scope of assessment may overlap with other parallel proceedings, such as Investor-State Arbitration against the particular C.P. The procedure gives the Secretariat broad discretion to define the scope of the complaint itself. Furthermore, the flexible dispute settlement procedure gives the proceedings the character of a diplomatic tool rather than a judicial tool. For example, if the initiating party withdraws the complaint, the Secretariat may nevertheless pursue the procedure further, making it unlike more traditional dispute resolution procedures.[97]

The fact-finding, or investigation phases, which need to be carried out by the Secretariat raise several questions on which the rules of procedure seem to be silent. In case the complaint is submitted by a private party, for example, there is no clear requirement as to what the complainant needs to submit as evidence of the alleged violations. Article 22 does not address the issue of credibility of the complaint and does not state the legal standard that needs to be addressed by the complaint. Although Section 2 refers to the submission of the evidence and copies of relevant correspondence with the national authorities of the parties, this is not mandatory, and thus appears to be of a voluntary or recommendatory nature.[98] This makes the private bodies mere messengers of the allegations of breach of obligations by the C.P., and which do not impose any burden of proof.

Another issue on which the rules do not provide clear guidance are the means of assessment of the case. As mentioned above, the Secretariat not only assesses legal aspects of the case, but rather often is called upon to determine the credibility of technically difficult documents, such as E.I.A. studies that are challenged by third parties. In this case, the regulation does not provide well-defined guidance for the assessment of complex and technical E.I.A. The Secretariat's role would be aided greatly if the rules provided the Secretariat the possibility to employ technical consultants who would provide assessment of the technical credibility of the E.I.A.

Regardless of these shortcomings, if the Secretariat deems that credible grounds for failure to comply with En.C. *acquis* exists, it addresses the Party concerned with the Opening Letter,[99] where it invites the C.P. to submit its observations on the allegations. In case of the absence of the response by the party concerned, the Secretariat submits to the M.C. a reasoned request,[100] which must contain a coherent and detailed statement of the reasons that led the Secretariat to conclude that the C.P. failed to fulfill its Obligations.

96 Ibid, Art. 3 (1)–(2).
97 Dirk Buschle, *supra* note 40, p. 30.
98 Energy Community, *supra* note 92, Art. 22 (2).
99 Ibid, Art. 13.
100 Ibid, Art. 29.

A reasoned request under Article 91 of the Treaty[101] by the Secretariat could already be seen as the quasi legal act of issuing a decision on the alleged non-compliance with the En.C. Treaty, which makes the Secretariat a "quasi-judicial" body, and the M.C. might be seen as the mere execution tool for the "decision" taken by the Secretariat, which the Party concerned must implement. Therefore, the Secretariat is *de facto* the main decision-making body in the En.C. legal system, as it both addresses enforcement as the last resort, and adopts the role of settling the disputes through active interaction with the party or parties concerned, by means of negotiations, facilitation, or mediation, for which the Secretariat may also convene a special dispute resolution body. However, the dispute resolution process is different from the more traditional infringement process under the treaty.

8.4.1 Infringement case studies under the Environmental Impact Assessment Directive

The following section of this chapter provides an evaluation of the above-described processes through a sample of cases from the En.C. Secretariat's docket. Over a period of seven years, a total of twenty cases have been submitted to the Secretariat, most of which were not pursuant to the En.C. Treaty's Article 92 but were settled through negotiations. The number of complaints claiming a breach of the E.I.A. Directive is relatively low, with only four of the twenty cases addressing alleged breaches under the E.I.A. decision-making process. The complaints mostly claim that a necessary E.I.A. report is lacking or that there has been some form of non-compliance with the *acquis*. Thus, this section also elaborates upon the role of the Secretariat in ensuring the sustainable construction of new power plants in the C.P.s, where the possible end-consumers have the possibility to participate directly in the correct administration of the environmental permitting process.

From the following four EnC infringement cases against BiH, Ukraine, Georgia, and Albania, two of these cases have been resolved, a fact that demonstrates the unique character of the En.C. Secretariat Dispute Settlement Body. The remaining two against Georgia and Albania are still ongoing during the writing process of this chapter.

Case ECS-01/15: Bosnia and Herzegovina[102]

This case was brought as an allegation of non-compliance of a non-renewable energy source. The case demonstrates the flexible nature of En.C. body, which can encourage more private bodies and interested stakeholders to take an active

101 "Treaty Establishing The Energy Community," *supra* note 91, Art. 91.

102 See Energy Community, "Case ECS 01/15: Bosnia and Herzegovina," 2017-2018 available at https://www.energy-community.org/legal/cases/2015/case0115BH.html (retrieved 12 November 2020).

role in the correct application of En.C. *acquis*. In 2011, private investor Comsa Energy announced a plan to construct a coal-fired power plant with the capacity of 600 MWe, "TPP Ugljevik 3." The plant would be fired by the lignite mined in the municipality of Ugljevik, located in Republika Srpska, BiH. Near the territory, there was already another operating lignite power plant, "TPP Ugljevik 1," with the capacity of 800MWth, and with high sulphur dioxide (SO_2) emissions. TPP Ugljevik 3 obtained approval of its E.I.A. from the Ministry of Spatial Planning, Construction and Ecology of Republika Srprska in June 2013. Following approval of the E.I.A., the investor obtained an environmental permit from the same Ministry in November 2013.[103]

In December 2014, the Secretariat received a complaint alleging non-compliance with the administrative environmental permitting process by the Ministry, as per Directive 2011/92/EU Article 3, Article 5(3)(b), (c), and (d) and Article 7 of the E.I.A. Directive. The complaint specifically alleged non-compliance due to the failure to provide a description of direct and indirect impacts of the project, as required by Article 3 of the E.I.A. Directive.[104] The study submitted by the developer did not quantify the estimated greenhouse gas emissions, which was necessary to assess the impacts, as required by Article 3 of the E.I.A. Directive. Furthermore, the Secretariat found that the E.I.A. study contained contradictory data regarding the estimated emissions of SO_2, nitrogen oxides, and particular matter.[105] Upon receipt of the developer's E.I.A., the decision-making authorities had neither carried out independent investigations nor requested the submission of additional information or amendments. The Secretariat concluded that this was in violation of the EnC *acquis* on the environment.

Furthermore, an assessment carried out by the Secretariat found that the decision-making authorities failed to meet their responsibilities with respect to several issues under Article 5.[106] First, the Secretariat found that regarding Article 5(3)(c), the study did not provide the assessment of the geographical area that would incur an environmental impact due to the dispersion of the of the anticipated emissions. Second, the study did not provide qualitative or quantitative analyses of the wastewater composition, lacking hourly volumes, annual volumes, and an impact analysis on the aquatic environment. Finally, Article 5(3)(d) requires the assessment of feasible alternatives, but the

103 See Energy Community, "Case ECS-1/15; Reasoned Request," May 18, 2018 available at https://www.energy-community.org/dam/jcr:c71d021d-e422-4b21-9280-853959f3f41b/MC_CaseECS-1_15_RR_112018.pdf (retrieved 12 November 2020), pp. 2–3.

104 "Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 Amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment," *supra* note 80, Art. 3.

105 Energy Community, *supra* note 102, p. 3.

106 "Directive 2014/52/EU EU of the European Parliament and of the Council of 16 April 2014 Amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment," *supra* note 80, Art. 5.

study provided only a short justification of the choice of technology. The Secretariat found that this assessment severely lacking in not only provided no realistic analyses, but also because the study justified the lack of additional analyses because that "requires significant investment and costs."[107]

For the purposes of this chapter in this book, the violation of Article 7 of the E.I.A. Directive is most important: the Secretariat concluded that the responsible decision making-bodies failed to actively engage neighboring countries that would be impacted by the dispersion of the air pollutants; a fact that the E.I.A. study also failed to identify.[108] Following these findings, the Secretariat initiated an infringement case against BiH. By letter, the Secretariat provided BiH with preliminary findings of the E.I.A. process for the planned Uglijevik 3 power plant, in which it referred to the failure of the C.P. to address all direct, indirect, and transboundary impacts, as well as to the failure to adequately engage the concerned public in accordance with the E.I.A. Directive requirements. Thus, the Secretariat also concluded that BiH failed to fulfill its obligations under Articles 12 and 16 of the En.C. Treaty.

In accordance with the procedural rules of the dispute settlement process, BiH was given an opportunity to review and comment upon the preliminary findings of the Secretariat and it did so in March, 2018. BiH also initiated a mediation process prior to the Secretariat's reasoned request having been submitted to Ministerial Council in October 2018.[109] The mediation panel, organized by the Secretariat, proved to be successful. The representatives of the BiH, in consultation with the investors, agreed that with the assistance of the Secretariat, a new E.I.A. would be provided by the investors and a process would proceed in accordance with En.C. *acquis*.[110]

Case ECS-13/16: Ukraine[111]

This case concerns problems in national administration and non-compliance due to delayed transposition of the *acquis* into the national legislation of Ukraine. In September 2016, the Secretariat sent an opening letter to Ukraine addressing non-compliance with the En.C. environmental *acquis*, due to the failure to have transposed the E.I.A. Directive into national law by January 1, 2013.[112] Following the opening letter on October 4, 2016,

107 Peter Vajda, "Implementation of the EIA Directive in the Western Balkans—A Case Study of the Ugljevik 3 Thermal Power Plant," 20 *ERA Forum* (March 2020), p. 9.

108 Energy Community, *supra* note 102, p. 5.

109 Peter Vajda, *supra* note 107, p. 12.

110 Ibid.

111 See Energy Community, "Case ECS 13/16: Ukraine/Environment," 2016-2017, available at https://www.energy-community.org/legal/cases/2016/case1316UA.html (retrieved 12 November 2020).

112 See Energy Community, "Case ECS 13/16: Ukraine/Environment Opening Letter." September 6, 2016, available at https://www.energy-community.org/legal/cases/2016/case1316UA.html (retrieved 12 November 2020).

Ukraine's parliament, the *Verkhovna Rada*, adopted the Ukrainian legislation on E.I.A. The adopted legislation by the *Rada*, which was sent to the President of Ukraine, was not signed and was returned to the *Rada*. In January 2017, the Secretariat issued a reasoned opinion, giving a two-month period for the Ukrainian government to respond to the allegations of non-compliance.[113] By May 2017, Ukraine had not responded, so the Secretariat submitted a reasoned request to the M.C., according to Article 29 of the Rules of Procedure for Dispute Settlement. However in July 2017, the Ukrainian Ministry of Energy and Coal submitted information noting the adoption of updated legislation on E.I.A. Thereafter, the Secretariat withdrew the request submitted to the Ministerial Council and the case was closed.[114]

Case ECS-12/18: Georgia[115]

In December 2018, several Georgian N.G.O.s registered a complaint with the Secretariat alleging that the Republic of Georgia, Ministry of the Environment, failed to comply with the E.I.A. Directive by issuing a permit based on a poorly drafted E.I.A. report, as well as failing to ensure proper engagement of the concerned public. The allegations regarded Larsi H.P.P. (20 MW), Dariali H.P.P. (108 MW), Nenskra H.P.P. (280 MW), Shuakhevi H.P.P. (184 MW), Namakhvani H.P.P. (333 MW), Twishi H.P.P. (100 MW), Mestya-Chala 1,2 H.P.P. (110 MW), and Shavi Aragvi H.P.P. (8 MW).[116] The Secretariat's preliminary findings indicated that the environmental permits for six H.P.P.s out of eight were issued prior to Georgia becoming a C.P. of the EnC in July 2017. Therefore, the Secretariat did not have jurisdiction to review their permitting process for compliance with the *acquis*.

As between the two remaining H.P.P., the complaint alleged that the Ministry issued the permit to the Nenskra H.P.P. "to build the H.P.P. without studying the impact on the environment and excluding a radical change in the construction project of the dam itself."[117] The complainants did not, however, provide any evidence to support these allegations in the complaint

113 See Energy Community, "Case ECS 13/16: Ukraine/Environment Reasoned Opinion," January 12, 2017, available at https://www.energy-community.org/legal/cases/2016/case1316UA.html (retrieved 12 November 2020).

114 See Energy Community, "Case ECS 13/16: Ukraine/Environment Closing of the Case," July 24, 2017, available at https://www.energy-community.org/legal/cases/2016/case1316UA.html (retrieved 12 November 2020).

115 See Energy Community, "Case ECS 12/18: Georgia/Environment," 2018, available at https://www.energy-community.org/legal/cases/2018/case1218GE.html (retrieved 12 November 2020).

116 List of Potential Power Plants in Georgia, Former Ministry of Energy of Georgia, available at: Http://Www.Energy.Gov.Ge/Projects/Pdf/Pages/List%20of%20Potential%20hpps%201759%20eng.pdf.

117 Letter N 17/1 of the Centre of Innovative Development of Enterprises of 25 February 2019, addressed to Dr. Dirk Buschle and the Energy Community Secretariat.

or in any further submissions. In October 2015, the Ministry of Environmental Protection had approved[118] the E.I.A. study assessment conclusion issued by the L.E.L.P. Technical and Construction Supervision Agency and requested the operator, Nenskra Hydro, to ensure compliance with the terms and conditions required in the assessment conclusion.[119]

In January 2019, Nenskra Hydro made a request to the Ministry to carry out a screening process due to the changes made to the original E.I.A. conducted in 2015. The request was published on the Ministry's website, calling for submissions till January 28, 2019 of interested stakeholders in the process.[120] The Ministry reviewed the submissions made on February 4, 2019, issued another Order[121] regarding the outcome of the screening process, and concluded that taking into consideration the nature of the changes made by Nenskra Hydro to the Nenskra H.P.P. project, no new E.I.A. was required.

In reaching its decision, the Ministry applied the screening criteria required by Article 4(3) and Annex III of Directive 2011/92/EU. Since that time, Nenskra Hydro has been reporting the E.I.A. monitoring results to the Ministry, and where required by Georgian legislation, has been holding public hearings and receiving submissions by the interested stakeholders. Furthermore, during the fact-finding by the Secretariat the developers submitted a new application for an environmental permit to the Ministry due to the modifications made to the original projects of Nenskra and Namakhvani H.P.P.s. The modified E.I.A. report for Namakhvani H.P.P. was approved by the Ministry in February 2020. The Ministry decided that the modifications to the original Nensrka H.P.P. project were very minor, and therefore, a new E.I.A. study was not necessary.

Case ECS-03/19: Albania[122]

In February 2019, the Secretariat filed an action against Albania regarding an alleged breach of the E.I.A. Directive, primarily concerning the content of

118 Order No. 769 of October 2, 2015 of the Ministry of Environmental Protection of Georgia on Rules and Deadlines for Reporting on Compliance with Terms of License for Use of Natural Resources, February 18, 2015, available at http://faolex.fao.org/docs/pdf/geo167628.pdf (retrieved 12 November 2020).

119 See Order No. 769 of Ministry of Environmental Protection and Natural Resources of Georgia, October 2, 2015 In "Nenskra Hydropower Project Supplementary Environmental & Social Studies" Annexes to Volume 2, Project Definition, p. 5, available at: Http://Nenskra.Ge/File/2017/04/Vol-2_ES-Nenskra_Project-Definition_Annexes.Pdf

120 Ministry of Environmental Protection and Agriculture of Georgia, "EIA and SEA Announcements, Ministry of Environmental Protection and Agriculture," 17 January, 2019.

121 Order No. 2-110 of January 17, 2019 of the Ministry of Environmental Protection of Georgia.

122 See Energy Community, "Case ECS-03/19: Albania/Opening Letter," September 14, 2019, available at https://www.energy-community.org/legal/cases/2019/case0319AL.html (retrieved 12 November 2020).

an E.I.A. study and the failure of the administrative bodies to ensure proper engagement of the public concerned in the decision-making process regarding the planned H.P.P. on the Vjosa River at the village of Poçem in Albania. The Secretariat carried out an independent assessment of the case and concluded that E.I.A. Directive requirements were violated. On September 14, 2020, the Secretariat issued an Opening Letter inviting Albania to address the alleged violations. According to the Rules of the Procedure for Dispute Settlement, Albania had two months to respond to the allegations in order to help Secretariat to establish full background of the Case. At the time of publication of this book, the Secretariat's investigation is continuing.

8.4.2 Lack of sanctions in the EnC legal structure

The adoption of a decision by the M.C. is not a smooth process. Under the En.C. Treaty, although the decision is legally binding for the C.P.s concerned, there is no effective tool for enforcement of the decision and the M.C. must rely upon the will of the parties to comply. Under Article 92 of the Treaty, in case the C.P. fails to implement the decision issued by the M.C.,[123] the M.C. upon a reasoned request by a Party, Secretariat, or Regulatory board acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its obligations and may suspend the voting rights and exclude the C.P. from attending the meetings. These sanctions are not generally regarded as sufficient incentives to implement the decisions, however.

Among the Treaty updates, a more strict sanctioning system has been proposed for several years, emphasized by the Reflection Group in 2014.[124] Introducing monetary sanctions is quite problematic, due first to the fact that it will require unanimous acceptance by all the parties. Second, for the treaty to function effectively, all C.P.s need to uniformly implement the sanctions. Third, such sanctions touch upon policy. The implementation of the EnC *acquis* does not provide any guarantees for a full integration into the European Energy Market or the E.U. Thus, the issues of who receives the funds from the sanctions and how they would be managed are challenges to be decided at the constitutional level of the EnC.

Therefore, as with the other issues discussed above, in order to justify the amendment of the Treaty to provide stricter sanctions, a reevaluation of the E.U.'s approaches towards C.P.s would be required. Introducing a sanctioning system will also require updating the E.U.'s bilateral agreements (such as association agreements) with the C.P.s, along with the necessary amendments to the EnC treaty.

123 "Treaty Establishing the Energy Community," *supra* note 91, Art. 92.

124 Energy Community, "An Energy Community for the Future," March 2014, available at: https://energy-community.org/dam/jcr:22770b82-8f24-47f3-a75d-cc037d3b2bf2/Info_HLRG_EnC.PDF (retrieved 12 November 2020).

8.5 Conclusion

In summary, this chapter considered the relationship of the Global North and Global South through drawing the parallels to the relationship between the E.U. and its neighboring countries. By arguing that instead of a polarized attitude, a more collaborative approach towards the relationship of these countries must be adopted. If such a change is not possible between Europe and its immediate neighbors, it does not portend well for attempts at altering the approach concerning the Global South. A voluntary transposition of the E.U. Energy *acquis,* without any conditional guarantees for the membership, can be accomplished by various incentives and socio-economic development of the C.P.s, but it has yet to be cemented in place. Socio-economic development can be employed to promote legal implementation through green mechanisms. Within the scope of the En.C. *acquis,* the Secretariat acts as a bridging institution and promoter of S.D. in the respective national legal systems, specifically with reference to the R.E. Directive and E.I.A. Directive as the elements of S.D. Furthermore, the G.O.s were analyzed as mechanisms for providing S.D. assessment to the newly constructed renewable energy electricity generating plant. As the cases have shown, the D.R. body of the Secretariat is the main enabling instrument of successful transposition of S.D. objectives in the respective C.P.s.

Bibliography

Agelebe, Dennis et al. "Environmental Impact Assessment Systems," in *Environmental Law Across Cultures: Comparisons for Legal Practice*. Ed. Kirk W. Junker. London: Routledge, 2020.

Bodansky, Daniel, et al. *The Oxford Handbook of International Environmental Law.* Oxford University Press, 2008.

Börzel, Tanja A. "When Europe Hits … Beyond Its Borders: Europeanization and the Near Abroad" 9 *Comparative European Politics* (2011): 398–399.

Bouris, Dimitris, and Dimitris Papadimitriou. "The EU and Contested Statehood in Its Near Abroad: Europeanisation, Actorness and State-Building." 25 *Geopolitics* (2020): 273–293.

Bruhn-Tysk, Sara, and Mats Eklund. "Environmental Impact Assessment—A Tool For Sustainable Development?: A Case Study of Biofuelled Energy Plants In Sweden." 22 *Environmental Impact Assessment Review* (2002): 132.

Bürgin, Alexander. "National Binding Renewable Energy Targets for 2020, But Not for 2030 Anymore: Why the European Commission Developed from a Supporter to a Brakeman." 22 *Journal of European Public Policy* (2015): 700.

Bulmer, Simon. "Theorizing Europeanization." *Europeanization*. Palgrave Macmillan, 2008: 47.

Buschle, Dirl. "The Energy Community and the Energy Charter Treaty: Special Legal Regimes, Their Systemic Relationship to the EU, and Their Dispute Settlement Arrangements." 12 *Oil, Gas & Energy Law Intelligence* (2014): 28.

Cambini, Carlo, and Alessandro Rubino. *Regional Energy Initiatives: Medreg and the Energy Community.* Routledge, 2014.

Chiu, Yen-Lin Agnes. "Towards Sustainable Enterprises: The Impact Factor of Climate Change for Corporate Responsibility And Performance." 40 *European Journal of Law And Economics* (2015): 343–346.

Egelston, Anne E. *Sustainable Development: A History*. Springer Science + Business, 2013.

El-Ashry, Mohamed T. "Balancing Economic Development with Environmental Protection in Developing and Lesser Developed Countries," 43 *Air & Waste* (1993): 18–24.

Faruqee, Rashid, and Kemal, A. R. "Role of Economic Policies in Protecting the Environment: The Experience of Pakistan [with Comments]" 35 *The Pakistan Development Review* (1996): 483–506.

Fix, Liana, and Andrea Gawrich. "Out of the Shadow? Georgia's Emerging Strategies of Engagement in the Eastern Partnership: Between External Governance and Partnership Cooperation." 7 *Caucasus Survey* (2019): 2.

Gan, Kai Peng. "Sustainable Development in International Law." 361–363 *Advanced Materials Research* (2011): 1937–1941.

Iliopoulos, Theodoros G. "Dilemmas of a New Renewable Energy Directive." 27 *European Energy and Environmental Law Review* (2018): 212.

Karova, Rozeta. "Enforcement Record of the Energy Community." 5 *European Energy Journal* (2015): 3.

Kathuria, Sacha. "Economic Choices Enabled by Environmental Law," in *Environmental Law Across Cultures: Comparisons for Legal Practice*. Ed. Kirk W. Junker. London: Routledge, 2020: 177–200.

Kenig-Witkowska, Maria. "The Concept of Sustainable Development in the European Union Policy and Law." 1 *Journal of Comparative Urban Law and Policy* (2017): 64–80.

Korosteleva, Elena A. *The European Union and Its Eastern Neighbours: Towards a More Ambitious Partnership?* (BASEES/Routledge Series on Russian and East European Studies 78), 2012.

Lavranos, Nikos, and Cees Verburg. "Renewable Energy Investment Disputes: Recent Developments and Implications for Prospective Energy Market Reforms European Energy Law Report XII – 2018." 48 *University of Groningen Faculty of Law Research Paper* (2019): 65–94.

Park, Deok-Young. *Legal Issues on Climate Change and International Trade Law*, Springer International Publishing, 2016.

Petrov, Roman. "Energy Community as a Promoter of the European Union's 'Energy Acquis' to Its Neighbourhood." 39 *Legal Issues of Economic Integration* (2012): 334–336.

Titi, Catharine. "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements." 26 *European Journal of International Law* (2015): 639–661.

Samkharadze, Irakli. "Europeanization of Energy Law and Policy beyond the Member States: The Case of Georgia." 130 *Energy Policy* (2019): 1–6.

Saurugger, Sabine, and Radaelli, Claudio M. "The Europeanization of Public Policies: Introduction" 10 *Journal of Comparative Policy Analysis: Research and Practice* (2008): 213–219.

Schimmelfennig, Frank and Ulrich Sedelmeier. "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe." 11 *Journal of European Public Policy* (2004): 670–671.

Vajda, Peter. "Implementation of the EIA Directive in the Western Balkans—A Case Study of the Ugljevik 3 Thermal Power Plant." 20 *ERA Forum* (2020): 9.

Van Evercooren, Dirk. "The EU Approach to the Regulation of Guarantees of Origin." *European Energy Law Report XIII*, Eds. Martha M. Roggenkamp and Catherine Banet, 2020.

Van Harten, Gus. "The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and Europe-Vietnam FTA." 1 *University Of Bologna Law Review* (2016): 140.

Verhagen, Gijs. "The Compliance and Dispute Settlement System of the European Energy Community." 46 *Legal Issues of Economic Integration* (2019): 150.

Voigt, Christina. *Sustainable Development as a Principle of International Law.* Brill/Nijhof, 2009.

Zillman, Donald N. "Evolution of Modern Energy Law: A Personal Retrospective." 30 *Journal of Energy & Natural Resources Law* (2012): 485–593.

9 Global environmental governance

A necessary pathway for sustainable development of Caribbean Small Island Developing States[1]

Richard A. Byron-Cox[2]

9.1 Introduction

In September 2017, parts of the Caribbean were struck by the deadly hurricane Irma. By the time it departed, some of the Caribbean Small Island Developing States (S.I.D.S.)[3] had been dealt terrible blows causing more than thirty deaths and billions of dollars' worth of damage.[4] While it is rather difficult to assess the "true" cost of a disaster,[5] this storm was catastrophic for many of these islands. The destruction may never be calculated and therefore never known, as what was the real damage to ecosystems, biodiversity, and future development is virtually impossible to calculate. It is necessary to emphasize here that storms are nothing new in the Caribbean. What is new and of great significance is the increased frequency and intensity of these and other natural disasters. The logical questions are from whence these increases came and how this can be mitigated. Figure 9.1 shows the Caribbean S.I.D.S.

These natural disasters are only part—even if a significant part—of the developmental challenge faced by Caribbean S.I.D.S.[6] Dealing with this multiplicity of problems is a tall order. There is clearly no one solution; no silver bullet that hits the target in the bullseye. Further, with the adoption

1 While this work is focused on the Caribbean S.I.D.S., much of what is written here can be equally applied to all S.I.D.S.

2 Head of the Capacity Development and Innovations Office at the Secretary of the United Nations Convention to Combat Desertification (U.N.C.C.D.).

3 See Section G of Agenda 21 for an understanding.

4 See John P. Cangialosi et al., "National Hurricane Center Tropical Cyclone Report: Hurricane Irma (AL112017), 30 August–12 September 2017," June 30, 2018, available at https://www.nhc.noaa.gov/data/tcr/AL112017_Irma.pdf (retrieved 25 February 2021).

5 Mattia Luigi Ratti, "The Economics of Natural Disasters: An Overview of the Current Research Issues and Methods," C.E.R.E. Working Paper, March 2017, available at http://www.cere.se/documents/wp/2017/CERE_WP2017-3.pdf (retrieved 25 February 2021), p. 2.

6 Jacqueline Laguardia Martinez, "Development and Environmental Challenges in the Caribbean SIDS," May 25, 2017, available at https://www.slideshare.net/jlaguardiamartinez/development-and-environmental-challenges-in-caribbean-sids (retrieved 25 February 2021).

DOI: 10.4324/9781003160236-13

Figure 9.1 Map of all Caribbean S.I.D.S. © DeGraff Ollivierre, Alison, *National Geographic Maps*, 2000.

by the United Nations General Assembly (U.N.G.A.) of Agenda 2030,[7]—to which all Caribbean S.I.D.S. have pledged compliance—this challenge is more demanding, as the quest is now one of achieving sustainable development.

Caribbean S.I.D.S. development challenges must be met by a series of overarching social, economic, political, and environmental policies, as well as mechanisms and actions that must all have the relevant and efficacious normative and regulatory base. The role of national law is therefore immediately apparent. But these islands are not a world unto themselves, but merely a physical and geological connection to the rest of the globe. As emphasized by Ralph Gonsalves, Prime Minister of St. Vincent and the Grenadines, the S.I.D.S. are intrinsically tied to a globalized world that brings serious consequences. Gonsalves explains:

> Among the major threats to global security, now and in the future, is the real possibility of a reduction in the quality of the environment for life

7 See United Nations General Assembly Resolution RES/70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development,* A/RES/70/1 (21 October 2015), available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (retrieved 25 February 2021).

> and living, and the adverse effects of climate change. Indeed, together they constitute existential challenges to human civilisation, particularly to small island developing countries threatened by global warming, coastal erosion, rising sea levels and highly unstable weather systems.[8]

The words of Gonsalves further emphasize a truism that the sustainable development of Caribbean S.I.D.S. must go through and be aided by the pathway of their cooperation with the rest of the international community. Some key questions immediately arise: What should that pathway look like? What should be the relations conducted in that pathway? How should they be conducted? And, who should conduct those relations? Underlying all these are the fundamental questions: What are or should be the norms and rules that determine how that pathway operates? Who writes those rules and enforces their implementation? This work is focused on shedding some light toward answering these last two questions.

9.2 Concept of and need for global environmental governance

That the international community saw the need to set up the Brundtland Commission in 1983 *ipso facto* testifies to the fact that world leaders realized the global environment is in effect connected and that there is some need to cooperate as regards its use and protection. This Commission was tasked by the U.N.G.A. to, *inter alia*, formulate a global agenda for change. It was to recommend ways that concern for the environment may be translated into greater cooperation among developing countries and between countries at different stages of economic and social development, and lead to the achievement of common and mutually supportive objectives that take account of the interrelationships among people, resources, environment, and development; and to consider ways and means by which the international community can more effectively address environmental concerns.[9]

This mandate given to the Commission is an admission that some global standards—if not rules—must be set and agreed to by all, as regards mankind's approach to development and use of natural resources for that purpose. It was an acceptance, even if tacit, that there must be some form of internationally designed rule-based governance of the processes of social and economic development and their interaction with the natural environment, which promotes international cooperation and collaboration to this end. The creation of the Commission was fundamental to initiation of this process.

8 Ralph E. Gonsalves, *Our Caribbean and Global Insecurity* (CreateSpace Independent Publishing Platform, 2017), p. 169.

9 U.N. World Commission on Environment and Development, "Our Common Future: Report of the World Commission on Environment and Development, Chairman's Foreword," (Oxford: Oxford University Press, 1987).

With the Brundtland Commission' report serving as a fundament that offered for the first time a definition of sustainable development, the international community proceeded to adopt many different instruments, from resolutions to treaties, concerning states' cooperation and collaboration as pertains to their relation to the natural environment as they pursue their social and economic development.[10] Three of these—the United Nations Framework Convention on Climate Change (U.N.F.C.C.C.), the Convention on Biological Biodiversity (C.B.D.), and the United Nations Convention to Combat Desertification (U.N.C.C.D.), known collectively as the Rio Conventions, and their various protocols and other later additions—set some very useful blanket international norms, addressing human behavior in relation to their respective subjects. The objective of achieving sustainable development is the common thread running through all three, pointing to the elementary truth that trying to address this crucial issue purely behind the borders of national sovereignty and political independence will only ensure that all will fall short of that goal to their individual and collective detriment.

The international community decided to work on these international instruments because the reality was and still is, that many of the planet's natural resources are being overexploited, and if the overexploitation is not halted, will lead to their complete exhaustion. Ten years ago, the Food and Agriculture Organization (F.A.O.) highlighted that potable water and bioproductive land seem to be neverendingly degraded by human activity. This was revealed in a 2011 report that states, *inter alia*, that there exists a "creeping degradation of the land and water systems that provide for global food security and rural livelihoods."[11] The status of the planet's biodiversity is in no better shape. Indeed, the latest United Nations Environment Programme (U.N.E.P.) biodiversity report opens with this dire warning:

> Humanity stands at a crossroads with regard to the legacy it leaves to future generations. Biodiversity is declining at an unprecedented rate, and the pressures driving this decline are intensifying. None of the Aichi Biodiversity Targets will be fully met, in turn threatening the achievement of the Sustainable Development Goals and undermining efforts to address climate change.[12]

10 See Sustainable Development Goals Knowledge Platform, "Major Agreements & Conventions," available at https://sustainabledevelopment.un.org/index.php?menu=122 (retrieved 25 February 2021).

11 The Food and Agriculture Organization of the United Nations and Earthscan, "The State of the World's Land and Water Resources for Food and Agriculture: Managing Systems at Risk," 2011, available at http://www.fao.org/3/i1688e/i1688e.pdf (retrieved 25 February 2021), p.3.

12 Secretariat of the Convention on Biological Diversity, "Global Biodiversity Outlook 5," 2020, available at https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf, (retrieved 25 February 2021), p. 8.

Whether it is pollution,[13] ocean acidification,[14] destruction by war,[15] or the ravages of man-made climate change,[16] the planet is in dire need of protection from the Anthropocene that is evident in practically every corner of the globe. The Caribbean S.I.D.S., being tiny, vulnerable, poor and powerless, are among the hardest-hit victims of much of these destructive forces, especially that of man-made climate change.[17] And they have little influence, if any, on the actions that cause these plagues that so severely affect them.

A major role of any branch of law is providing principles, norms, and rules that govern the behaviors of the subjects[18] (those persons with legal right and responsibilities) of that branch of law. This is also the case with international environmental law. Caribbean S.I.D.S., being independent, sovereign states are subjects of that law with, what may at a glance, seem to be equal rights and responsibilities as all other nations. However, just a slightly more inquisitive look would immediately reveal that this is an illusion, that masks the reality of the powerlessness of these S.I.D.S. This pretense of equal sovereignty of states under this law is especially seen in its ramifications for Caribbean S.I.D.S.

In a rule-of-law community that seeks justice for all its subjects, law ought to be the defender of the weak. If this is not the case, then might makes right, and justice is a function of enforcing might, rather than ensuring the practice of rights and fulfillment of responsibilities. Today the fundamental question is whether international environmental law will mature to the point of being a body of rules and norms standing on the cornerstone of ensuring justice at the global level.

Notwithstanding that the challenges to sustainable development of Caribbean S.I.D.S. are many, varied, and complex, there are ways of meeting and defeating these challenges. And, in the same way these problems vary, so

13 See for example The Lancet Commissions, "The Lancet Commission on Pollution and Health," October 19, 2017, available at https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(17)32345-0.pdf (retrieved 25 February 2021).

14 James C. Orr et al., "Anthropogenic Ocean Acidification over the Twenty-first Century and Its Impact on Calcifying Organisms," 437 *Nature* (2005), pp. 681–686.

15 House of Commons, "Conflict and Development: Peacebuilding and Post–conflict Reconstruction. Sixth Report of Session 2005–06: Volume I ," October 17, 2006, available at https://publications.parliament.uk/pa/cm200506/cmselect/cmintdev/923/923i.pdf (retrieved 25 February 2021).

16 See for example European Environmental Agency, "Climate Change, Impacts and Vulnerability in Europe 2012. An indicator-based report," *EEA Report* No. 12/2012, available at https://www.eea.europa.eu/publications/climate-impacts-and-vulnerability-2012 (retrieved 25 February 2021).

17 Inter-American Development Bank, "Small Island States: Building Resilience to Climate Change in Small Island Developing States," 2020, available at https://www.iadb.org/en/ove/climate-change-caribbean-small-island-states (retrieved 25 February 2021).

18 For a brief general discussion see Kishan Tiwari, "Importance of Law in Society," February 1, 2017, available at https://legaldesire.com/article-importance-of-law-in-society/ (retrieved 25 February 2021).

too do the solutions, including the levels at which they should be addressed, starting from local and community levels, through to national, sub-regional, regional, and global levels. This chapter argues that addressing the problems at the global level is one of the key tools in helping Caribbean S.I.D.S. to overcome these challenges.

9.2.1 Schools of thought on governance

Before proceeding to implement the idea of global environmental governance (G.E.G.), there is the need to briefly address the idea of global governance. There are many definitions and theories as to what constitutes governance.[19] The *World Book Dictionary* simply notes it means to "rule" or to "control."[20] A small step beyond this *prima facie* understanding reveals that governance is quite a complex concept with which to grapple.[21] This "loaded" terminology includes elements of mechanisms, policies, relationship between component parts, and various ideas and practices, as well as the idea of the enforcement of procedures, and periodic if not constant monitoring. This chapter is, however, concerned with governance mainly from the standpoint of norms and rules on which it is based; that is to say the normative and legal architecture on which it stands, and which determines its component parts and their roles, and the behavior of those who exercise governance (i.e., those who run this machinery).

As it is with governance, so too there are different postulations as to what is global governance. Thomas G. Weiss and Kevin V. Ozgercin note that "the concept of global governance has not only become more widespread and popular, but confusion about its meaning has increased."[22] This seems to support the view of those who argue that global governance is "complex and little understood."[23] Notwithstanding these differences, it is safe to say that most concepts of global governance conceive of it as governance on a world scale requiring cooperation and collaboration of various players. It is not within the scope of this chapter to discuss the various aspects, elements, and all component parts of global governance, or to offer a plausible definition of the same. The chief concern is simply to establish that whatever its component parts, various aspects and elements, global governance is an order of sorts, having its foundation in some norms and rules. This means it

19 See Christopher Ansell and Jacob Torfing, *Handbook on Theories of Governance* (Cheltenham: Edward Elgar Publishing, 2016).

20 Clarence L. Barnhart and Robert K. Barnhart: *The World Book Dictionary*, (Chicago: World Book, 1993).

21 Mark Bevir, *Governance: A Very Short Introduction*, (Oxford: Oxford University Press, 2012).

22 Thomas G. Weiss and Kevin V. Ozgercin, "The Evolution of Global Governance: Theory and Practice," in *International Relations* (EOLSS Publications, 2009).

23 See The Global Challenges Foundation, "What Is Global Governance?" 2020, available at https://globalchallenges.org/global-governance/ (retrieved 25 February 2021).

possesses a normative and legislative architecture that ought to regulate the behaviors of its subjects and actors, thereby ensuring some kind of commonly accepted mode of conduct in their relations, one with the other, as well as in their behavior towards the objects of those relations.

9.2.2 Theories on global environmental governance (G.E.G.)

Concepts abound on how one ought to understand environmental governance.[24] For some, "Environmental governance is where sustainability, performance and traditional corporate governance intersect."[25] Others claim it "is the term we use to describe how we as humans exercise our authority over natural resources and natural systems."[26] Some further argue that environmental governance is by nature tied to sustainable development.[27] These are all plausible theories supported by some evidence. For sure, measures aimed at achieving some form of environmental governance were instituted in many countries with the aim, *inter alia*, of regulating behavior toward the natural environment, while not necessarily having the achievement of sustainable development as the goal.

The question of definition is an investigation of "general aims or objectives."[28] And there are other approaches.[29] What is generally agreed is that environmental governance is a process that has actors, (people acting at various levels, through various institutions, and by use of various mechanisms), and there is an object to which those actions are directed, namely the relations between the social and economic development process, and the natural environment. There are also relations between these actors, and their relations toward the object. The normative base of these relations vis-à-vis Caribbean S.I.D.S. is the thrust of this chapter.

This normative base comes into being through the drafting, adoption, application, and enforcement of the legal norms and rules determining behavior

24 Edward Challies and Jens Newig, "What Is 'Environmental Governance'? A Working Definition: Sustainability Governance," June 14, 2019, available at https://sustainability-governance.net/2019/06/14/what-is-environmental-governance-a-working-definition/ (retrieved 25 February 2021).

25 See Wallace Partners, "Environment Governance," 2020, available at https://web.archive.org/web/20131209034511/http://wallacepartners.net/governance.html (retrieved 25. February 2021).

26 United Nations Development Programme, United Nations Environment Programme, World Bank and World Resources Institute, "World Resources 2002-2004: Decisions for the Earth: Balance, Voice, and Power," July 2003, available at https://files.wri.org/s3fs-public/pdf/wr2002_fullreport.pdf (retrieved 25 February 2021), p. 1.

27 See for example Akihisa Mori, *Environmental Governance for Sustainable Development: East Asian Perspectives*, (Tokyo: United Nations University Press, 2013).

28 Nathan J. Bennett and Terre Satterfield, "Environmental Governance: A Practical Framework to Guide Design, Evaluation and Analysis," 11 (6) *Conservation Letters* (2018), pp. 1–13.

29 For a discussion on this see Derek Armitage et al., "Environmental Governance and Its Implications for Conservation Practice," 5 *Conservation Letters* (2012), pp. 245–255.

of these subjects. Those relations are varied and complex. They exist at various levels from communal to national within the individual state, moving outward to cover the entire globe, and from the international level, moving inwards to the national level.

Put in simple terms, G.E.G. is environmental governance on a global scale. Invariably, there are many arguments as to how G.E.G. should be concretely understood.[30] G.E.G. is a broad subject covering topics from climate governance[31] and ocean governance,[32] to mitigating the problems of pollution and biodiversity loss on the global scale. There are also related concepts such as international environmental governance.[33]

Notwithstanding the challenges of defining G.E.G., there are certain discernible components, including organizations, policy instruments, financing mechanisms, rules, procedures, and norms that regulate global environmental protection.[34] Based on this understanding and others,[35] G.E.G. cannot be correctly conceptualized without including the element of the norms and rules that regulate it. These norms and rules should play a major role in determining not just the actions that ought to be carried out; but of equal importance what are the rights and duties of those undertaking those actions? How they are to be carried out? And what is the nature of the relations between those undertaking these actions?

9.3 An understanding of sustainable development and the Caribbean S.I.D.S.

The fact that the international community, in the wake of Brundtland Commission report, adopted several major international instruments in

30 Richard E. Poole, "Global Governance and the Environment: Evaluating the Effectiveness of Global Governance in Tackling Contemporary Environmental Issues," 4 (6) *Inquiries* (2012).

31 For an understanding see Liliana N. Andonova et al., "Transnational Climate Governance," 9 (2) Global Environmental Politics (2009), pp. 52–73.

32 See for example European Commission, High Representative of the Union for Foreign Affairs and Security Policy, "Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: International Ocean Governance: An Agenda for the Future of Our Oceans," November 11, 2016, available at https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/join-2016-49_en.pdf (retrieved 25 February 2021).

33 Used for example in the circles of by U.N.E.P., but not really defined: see: Thomas F. McInerney, "UNEP, International Environmental Governance, and the 2030 Sustainable Development Agenda," May 2017, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/21247/UNEP_IEG_2030SDA.pdf?sequence=1&isAllowed=y (retrieved 25 February 2021).

34 Adil Najam et al., *Global Environmental Governance: A Reform Agenda*, (Winnipeg: International Institute for Sustainable Development, 2006), p. 3.

35 See for example Jean-Frederic Morin and Amadine Orsini, "Essential Concepts of Global Environmental Governance," (London: Routledge, 2021).

support of its basic thesis culminating in the adoption of Agenda 2030, is proof positive that the challenge of achieving sustainable development is a global one. The various reports from the Intergovernmental Panel on Climate Change (I.P.C.C.),[36] those concerning the status of the planet's biodiversity,[37] and those informing us of the situation with our land and water[38] all testify to the need to address sustainable development as a global concern, and for the establishment of a global regulatory framework for the same.

The role of a relevant G.E.G. legal framework to help ensure sustainable development of Caribbean S.I.D.S. is the central concern here. It is the conviction of some that without an approach to G.E.G. with rules and norms specifically tailored to address positively this matter, these island states will find it wholly impossible to achieve the targets of the seventeen Sustainable Development Goals, as outlined in Agenda 2030. Camillo Gonsalves, Minister of Finance, Economic Planning, and Sustainable Development of St. Vincent and the Grenadines, puts it this way:

> In considering and shaping development cooperation in a still-evolving world order, the unique needs and vulnerabilities of the small island states must occupy a special place on the global agenda—not as an act of charity or as the result of moral suasion, but as a matter of justice, of logic, and of the islands' inalienable right to develop and to exist. [39]

There is little if any dispute that these islands face enormous challenges in their struggle to develop. However, before investigating the nature of the main challenges, their causes, and the role of the requisite normative architecture of G.E.G. in helping to turn these challenges into opportunities, there is need to have an understanding of the nature of sustainable development and of which Caribbean S.I.D.S. this chapter speaks.

9.3.1 The age of sustainable development

It is safe to say that sustainable development is a paradigm shift in the concept, purpose, and practice of the process of development globally. Prior to the arrival of this idea, a nation's development was seen almost purely in socio-economic terms. The concept of sustainable development added the crucial element of the environment. The generally accepted understanding of sustainable development comes from the report of the World Commission

36 See I.P.C.C., "Reports," available at https://www.ipcc.ch/reports/ (retrieved 25 February 2021).

37 See Convention on Biological Diversity, "Global Biodiversity Outlook (GBO)," 2020, available at https://www.cbd.int/gbo/ (retrieved 25 February 2021).

38 Food and Agriculture Organization of the United Nations, *supra* note 11.

39 Camillo M. Gonsalves, *Globalised. Climatised. Stigmatised*, (Independently published, 2019), p. 163.

on Environment and Development (W.C.E.D.)—otherwise known as the Brundtland Commission—titled "Our Common Future." That report defines it to be "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[40]

There are varying interpretations of this concept[41] that have spurred many discussions that are not directly relevant to this chapter. However, sustainable development in principle is a mission where the international community seeks to ensure social and economic development while not forgetting the need to protect and even enhance the natural environment for future generations. All member states of the United Nation have agreed to this mission, as their adoption of Agenda 2030 testifies.

9.3.2 Caribbean S.I.D.S.

The concept of S.I.D.S. was formerly introduced into the lexicon of international law and relations via Agenda 21 adopted at the United Nations Conference on Environmental and Development (U.N.C.E.D.).[42] Section G. paragraph 17.123. covering the "Sustainable development of small islands," while not providing a definition, gives a description of their basic features and emphasizes that they "are a special case both for environment and development. They are ecologically fragile and vulnerable. Their small size, limited resources…, place them at a disadvantage economically."[43] It goes on to highlight in paragraph 17.125:

> Small island developing States have all the environmental problems and challenges of the coastal zone concentrated in a limited land area. They are considered extremely vulnerable to global warming and sea level rise, with certain small low-lying islands facing the increasing threat of the loss of their entire national territories. Most tropical islands are also now experiencing the more immediate impacts of increasing frequency of cyclones, storms and hurricanes associated with climate change. These are causing major set-backs to their socio-economic development.[44]

40 U.N. World Commission on Environment and Development, *supra* note 9, paragraph 27.

41 For more see Judith C. Enders and Moritz Remig, *Theories of Sustainable Development*, (London: Routledge, 2014); Rachel Emas, "The Concept of Sustainable Development: Definition and Defining Principles," Brief for G.S.D.R., 2015, available at https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf (retrieved 25 February 2021).

42 See: United Nations Sustainable Development, "AGENDA 21- United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992," 1992, available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (retrieved 25 February 2021).

43 Ibid.

44 Ibid.

These common challenges are important in defining Caribbean S.I.D.S. as three are continental countries, geographically speaking, while two of them share one island. There are in total more than twenty-five Caribbean S.I.D.S.[45] This chapter is, however, concerned only with the fourteen entities that are sovereign states, United Nations members, and are part of the Caribbean Community (CARICOM). These latter states all participate independently in the global interaction and discussion on sustainable development, including the making of international norms governing the same.[46]

9.3.3 The challenge of sustainable development of Caribbean S.I.D.S.

Sustainable development is a challenge that Caribbean S.I.D.S. have faced even before the term entered the realm of international politics, and scientific and intellectual discourse. From the first day of their march to development as sovereign nations beginning with the short-lived West Indian Federation of 1958–1962, there was always the question whether these tiny nations can survive, much more develop in a hostile world. As Kevin Edmonds postulates, "With the Federation providing regional integration, it was hoped that the Caribbean would successfully overcome the geopolitical constraints of its small territories, as well as the structural legacies of colonialism and underdevelopment."[47]

This challenge has not receded but has in many respects intensified.[48] Caribbean S.I.D.S. are a living legacy of an international world order where conquests and settler-colonialism were legal; where it was accepted practice for imperial powers to arrogate other peoples' lands through plunder, conquest, and genocide. It is through the fever of this history when international law all but sanctioned the brute force of the powerful that the nations identified today as Caribbean S.I.D.S. were forged.

Until the signing of the 1919 Treaty of Versailles, war was broadly speaking, a legal tool for the expression of foreign policy. This even after nations had signed many peace treaties time and again, including that at Westphalia in 1648, which was to have settled all the *casus belli* between the Christian

45 Sustainable Development Goals Knowledge Platform, "Small Island Developing States UN Members (38)," available at https://sustainabledevelopment.un.org/topics/sids/list (retrieved 25 February 2021).

46 See: CARICOM, Caribbean Community, "Member States and Associate Members," available at https://caricom.org/member-states-and-associate-members/ (retrieved 25 February 2021).

47 Kevin Edmonds, "An Elusive Independence: Neocolonial Intervention in the Caribbean," 146 *International Socialism: A Quarterly Review of Socialists Theory* (2015), p. 128.

48 For an in-depth discussion see: Jacqueline Laguardia Martinez, "Development and Environmental Challenges in Caribbean SIDS," 2017, available at https://www.slideshare.net/jlaguardiamartinez/development-and-environmental-challenges-in-caribbean-sids (retrieved 25 February 2021).

"civilized" nations of Europe.[49] The Versailles Treaty also failed to prevent war. The creation of the United Nations was supposed to have meant a new beginning, a new world order based on an agreement legislating the obligation of all nations to uphold international peace and security. That agreement is the United Nations Charter.[50]

It must be appreciated that were it not for the new world order ushered in by this Charter, where decolonization became a necessary process in the furtherance of international peace and security,[51] tiny nations like the Caribbean S.I.D.S. would not be sovereign states. It is the upholding of international law that guarantees their continued independent existence. This latter statement is universally true including their existence in this age of climate change. Caribbean S.I.D.S.' basic reality is that they exist in a global environment where there are no mechanisms allowing for their effective participation in its governance. This circumstance is in and of itself disadvantageous and unjust. As outlined in a special report, in Caribbean S.I.D.S.,

> Environmental changes were found to be driven by socio-economic factors as well as by external forces over which these states have little or no control. Adverse environmental change in turn has negative consequences for social and economic development and sustainable development overall.[52]

It is pellucidly clear how detrimental this status quo is to these nations. The same report, while painting a less than hopeful picture of Caribbean S.I.D.S. environmental future, goes on to state:

> Affecting all aspects of the environment are local and regional meteorological changes associated with global climate change. Sea-level rise of 30–50 cm for the Caribbean over the next 50 years has been considered a reasonable projection. Although the severity of this threat will vary among the Caribbean SIDS ... the resulting effects will be coastal erosion, saltwater intrusion into coastal agricultural lands and aquifers, an escalation of the frequency and intensity of hurricanes and tropical

49 Derek Croxton, *Westphalia: The Last Christian Peace* (Basingstoke: Palgrave Macmillan, 2013).

50 See Article I of the Charter of the United Nations and Statute of the International Court of Justice.

51 See Chapter XII of the Charter of the United Nations and Statute of the International Court of Justice.

52 Leslie J. Walling et al., "Caribbean Environment Outlook: Special Edition for the Mauritius International Meeting for the 10-Year Review of the Barbados Programme of Action for the Sustainable Development of Small Island Developing States," 2005, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9376/-Caribbean_Environment_Outlook-2004GEO_CarribeanEnvironmentOutlook_2004.pdf.pdf?-sequence=3&amp%3BisAllowed= (retrieved 25 February 2021), p. 1.

> storms, an increase in the frequency and severity of coastal inundation and flooding, and disruptions in precipitation and potable water supplies. Critical infrastructure and vital utilities will be at severe risk, and the countries will be required to consider costly adaptation measures to protect vulnerable populations.[53]

There is no dispute that Caribbean S.I.D.S. are at the receiving end of an unbalanced G.E.G. system, fashioned by legal norms and rules that pretend some form of concern for the interest of these states. The legal architecture of G.E.G., as it stands, is fundamentally flawed in that it treats the sustainable development of Caribbean S.I.D.S. and the attending obstacles to the same, as a Caribbean S.I.D.S.' problem. The fact is, the Caribbean peoples are citizens of this global community, and their immediate environment is but a part of the globe's environment. Consequently, their fate is in the end, ultimately, the fate of this planet as regards the issue of sustainable development. That elementary truth must be accepted and addressed as part of the process of G.E.G. Therefore, the reform, and indeed the revolutionizing of the international legal architecture of G.E.G. to this end, are imperative.

9.4 Existing norms regulating G.E.G.

There is one very fundamental point that must be made when one speaks of the framing of norms intended to regulate G.E.G. as it relates to the sustainable development process. These norms were created when all the sovereign states of CARICOM Caribbean S.I.D.S. had gained their independence.[54] This fact led to them becoming member states of the United Nations and through it and other mechanisms, they contribute to the creation and further development of these norms. This is extremely significant in that what exists today as international norms regulating this process is not a total dictate from others. Secondly, this process continues to progress with more-informed inputs from these S.I.D.S. These, along with other enabling circumstances, such as the relatively large number of S.I.D.S.', have allowed them to influence—if in a very limited way—this legal framework.

Several major international instruments concerning G.E.G. and sustainable development were adopted at U.N.C.E.D. in 1992. Since then, there has been something of a flurry in the development of international norms focused on facilitating the sustainable development process in general where

53 Ibid.

54 See: Caribbean Elections, "Independence in the Caribbean- Road to Independence," available at http://www.caribbeanelections.com/education/independence/default.asp (retrieved 25 February 2021).

S.I.D.S. are given mention. And significantly, there have been those specifically addressing the conditions of the S.I.D.S.[55]

The Future We Want, The Addis Abba Action Agenda, Agenda 2030, and the Paris Agreement are among instruments that deal with the regulation of sustainable development covering all states while not being particularly focused on any specific group. Yet, the special challenges faced by S.I.D.S. are not only recalled; these documents reaffirm the commitment of the international community to supporting the S.I.D.S.' battle to overcome obstacles to sustainable development. The Future We Want declares:

> We reaffirm our commitment to fully implement … the Programme of Action for the Sustainable Development of Small Island Developing States (Barbados Programme of Action) and the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States.[56]

The Addis Abba Action Agenda declares:

> We recognize the importance of addressing the diverse needs and challenges faced by countries in special situations, in particular … small island developing States. … We further reaffirm that small island developing States remain a special case for sustainable development in view of their small size, remoteness, narrow resource and export base, and exposure to global environmental challenges.[57]

Agenda 2030 in its paragraph 22 recalls *inter alia*: "Each country faces specific challenges in its pursuit of sustainable development. The most vulnerable countries and, in particular, … small island developing States, deserve special attention."[58] In paragraph 56, Agenda 2030 assures, "In deciding upon these Goals and targets, we recognize that each country faces specific challenges to achieve sustainable development, and we underscore the special challenges facing the most vulnerable countries and, in particular, …small

55 For a list of these document see Sustainable Development Goals Knowledge Platform, "Major Agreements and Conventions," available at https://sustainabledevelopment.un.org/index.php?menu=122 (retrieved 25 February 2021).

56 United Nations Conference on Sustainable Development, "The Future We Want: Outcome Document of the United Nations Conference on Sustainable Development Rio de Janeiro, Brazil, 20–22 June 2012," available at https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf (retrieved 25 February 2021), p. 5.

57 United Nations General Assembly Resolution 69/313, "Addis Ababa Action Agenda of the Third International Conference on Financing for Development," August 17, 2015, available from https://undocs.org/A/RES/69/313, p. 4.

58 U.N. General Assembly Resolution 70/1: "Transforming Our World: The 2030 Agenda for Sustainable Development," A/RES/70/1, 21 October 2015, available from https://undocs.org/A/RES/70/1.

island developing states."[59] The Paris Agreement, which unlike many other international instruments addressing matters of sustainable development in a binding treaty[60] that allows no reservation,[61] contains several positions that seek to support S.I.D.S. efforts in the mitigation of, and adaptation to climate change.[62] These instruments are, however, meant to address sustainable development generally and globally. They are not specific to S.I.D.S.

In addition to the documents listed immediately above and others of like nature, there are international instruments that address directly, exclusively, and in detailed manner, the regulation of G.E.G. as it relates to the specific challenges of sustainable development that S.I.D.S. face. Caribbean S.I.D.S. have played an integral part in crafting these latter instruments. Indeed, the first major international instrument concerning S.I.D.S. in the wake of Agenda 21 was the Barbados Plan of Action (B.P.O.A.), adopted at the first U.N. Global Conference on the Sustainable Development of S.I.D.S., hosted by that CARICOM Caribbean nation in 1994. The B.P.O.A. has been reviewed, leading to adoption of several other international instruments establishing norms specifically addressing sustainable development of S.I.D.S.

The major instruments among these are:

a) "State of Progress and Initiatives for the Future Implementation of the Programme of Action for the Sustainable Development of SIDS," adopted by the United Nations General Assembly at its 22nd Special Session.
b) The Mauritius Strategy of Implementation (M.S.I.) for the further implementation of the BPOA adopted in 2005.
c) The Small Island Developing States Accelerated Modalities of Action, also known as the S.A.M.O.A. Pathway, adopted in 2014.[63]

As U.N.G.A. resolutions and outcomes of conferences, these documents are not binding agreements. They do not contain stipulations that bind participating states. They are therefore what many public international law experts describe as "soft law," and which therefore, unlike norms of "hard law," are generally strictly non-binding in nature and very difficult if not impossible to enforce.[64] They are seen by some as but policy declarations, suggestion of codes of behavior and guidelines for standards of conduct, not prescribing, stipulating, and demanding behavior to which states must adhere. Conse-

59 Ibid.
60 See Article 20 of the Agreement.
61 See Article 20 of the Agreement.
62 See Articles 9, 11 and 13 of the Agreement.
63 For the full documents see Sustainable Development Goals Knowledge Platform, "Conferences," available at https://sustainabledevelopment.un.org/conferences (retrieved 25 February 2021).
64 For an in-depth discussion on this see Kenneth Wayne Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," 54 *International Organization* (2000), p. 421.

quently, there is much discourse as to their legal weight. We shall return to this question later, as this point is of real significance to Caribbean S.I.D.S.

While the precise legal nature and force of these outcomes documents and resolutions might be a never-ending debate among scholars, there can be no disputing the fact that they signify several important moments as regards the norms regulating G.E.G. that impact Caribbean S.I.D.S.' sustainable development process. First, they indicate that the international community recognizes that S.I.D.S. are a special group of states within the global sustainable development context, and need differential attention and treatment, which must be guided by some sort of internationally agreed framework of norms.

Second, they emphasize that all such frameworks must be based on partnership of one form or the other between S.I.D.S. and those nations that are able to help them in their quest. They also set out some of the basic principles for this partnership, identifying—if not stipulating—the specific behaviors expected of all concerned, thereby creating a normative framework that guides their actions.

Third, and of tremendous import, is that S.I.D.S. played a significant role in the creation of these documents, which are of some international significance even if they are not hard law in the context of international law.

Fourth, they present a real and substantive base upon which more meaningful and effective legal norms and structures can be built. From the adoption of Agenda 21 in 1992 to the S.A.M.O.A. Pathway of 2014, there has been a clear evolution, showing a trajectory of moving from concepts and blanket norms to attempted focus on actions, mechanisms, and structures to facilitate actual implementation.

Fifth, they are both the result of and stimuli for formal cooperation and collaboration among S.I.D.S. themselves, furthering their cause for sustainable development.

All *supra dictum* concerning international norms may be construed by some as adequate to address Caribbean S.I.D.S.' sustainable development. It is the contention of this chapter that this is far from being the case. The general postulation here is that a legal structure whether soft or hard, can only be considered effective and meaningful if it achieves the objectives for which it was constructed. And while this chapter maintains that the structure as established is indeed a necessary and promising start, it is only a start. There is much much more that must be done. This chapter embraces the S.I.D.S.' thesis that this work for them is more than a matter of sustainable development. It is a battle for their very survival—a question of existence.[65]

65 See: S. Faiz Ahmed, "An Examination of the Development Path Taken by Small Island Developing States: Jamaica a Case Study: Faculty of Arts, the University of Prince Edward Island Charlottetown, Prince Edward Island August, 2008: Chapter 1. (Unpublished master's thesis on file with the author.)

There is agreement in all of the instruments recalled above that S.I.D.S. are a special case as regards the challenges they face. The problem therefore is not one of convincing the rest of the international community of the need for S.I.D.S. to have differential attention and treatment. Regard it as a case concerning the need for creating, and more so implementing through enforcement norms for realization of that attention and treatment. In this regard, several key factors must be addressed in the further design of international norms that promotes a just G.E.G. process that safeguards the legitimate interests of Caribbean S.I.D.S. This chapter now turns to giving an outline of those factors.

9.5 The need for a true concept of one global environment

There is a dire need for the international community to understand that the global environment, while being of many parts, is one wholly connected system. Having this concept and practice is a necessary condition if Caribbean S.I.D.S. are to be properly valued, and their protection and development seen as *sin qua non* to the rest of humanity. The Declaration of Barbados adopted at the Global Conference on the Sustainable Development of Small Island Developing States declares that S.I.D.S.' biodiversity is among the most threatened in the world, and notes that their ecosystems provide ecological corridors linking major areas of biodiversity around the world.[66] Paragraph 17.124. of Agenda 21 highlights that the S.I.D.S.' "geographic isolation has resulted in their habitation of a comparatively large number of unique species of flora and fauna, giving them a very high share of global biodiversity." While there are similar statements and recognition in other relevant documents, one of these instruments recognizes that the immediate environment of S.I.D.S., and S.I.D.S. themselves, are equal and integral parts of the planet's environment, in which all nations have an equal interest in ensuring protection.

This conceptualizing of S.I.D.S. as a necessary part of the global environment, with environmental value to all of humanity is most important for and in creating just norms addressing global sustainable development. With such an approach, the rest of the international community will move from optionally helping S.I.D.S. to seeing a real and vital stake in doing so. Without this conceptual approach, S.I.D.S.' challenge will remain by and large just that. If such a conceptualization were to be accepted, then the international instruments shall be written in a manner where the rest of the world will

66 United Nations A/CONF/167/9, "Conference Report of the Global Conference on the Sustainable Development of Small Island Developing States Bridgetown, Barbados, 25 April–6 May 1994," available at https://undocs.org/pdf?symbol=en/A/CONF.167/9 (retrieved 25 February 2021), p. 2.

see S.I.D.S. not as merely islands with their unique challenges, but rather as necessary and indispensable parts of the global landscape and environment.

The international community must understand that, to paraphrase John Donne,[67] Caribbean S.I.D.S. are not islands unto themselves, but are pieces of the global environmental whole. Consequently, their death diminishes that whole, and although climate change tolls the bell on S.I.D.S. today, it is but a forewarning that the bell will toll for this planet sooner rather than later.[68] It is therefore a basic requirement that the protection and survival of Caribbean S.I.D.S. be understood as measure needed to protect this planet.

9.6 The legal force of the instruments

As already pointed out, most of the international instruments adopted concerning sustainable development of S.I.D.S. are non-binding. States are neither required to sign or ratify these, nor need they adopt them into national legislation, making them legal obligations of the state. This chapter suggests that legally binding instruments are to be preferred in cases where real and concrete commitment, functioning mechanisms, and practical actions for implementation are needed, as is the case with Caribbean S.I.D.S.

The dangers Caribbean S.I.D.S. face from further increase in global warming are stark and very very real. In the view of Camillo Gonsalves of St. Vincent and the Grenadines:

> The greatest long-term threat to the development of small islands is climate change. The greatest immediate threat to the development of any individual small island is a natural disaster, caused, quickened or exacerbated by climate change. The grave and gathering menace of climate change is the inescapable, in calculable risks that looms over every forecast, plan or aspiration. Island states are on the verge of being "climatised" out of existence.[69]

Gonsalves' conclusions are neither far-fetched nor alarmist. They are based on hard-core scientific evidence recorded in various documents, in particular reports prepared by the I.P.C.C. The "Climate Change 2014 Synthesis Report" is populated with data[70] that fully corroborates Gonsalves' dire warning.

67 John Donne, *No Man Is an Island: Selections from the Prose of John Donne*, (London: Folio Society, 1997; first published 1624).

68 Stephen Leahy, "Climate Change Driving Entire Planet to Dangerous 'Tipping Point' National Geographic," November 27, 2019, available at https://www.nationalgeographic.com/science/2019/11/earth-tipping-point/ (retrieved 25 February 2021).

69 Camillo M. Gonsalves, *supra* note 39, p. 82.

70 See: I.P.C.C., R. K. Pachauri and L. A. Meyer, "Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change," 2014, available at https://ar5-syr.ipcc.ch/ipcc/ipcc/resources/pdf/IPCC_SynthesisReport.pdf (retrieved 25 February 2021).

One cannot address climate change mitigation or adaption that ensures Caribbean S.I.D.S.' very survival through empty promises, wish lists, or the compilation of beautiful sounding non-binding resolutions and declarations. These nations are facing a situation where the fierce urgency of acting now is indisputable. The time to do away with promises is long past. The hour for legally binding commitments is now, including, as Gonsalves postulates "a legal basis to penalize the non-compliant."[71]

The obstacles in Caribbean S.I.D.S.' pathway to sustainable development must be cleared by relevant norms and rules of G.E.G. What exist now are in reality little more than lofty ideals, merely giving temporary psychological boosts to Caribbean S.I.D.S. politicians, allowing their dubious development partners to appear to take action, while leaving status quo ante, which promises Caribbean S.I.D.S. only climatization out of existence. This is not to say that instruments like the B.P.O.A., the MSI for the B.P.O.A. implementation, and the S.A.M.O.A. Pathway are totally useless. They do contain very important and useful positions vis-à-vis better G.E.G. to facilitate Caribbean S.I.D.S.' development sustainable process. However, the legal strength of these documents as regards enforceability is not even that of a promissory note. This state of affairs must change if the legal architecture on which G.E.G. stands is to play any meaningful role in helping to create a viable pathway for S.I.D.S. Put simply, the creation of binding and enforceable international legislation is the only sure way of providing a credible guarantee that G.E.G. will truly facilitate S.I.D.S.' sustainable development process.

9.7 Action: the key agent of change

Directly tied to the non-binding nature of most of these instruments is the issue of practical implementation. Action is the key agent of change. It is where the music is separated from the noise and demonstrates genuine commitment. All the research and study done so far forecast that the continuing rise in global temperature will lead to sea-level rise,[72] as well as cause more frequent and more destructive disasters, resulting in greater and greater havoc on the physical, social, economic, and environment landscapes of S.I.D.S. This rise will also continue to seriously damage ecosystems and cause danger to life and the living. This is testimony to the dire need for immediate action for S.I.D.S. mitigation of and adaptation to climate change.

In response to this real problem of existence for Caribbean S.I.D.S., the lawmakers and law enforcers of the international order make only

71 Camillo M. Gonsalves, *supra* note 39. p. 86

72 For more on this research and study see Stacy-ann Robinson, "Climate Change Adaptation in SIDS: A Systematic Review of the Literature Pre and Post the IPCC Fifth Assessment Report," 2020, available at https://onlinelibrary.wiley.com/doi/epdf/10.1002/wcc.653 (retrieved 25 February 2021).

non-binding promises that cannot be and will not be enforced. As *supra dictum*, no amount of beautiful promises can fix the situation Caribbean S.I.D.S. are facing and will face going forward. What is needed in these circumstances is the adoption of binding international norms that are focused on implementation of real and concrete relevant actions to bring about the required results. In place of commitment to concrete and result-oriented actions, Caribbean S.I.D.S. are left to virtually fend for themselves even though their contribution to many of the environmental problems faced by the planet is miniscule.

This attitude of empty promises is nothing new if one takes a brief glance into the history of the behavior of most of these lawgivers when it comes to providing resources. The classic example of unfulfilled promises of the law enforcers is that of giving as development aid a minimum net among of 1% of their Gross National Product (G.N.P.) since 1972. This first came as a proposal made in the Pearson Report, which actually made a call for the provision of 0.7% of their G.N.P. as official development assistance.[73] Needless to say, fifty years later this promise remains unfulfilled by the overriding majority of these donor countries.[74]

The solution to this problem of unfulfilled promises is a legal system that recognizes that the needs of Caribbean S.I.D.S. will only be met through use of some essential mechanisms including that of international partnerships committed to action. Partnerships must be based on binding agreements, if their workings, actions, and results are to come to fruition. Further, these agreements must make it incumbent on partners to carry out their pledges on time and report on the same.

9.8 The need to address specifics

Even with just prima facie reading of the existing G.E.G. norms concerning supporting S.I.D.S.' sustainable development, one can immediately appreciate that they say much in general, but little in specific. This may seem oxymoronic, yet it is very true. In all of these major instruments there are blanket statements of what the other states—the developed and powerful—could and should do to support and facilitate the S.I.D.S.' quest. However, there are no concrete commitments to funding, to action, to any real and tangible support. It is all left really to the whims and fancies of those who wish to provide this support. It is all optional and deliberately very vague.

The challenges to sustainable development in the Caribbean S.I.D.S. are not imaginary, neither are they shrouded in secrecy. These have been and are

73 Lester B. Pearson, *Partners in Development: Report of the Commission on International Development*, (New York: Praeger, 1969).

74 Development aid in 2015 continues to grow despite costs for in-donor refugees: 2015 Preliminary O.D.A. Figures: Development Assistance Committee, O.E.C.D. – Paris, 13 April 2016.

being discussed by many writers and intellectuals.[75] They are not hypothetical situations that can wait on illusionary solutions that are eternally pursued but never attained. The powers who frame the rules of G.E.G. must move beyond the creation of these blanket norms that address nothing concretely or substantively. There must be political will and leadership foresight to adopt and guarantee through binding agreements, the norms that directly address the removal of the obstacles to Caribbean S.I.D.S.' sustainable development. From observation of these same powers in other spheres, it is obvious that action is possible. When these powers want a particular behavior from S.I.D.S., be it on the issue of tax evasion by their rich citizens, or their fight against real or imagined terrorism, they simply create blacklists, name concrete countries, then follow through with laser-like precision actions they deem necessary to ensure compliance, regardless of the innocence or guilt of Caribbean S.I.D.S.[76]

The simple logic here is that norms that are decidedly general in their nature, design, content, and intention, cannot be considered as serious in cases where the relations to be regulated are very specific, requiring defined and concentrated actions as solutions. Caribbean S.I.D.S. can never hope to receive adequate support, cooperation, and collaboration on this journey to sustainable development if those who are to accompany them reject the need for targeted actions necessary in overcoming each material and particular obstacle that they meet on this journey.

9.9 Strengthening and respecting the voice of Caribbean S.I.D.S.

Caribbean S.I.D.S., beginning with the B.P.O.A., have played a significant role in the creation and development of many of the norms concerning G.E.G. as it relates to the sustainable development of all S.I.D.S. But even if these instruments were to have some meaningful legal effect, there must be more impact from the voices and roles of Caribbean S.I.D.S. in the creation, further development, and implementation of these norms. This problem of adding volume and authority to the voice of Caribbean S.I.D.S. is at its root multifaceted and must be therefore solved from different angles. In the first place, many of the islands are so small in population and limited in scientific, technical, technological, and other institutional capacities, that it is simply

75 See for example K. Levitt and L. Best, "Character of Caribbean Economy," in *Caribbean Economy: Dependence and Backwardness*, (Kingston: Jamaica, 1978); Tigerjeet Ballayram, "The Promises and Challenges of the Sustainable Development Goals for Caricom Caribbean Countries," 5 (1) *Journal of Food Security* (2017), pp. 1–8.

76 See European Council, "The EU List of Non-Cooperative Jurisdictions for Tax Purposes of 18 February 2020," 2020/C 331/03), October 7, 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG1007(01)&from=EN (retrieved 25 February 2021): This list demonstrates the arbitrary action of the powerful. As can be seen, the punished are mostly S.I.D.S.

impossible for them on their own to compile on all the information needed, access the expertise necessary, and generate the finances and other resources required, to be able to seriously impact the creation and development of the G.E.G. legal architecture. After all, "the developed world was the main source of knowledge" as regards the effect of climate change on the S.I.D.S.[77] This limitation of capacity is recognized in many of the normative instruments cited in this chapter.[78]

The fundamental issue here is whether the big and powerful states are prepared to create and further develop the norms to regulate G.E.G., by enabling Caribbean S.I.D.S. to fully participate in this process and have the reality their existence converted into law. The issue is therefore one of a genuine democratization of the law-making process (i.e., revolutionizing it to ensure Caribbean S.I.D.S. are de facto equal participants, empowered to really exert influence on the same). As political science professor Iris Young states, "The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making process and have had the opportunity to influence the outcomes."[79]

9.10 The need for a broader approach

Although the existing international norms of G.E.G. are specifically geared at supporting the process of sustainable development in S.I.D.S. that cover many of its social, economic, and environmental aspects, they are generally written without serious consideration of many other facts and factors that weigh very heavily on this process. The thesis here is not that these norms should cover everything under the sun that may affect this process, but rather that there are several major socio-economic issues that may at first seem not to be directly tied to the question of G.E.G. However, these socio-economic issues so severely affect the sustainable development of Caribbean S.I.D.S. that the norms of G.E.G. should be designed to exert in principle, great influence on these factors such that their negative impacts are significantly reduced if not liquidated all together. These include foreign debt, unfair trade, and the globalization of a northern economy.

9.10.1 The foreign debt of Caribbean S.I.D.S.

The foreign debt of Caribbean S.I.D.S. has been the subject of many publications.[80] Irrespective of the author, the general consensus including that of the

77 Stacy-ann Robinson, *supra* note 72, p. 15.

78 See for example Articles 9 & 11 of the Paris Agreement.

79 Iris Marion Young, *Inclusion and Democracy*, (Oxford: Oxford University Press, 2000), pp. 5–6.

80 See for example Kempe R. Hope, "External Borrowing and the Debt Problems of Some Caribbean Nations," 59 (3/4) *Nieuwe West-Indische Gids / New West Indian Guide* (1985),

relevant regional and sub-regional bodies, is that this debt is an ill-conceived burden that makes it nearly impossible for any of these nations ever to succeed in their quest for sustainable development.[81] Money that they should be investing in development is used to pay the principal and interest to service debts. It is in this light that it must not be forgotten that Caribbean S.I.D.S. contribute little to the climate change phenomenon but suffer disproportionately from the same. And, as outlined earlier, the destructive force of hurricanes, along with more frequent and increasingly severe droughts, are forcing these S.I.D.S. to spend ever-increasing amounts on adaptation measures. This is one of the reasons why Sebastian Acevedo, Aliona Cebotari, and Therese Turner-Jones concluded in a policy paper written for the International Monetary Fund that "Given the exceptionally high costs of natural disasters, small states in the Caribbean should be seen as frontline candidates for support from climate-change funding, as global strategies for mitigation and adaptation to climate change become operational."[82]

Simply put, the norms of G.E.G. that are to regulate the sustainable development process must take into consideration the significant foreign debt of Caribbean S.I.D.S. It is important to note that the B.P.O.A. never mentioned foreign debt. However, by the time of adoption of the M.S.I. for the B.P.O.A. implementation, S.I.D.S. had realized the importance integrating foreign debt into the strategy to achieve sustainable development. This instrument declares:

> Good governance at the international level is fundamental for achieving sustainable development… To this effect, the international community should take all necessary and appropriate measures, including ensuring support for structural and macroeconomic reform, a comprehensive solution to the external debt problem.[83]

---

pp. 197–210; J. Jason Cotton and Vishana Jagessar, "Private Sector External Debt in the Caribbean: The Stylized Facts," 2018, available at https://cert-net.com/files/publications/conference/2018/CERT_JCotton%20and%20VJagessar_AMSC2018.pdf (retrieved 25 February 2021).

81 "Borrowing Is Not an Option for Caribbean Countries, Access to Concessional Funding and Debt Relief Is Urgently Needed to Face the COVID-19 Crisis: Economic Commission for Latin America and the Caribbean," press release of 29 April 2020, available at https://www.cepal.org/en/pressreleases/borrowing-not-option-caribbean-countries-access-concessional-funding-and-debt-relief (retrieved 25 February 2021).

82 Sebastian Acevedo et al., "Caribbean Small States: Challenges of High Dept and Low Growth: IMF Policy Paper," February 20, 2013, available at https://www.imf.org/external/np/pp/eng/2013/022013b.pdf (retrieved 25 February 2021), p. 21.

83 International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing State, "Draft Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States," January 10–14, 2005, available at https://www.un.org/smallislands2005/pdf/sids_strategy.pdf (retrieved 25 February 2021), paragraph 89.

The S.A.M.O.A. Pathway mentions debt problems. But in keeping with the practice of such conference outcome documents, it says nothing really concrete as regards how this problem could and should be solved within the quest for sustainable development.[84]

Because the level of foreign indebtedness of Caribbean S.I.D.S. is so severe that it impedes sustainable development efforts, the norms of G.E.G. must establish the structure to alleviate this threat. The Addis Ababa Action Agenda dedicates a whole subsection to the question of debt. But here too, there is little concrete substance as to how the foreign debt obstacle to sustainable development can be alleviated. Further, it says nothing about the specific case of S.I.D.S.[85]

9.10.2 Unfair trade and globalization for the rich and powerful

In the mid-1990s, the United States began trade actions against the European Union that are now termed the "Banana Wars," culminating in the latter revoking trade preferences it gave to former colonies from where it imports bananas. Consequently, five Caribbean S.I.D.S.—Dominica, Grenada, St. Lucia, St. Vincent, and Grenadines (S.V.G.)—and Jamaica lost their market in Europe, leading to serious economic, social, and environmental consequences that remain. In the case of S.V.G., this trade "amounted to as much as one-fifth of its G.D.P. Today, that number is zero."[86] This is all but catastrophic. Norman Girvan, a leading Caribbean intellectual and economist, dubbed it "An economic tsunami!"[87]

The case of the Banana Wars is but one example in which the developed world's concerns ignored the development hopes and aspirations of developing countries. Reference has previously been made to the various blacklists on which these latter nations are placed, further hindering their abilities to develop sustainably. In what he terms "Fiscal colonialism," former Secretary General of the Association of Caribbean States, Norman Girvan, elucidates:

> The Harmful Tax Competition Initiative of the O.E.C.D. is a unilateral imposition of rules by the rich countries to protect their own interest, which has severely hurt the international financial services sector of

84 See for example paragraph 28 of the United Nations General Assembly Resolution 69/15, Resolution adopted by the General Assembly on 14 November 2014 without reference to a Main Committee (A/69/L.6)] 69/15, S.I.D.S. Accelerated Modalities of Action (S.A.M.O.A.) Pathway, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/15&Lang=E (retrieved 25 February 2021).

85 See of section E of Chapter II of the Addis Ababa Action Agenda, *supra* note 57.

86 Camillo M. Gonsalves, *supra* note 39, p. 37

87 Norman Girvan, "Existential Threats in the Caribbean: Democratising Politics, Regionalising Governance," *The Caribbean Review*, August 6, 2017, available at https://www.caribbeanreview.org/2017/08/existential-threats-in-the-caribbean/ (retrieved 25 February 2021).

> several Caribbean jurisdictions. I am reliably informed that the offshore sector in Dominica is virtually wiped out, and it has diminished considerably in Antigua and Barbuda, St. Kitts-Nevis, St. Lucia, and Grenada, and that even in larger jurisdictions such as the Bahamas and Cayman Islands, the offshore banking sector has declined. Fiscal colonialism![88]

What is extremely important to understand here is that the destruction of the vital banana trade and that of the offshore financial services sector were accomplished through legal means. They were done using the prevailing legal rules of international trade, commerce, and business as dictated by developed states, disregarding fairness in the quest for sustainable development by Caribbean S.I.D.S. This is a classic demonstration at the international level of Oliver Goldsmith's dictum pronounced more than two centuries ago that, "Law grinds the poor; and rich men rule the law."[89] Girvan demonstrates most vividly how destructive these rules are, when he writes:

> Up to the end of the 1980s the banana industry was the largest single employer of labour, peasant occupation and export earner in the Windward Islands. Enter the WTO agreement, American multinationals growing bananas on Latin American plantations where cheap labour can be exploited, and campaign financing for the Bill Clinton presidential campaigns. Next: the U.S. lodges a complaint to the WTO that the EU treatment of ACP bananas is discriminatory; the WTO rules against the EU; the EU opens its market to low-cost bananas; and goodbye Windward Islands banana industry.[90]

Much of the present and emerging international rules of trade and globalization facilitate a neoliberal agenda, thus leading to trade and economic marginalization of the already poor and powerless nations. Noam Chomsky puts it this way:

> The neoliberal Washington consensus is an array of market-oriented principles designed by the government of the United States and the international financial institutions that it largely dominates, and implemented by them in various ways for the more vulnerable societies, often as stringent structural adjustment programs. The basic rules, in brief are: liberalize trade and finance, let markets set price ("get prices right"), and inflation ("macroeconomic stability"), privatize. … The decisions of those who impose the "consensus" naturally have a major impact on global order. … The international business press has referred

88 Ibid.
89 Oliver Goldsmith, *The Traveller* (1764), p. 386.
90 Norman Girvan, *supra* note 87.

> to these institutions as the core of a "de facto world government" of a "new imperial age."[91]

Economists are forced to accept that globalization brings many challenges for the so-called developing states, as rules, institutions. and mechanisms that are used to enforce this world economic order, work in the interest of the developed states.[92]

9.11 Conclusion

It is rather easy to come to the conclusion that by use of the present legal architecture of neoliberal globalization, the powerful nations are determined to ensure that S.I.D.S. remain, as Frantz Fanon said, "The Wretched of the Earth."[93] This situation was created and is maintained by the powerful developed states. Changing the situation means there must be a change in these rules. And while these norms are generally directly related to the world economic and financial order, it has been demonstrated that their impact on the sustainable development of Caribbean S.I.D.S. is huge. Therefore, the norms of G.E.G. as they pertain to sustainable development must pay attention to unfair trade and neoliberal globalization. The norms and rules that are and will be the legal foundation of G.E.G. including as it pertains to sustainable development are rapidly evolving. As former General Counsel and Secretary to the International Development Law Organization, Thomas F. McInerney, points out:

> In less than a decade, the playing field in which global environmental governance occurs has changed significantly. Among these changes are the creation of new institutional structures, the widespread adoption of strategic management practices, the development of new targets and indicators to gauge progress, the launch of an array of new efforts to realize synergies throughout the UN system, and new capabilities and approaches to cultivating knowledge. Rather than a completed project, these developments need to be seen as building the foundations for longer term improvements in the coherence and effectiveness of the international environmental governance system.[94]

As these principles and norms of G.E.G. unfold speedily before our very eyes, the importance of Caribbean S.I.D.S. getting into the action now, while the foundation is being constructed and re-enforced, cannot be overstated.

91 Noam Chomsky, *Profit over People: Neoliberalism and Global Order* (New York: Seven Stories Press, 1998), p. 20.
92 See Joseph E. Stiglitz, *Globalization and Its Discontents* (Munich: Penguin, 2002).
93 Frantz Fanon et al., *The Wretched of the Earth* (Paris: Présence Africaine, 1963).
94 Thomas F. McInerney, *supra* note 33.

McInerney goes on to say, "Should dramatic improvements in the effectiveness of international environmental governance and international environmental law not occur, within a few decades conditions may become irreparable across many different areas."[95] The scientific evidence available—as shown in various parts of this work—points to the fact that S.I.D.S. are among areas where conditions will be irreparable. Indeed, if creation and application of the norms that will regulate future G.E.G. do not make environmental, ecological, economic, and social justice for S.I.D.S. central to these processes, Camillo Gonsalves shall be proven a prophet, as these nations shall be globalized, climatized, and stigmatized out of existence.[96]

Before the 1960s, the majority of S.I.D.S. were under the sovereignty of imperial powers. They did not exist as states. This means that international law before that time had no contribution from these states, and they as "new" independent subjects of this law, are operating in a world with a legal foundation that they played no part in building. History instructs us that that old order legitimized colonialization and economic exploitation of S.I.D.S. In short, it was never designed to defend their interests or indeed be of any benefit to them.

The principles, norms, and rules of G.E.G. are not created tabula rasa. The developed states had a head start. Still, the ongoing evolution of this process, particularly as it relates to sustainable development, can and must afford Caribbean S.I.D.S. the chance to play an equal role going forward. For this to happen, the global powers must appreciate that the catastrophe that now threatens S.I.D.S. is an indicator of the situation for the entire planet. These islands are the first in the line to suffer because of their size, vulnerability, lack of resources, and having been the victims of a world order where aggression was legalized and practiced against and upon them through imperialism, colonialism, slavery, and mercantile capitalism that reduced them to sources of raw material and markets to dump inferior industrial products.

This paradigm can shift significantly if those who are in control of multilateral diplomacy come to the realization that the

> pre-independence global order, and islands' tacit acceptance of its strictures as a precondition to nationhood, has evolved into a massive system of rules and enforcement mechanisms that do not consider or accommodate island specificities. Global arbiters of policy seek to impose an ideological homogeneity through force of law, might and money. These externally imposed prescriptions are a terror, and the chilling effect that they have on creative policy solutions has constrained most islands to follow an orthodoxy prescribed from on high.[97]

95 Ibid, p. 3.
96 Camillo M. Gonsalves, *supra* note 39.
97 Ibid, p. 14.

The issue of the creation of binding, enforceable principles, norms, and rules of G.E.G. that help ensure the sustainable development of S.I.D.S. is not a matter of granting them superpower benevolence, or one of the former demanding some kind of a handout, but is rather a matter of justice. If law cannot deliver justice to the poor, the weak, the small, and the powerless, then one must question whether such law can guarantee international peace and security, which is the stated purpose of the fundamental norms and principles of the post 1945 world order as proclaimed in the United Nations Charter.[98] And if such would be the case, then we are reminded of what Immanuel Kant instructs, "If justice perishes, human life on earth has lost its meaning."[99]

Bibliography

Ahmed, S. Faiz. *An Examination of the Development Path Taken by Small Island Developing States: Jamaica a Case Study: Faculty of Arts The University of Prince Edward Island*, 2008. https://www.islandvulnerability.org/m/ahmedm.pdf

Abbott, Kenneth W. and Duncan Snidal. "Hard and Soft Law in International Governance." 54 *International Organization* (2000): 421.

Acevedo, Sebastian et al. "Caribbean Small States: Challenges of High Debt and Low Growth." February 20, 2013. International Monetary Fund Policy paper. https://www.imf.org/external/np/pp/eng/2013/022013b.pdf

Andonova, Liliana B., et al. *Transnational Climate Governance*. Cambridge University Press, 2014.

Ansell, Christopher, and Jacob Torfing. *Handbook on Theories of Governance*. Edward Elgar Publishing, 2016.

Armitage, Derek, et al. "Environmental Governance and Its Implications for Conservation Practice." 5 *Conservation Letters* (2012): 245–255

Ballayram, Tigerjeet Ballayram. "The Promises and Challenges of the Sustainable Development Goals for Caricom Caribbean Countries." 5 (1) *Journal of Food Security* (2017): 1–8.

Barnhart, Clarence L., and Robert K. Barnhart. *The World Book Dictionary*. World Book. Inc, 2003.

Bennett, Nathan J., and Terre Satterfield. "Environmental Governance: A Practical Framework to Guide Design, Evaluation and Analysis." 11 (6) *Conservation Letters* (2018): 1–13.

Bevir, Mark. *Governance: A Very Short Introduction*. Oxford University Press, 2012.

Cangialosi, John P., et al. "National Hurricane Center Tropical Cyclone Report. *Hurricane Irma (AL112017)* 30 August–12 September 2017." June 30, 2018, available at https://www.nhc.noaa.gov/data/tcr/AL112017_Irma.pdf.

Challies, Edward, and Jens Newig. "What Is 'Environmental Governance'? A Working Definition." 2019. Available at https://sustainability-governance.net/2019/06/14/what-is-environmental-governance-a-working-definition/.

Chomsky, Noam. *Profit over People: Neoliberalism and Global Order*. Seven Stories, 1998.

98 See Article I of the United Nations Charter.

99 Immanuel Kant, *Metaphysics of Morals*, 1797.

Cotton, J. Jason and Vishana Jagessar. "Private Sector External Debt in the Caribbean: The Stylized Facts." *Caribbean Development Bank (CDB)*, 2018. https://cert-net.com/files/publications/conference/2018/CERT_JCotton%20and%20VJagessar_AMSC2018.pdf

Croxton, Derek. *The Last Christian Peace*. Westphalia, 2013.

DeGraff Ollivierre, Alison. *National Geographic Maps,* 2000.

Donne, John. *No Man Is an Island: Selections from the Prose of John Donne*. Folio Society, 1997.

Edmonds, Kevin. "An Elusive Independence: Neocolonial Intervention in the Caribbean." 2015. *International Socialism. A Quarterly Review of Socialists Theory* (2015): 128.

Emas, Rachel. "Brief for GSDR 2015: The Concept of Sustainable Development: Definition and Defining Principles." https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf.

Enders, Judith C., et al. *Theories of Sustainable Development*. Routledge, 2015.

Faieta, Jessica. "Rethinking Progress in Sustainable Development Era." *Inter Press News Agency* (2016). http://www.ipsnews.net/2016/09/caribbean-rethinking-progress-in-sustainable-development-era/.

Fanon, Frantz. *The Wretched of the Earth*. Grove Press, 2005.

Girvan, Norman. "Existential Threats in the Caribbean: Democratising Politics, Regionalising Governance." *The Caribbean Review: Independent Thought, Indigenous Spirit*. August 6, 2017 https://www.caribbeanreview.org/2017/08/existential-threats-in-the-caribbean/.

Goldsmith, Oliver. *The Traveller.* 1764.

Gonsalves, Camillo M. *Globalised. Climatised. Stigmatised*. Independently Published, 2019.

Gonsalves, Ralph E. *Our Caribbean and Global Insecurity*. CreateSpace Independent Publishing Platform, 2017.

Hope, Kempe Ronald. "External Borrowing and the Debt Problems of Some Caribbean Nations." 59 (3/4) *Nieuwe West-Indische Gids / New West Indian Guide* (1985): 197–210.

Kant, Immanuel. *Metaphysics of Morals*. 1797.

Landrigan, Phillip J. et al. "The Lancet Commission on Pollution and Health." October 19, 2017, *Lancet* 2018: 462–512.

Leahy, Stephen. "Climate Change Driving Entire Planet to Dangerous 'Tipping Point.'" *National Geographic*, 2019. https://www.nationalgeographic.com/science/2019/11/earth-tipping-point/

Levitt, K., and L. Best. "Character of Caribbean Economy," in *Caribbean Economy: Dependence and Backwardness*. Jamaica, 1978. http://www.sciepub.com/reference/183514.

Martinez Laguardia, Jacqueline. "Development and Environmental Challenges in Caribbean SIDS." 2017. Available at https://www.slideshare.net/jlaguardiamartinez/development-and-environmental-challenges-in-caribbean-sids.

McInerney, Thomas F. "UNEP, International Environmental Governance, and the 2030 Sustainable Development Agenda." 2017 https://wedocs.unep.org/bitstream/handle/20.500.11822/21247/UNEP_IEG_2030SDA.pdf?sequence=1&isAllowed=y.

Mori, Akihisa. *Environmental Governance for Sustainable Development: East Asian Perspectives*. United Nations University Press, 2013.

Morin, Jean-Frederic and Amadine Orsini. *Essential Concepts of Global Environmental Governance*. 2nd Ed. Routledge, 2020.

Najam, Adil, et al. *Global Environmental Governance: A Reform Agenda*. International Institute for Sustainable Development, 2006.

Orr, James C., et al. "Anthropogenic Ocean Acidification over the Twenty-first Century and Its Impact on Calcifying Organisms." 437 *Nature* (2005): 681–686.

Pachauri, R. K., and L. A. Meyer. "Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change." 2014. available at https://ar5-syr.ipcc.ch/ipcc/ipcc/resources/pdf/IPCC_SynthesisReport.pdf.

Pearson, Lestor B. *Partners in Development: Report of the Commission on International Development*. Praeger, 1969.

Poole, Richard E. "Global Governance and the Environment: Evaluating the Effectiveness of Global Governance in Tackling Contemporary Environmental Issues." 4 (6) *Inquires* (2012): 1–2.

Ratti, Mattia Luigi. "The Economics of Natural Disasters: An Overview of the Current Research Issues and Methods." 3 *CERE Working Paper* (2017). http://www.cere.se/documents/wp/2017/CERE_WP2017-3.pdf,

Robinson, Stacy-ann. "Climate Change Adaptation in SIDS: A Systematic Review of the Literature Pre and Post the IPCC Fifth Assessment Report." 11 (4) *WIREs Climate Change* (2020): 1–21.

Stiglitz, Joseph E. *Globalization and Its Discontents*. W.W. Norton & Company, 2002.

Walling, Leslie J., et al. "Caribbean Environment Outlook: Special Edition for the Mauritius International Meeting for the 10-year Review of the Barbados Programme of Action for the Sustainable Development of Small Island Developing States." 2005. Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9376/-Caribbean_Environment_Outlook-2004GEO_CarribeanEnvironmentOutlook_2004.pdf.pdf?sequence=3&amp%3BisAllowed=.

Weiss, Thomas G., and Kevin V. Ozgercin. "The Evolution of Global Governance: Theory and Practice," in *International Relations*. Eds. Jarrod Wiener and Robert A. Schrire. EOLSS Publications, 2009.

Young, Iris Marion. *Inclusion and Democracy*. Oxford University Press, 2000.

10 Going beyond the law

The potential and limits of public participation in the context of sustainable development

Marek Prityi[1]

10.1 Introduction: interlinkages among brain, behavior, and public participation

According to Nobel Prize winning economist Daniel Kahneman, the answer to many problems and misunderstandings in our life rests in the interplay between the fast—to a great extent intuitive—form of thinking, and the slow—to a great extent reflective—form of thinking. Both forms of thinking, which Kahneman calls System 1 and System 2, are inherently wired in our nature, and determine the way how we perceive and understand the world and how we react to the things that happen to us. While often serving us well, the interplay between fast and slow thinking can be also influenced and driven by different forms of biases.[2] For example, an intuitively strong loss aversion, which is at heart of the precautionary principle prohibiting actions with a potential to cause harm, is embedded in the System 1.[3] As interpreted by the Head of the Scientific Foresight Service of the European Parliament, Lieve van Woensel, "we tend to think in ways that need the

1 Dr. Marek Prityi is State Adviser at the Slovak Ministry of Environment. He is a graduate of the Comenius University in Bratislava and Trnava University, Slovakia, and collaborated as Research Associate with the organization gLAWcal-Global Law Initiatives for Sustainable Development before completing his doctoral research in the field of environmental comparative law at the University of Cologne, Germany.

2 Daniel Kahneman, *Thinking, Fast and Slow,* (Munich: Penguin, 2012). In the context of scientific and advisory processes, Lieve van Woensel differentiates between several forms of biases: research biases (sampling bias, experimenter bias, reporting bias, and sponsorship bias), cultural and value biases (ideological bias, in-group bias, confirmation bias, and stereotype bias), attention biases (tunnel vision and blind spot bias, the bias blind spot, and the target bias), interest-based biases (self-serving bias, tactical bias, and conflict of interest bias), availability biases (media bias, anchoring bias, knowledge bias, and authority bias), and associative biases (nature and bio biases, romantic bias, and ethicality bias). See Lieve van Woensel, *A Bias Radar for Responsible Policy-Making: Foresight-Based Scientific Advice*, (Basingstoke: Palgrave Macmillan, 2020), pp. 21–27.

3 Even though precautionary principle is one of the core principles of environmental law, it can also hinder the introduction of new inventions. See Daniel Kahneman, *supra* note 2, p. 351.

DOI: 10.4324/9781003160236-14

least amount of energy."[4] Biases stem more often from System 1 than from System 2.[5]

In this regard, Kahneman refers to the work of Paul Slovic,[6] a professor of psychology who voiced doubts about the experts' "sole control of risk policy [and] the idea that risk is objective."[7] He argues that the understanding of risk is to a great extent influenced by culture and subjective opinions and for this reason, the opinions and wishes of citizens should be considered and reflected in decision-making.[8] By contrast, ignorance of the public opinion can result in rejection of the results of decision-making by the public.[9] As reiterated by Caron Chess and Kristen Purcell of the Center for Environmental Communication at Rutgers University: "risk management decisions that are made in collaboration with stakeholders are more effective and more durable."[10]

On the other hand, as further noted by Kahneman, the stance of Harvard Law professor Cass Sunstein[11] towards the equality between the opinions of experts and citizens is distinctly different. Sunstein argues that the flaws in regulatory systems are often the result of authorities' succumbing to the pressures from the public. While acknowledging the relevance of subjective views and perceptions influenced by values and culture in the context of certain aspects of assessment, he emphasized the value of "the objectivity that may be achieved by science, expertise, and careful deliberation."[12] Opening the communication channels to the public also means sometimes opening the doors to "irrational concerns of citizens."[13] This can be one of the defining traits and at the same time inherent flaws of democracy in terms of its ability to set priorities, considering that "the response of the political

4 Lieve van Woensel, *supra* note 2, p. 19.

5 Ibid.

6 See for instance Paul Slovic et al., "Risk as Analysis and Risk as Feelings: Some Thoughts about Affect, Reason, Risk and Rationality," 24 (2) *Risk Analysis* (2004), pp. 311-320; Roger E. Kasperson et al., "The Social Amplification of Risk: A Conceptual Framework," 8 (2) *Risk Analysis* (1988), pp. 177–187; Paul Slovic, "Risk Perception," 236 *Science* (1987), pp. 280-285; Paul Slovic, "Perceived Risk, Trust and Democracy," 13 (6) *Risk Analysis* (1993), pp. 675-682; Paul Slovic, "Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield," 19 (4) *Risk Analysis* (1999), pp. 689–701.

7 Daniel Kahneman, *supra* note 2, p. 141.

8 Ibid, p. 144.

9 Ibid.

10 *Framework for Environmental Health Risk Management*; Presidential/Congressional Commission on Risk Assessment and Risk Management: Washington, D.C., 1997, cited in Caron Chess and Kristen Purcell, "Public Participation and the Environment: Do We Know What Works?" 33 (16) *Environmental Science and Technology*, (1999), p. 2685.

11 See for instance Timus Kuran and Cass R. Sunstein, "Availability Cascades and Risk Regulation," 51 *Stanford Law Review* (2007), pp. 685–768.

12 Daniel Kahneman, *supra* note 2, pp. 141–142.

13 Ibid, p. 142.

system is guided by the intensity of public sentiment."[14] It can lead to the distribution of public resources based on priorities set in a distorted manner.[15]

Kahneman, referring to Sunstein and his collaborator Timur Kuran, recalls two examples in the environmental field when the concerns of citizens led to government action. The "Love Canal affair" in 1979 in the United States concerned a situation with toxic waste that caused contamination of water and foul smell, which understandably caused concerns in the local community and caught media attention. While there were also voices among scientists claiming that the dangers were overstated, the government facilitated relocation of residents and the situation served as an incentive to adopt the legislation addressing the issue of toxic sites, the Comprehensive Environmental Response, Compensation, and Liability Act,[16] which is considered to be a hallmark of environmental legislation.[17]

The second example was the Alar incident in 1989 in the United States concerning the effects of chemicals sprayed on apples. The fear began to spread among the public that large doses of these chemicals can cause tumors. The story circulated widely in the media and consequently, the apple industry suffered huge losses. Even though it was confirmed that there was a small risk that the substance might be a possible carcinogen, Kahneman suggests that the public, and subsequently the government, overreacted to a relatively minor problem, pointing out further that "[t]he net effect of the incident on public health was probably more detrimental because fewer good apples were consumed."[18] In his view, it "illustrates a basic limitation in the ability of our mind to deal with small risks: we either ignore them altogether or give them far too much weight—nothing in between."[19]

Nevertheless, despite justified concerns that the reaction in both cases was not based on unequivocally objective weighing of costs and benefits, it had an undisputedly beneficial effect on underscoring that environmental concerns should be treated as priorities.[20] Even in the context of tools of environmental democracy, such as public participation, it is noteworthy to be reminded of the words that:

> [d]emocracy is inevitably messy, in part because the availability and affect heuristics that guide citizens' beliefs and attitudes are inevitably biased,

14 In this regard, it is referred to the so-called availability cascade, "a self-sustaining chain of events, which may start from media reports of a relatively minor event and lead up to public panic and large-scale government action." See Daniel Kahneman, *supra* note 2, p. 142.

15 Daniel Kahneman, *supra* note 2, p. 144.

16 The Comprehensive Environmental Response, Compensation, and Liability Act (commonly referred to as CERCLA or the Superfund Act), enacted by the U.S. Congress on December 11, 1980. For more information, see https://www.epa.gov/superfund/superfund-cercla-overview (retrieved 2 August 2020).

17 Daniel Kahneman, *supra* note 2, pp. 142–143.

18 Ibid, p. 143.

19 Ibid, p. 143.

20 Ibid, p. 145.

> even if they generally point in the right direction. Psychology should inform the design of risk policies that combined the experts' knowledge with the public's emotions and intuitions.[21]

Public participation enables the citizens to express their views and represents a communication channel between citizens and public authorities. While it has potential benefits, the risks related therewith need to be harnessed to fully use its potential.

10.2 From text into action: public participation in international environmental law

Public participation is one of the core environmental procedural rights; others are the right to information and access to justice. This "triptych"[22] can be perceived as a chain of interrelated rights: access to information is a necessary prerequisite for citizens to be able to participate in environmental decision-making,[23] while access to justice is a measure of last resort that enables citizens to claim their rights to information and public participation in administrative procedures and before courts.[24]

Generally speaking, the benefits of environmental procedural rights can be summarized as follows: they contribute to democratization of decision-making processes; they have awareness-raising functions and enable one to gather inputs from the public and in this way improve decision-making; and they have an "instrumental function," resting in "increasing the legitimacy and social acceptability of the decision-making procedures and their outcomes."[25] At

21 Ibid.

22 This expression is borrowed from Sidney Guerra and Guilia Parola, "Implementing Principle 10 of the 1992 Rio Declaration: A Comparative Study of the Aarhus Convention 1988 and the Escazú Agreement 2018," 2 *Curitiba* (2019), p. 13.

23 "Sound information is the basis for effective participation." See Jukka Similä, "The Evolution of Participatory Rights in the Era of Fiscal Austerity and Reduced Administrative Burden," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd, 2017). See also Wanxin Li et al., "Getting Their Voices Heard: Three Cases of Public Participation in Environmental Protection in China," 98 *Journal of Environmental Management* (2012), pp. 65, 66.

24 *The General Principles of EU Administrative Procedural Law* 7 (European Parliament, Directorate-General for Internal Policies. 2015). As noted by Gill in the context of specialized environmental courts and tribunals in India, access to environmental justice can be also provided "in a participatory manner," which illustrates the interconnectedness of environmental procedural rights. Especially the relaxing of requirements concerning *locus standi* and the development of public interest litigation in India are seen as important catalysts of a "polycentric, participatory and democratic" process that is needed "to meet the challenges of the time." See Gitanjali Nain Gill, "Access to Environmental Justice in India: Innovation and Change," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd., 2017), p. 221.

25 Goda Perlaviciute and Lorenzo Squintani, "Public Participation in Climate Policy Making: Toward Reconciling Public Preferences and Legal Frameworks," 2 *One*

the same time, they provide access to local knowledge and enable learning at individual and community levels, thereby leading to sustainability. Informed public participation can avoid potentially costly litigation as well.[26] Moreover, a person or community's involvement in decision-making can reinforce the feeling of ownership of the outcome of decision-making procedures.[27]

The inclusion of a variety of actors, including non-state actors, also represents "the recognition that environmental problems cannot be adequately resolved by government in isolation."[28] Moreover, environmental procedural rights can be seen through the lens of a procedural limb of environmental justice, emphasizing *inter alia* fairness in decision-making.[29]

These rights are presently embedded "in legal frameworks at the national, supranational and international level."[30] In more general terms, these rights articulate citizens' right to participate in the government *directly*, as articulated in Article 21(1) of the 1948 Universal Declaration of Human Rights, but in an environmental context.[31] While the reference in Principle 10[32] of the

---

Earth: Perspective (2020), p. 341; see also Caron Chess and Kristen Purcell, *supra* note 10, pp. 2685–2691.

26 Ciaran O'Faircheallaigh, "Public Participation and Environmental Impact Assessment: Purposes, Implications and Lessons for Public Policy-Making," 30 *Environmental Impact Assessment Review* (2010), p. 19.

27 Bert Enserink and Joop Kopenjan, "Public Participation in China: Sustainable Urbanization and Governance," 18 (4*) Management of Environmental Quality: An International Journal*, (2007), pp. 459, 469.

28 Thomas Johnson, "Environmentalism and NIMBYism in China: Promoting a Rules-Based Approach to Public Participation," 19 (3) *Environmental Politics* (2010), pp. 430, 431.

29 As further noted by Ferruci, the concept of environmental justice "has evolved from referencing to hazardous materials in low income and minority communities to a broader set of issues of equity, into their procedural, geographic and social aspects." See Giada Ferrucci, "A Pioneering Platform: Strengthening Environmental Democracy and Justice in Latin America and the Caribbean," 20 *Journal of Management Policy and Practice* (2019), p. 11. Moreover, it has been argued that evaluation of public participation procedures should be based on two main criteria, namely *fairness* and *competence*. See Caron Chess and Kristen Purcell, *supra* note 10, p. 2686.

30 Jerzy Jendrośka, "Introduction: Procedural Environmental Rights in Theory and Practice," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd., 2017), p. xvii.

31 Emma Mitrotta, "Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd., 2017), p. 365.

32 "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Rio Declaration represents a prominent example at the level of soft law, the most prominent example of a "binding international standard" is the United Nations Economic Commission for Europe (U.N.E.C.E.) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, known more simply as the "Aarhus Convention."[33]

The impact of the Aarhus Convention can be felt mostly in the European Union and its member states, as well as a broader Pan-European region,[34] including the countries of the Eastern Partnership[35] and Central Asia,[36] yet it is prominent in the context "of developing the legal framework in this respect worldwide."[37] In this regard, it is interesting, to note the efforts and interest of Guinea-Bissau, which expressed interest in becoming a party to the Aarhus Convention.[38] However, as noted by Emily Barrit, lecturer at King's College London, this original ambition to develop into a global instrument runs contrary to the underlying idea of participatory rights enshrined in the convention (i.e., "that environmental problems are best resolved with the participation of those concerned").[39] The universal values need to be interpreted through the cultural, political, and social lens of a particular region. Thus, a regional approach has proven to be a more accessible path so far.[40]

The Aarhus Convention has served as an inspiration for other regions of the world.[41] The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as the "Escazú Agreement,"[42] adopted under the auspices

33 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, 25 June 1998, U.N.T.S., Vol. 2161, p. 447, available at https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf (retrieved 13 November 2020); see Jerzy Jendrośka, *supra* note 30, p. xvii.

34 The Aarhus Convention has 47 Parties from the U.N.E.C.E. region. European Union is also party to the Aarhus Convention.

35 Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine.

36 Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan.

37 Jonas Ebbeson, "Public Participation," in *The Oxford Handbook of International Environmental Law*, (Oxford: Oxford University Press, 2008), p 686; Jerzy Jendrośka, *supra* note 30, p. xvii.

38 Economic Commission for Europe, Preliminary Assessment of the Institutional, Policy and Legal Framework of Guinea Bissau, 31 July 2017, available at https://www.unece.org/fileadmin/DAM/env/pp/mop6/8a_Accession_by_non-ECE_states/ECE.MP.PP.2017.47_Guinea_Bissau-auc.pdf (retrieved 13 November 2020). However, as noted by Barrit, no country outside of U.N.E.C.E. region which has expressed initial interest to accede to the Aarhus Convention has in the end done so. See Emily Barrit, "Global Values, Transnational Expression: From Aarhus to Escazú," *Research Handbook on Transnational Environmental Law, TLI Think! Paper 11/2019,* pp. 1–22.

39 Ibid.

40 Ibid.

41 Goda Perlaviciute and Lorenzo Squintani, *supra* note 25, p. 342.

42 18. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018,

of the U.N. Economic Commission for Latin America and the Caribbean in 2018, follows a similar path as the Aarhus Convention in achieving the objectives associated with Principle 10 of the Rio Declaration.[43] As such, it represents a significant example of "a [second] regional elaboration of Principle 10 and also of the U.N.E.P. Bali Guidelines, the most detailed guidance on Rio Principle 10 adopted globally."[44] However, as noted by Barrit, the Escazú Agreement should not be seen as an "imitation of Aarhus." It interprets Principle 10 in a manner reflecting the challenges and context of the Latin American and the Caribbean region.[45]

Environmental and social challenges are intertwined in the Latin America and the Caribbean region. Environmental degradation has a negative impact on livelihoods, and socio-environmental struggles are related with the issues, such as "social inclusion, equality [and] poverty eradication."[46] The Escazú Agreement takes into account the needs of indigenous and vulnerable people in the region, which can be illustrated on specific reference to "persons or groups in vulnerable situations."[47] This emphasis on "vulnerability … brings together human rights and environmental narratives further."[48]

U.N.T.S., Vol. 196, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en. (retrieved 13 November 2020).

43 Juliana Zuluaga Madrid, "Definitions of the Aarhus Convention v. The Proposal for a New Latin America and the Caribbean Instrument: Mapping the Differences in the Material Scope of Procedural Environmental Rights in International Law," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd., 2017), pp. 42–43; see also Louis J. Kotzé and Duncan French, "A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for Lex Anthropocenae?," 18 *International Environmental Agreements: Politics, Law and Economics* (2018).

44 As noted further by Stec and Jendrośka, Rio + 20 Conference identified the regional level "as an important setting for action to promote access to information, public participation and access to justice in environmental matters." In fact, the regional approaches and mechanisms have proven to be a more viable option in promoting principles of environmental democracy than the efforts to adopt "a global convention" enshrining and implementing the standards of Principle 10. See Stephen Stec and Jerzy Jendrośka, "The Escazú Agreement and the Regional Approach to Principle 10: Process, Innovation, and Shortcomings," 31 *Journal of Environmental Law* (2019), pp. 533–545. As noted by Ferruci, documents such as the Principles of Environmental Justice (1991), the Bali Principles of Climate Justice (2002), and the Universal Declaration of the Rights of Mother Earth (2010), have already underscored the connection between social justice, environmental matters, and democratic governance. See Giada Ferrucci, *supra* note 29, p. 11.

45 Emily Barrit, *supra* note 38.

46 Giada Ferrucci, *supra* note 29, p. 10.

47 Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, Art. 2 (e), Art. 4 (5), Art. 5 (3)–(4) (17), Art. 6 (6), Art. 7 (14), Art. 8 (5), Art. 10 (2 e); see also Juliana Zuluaga Madrid, *supra* note 43, p. 53. Moreover, the Escazú Agreement "is the first legally binding instrument to contain specific provisions aimed at the protection of environmental human rights defenders." See Stephen Stec and Jerzy Jendrośka, *supra* note 44, pp. 7–8.

48 Stephen Stec and Jerzy Jendrośka, *supra* note 44, p. 8.

In contrast to the Aarhus Convention, the Escazú Agreement "does not differentiate between 'the public' and 'the public concerned' … with respect to the participation pillar … [n]or is special consideration given to environmental N.G.Os."[49] This approach can be seen in a broader context as well, considering that the adoption of the Escazú Agreement correlated with the adoption of the Framework Principles on Human Rights and the Environment (the "Knox Principles")[50] by the U.N. Special Rapporteur on Human Rights and the Environment[51] and the Declaration on Environmental Rule of Law[52] adopted by the International Union for Conservation of Nature (I.U.C.N.) World Congress on Environmental Rule of Law. Both documents can be seen in the light of a tendency to progressive interpretation of the Principle 10 in a manner emphasizing the role of minorities, vulnerable people, indigenous peoples, and environmental defenders.[53]

The provisions in the Escazú Agreement that specifically address the situation of vulnerable and indigenous people serve as proof of the ambition to react to the regional challenges. In contrast to the Aarhus Convention, which is built on the underlying assumption that the public has the necessary literacy and language skills to make use of participatory rights, the provisions of the Escazú Agreement need to be applied in a context in which many of its potential beneficiaries might be illiterate. Thus, the approach taken by the Escazú Agreement is more sensitive to these issues. For example, Article 5(3)–(4) stipulates that the states need to ensure that assistance to vulnerable people and groups in accessing information is provided, "both in terms of formulating requests for that information and also in processing the information once received."[54] Further, Article 7(14), articulates support to vulnerable people in the context of participatory processes.[55] While this observation and objective are relevant and their application in practice can be undoubtedly useful, it needs to be considered that informal personal channels to political actors or bureaucrats can be as important as the knowledge of participatory rights and their potential use.[56]

49 Ibid, p. 5.

50 Framework Principles on Human Rights and the Environment, 2018, https://www.ohchr.org/en/issues/environment/srenvironment/pages/frameworkprinciplesreport.aspx (retrieved 6 January 2021).

51 United Nations, General Assembly, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/37/59 (24 January 2018), available at https://undocs.org/A/HRC/37/59 (retrieved 13 November 2020).

52 I.U.C.N. World Declaration on the Environmental Rule of Law, available at https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/wcel-important-documentation/environmental-rule-law (retrieved 6 January 2021).

53 Stephen Stec and Jerzy Jendrośka, *supra* note 44, p. 3.

54 Emily Barrit, *supra* note 38.

55 Ibid.

56 Lily L. Tsai and Yinqing Xu, "Outspoken Insiders: Political Connections and Citizen Participation in Authoritarian China," 40 (3) *Political Behavior* (2018), pp. 629–657.

The definition of "persons or groups in vulnerable situations" enshrined in the Escazú Agreement is the first in any international legal instrument.[57] While the definition is quite broad to accommodate the specific national context of respective parties to the agreement, it is relevant to note that the concept of vulnerability is one based on "interdependency, sensitivity and community."[58] As further noted, the concept of vulnerability can be viewed through the lens of Principle 14 of the Knox Framework Principles, which emphasizes the need to perceive vulnerability "from the perspectives of exposure, resilience, and coping ability."[59]

This is justified, considering that traditional public participation mechanisms, embedded for example in the Aarhus Convention,[60] are available and used mainly by middle class citizens and do not secure "an adequate level of protection to the effective participation of specific target groups."[61] By way of analogy, the remark of Margherita Paola Poto in reference to public participation rights of indigenous people in the Arctic region notes that "the international community … had to restore an ancestral injustice related to an unfortunate long series of land expropriation, redistribution, [and] marginalisation when not discrimination."[62]

Even though the situation of marginalized people is not specifically addressed in the text of the Aarhus Convention, the secretariat of the Aarhus Convention balanced it to a certain extent through the text of the non-binding Maastricht Recommendations on Promoting Effective Public Participation

57 The text of the definition states that "[p]ersons or groups in vulnerable situations means those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations." See Stephen Stec and Jerzy Jendrośka, *supra* note 44, p. 10.

58 Stephen Stec and Jerzy Jendrośka, *supra* note 44, p. 9.

59 In contrast to the Escazú Agreement, the Knox Framework Principles differentiate more explicitly between vulnerable groups and indigenous peoples, noting that indigenous peoples should not be automatically presumed to be vulnerable based on their embeddedness in the natural environment and dependency on natural resources. This distinction should be noted in other contexts as well. See Stephen Stec and Jerzy Jendrośka, *supra* note, 44, pp. 9–10.

60 The Aarhus Convention attempts to conquer "a strong imbalance of power among actors" not only in the field of public participation, but also in the field of access to justice, by providing generous rights to environmental N.G.O.s. See Vasiliki Karageorgou, "Environment-Related Disputes in the Light of the Aarhus Convention and E.U. Law: Tensions between Effective Judicial Protection and National Procedural Autonomy," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd., 2017), p. 229.

61 Margherita Paola Poto, "Legal Instruments to Protect Indigenous Peoples' Participation in Europe and in the Arctic Region," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd, 2017), p. 161.

62 Ibid.

in Decision-Making in Environmental Matters.[63] This document underscores the need to pay special attention to vulnerable people mainly in the context of notifying the public.[64] It remains, however, only a non-binding document.[65] As noted above, the Escazú Agreement addresses different social challenges in a region with "sectors of society that have historically been marginalized from decision-making on issues relating to the environment."[66]

The Escazú Agreement is the first international environmental treaty that specifically addresses the issue of protection of environmental defenders. This is justified, considering that the territorial scope of the Escazú Agreement covers mainly the region of Latin American and the Caribbean region where environmental defenders are most at risk.[67] The objective of the Escazú Agreement is to prevent the criminalization of environmental activists and secure their protection.[68] The explicit protection for environmental defenders illustrates the different contexts of the Escazú Agreement in both territorial and temporal terms, in comparison to the Aarhus Convention. At the same time, it demonstrates the stronger human rights focus of the Escazú Agreement in comparison to the Aarhus Convention.[69]

In the context of the Escazú Agreement, it is also relevant to note the *pro persona* principle,[70] which is characteristic for the Latin American region and "which has had a special resonance in cases involving the rights of indigenous peoples."[71] Thus, the progressive interpretation applicable to human rights enshrined in regional human rights documents is equally applicable to the

63 U.N.E.C.E., *Maastricht Recommendation on Promoting Effective Public Participation in Decision-Making in Environmental Matters Prepared under the Aarhus Convention* (Geneva: United Nations, 2015), available at https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf (retrieved 13 November 2020).

64 Ibid, para. 63, 67.

65 Nevertheless, even non-binding soft law instruments can have a great influence on the international legal system. See Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003).

66 Sidney Guerra and Guilia Parola, *supra* note 22, p. 8.

67 The killings of environmental defenders have multiplied from two per week to four per week in the course of the last fifteen years. Latin America is the most problematic region, with 60% of murders of environmental defenders occurring there. In Ian Granit, "Protecting the Defenders: Exploring the Role of Global Corporations and Treaties," July 8, 2020, available at https://www.e-ir.info/2020/07/08/protecting-the-defenders-exploring-the-role-of-global-corporations-and-treaties/ (retrieved 13 November 2020).

68 Giada Ferrucci, *supra* note 29, p. 13.

69 Emily Barrit, *supra* note 38.

70 Essentially, according to the *pro personae* or *pro homine* principle, human rights norms should be interpreted as extensively as possible when recognizing individuals' rights and as restrictively as possible when imposing limits on enjoyment of human rights. See Hayde Rodarte Berbera, *The Pro Personae Principle and Its Application by Mexican Courts*, 2017, https://www.qmul.ac.uk/law/humanrights/media/humanrights/news/hrlr/2018/Hayde-Rodarte-Berbera.pdf (retrieved 6 January 2021).

71 Stephen Stec and Jerzy Jendrośka, *supra* note 44, p. 7.

rights enshrined in the Escazú Agreement.[72] These provisions of the Escazú Agreement need to be read in the light of the ambition to address inequalities in the region as well as in the temporal context of its adoption when a number of countries have already elaborated constitutional and statutory environmental rights provisions.[73] The Escazú Agreement has a potential to further impact the environmental rights guarantees and strengthen "the level of the protection of environmental participatory rights in the region."[74]

Moreover, when it comes to the Escazú Agreement, it is possible to note a rather sharp contrast to the Aarhus Convention in this regard. While the Aarhus Convention applies the "any person principle" when defining the public, the Escazú Agreement limits the scope to the members of the public who are "nationals or … subject to the national jurisdiction of the State Party."[75]

It is relevant to note the observation that the recognition and articulation of public participation standards is influenced by the meaning of public participation in certain countries and milieus as well. For example, the relevant provisions of the South African Constitution imply that public participation needs to be seen also "as a means of personal and community growth—by understanding and being aware of environmental issues—and of inclusion of all interested and affected parties."[76] The Escazú Agreement also underscores the importance of social conditions "to enable meaningful participation and engagement with environmental information."[77]

However, from the perspective of practical implementation of environmental procedural rights, it is relevant to note that law itself is not enough to bring the spirit of environmental procedural rights to life. As it was noted in the report *Our Common Future* (the "Brundtland Report"),[78] "[t]he law alone cannot enforce the common interest. It principally needs community knowledge and support, which entails greater public participation in the decisions that affect the environment."[79] These matters are greatly influenced by the way the society and its individual parts function and interact.

72 Ibid.

73 Emily Barrit, *supra* note 38.; see also Ryan Kraski et al., "Constitutional Provisions," in *Environmental Law Across Cultures: Comparisons for Legal Practice*, (London: Routledge, 2020), p. 121.

74 Sidney Guerra and Guilia Parola, *supra* note 22 p. 3.

75 Art. 2 (d); see also Stephen Stec and Jerzy Jendrośka, *supra* note 37, p. 12.

76 Emma Mitrotta, *supra* note 31, p. 370.

77 This is one of the aspects that makes the Escazú Agreement different from the Aarhus Convention, which focuses mainly on "facilitating citizen engagement in a technical sense." See Emily Barrit, *supra* note 38.

78 World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report),* A/42/427, (20 March 1987), available at https://digitallibrary.un.org/record/139811/files/A_42_427-ES.pdf (retrieved 13 November 2020).

79 Ibid, para 77.

10.3 Potential and limits of public participation in a dynamic and complex context

Public participation can become a double-edged sword and, in the words of communication scholar Leah Sprain, "a wicked problem" in the context of global problems with local impact, such as climate change.[80] The paradox of such a complicated matter as climate change can also be attributed to the tendency to prefer participation at local level in comparison to "macro-level decision-making" entailing and determining strategic priorities even for projects at the local level.[81] Perhaps it is a reflection of the natural tendency of people to prefer participation at the local level, which seems more important and closer to them, in contrast to participation at higher, macro level, which may feel remote and less important.[82]

However, at the same time, findings suggest that "people accept climate policy more if they can influence major decisions."[83] As noted above, the role of citizens in environmental matters is explicitly acknowledged in relevant laws at the national and international level. However, the issues concern the translation of these principles in practice.[84] While the law acknowledges this important role of citizens in environmental matters, it is less clear what their active role should be in a democratic process.[85] It has been suggested that the regulation and organization of public participation processes leads the people to participate in minor, rather than major decisions.[86] In the context of complex issues, such as climate change or choosing the location of waste disposal facilities, an application of strictly participatory practices in decision-making may even lead to a state of paralysis.[87]

On the one hand, "participatory approaches … are central to negotiating conflicting values and contributing local knowledge necessary to managing certain aspects of climate change."[88] On the other hand, "[p]ower and hierarchy compound the challenges of diversity, making a stable consensus improbable and potentially discriminatory toward those living at the margins

80 Leah Sprain, "Paradoxes of Public Participation in Climate Change Governance," 25 *The Good Society* (2016), pp. 62–80.

81 Goda Perlaviciute and Lorenzo Squintani, *supra* note 25, p. 344; see also Xuemei Bai et al., "Urban Policy and Governance in a Global Environment: Complex Systems, Scale Mismatches and Public Participation," 2 *Current Opinion in Environmental Sustainability* (2010), pp. 129–135.

82 Goda Perlaviciute and Lorenzo Squintani, *supra* note 25, p. 345.

83 Ibid, p. 344.

84 Inger Lassen et al., "Climate Change Discourses and Citizen Participation: A Case Study of the Discursive Construction of Citizenship in Two Public Events," in 5 *Environmental Communication* (2011), pp. 411–412.

85 Ibid.

86 Goda Perlaviciute and Lorenzo Squintani, *supra* note 25, p. 343.

87 Ciaran O'Faircheallaigh, *supra* note 26, pp. 19, 22.

88 Leah Sprain, *supra* note 80, p. 63; see also Xuemei Bai et al., *supra* note 81, p. 129.

of society."[89] Even though this is an important factor and perhaps an unsurmountable hurdle, it is an issue that must be addressed and discussed. As European Commission consultant Stephen Stec reminds us, "the balance of power is among the most important ideational factors that lead societies towards innovation in the face of governance challenges."[90]

In the context of environmental issues, such as climate change, issues of distributive and procedural justice are important as well.[91] The views of various spheres of society, such as marginalized people can be, for instance, applied and integrated in the context of the Strategic Impact Assessment procedure.[92] While public participation has a potential to strengthen public trust and empower people, poor design of public participation processes bears the risk of resulting in "undemocratic outcomes by reinforcing existing power inequalities, marginalizing minority perspectives, creating dysfunction consensus, or fostering cynicism."[93] Depending on the context, a "culture of participatory abstinence" might be the problem. Formal participation by organized groups might be more widespread than "the participation of local constituents, or non-organised publics."[94]

In theory, these issues and their related challenges are well-recognized. For example, the Rio Declaration specifically emphasized the need to include the participation of women and indigenous people.[95] In addition, the importance of participation of indigenous peoples and local communities in environmental matters is recognized by the 1989 International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries,[96] the Resolution VII.8 on Local Communities and Indigenous People adopted under the auspices of the Ramsar Convention,[97] and the Convention on Biological Diversity.[98]

89 Leah Sprain, *supra* note 80, p. 63.

90 Stephen Stec, "Developing Standards for Environmental Procedural Rights through Practice: The Changing Character of Rio Principle 10," in *Procedural Environmental Rights: Principle X in Theory and Practice*, (Cambridge: Intersentia Ltd., 2017), p. 8.

91 Leah Sprain, *supra* note 80, p. 67; see also Goda Perlaviciute and Lorenzo Squintani, *supra* note 25, p. 344.

92 Ciaran O'Faircheallaigh, *supra* note 26, p. 23.

93 Leah Sprain, *supra* note 80, p. 67; see also Anna Weselink et al., "Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives," 43 *Environment and Planning* (2011), pp. 2688–2704.

94 Ana Davies, "What Silence Knows – Planning, Public Participation and Environmental Values," 10 *Environmental Values* (2001), p. 78.

95 Jukka Similä, *supra* note 23, p. 19.

96 *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Geneva, 27 June 1989, *U.N.T.S.,* Vol. 1650, No. 169, available at https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c0136 (retrieved 13. November 2020).

97 *Convention on Wetlands of International Importance*, Ramsar, 2 February 1971, *U.N.T.S.,* Vol. 996, p. 245, available at https://treaties.un.org/pages/showDetails.aspx?objid=080000028-0104c20 (retrieved 13 November 2020).

98 *Convention on Biological Diversity,* Rio de Janeiro 5 June 1992*, U.N.T.S.,* Vol. 1760, p. 79, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27 (retrieved 13 November 2020); see Emma Mitrotta, *supra* note 31, p. 373.

It is questionable whether marginalization[99] is not to a certain extent a result of the way the legal texts discussing public participation are framed, considering that, as noted by Aalborg University professor Inger Lassen, "citizen participation is constructed as a cognitive rather than a material process."[100] As noted further by Sprain, inclusion of the poor and vulnerable into imported participatory frameworks can degenerate into a situation when the local social context of the people in question is not sufficiently taken into account and is overshadowed by predefined ideas and outside views about the problems they supposedly face. It can also lead to a situation when public participation is used as a disguise to free "the state from its social responsibility and stifling political dissent through the illusion of decentralizing power."[101]

There is also the risk that when the communities are left with the option of framing an issue like climate change, "they may not focus on climate change adaptation as the central problem, which could result in inaction on climate change."[102] As noted by Stephen Stec, "[t]he complex trade-offs necessary to address climate change and other challenges raise the stakes for society's winners and losers, and raise the spectre of political decision-making."[103] The magic of the beauties and risks of public participation rests in the fact that people do not have a predisposed "set of beliefs [guiding] participants to a particular outcome."[104] This can naturally lead to focus on more immediate and straightforward issues than climate change.[105]

A consequence implied by Stephen Stec is that "the usual calculus for public participation changes [which] could result in modification of the public participation model [and to] the backlash against public participation in decision-making in general."[106] This could occur gradually, for instance, by the means of raising "the threshold size of activities requiring an environmental permit," which is a process that is often tied to public participation requirements.[107]

The COVID-19 pandemic has also illustrated impacts of public participation, and the quality of implementation and practice of procedural rights in general, combining issues of health and the environment. The Aarhus Convention Compliance Committee, in its response to Kazakhstan concerning the exercise of environmental procedural rights in the context of

99 Andrea Sarzynski, "Public Participation, Civic Capacity, and Climate Change Adaptation in Cities," 14 *Urban Climate* (2015), p. 52, 53. Such phenomenon was noted, for instance, in the context of E.I.A. procedure in China. See Ciaran O'Faircheallaigh, *supra* note 10, pp. 19, 23.

100 Inger Lassen et al., *supra* note 84, p. 418.

101 Leah Sprain, *supra* note 80, p. 68.

102 Ibid, p. 72.

103 Stephen Stec, *supra* note 77, p. 8.

104 Leah Sprain, supra note 80, 72.

105 Ibid.

106 Stephen Stec, *supra* note 77, p. 8.

107 Jukka Similä, *supra* note 95, p. 30.

the COVID-19 situation, held that undermining of environmental procedural rights under the Aarhus Convention is not acceptable.[108] A long-lasting pandemic, accompanied by an economic crisis, might motivate governments to weaken environmental procedural rights as a part of the efforts to stimulate economic recovery. Even when acknowledging necessary security measures in such an extreme situation, fundamental rights must be maintained so as not to undermine democracy itself. As noted by Stephen Stec, "[d] eliberative processes involving transparency and accountability can be shoved aside where issues are clothed in the trappings of security considerations."[109] A rhetoric referring to strengthening or protecting of democracy can also be used to justify steps shrinking the space for participation.[110] However, not every measure leading to a restriction of space of public participation can be automatically branded as authoritarian innovation.[111]

10.4 From theory to practice: examples of public participation in the Global South

Cross-border conservation projects, such as in the case of the Kavango Zambezi Transfrontier Conservation Area, which is in the territory spanning Angola, Botswana, Namibia, Zambia, and Zimbabwe,[112] tend to qualify local communities as the concerned public. Thus, mechanisms are put in place to enable their inclusion in conservation efforts.[113] Cultural, social, and economic factors that tie local communities to their environment and to transboundary natural resources work together in a constructive manner that benefits both the environment and the communities.[114] Conservation efforts that are sensitive both to the environment and local communities must respect and integrate traditional knowledge and management practices developed by local communities over long periods of time.[115]

The dynamics characteristic for public participation can also be observed in the context of the integrated water resources management where multiple

108 Economic Commission for Europe, Aarhus Convention Compliance Committee, *Statement on the Application of the Aarhus Convention during the COVID-19 Pandemic and the Economic Recovery Phase,* ECE/MP.PP/C.1/2020/5, 2 September 2020, available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-67/ece.mp.pp.c.1.2020.5.add.1_advance_unedited.pdf (retrieved 26 September 2020).

109 Stephen Stec, *supra* note 77, p. 7.

110 Thomas Pepinsky, "Authoritarian Innovations: Theoretical Foundations and Practical Implications," 27 (16) *Democratization* (2020), p. 1, 5.

111 Ibid, p. 7.

112 *Kavango-Zambezi: Transfrontier Conservation Area*, available at https://kavangozambezi.org/en/about/

partner-countries (retrieved 13 November 2020).

113 Emma Mitrotta, *supra* note 31, p. 379.

114 Ibid, p. 380

115 Ibid, p. 383.

groups of interested parties interact. The management of water resources is seen as a pillar around which many of these diverging interests may coalesce.[116] The involvement of local communities is a crucial precondition for success in this regard, considering their interaction with their immediate environment and the fact that they are directly affected by water management practices.[117]

While the level of involvement of local communities in Tanzania has been recently characterized as insufficient, local participation still has advantages. For example, participatory approaches have a huge potential in the context of knowledge generation, in which local communities can be a valuable source of knowledge, including the indigenous knowledge, that leads to useful and practical solutions that are sensitive to environmental, social, and cultural practices. In addition, the creation of trust in this regard, and the potential to eliminate conflicts as a result, should not be understated.[118] Yet, poorly chosen methods of communication can harm the trust of local communities in participatory approaches and result in the loss of any potential benefits.[119] Because participatory practices in decision-making and strategic planning in developing countries may only be due to requirements set by aid donors, they may merely result in a "window-dressing" ritual.[120]

Successful local community involvement and participatory approaches in water resources management can be found in a variety of countries in the Global South, including South Africa, Zambia, Ghana, or India.[121] These local community involvement considerations are relevant in the context of climate adaptation as well, taking into account that "[a]daptive actions tend to be context- and place-specific, with implications for relatively delimited sets of stakeholders and requiring a knowledge base tailored to local settings."[122]

Aboriginal groups in Australia provide an illustrative study from the 1990s, when they had been originally often excluded from participation in E.I.A. procedures concerning their territories. Consequently, they decided to conduct their own impact assessment studies and used them to negotiate legally binding agreements with project developers. In this way, they were able to preserve control over environmental and cultural matters related to mining operations.[123]

116 Esther W. Dungumaro and Ndalahwa F. Madulu, "Public Participation in Integrated Water Resources Management: The Case of Tanzania," 28 *Physics and Chemistry of the Earth* (2003), p. 1010.

117 Ibid, p. 1011.

118 Ibid.

119 Roger Few et al., "Public Participation and Climate Change Adaptation: Avoiding the Illusion of Inclusion," 7 *Climate Policy* (2007), p. 49.

120 Bo-Sing Tang et al., "Social Impact Assessment and Public Participation in China: A Case Study of Land Requisition in Guangzhou," 28 *Environmental Impact Assessment Review* (2008), pp. 57, 59.

121 Esther W. Dungumaro and Ndalahwa F. Madulu, *supra* note 116, p. 1012.

122 Roger Few et al., *supra* note 119, p. 47.

123 Ciaran O'Faircheallaigh, *supra* note 10, 19, 23.

The Forest Rights Act in India represents a prominent example of decision-making where local people's involvement plays a crucial role. According to the provisions of the Forest Rights Act and the Panchayats Extension to the Scheduled Areas Act (P.E.S.A.), *gram sabhas* (village councils) and *panchayats* (elected village councils) are competent to give prior informed consent to projects with major social and environmental impact.[124] Forest dwellers and local communities are treated as custodians of the forests.[125] The Forest Rights Act recognizes that natural resources have a social function as well.[126] Even though it is questionable whether the participation of forest dwellers is meaningful and inclusive at all times (considering, for example, the hierarchies in villages), broad rights in the hands of forest dwellers represent a powerful weapon that can effectively halt development projects.[127] On the other hand, when it comes to the interaction between citizens and state authorities, one needs to consider the need for brokers or *dalaal* (mediators) using their personal connections to solve citizen's grievances.[128]

10.5 Conclusion

It still remains the case that, as the Brundtland Report noted, "[t]he law alone cannot enforce the common interest. It principally needs community knowledge and support, which entails greater public participation in the decisions that affect the environment."[129] Public participation is a powerful instrument in the processes of environmental protection and sustainable development. Enshrining public participation as a legal requirement is only the first and

124 *The Provisions of the Panchayats (Extension to the Scheduled Areas) Act*, 1996, Art. 4, available at: https://tribal.nic.in/actRules/PESA.pdf (retrieved 14 November 2020); see also F.R.A., Chapter II, Sec. 3(2)(ii), http://extwprlegs1.fao.org/docs/pdf/ind77867.pdf (retrieved 14 November 2020); Rucha Ghate, *Decentralizing Forest Management: Pretense or Reality?*, 8, Presentation at the Working Group, "The Politics of Authority, Land and Natural Resources: Broadening the Analysis," June 3–6 2009, available at: http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.552.7651 (last updated January 9, 2021).

125 Naveen Thayyil, "Public Participation in Environmental Clearances in India: Prospects for Democratic Decision-Making," 56 *Journal of the Indian Law Institute* (2014), p. 485; see also Armin Rosencranz, "The Forest Rights Act 2006: High Aspirations, Low Realization," 50 *Journal of the Indian Law Institute* (2008), pp. 658-659.

126 Kishan Khoday and Usha Natarajan, "Fairness and International Law from Below: Social Movements and Legal Transformation in India," 25 *Leiden Journal of International Law* (2012), p. 436.

127 Interview by Marek Prityi with environmental N.G.O. in Pune on 15 March 2018.

128 In China, it is interesting to note the concept of such clientelist ties known under the phrase "*guanxi*." See Lily L.Tsai & Yinqing Xu, "Outspoken Insiders: Political Connections and Citizen Participation in Authoritarian China," 40 (3) *Political Behavior* (2018), pp. 629–657.

129 World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report),* A/42/427, (20 March 1987), available at https://digitallibrary.un.org/record/139811/files/A_42_427-ES.pdf (retrieved 13 November 2020), para 77.

necessary precondition to utilize its potential. To use its full potential, public participation must be meaningful and inclusive, not just a "window-dressing ritual."[130] When considering the meaningfulness of public participation procedures, one needs to think not only about power imbalances, but about the way people make decisions at the individual level and the implications for the dynamics at the societal level. Public participation in the practices of sustainable development shows that the solution of environmental problems requires not only scientific rigor but an understanding and sensitivity towards culture and values as well.

Bibliography

Arnstein, Sherry. "A Ladder of Citizen Participation." 35 *Journal of the American Institute of Planners* (1969): 216–224.

Bai, Xuemei et al. "Urban Policy and Governance in a Global Environment: Complex Systems, Scale Mismatches and Public Participation." 2 *Current Opinion in Environmental Sustainability* (2010): 129–135.

Berbera, Hayde Rodarte. *The Pro Personae Principle and Its Application by Mexican Courts* (2017). https://www.qmul.ac.uk/law/humanrights/media/humanrights/news/hrlr/2018/Hayde-Rodarte-Berbera.pdf.

Chess, Caron, and Kristen Purcell. "Public Participation and the Environment: Do We Know What Works?" 33 (16) *Environmental Science and Technology* (1999): 2685–2692.

Davies, Ana. "What Silence Knows – Planning, Public Participation and Environmental Values." 10 *Environmental Values* (2001): 78–102.

Dungumaro, Esther, and Ndalahwa Madulu. "Public Participation in Integrated Water Resources Management: The Case of Tanzania." 28 *Physics and Chemistry of the Earth* (2003): 1009–1014.

Ebbeson, Jonas. "Public Participation." *The Oxford Handbook of International Environmental Law.* Oxford University Press, 2008.

Enserink, Bert, and Joop Kopenjan, "Public Participation in China: Sustainable Urbanization and Governance." 18 (4) *Management of Environmental Quality: An International Journal* (2007): 459–469.

Ferrucci, Giada. "A Pioneering Platform: Strengthening Environmental Democracy and Justice in Latin America and the Caribbean." 20 *Journal of Management Policy and Practice* (2019): 11.

Few, Roger. "Public Participation and Climate Change Adaptation: Avoiding the Illusion of Inclusion." 7 *Climate Pollicy* (2007): 46–59.

Gill, Gitanjali Nain. "Access to Environmental Justice in India: Innovation and Change," in *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia Ltd., 2017: 209–228.

Granit, Ian. "Protecting the Defenders: Exploring the Role of Global Corporations and Treaties." E-International Relations (8 July, 2020). https://www.e-ir.

130 Sherry R. Arnstein, "A Ladder of Citizen Participation," 35 *Journal of the American Institute of Planners* (1969), p. 219.

info/2020/07/08/protecting-the-defenders-exploring-the-role-of-global-corporations-and-treaties/.

Guerra, Sidney, and Giulia Parola. "Implementing Principle 10 of the 1992 Rio Declaration: A Comparative Study of the Aarhus Convention 1988 and the Escazú Agreement 2018." 2 *Curitiba* (2019): 1–33.

Jendrośka, Jerzy. "Introduction: Procedural Environmental Rights in Theory and Practice," in *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia Ltd., 2017: xvii–xxvi.

Johnson, Thomas. "Environmentalism and NIMBYism in China: Promoting a Rules-Based Approach to Public Participation." 19 (3) *Environmental Politics* (2010): 430–448.

Kahnemann, Daniel. *Thinking, Fast and Slow*. Penguin, 2012.

Karageorgou, Vasiliki. "The Scope of the Review in Environment-Related Disputes in the Light of the Aarhus Convention and EU Law: Tensions between Effective Judicial Protection and National Procedural Autonomy," in *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia Ltd., 2017: 229–260.

Kasperson, Roger E., et al. "The Social Amplification of Risk: A Conceptual Framework." 8 (2) *Risk Analysis* (1988): 177–187.

Khoday, Kishan, and Usha Natarajan. "Fairness and International Law from Below: Social Movements and Legal Transformation in India." 25 *Leiden Journal of International Law* (2012): 415–441.

Kotzé , Louis J., and Duncan French. "A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for Lex Anthropocenae?" 18 *International Environmental Agreements: Politics, Law and Economics* (2018).

Kraski, Ryan, et al. "Constitutional Provisions," in *Environmental Law Across Cultures: Comparisons for Legal Practice*. Ed. Kirk W. Junker. London: Routledge, 2020.

Kuran, Timus, and Cass R. Sunstein, "Availability Cascades and Risk Regulation." 51 *Stanford Law Review* (2007): 685–768.

Lassen, Inger. "Climate Change Discourses and Citizen Participation: A Case Study of the Discursive Construction of Citizenship in Two Public Events." 5 *Environmental Communication* (2011): 411–427.

Li, Wanxin et al. "Getting Their Voices Heard: Three Cases of Public Participation in Environmental Protection in China." 98 *Journal of Environmental Management* (2012): 65–72.

Mitrotta, Emma. "Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas." *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia, 2017: 363–386.

O'Faircheallaigh, Ciaran. "Public Participation and Environmental Impact Assessment: Purposes, Implications and Lessons for Public Policy-Making." 30 *Environmental Impact Assessment Review* (2010): 19–27.

Pepinsky, Thomas. "Authoritarian Innovations: Theoretical Foundations and Practical Implications." 27 (16) *Democratization* (2020): 1092–1101.

Perlaviciute, Goda, and Lorenzo Squintani. "Public Participation in Climate Policy Making: Toward Reconciling Public Preferences and Legal Frameworks." 2 *One Earth: Perspective* (2020): 341–348.

Poto, Margherita Paola. "Legal Instruments to Protect Indigenous Peoples' Participation in Europe and in the Arctic Region," in *Procedural Environmental*

Rights: Principle X in Theory and Practice. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia Ltd., 2017: 159–170.

Rosencranz, Armin. "The Forest Rights Act 2006: High Aspirations, Low Realization." 50 *Journal of the Indian Law Institute* (2008): 656–677.

Sarzynski, Andrea. "Public Participation, Civic Capacity, and Climate Change Adaptation in Cities." 14 *Urban Climate* (2015): 52–67.

Similä, Jukka. "The Evolution of Participatory Rights in the Era of Fiscal Austerity and Reduced Administrative Burden." *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia, 2017: 19–38.

Slovic, Paul. "Risk Perception." 236 *Science* (1987): 280–285.

Slovic, Paul. "Perceived Risk, Trust and Democracy." 13 (6) *Risk Analysis* (1993): 675–682.

Slovic, Paul. "Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield." 19 (4) *Risk Analysis* (1999): 689–701.

Slovic, Paul et al. "Risk as Analysis and Risk as Feelings: Some Thoughts about Affect, Reason, Risk and Rationality." 24 (2) *Risk Analysis* (2004): 311–320.

Sprain, Leah. "Paradoxes of Public Participation in Climate Change Governance." 25 *The Good Society* (2016): 62–80.

Stec, Stephen, and Jerzy Jendrośka. "The Escazú Agreement and the Regional Approach to Principle 10: Process, Innovation, and Shortcomings." 31 *Journal of Environmental Law* (2019): 533–545.

Stec, Stephen. "Developing Standards for Environmental Procedural Rights through Practice: The Changing Character of Rio Principle 10." *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia, 2017: 3–18.

Tang, Bo-Sing et al. "Social Impact Assessment and Public Participation in China: A Case Study of Land Requisition in Guangzhou." 28 *Environmental Impact Assessment Review* (2008): 57–72.

Thayyil, Naveen. "Public Participation in Environmental Clearances in India: Prospects for Democratic Decision-Making." 56 *Journal of the Indian Law Institute* (2014): 463–492.

Tsai, Lily L., and Yinqing Xu. "Outspoken Insiders: Political Connections and Citizen Participation in Authoritarian China." 40 (3) *Political Behavior* (2018): 629–657.

Van Woensel, Lieve. *A Bias Radar for Responsible Policy-Making: Foresight-Based Scientific Advice*. Palgrave Macmillan, 2020.

Weselink, Anna, et al. "Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives." 43 *Environment and Planning* (2011): 2688–2704.

Zuluaga Madrid, Juliana. "Definitions of the Aarhus Convention v. the Proposal for a New Latin America and the Caribbean Instrument: Mapping the Differences in the Material Scope of Procedural Environmental Rights in International Law." *Procedural Environmental Rights: Principle X in Theory and Practice*. Eds. Jerzy Jendroska and Magdalena Bar. Intersentia, 2017: 39–58.

11 Environmental hazards and human rights violations

The case of *Presídio Central* Prison in Brazil

Daniel Neves Pereira[1] *and Stella Emery Santana*[2]

11.1 Introduction

This final chapter of Part III extends the alternatives under consideration in three directions. First, in discussing the "environment," rather than being limited to the "natural" environment found by humans, this chapter alternatively includes the built, or man-made, environment for humans. Second, insofar as international environmental law has been recognized to have been with us in the mainstream for more than fifty years, the limitations of its ambit are showing themselves. If we acknowledge that legal systems are human operations, and if one set of tools in these human operations does not do the job, it is not surprising that we look for another set of tools. In that sense, although the built environment is indeed part of the environment in which humans live, environmental law as such has not done enough to address the wrongs that occur in the built environment. The alternative set of tools that will be considered here are those from human rights law. And third, looking toward examples of humans whose environmental rights are violated, prisoners.

The international human rights regime and the environmental movement were born in historical moments with differences in nature and goals.[3] The human rights regime was born immediately after World War II, with the United Nations Charter and the Universal Declaration of Human Rights[4]; while the environmental movement was born in the late 1960s and early

1 David Neves Pereira is Trial Court Judge in Brazil; International Human Rights LL.M., Robert H. McKinney School of Law, Indiana University, U.S.A.
2 Ph.D. Professor of Law at Centro Universitário F.A.E.S.A., Vitória, E.S., Brazil. Affiliate Faculty, Robert H. McKinney School of Law, Indiana University, U.S.A.
3 Sumudu Atapattu, "The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law," 16 (1) *Tulane Environmental Law Journal* (2002), p. 71.
4 Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context*, 2nd ed. (Oxford: Oxford University Press, 2013), p. 139

DOI: 10.4324/9781003160236-15

1970s, with the 1972 Declaration of Stockholm as the first U.N. document concerning the topic.[5]

As the interconnection between human rights and the environment became increasingly evident, governments, experts, and advocates discussed the best way to implement both regimes. Although their first connections go back to the 1980s,[6] the proper location of the connection at the international level still is not clear. For example, it was only in 2018 that the Inter-American Court of Human Rights (IACourtHR) issued an Advisory Opinion recognizing an "autonomous right to a healthy environment under the American Convention."[7] Even the concept of a human right to a healthy environment is still contested due to the different demands in implementing that right.[8]

For the purposes of this chapter, there is also reluctance by some governments to acknowledge the built environment (in our case, prisons) as being within the concept of the environment with which rights can be associated. For example, in 2007 the United States' Environmental Protection Agency (E.P.A.) observed "[p]otential environmental hazards at federal prisons,"[9] but the E.P.A. did not include prisons in its 2020 Environmental Justice Action Agenda. There is also a mismatch between the governmental levels of implementation between environmental law and human rights law. Environmental hazards in prisons are commonplace, but if they are regulated at all, it is at the local level; there is no machinery for their environmental protection in the international and regional levels. On the other hand, advocates often use international and regional human rights machinery. Thus it is difficult to find complementary tools from human rights and environmental law that work at the same level of redress.[10]

5 Paolo Galizzi, "From Stockholm to New York, via Rio and Johannesburg: Has the Environment Lost Its Way on the Global Agenda?" 29 *Fordham International Law Journal* (2005), p. 1002.

6 Neil A.F. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment," 27 *Columbia Human Rights Law Review* (1996), p. 490.

7 Maria L. Banda, "Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights," 22 (6) American Society of International Law *Insights*, May 10, 2018 available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human (retrieved 3 December 2020).

8 See Dominic McGoldrick, "Sustainable Development and Human Rights: An Integrated Conception," 45 (4) *The International and Comparative Law Quarterly* (1996), pp. 811–812. The author identifies four significant difficulties to consider environmental rights as a human right: (1) they pursue different objectives, (2) a human rights-based approach (individualistic and anthropocentric) does not reflect the value of the environment adequately, (3) environmental rights are too indeterminate, and (4) whether they are procedural, substantive, or both.

9 Andrea C. Armstrong, "Death Row Conditions through an Environmental Justice Lens," 70 (2) *Arkansas Law Review* (2017), pp. 50, 207, quoting Donna Heron, "Federal Prisons to Get Environmental Checks," E.P.A., July 24, 2007.

10 Neil A.F. Popovic, *supra* note 6, p. 494.

One example of the use of human rights machinery to solve environmental issues is the case of *Presídio Central* Prison, Brazil, before the IACourtHR, where several environmental problems were addressed as human rights violations.[11] In the case, the plaintiffs took action to solve the environmental hazards that affected the life, health, and dignity of the inmates. However, Article 68.2 of the American Convention of Human Rights[12] allows implementation in national courts, but only when an Inter-American Court of Human Rights decision stipulates compensatory damages, thereby leaving doubts as to whether the ruling can be implemented if it requires structural measures or specific performance to solve environmental hazards.

In this context, this chapter explains in its first part that the concept of environment is not limited to the natural world, but that it includes the human activities that modify the natural environment to provide what they need for living, that is, the man-made or built environment. Prison facilities fit in the concept of man-made environment mentioned in the 1972 Stockholm Declaration and can be protected by environmental rules.

The second part demonstrates that even after the birth of the environmental movement in the late 1960s, and even after the man-made environment was included in the concept of environment, it took some time for governments to understand prisons as locations deserving environmental attention. The chapter provides examples from several environmental hazards found in prisons in the United States, Brazil, and worldwide. Most specifically, the second part analyzes the environmental risks in the *Presídio Central* case study.

The third part of the chapter analyzes the international rules regarding the prisoners' human rights and the environment. Specifically discussed are: (1) the development of international rules regarding prisoners' human rights, from the 1689 English Bill of Rights until the 1969 American Convention on Human Rights; (2) the birth of international environmental law with the 1972 Stockholm Declaration and the 1992 Rio Declaration; (3) the initial relations between human rights and the environment, from the appointment of a Special Rapporteur on Human Rights and the Environment in 1989 until the recognition of an autonomous "right to a healthy environment" under the American Convention on Human Rights in 2018; and (4) the initial relations of environmental hazards and human rights in prisons considering prisoners as a group of involuntarily displaced persons and, for this reason, particularly vulnerable to environmental risks.

The fourth part specifies the environmental hazards in *Presídio Central*, and relates them to human rights violations of prisoners, employees, families, and

11 A.J.U.R.I.S. and others, Petition in case #13.353 in the I.A.C.H.R., available at http://www.ajuris.org.br/sitenovo/wp-content/uploads/2016/06/representacao-pcpa-oea-2013.pdf (retrieved 14 April 2019).

12 American Convention on Human Rights, Article 68.2, November 1969, available at https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm (retrieved 3 December 2020).

the population living near the facilities. It also examines some aspects of the case filed before the IACourtHR and its enforceability issues.

In conclusion, the chapter supports the use of human rights machinery to redress environmental damages. It goes further, however, and proposes the need to create specific machinery to address environmental issues in international or regional levels, and to make possible the execution in the national courts of the IACourtHR decisions that identify environmental hazards, not only to compensate personal damages, but even to determine structural measures or specific performance to solve environmental problems.

11.2 Prisons as man-made environments

The first necessary step to understand what is subject to the protection of environmental law is to understand the concept of environment. The commonplace meaning is often to relate it to the "natural world,"[13] or, in more detail, "the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival."[14] This meaning limits environment to mean the complex of factors we receive from nature.

However, by still limiting meaning to dictionary definitions, environment can be understood as "the circumstances, objects, or conditions by which one is surrounded."[15] This shorter definition, paradoxically, makes its concept broader. The environment, then, would not be limited to the "natural world,"[16] but would include the "human activities which modify the natural environment in order to provide what they need for living,"[17] such as the example of urban areas, with streets, public spaces, houses, buildings and, by logical extension, prison facilities.

The idea of including both the natural and man-made environment in the concept of environment has already appeared in the Report of the United Nations Conference on the Human Environment in Stockholm, 1972. The document states that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and the enjoyment of basic human rights—even the right to life itself."[18] So, according to the understanding at that time, both the natural and the man-made are aspects of the environment.

13 *Oxford Dictionary*, "Definition of the Environment," available at https://en.oxforddictionaries.com/definition/environment (retrieved 3 December 2020).

14 *Merriam-Webster Dictionary*, "Definition of the Environment," December 1, 2020 available at https://www.merriam-webster.com/dictionary/environment (retrieved 3 December 2020).

15 Ibid.

16 *Oxford Dictionary*, *supra* note 13.

17 Paulus Bawole, "Harmony with Nature for Sustainable Built Environment, Man Made and Natural Environment," available at https://www.irbnet.de/daten/iconda/CIB_DC22849.pdf (retrieved 3 December 2020).

18 U.N., *Report of the United Nations Conference on the Human Environment in Stockholm 1972*, A/CONF.48/14/Rev.1 (5–16 June 1972) available at http://www.un-documents.net/aconf48-14r1.pdf (retrieved 3 December 2020).

The UN Stockholm Conference is a product of the dawn of modern environmentalism during a time of awakening concern for the welfare of human beings in the present and apprehension with the future of the humankind. Almost at the same time, and reflecting the same trend, national constitutions around the globe started adding provisions related to the environment's protection. By 2008, "fifty-nine constitutions guarantee[d] a right to a healthy environment in some form, while over one hundred impose an obligation on governments to protect the environment."[19]

That is the case, for example, with the Brazilian Constitution, which provides that:

> [e]veryone has the right to an ecologically balanced environment, which is an asset of common use and is essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.[20]

In addition, the Brazilian Constitution expressly mentions "environment" in several different provisions, related to the economic order,[21] rural property,[22] health and workplace,[23] and social communication.[24] Also, cultural heritage is protected by Article 216 of the Brazilian Constitution, which includes "urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value."[25] Finally, without expressly mentioning the word environment, the Brazilian Constitution indirectly protects the artificial environment in its Articles 182 and 183 referring to urban policy. These latter constitutional provisions are the base of the City Statute (Brazilian Federal Law 10.257/2001), which states in the first Article that the use of the urban property must observe "environmental balance."[26]

19 Bridget Lewis, "Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection," 8 (1) *Macquarie Journal of International and Comparative Environmental Law* (2012), p. 42.

20 Constitution of the Federative Republic of Brazil, Article 225, 2010, available at http://english.tse.jus.br/arquivos/federal-constitution (retrieved 3 December 2020).

21 Ibid, Articles 170, VI; 174, § 3º; and 177, §4º, I, "b."

22 Ibid, Article 186, II.

23 Ibid, Article 200, VIII.

24 Ibid, Article 220, § 3º, II.

25 Ibid, Article 216, V.

26 See City Statute of Brazil, "New Tools for Assuring the Right to the City in Brazil," Article 1, 2001, available at http://www.wiego.org/sites/default/files/resources/files/Brazil-The-Statute-of-the-City-Law-No-10.257-of%20-2001.pdf (retrieved 3 December 2020). In the implementation of urban policy, which are dealt with in arts, 182 and 183 of the Federal Constitution, the provisions of this Law shall be applied.

> Single paragraph. For all intents and purposes, this Law, called the City Statute, establishes rules of public order and social interest that regulate the use of the urban property for the collective good, security, and well-being of citizens, as well as environmental balance.

Those numerous provisions in the Brazilian Constitution led former Brazilian Senator Ney de Albuquerque Maranhão[27] to identify four aspects of the environment: natural, artificial, cultural, and workplace environments. He asserts that the Constitution "embraced a broad conception of the environment, encompassing elements not only ecological but also social and cultural."[28] Although there are historical and cultural reasons to justify such interpretations in the Brazilian legal system, even the use of a binary sense of the environment (natural or man-made), such as that of the Stockholm Declaration of 1972, is adequate considering the present focus. This binary sense considers the existence of the natural environment and all other types of environment tailored by material or ideological human activities, which entail either built environments, cultural environment, workplace environment, and any other classification that may be regionally appropriate.

When considering prison facilities, which are a product of human activity that modifies the natural environment to provide a place to keep inmates separate from the rest of the community, it fits in the concept of man-made environment. And, for this reason, the prison environment must be the object of protection as much as any other man-made environment, such as urban properties and public buildings.

At least eight different dimensions of the prison environment have been observed by researchers, including inmate activity, emotional feedback, freedom, privacy, safety, social elements, structural characteristics, and support.[29] The focus in this chapter will be on the physical environment. Elements such as "dry location free of negative elements, moderate climate, a steady water supply, proper drainage for waste, [and] steady supply of natural resources…play a prominent role in establishing the nature of the internal prison environment," [30] and, as it will be discussed ahead, it can affect the welfare and impact the human rights of the prisoners, their families, workers, and people who live near the facilities.

11.3 Environmental hazards in prisons

Although historically the physical conditions of prisons have never been commonly known as adequate,[31] the harsh surroundings of the facilities

27 Ney de Albuquerque Maranhão, "Meio Ambiente: Descrição Jurídico-Conceitual," Lex Doutrina, available at http://www.lex.com.br/doutrina_27301129_MEIO_AMBIENTE_DESCRICAO_JURIDICO_CONCEITUAL.aspx (retrieved 3 December 2020).

28 Ibid.

29 H. Toch, *Living in Prison: The Ecology of Survival* (New York: MacMillan, 1977) as incorporated by Andrew Ryan Bradford, "An Examination of the Prison Environment: An Analysis of Inmate Concerns across Eight Environmental Dimensions," *Electronic Theses and Dissertations Paper 2216* (2006), p. 2, available at http://dc.etsu.edu/etd/2216 (retrieved 3 December 2020).

30 Ibid. p. 13.

31 See Nick Flynn, *Introduction to Prisons and Imprisonment*, (Winchester: Waterside Press, 1998), pp. 84–87.

were not usually understood as environmental issues. Even after the birth of the environmental movement in the late 1960s, it took some time for governments and organizations to look at prisons as locations deserving environmental attention. In 2007, the United States' E.P.A. observed that "[p]otential environmental hazards at [U.S.] federal prisons are associated with various operations such as heating and cooling, wastewater treatment, hazardous waste and trash disposal, asbestos management, drinking water supply, pesticide use, and vehicle maintenance."[32] Notwithstanding this helpful observation, more than one hundred organizations labored to include prisoner populations in the Environmental Protection Agency's Environmental Justice (E.J.) 2020 Action Agenda[33] without success.[34]

The E.P.A.'s refusal to include the prison population cannot be explained by the unfitness of prisoners in the environmental justice goals. According to the E.P.A., "[e]nvironmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[35] Prisoners are a particularly vulnerable population in respect of race, color, national origin, and income.[36] In the United States, for example, 380 of every 100,000 white persons are in prison, 966 of every 100,000 Hispanic persons, and 2,207 of every 100,000 Black persons.[37] The median annual incomes for incarcerated people range from 21% to 54% lower than non-incarcerated people depending on race, ethnicity, and gender.[38]

Other researchers[39] classify prisoners as "involuntarily displaced populations," or "dislocated populations" such as "orphanages, prisons, and refugee

32 Andrea C. Armstrong, *supra* note 9, p. 207, quoting Donna Heron, *Federal Prisons to Get Environmental Checks*, E.P.A. (July 25, 2007).

33 See Environmental Protection Agency of the United States, "EJ 2020 Action Agenda," 2016, available at https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf (retrieved 3 December 2020).

34 See Human Rights Defense Center," Renewing Comments Re: Prisoner Populations Letter in E.J. 2020 Action Agenda," 2016, available at https://www.prisonlegalnews.org/media/publications/EJ%202020%20letter%20to%20EPA%20HRDC%20updated%20comment%207-28-16%20with%20Cover%20Letter%202.pdf (retrieved 3 December 2020).

35 Environmental Protection Agency of the United States, "Environmental Justice," 2014, available at https://www.epa.gov/environmentaljustice (retrieved 3 December 2020).

36 David N. Pellow, "Political Prisoners and Environmental Justice," 29 *Journal Capitalism Nature Socialism* (2018), pp. 1–20.

37 Prison Policy Initiative, "U.S. Incarceration by Race and Ethnicity," available at https://www.prisonpolicy.org/graphs/raceinc.html (retrieved 3 December 2020).

38 Bernadette Rabuy and Daniel Kopf, "Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned," July 9, 2015, available at https://www.prisonpolicy.org/reports/income.html (retrieved 3 December 2020).

39 Nikki L. Behnke et al., "Improving Environmental Conditions for Involuntarily Displaced Populations: Water, Sanitation, and Hygiene in Orphanages, Prisons, and Refugee and IDP Settlements," 8 (4) *Journal of Water Sanitation and Hygiene for Development* (2018), pp. 785–791.

and Internally Displaced Persons (I.D.P.) settlements."[40] It means that those groups "share dependency on others for their health and well-being, and often have heightened vulnerability,"[41] and for this reason, they should have special attention from the authorities who determine the displacement or the dislocation. But, if they are vulnerable, what explains the E.P.A.'s hesitancy to include the prisoner population in its Environmental Justice Agenda?

"Incarcerated people rarely attract the sympathy of the general population and are often socially ostracized,"[42] which makes the environmental hazards faced by the prisoners a secondary issue in the governmental decisions. This subordinate position helps to explain the scarcity of resources available to prisons in the United States and around the world. The President of the International Committee of the Red Cross described its reality in the Annual Conference of the International Corrections and Prisons Association in Namibia (2014):

> We all know that detainees are—by the fact of their isolation—vulnerable and it is our task and goal to protect them from arbitrary practices, persecution and abuse: Not only children, but the elderly or sick people are also vulnerable. Persons under interrogation, or accused of crimes against the State, those convicted to long-term or death sentences need our particular attention as humanitarian actors.
>
> One observation I have made again and again in our contacts with penitentiary services across the world is that for most politicians and institutional politics, prisons are never a priority. Resources, in particular financial resources, are scarce for present needs as well as for planning and conceptual work. As a consequence, many of the challenges in detention can be traced back to a simple, yet fundamental failure to keep prisons and corrections in step with the modern world. This is reflected in outdated legislation, practices, and buildings, which then result in anything from food shortage to overcrowding.[43]

As a result of the secondary position in the governments' concerns, prisoners' issues became chaotic with the rise of the prison population in the United States and Brazil in the last decades. In the United States, the prison population jumped from 503,586 to 2,217,947 from 1980 to 2014, with the incarceration going from 220 to 693 prisoners per 100,000 persons in the population in

40 Ibid, p. 1.
41 Ibid, p. 5.
42 Ibid, p. 3.
43 Peter Mauer, "Statement at the Annual Conference of the International Corrections and Prisons Association (ICPA)," October 27, 2014, available at https://www.icrc.org/en/document/annual-conference-international-corrections-and-prisons-association-icpa (retrieved 3 December 2020).

the same period.[44] In Brazil, the prison population increased from 32,573 to 726,712 from 1973 to 2016, with the incarceration rate escalating from 32 to 347 prisoners per 100,000 persons in the population during this time.[45]

This mass incarceration impacts the physical conditions of the prisons, with consequences in "the health of prisoners, prison-adjacent communities and local ecosystems."[46] However, most of these issues were studied through the lens of administrative, criminal, or human rights law, focused on the individual rights of the detainees. Research shows that:

> until recently, not much thought or research had been expended on the connections between mass incarceration and environmental issues, that is, problems that arise when prisons are sited on or near toxic sites, as well as when prisons themselves become sources of toxic contamination.[47]

11.3.1 Environmental hazards in prisons in the United States

In the United States, environmental hazards have been identified in prison units from coast to coast. The Human Rights Defense Center identified the following hazards in the 2016 letter addressed to the Deputy Associate Assistant Administrator of the Environmental Justice in the attempt to include the prison's issues in the E.J. 2020 Agenda: (1) flooding in Louisiana and Florida; (2) chemical spill in West Virginia; (3) nuclear threat in New York; (4) toxic waste landfill site in New York; (5) coal ash dump in Pennsylvania; (6) water quality problems related to the mining and processing of uranium in Colorado; (7) drought and increased temperatures in California; (8) arsenic in prison water supplies in Texas and California; (9) lead in prison water supplies in Michigan and Wisconsin; (10) prisons built on military Superfund site in California; and (11) water contamination in prisons nationwide.[48]

Freelance journalist Raven Rakia described the perils of the environmental conditions such as crumbling infrastructure, flooding and raining threats, excessive heat, and polluted air, taking the case of Rikers Island prison in New York as an example:

> Rikers is built on a landfill. The ground underneath the facilities is unstable and the decomposing garbage emits poisonous methane gas. In addition to extreme heat and poor air quality, flooding and crumbling

44 World Prison Brief, "Country Report," 2019, available at http://www.prisonstudies.org/country/brazil (retrieved 3 December 2020).

45 Ibid.

46 Candice Bernd et al., "America's Toxic Prisons: The Environmental Injustices of Mass Incarceration," June 1 2017, available at https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/ (retrieved 3 December 2020).

47 Ibid.

48 See Human Rights Defense Center, *supra* note 34.

> infrastructure pose a serious threat, especially when superstorms like Hurricane Sandy strike.[49]

Public interest lawyer Daniel W. E. Holt focuses on the issue of heat, which is aggravated by the overcrowding "[b]ecause human beings are sources of heat and humidity, [and] the number of people in a given enclosed space has a direct impact on the thermal conditions in that space."[50] Law Professor Andrea C. Armstrong has researched environmental hazards specifically taking place on "death rows" in Louisiana, such as (1) indoor air pollution (smoke, chemicals, and mold); (2) water pollution (rust and contaminated drinking water); (3) hazardous waste, such as sewage and wastewater; and (4) lead exposure.[51]

These examples of environmental hazards, researched in the United States, are present worldwide, including in Brazil and specifically the case study of *Presídio Central*.

11.3.2 Environmental hazards in prisons worldwide and in Brazil

The research cited above on environmental hazards in prisons was conducted in the United States, but research shows that the environmental hazards are worldwide. The U.S. State Department recognized "a serious challenge facing governments worldwide: ensuring those in detention and incarceration are treated humanely in environments that are safe and secure."[52] A May 2013 report identifies concerns related to prison conditions, such as "overcrowding, poor sanitation, [and] inadequate access to food or potable drinking water,"[53] in Bangladesh, Belgium, Benin, Brazil, Chad, Eritrea, Ethiopia, France, Haiti, Ireland, Italy, Lebanon, Mexico, Serbia, South Sudan, Sri Lanka, Ukraine, and Venezuela.

Brazil is one of the twenty-five countries mentioned by the U.S. State Department "whose governments receive United States assistance [and] raise serious human rights or humanitarian concerns."[54] The largest South American country raises concerns due to the increase of the prison

49 Raven Rakia, "A Sinking Jail: The Environmental Disaster That Is Rikers Island," March 15, 2016, available at https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island/, (retrieved 3 December 2020).

50 Daniel W. E. Holt, "Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change," Sabin Center for Climate Change Law, Columbia Law School, 2015, available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf (retrieved 3 December 2020).

51 Andrea C. Armstrong, *supra* note 9, pp. 217–219.

52 United States Department of State, "Report on International Prison Conditions," May 22, 2013, available at https://2009-2017.state.gov/documents/organization/210160.pdf (retrieved 3 December 2020).

53 Ibid.

54 Ibid.

population—that expanded eight times from 1990 to 2006[55]—combined with the scarcity of governmental funding for the maintenance of the facilities. At a visit to three facilities in the State of Paraná, British researcher Sacha Darke noticed that "[a]ll three were severely overcrowded, and none had any natural light."[56] And, in one of those prisons, "68 men were held underground in a cellar. Water stains covered the walls, and puddles had formed on the floor. Electric lights hung loosely from the ceiling."[57] Human Rights Watch Senior Researcher Cesar M. Acebes remarked that "[h]istorians of medieval times would recognize much in Brazil's modern-day prisons. Detainees are often held in dark, humid, and poorly ventilated cells."[58] Also, mentioning an on-site visit in the complex of Curado, in Recife, Acebes stated that he

> entered a cell containing 60 men that had only six cement bunks. Because there was not enough floor space for the men to lie down, they had put up a web of hammocks. The cell smelled overwhelmingly of feces, sweat, and mold.[59]

The conditions as mentioned above are an everyday reality in many Brazilian prisons, particularly in large urban centers, in which the overcrowding, the lack of government control, the action of criminal gangs, and the scarcity of resources are circumstances that expose prisoners to a harsh environment. That is the condition that almost five thousand prisoners face in Porto Alegre Central Penitentiary (*Presídio Central*).

11.3.3 Environmental hazards in Presídio Central

Porto Alegre Central Prison or "*Presídio Central de Porto Alegre*"—actually named "*Cadeia Publica de Porto Alegre*" —is located in the South of Brazil, and it was determined to be the worst prison in the country by a legislative committee in 2008.[60] This fact prompted the Association of Judges of the State of Rio Grande do Sul (A.J.U.R.I.S.) to create the "*Fórum da*

55 Ministry of Justice Brazil, Departamento Penitenciário Nacional, "Levantamento Nacional de Informações Penitenciária," 2016, available at http://dados.mj.gov.br/dataset/infopen-levantamento-nacional-de-informacoes-penitenciarias (retrieved 3 December 2020).

56 Sacha Darke, *Conviviality and Survival, Palgrave Studies in Prisons and Penology*, (Basingstoke: Palgrave Macmillan, 2018), p. 45.

57 Ibid, p. 46.

58 Cezar M. Acebes, "Brazil's Correctional Houses of Horror," *Foreign Affairs*, January 18, 2017, available at https://www.foreignaffairs.com/articles/brazil/2017-01-18/brazil-s-correctional-houses-horror (retrieved 3 December 2020).

59 Ibid.

60 Câmara dos Deputados, "CPI do sistema carcerário," 2009, p. 488, available at https://www.conjur.com.br/dl/relatorio-cpi-sistema-carcerario.pdf (retrieved 3 December 2020).

Questão Penitenciária" (Forum of Penitentiary Question) along with other institutions to file a claim[61] in the Inter-American Commission on Human Rights (I.A.C.H.R.) regarding the violation of human rights in the prison. The I.A.C.H.R. accepted the petition, giving the case the number 13.353 under the name *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil*. A significant part of the reasoning described environmental issues, yet it was not addressed by environmental law rules, but rather as regarding human rights violations. After the Brazilian government's response, the I.A.C.H.R. granted precautionary measures to the persons deprived of liberty in the facility.[62]

The environmental issues of the claim were based upon on-site visits by the Association of Judges, the Prosecutor's Office, the Public Defender's Office, the Medical Association, the Engineering Institute, and interviews with detainees and authorities, as well as being based upon photographic documentation.[63] Also, the Brazilian Engineering Appraisal and Expertise Institute of Rio Grande do Sul delivered a building inspection report analyzing: (1) reinforced concrete structures; (2) sealing and masonry; (3) electrical installations; (4) sanitary installations; and (5) firefighting. The claim addresses those issues but adds some information regarding (6) overcrowding, (7) kitchens and food, (8) hygienic conditions, and (9) temperature, also bringing in the human aspects of prison conditions.

According to the claim,[64] *Presídio Central* was opened in 1959 with individual cells without bathrooms. The cells were later transformed "to a collective cell with eight cement beds and in the center, a bathroom was improvised."[65] With the continuing growth and the overcrowding, "each of the eight-person cells [accommodates] forty inmates."[66] The overcrowding is the most visible issue of the prison, and it reinforces the environmental problems because the poor infrastructure is overloaded by the use of so many people. Prisoners sleep outside their cells and on the floor of the galleries, with no adequate space. Some "improvise 'aerial beds' made of cloth and plastic"[67] to face the lack of space and the cold temperatures.

With the population almost exceeding three times the original capacity, problems with the sanitary facilities are common. The prisoners install plastic bags on the ceiling and use plastic bottles as hoses to avoid sewage from upper toilets to fall over their beds.[68] This procedure leads the sewage to fall into the

61 A.J.U.R.I.S. and others, case #13.353 in the I.A.C.H.R., p. 9.
62 Inter-American Commission on Human Rights, "Resolution 14/2013, Precautionary Measure no. 8-13," December 30, 2013, available at http://www.oas.org/en/iachr/decisions/pdf/Resolution14-13(MC-8-13).pdf (retrieved 3 December 2020).
63 A.J.U.R.I.S. and others, case #13.353 in the I.A.C.H.R., p. 9.
64 Ibid.
65 Ibid, p. 10.
66 Ibid, p. 10.
67 Ibid, p. 11.
68 Ibid, p. 11.

inner courtyard, where "feces, urine, remains of food, dirt, rats, and cockroaches [share the space with prisoners], their children, their wives, and visitors."[69]

The kitchen can serve only 1,500 inmates, and the food is prepared by the prisoners themselves, using "the rubbish sewer running on the ground."[70] This situation encourages the remaining prisoners to use improvised electric stoves in the cells, powered by clandestine electrical connections, in which are added "televisions, radios, showers, water heaters, etc., resulting in high risk of fire, as well as energy overload."[71]

Finally, the temperature of the building is not controlled by any mechanism, but the ones improvised by the inmates, such as fans for the summer and electric heaters for the winter.[72] Considering that ambient outdoor temperature in Porto Alegre varies from 0°C (32°F) in the winter to more than 35°C (95°F) in the summer, the indoor temperature at the prison presents an additional severe problem.

The factors described above are environmental hazards found in *Presídio Central*, and all together constitute the physical environment that the inmates, workers, families, and nearby population are subject to. Those factors illustrate the above-quoted definition of the environment: "the circumstances, objects, or conditions by which one is surrounded."[73] In this case, the circumstances are related to the fact that prisoners are an "involuntary displaced population,"[74] with minimum possibility of changing their surroundings. This is a critical approach in this analysis. The objects are the built or man-made environment, such as the infrastructure of the building and its installations. The conditions can be natural, such as temperature, or human, such as the overcrowding and hygiene.

Table 11.1 compiles the information of the plaintiffs' petition and the building technical report stating the environmental hazards by topics.

Despite these numerous environmental hazards, and different from the examples of U.S. prisons,[75] the *Presídio Central* claim does not present specific information about water, soil, and air contamination, nor does it report if the inmates are subject to any level of chemical exposure. It does not necessarily mean that the issues do not exist, which is quite unlikely considering the risks found, but rather that the right of information concerning environmental hazards is probably being violated in the case. According to the Rio Declaration, "each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes."[76]

69 Ibid, p. 13.
70 Ibid, p. 15.
71 Ibid, p. 14.
72 Ibid.
73 Merriam-Webster Dictionary, *supra* note 14.
74 Nikki L. Behnke et al., *supra* note 38.
75 See the Human Rights Defense Center, *supra* note 34.
76 U.N. General Assembly, "Rio Declaration on Environment and Development," A/CONF.151/26 (Vol. I) (12 August 1992), available at https://www.un.org/en/

Table 11.1 Environmental hazards at Presídio Central

Topics	*Environmental hazards*
Reinforced concrete structures	• Lower reinforcement frames segregation and exposure, with insufficient covering and in hardware corrosion process; • Cracking on galleries mezzanine slabs, showing evidence of water infiltration from the cells' bathrooms; • Evidence of water infiltration through pavilions' expansion joints; • Generalized sanitary facilities leaking, causing concrete degradation and reinforcement corrosion.
Sealing and masonry	• Evidence of water infiltration, leaking, humidity stains, fungi, and mold, with widespread degradation of plaster coatings and painting finishes of masonry elevations in galleries and cells; • Detachment and disaggregation of floor ceramic tiles and masonry elevations of the galleries' bathrooms, with sealing and waterproofing failures at the cells' wet areas.
Electrical installations	• Apparent electrical networks, with uninsulated seams and precarious extensions; complete disregard of technical regulations regarding the design aspects and shock and electrical short-circuit safety installations.
Sanitary facilities	• Nonexistent sewerage system in the cells' bathrooms (private) and galleries (collective), with no drain box, with rudimentary mending through plastic bottles; • Sewage from cells' and galleries' bathrooms drained directly into the patios, running on the walls and open-air ditches in the patios; • Evidence of precarious repairs on PVC water pipes in the cell bathrooms' plumbing extensions.
Firefighting	• There is no fire prevention program, and even if it were proposed, it would not have conditions to be approved by the competent public authority, once it does not comply with the law due to prison overcrowding, electrical network precariousness, and no escape routes with unobstructed emergency exits.
Overcrowding	• The current occupancy is approximately 4,591 prisoners, although the official capacity is 1,984 prisoners. • The cells were assembled so that four individual cells gave way to a collective cell with eight cement beds with an improvised bathroom in the center; • In the galleries initially built for a hundred prisoners, there are approximately 470 people; • In the absence of beds, prisoners are forced to sleep on the floor on foam mattresses or to improvise "aerial beds" made of cloth and plastic.
Kitchens and food	• The kitchen is built to serve 1,500 inmates, although the prison population is well over 4,500 prisoners; • The proliferation of "handmade" kitchens around the cells; • The food is prepared by the inmates themselves, and it is inappropriately served in the same courtyards used by the prisoners and its visitors.
Hygienic conditions	• Sewage drains into the inner courtyard, and prisoners adapt ditches and use blankets to contain human feces; • There are feces, urine, remains of food, dirt, rats, and cockroaches in the inner courtyard, where prisoners receive their children, their wives, and visitors, and have meals; • Prisoners must eat meals with their hands and plastic bags; • Inmates are deprived of hygienic materials and clothing; and they are not provided with blankets, bedding, and towels.
Temperature	• Temperatures vary from around 0°C (32°F) in the winter to more than 35°C (95°F) in the summer, without any heating or cooling systems.

Sources: (1) Brazilian Engineering Appraisal and Expertise Institute of Rio Grande do Sul IBAPE/RS, Building Inspection Report, available at case 13.353 at Inter-American Commission on Human Rights; (2) A. J.U.R.I.S. and others, Petition in case #13.353 in the I.A.C.H.R., see references.

Therefore, taking into consideration the environmental hazards found in prisons worldwide and, more specifically, in the *Presídio Central* case study, the next part will analyze the international human rights standards regarding the treatment of the prisoners and relate them with the international rules on environment protection.

11.4 International rules regarding the rights of prisoners, human rights, and the environment

The standards regarding the topic of this study were not created simultaneously, but they were a product of years of historical development starting with the first rules about the rights of prisoners in the late seventeenth century. Adopted for constitutions of the new nations worldwide in the eighteenth and nineteenth centuries, they also served as grounds to international human rights provisions and international standards for the treatment of prisoners in the twentieth century. On the other hand, environmental rules are relatively new, becoming common the late 1960s, with the birth of the environmental regime. Finally, the studies relating human rights and the environment started to strengthen only in the 1990s, but still require some development, specifically regarding the environment in prisons.

11.4.1 International rules regarding the rights of prisoners

The first rule regarding the treatment of prisoners goes back to the English Bill of Rights in 1689[77] determining that "no cruel and unusual punishments [should be] inflicted," in a first attempt to limit the power of the king after the Glorious Revolution of 1688 "that overthrew King James II of England… and installed…William III…and his wife, Mary II, as England's new king and queen."[78] This document influenced the U.S. Constitution, where, in the Bill of Rights, one finds the same text in the Eighth Amendment, ratified in 1791,[79] with the intent to limit the power of the newly created central government.

The English and the American Bills of Rights influenced constitutions worldwide, such as the "French, German, Japanese, and South African

development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (retrieved 3 December 2020), Principle 10.

77 English Bill of Rights (1688) available at http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/data.pdf (retrieved 3 December 2020).

78 John D Bessler, "The Concept of 'Unusual Punishments' in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual," 13 (4) *Northwestern Journal of Law & Social Policy* (2018), p. 308.

79 American Bill of Rights, Eighth Amendment, available at https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf (retrieved 3 December 2020).

constitutions"[80] and also international rules. However, it was only in 1948 that the international community first wrote the principle in the Universal Declaration of Human Rights, stating that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[81] Although the Universal Declaration of Human Rights is not a formal treaty with binding power, the document expands the concept of the previous Bills of Rights and details the values of the United Nations Charter, serving as "the constitution of the entire regime, as well as the single most cited human rights instrument,"[82] which made its standards influence international law and modern constitutions enacted after World War II.

Grounded on the principles of its Charter and the Universal Declaration, and specifying the rule that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"[83] the United Nations adopted, in 1955, the Standard Minimum Rules for the Treatment of Prisoners setting the "essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions."[84] Those standards encompass rules regarding accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, contact with the outside world, religion, work, etc., making more concrete the principles of the Universal Declaration. These standards were updated in 2015 by the adoption of the General Assembly Resolution 70/175, known as the "Nelson Mandela Rules."[85]

The 1969 American Convention on Human Rights made an essential enlargement of the rule of the Universal Declaration in its Article 5, naming it "The Right to Humane Treatment."[86] For the first time, an international document mentions that "every person has the right to have his physical, mental, and moral integrity respected."[87] The American Convention also reaffirms the Universal Declaration statement that "[n]o one [should] be subjected to torture or to cruel, inhuman, or degrading punishment or treat-

80 Steven Calabresi and Bradley G. Silverman, "Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron," 1 *Michigan State Law Review* (2015), pp. 123–124.

81 U.N. General Assembly Resolution 217/A, "Universal Declaration of Human Rights," 10 December 1948, available at http://www.un.org/en/universal-declaration-human-rights/ (retrieved 3 December 2020).

82 Philip Alston and Ryan Goodman, *supra* note 4, p. 142.

83 U.N. General Assembly Resolution 217/A, *supra* note 78.

84 First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, available at https://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf (retrieved 3 December 2020).

85 U.N. General Assembly Resolution 70/175, *Standard Minimum Rules for the Treatment of Prisoners*, A/RES/70/175 (17 December 2015) available at https://undocs.org/A/RES/70/175 (retrieved 3 December 2020).

86 American Convention, *supra* note 12, Article 5.

87 Ibid, Article 5.1.

ment,"[88] but adds the specific need to observe the "inherent dignity of the human person"[89] for "[a]ll persons deprived of their liberty."[90] It also states the principle of personal responsibility by affirming that "[p]unishment shall not be extended to any person other than the criminal."[91] Finally, in paragraphs 4, 5, and 6, the American Convention expands the rules regarding the separation of convicted and non-convicted persons, the treatment of minors, and the need to observe "reform and social re-adaptation of the prisoners."[92]

There has been a clear expansion of the idea of the rights of prisoners in international law since 1689. The American Convention innovated and expanded the concepts stated in the English Bill of Rights, in the Eighth Amendment, and in the Universal Declaration to introduce new human rights to "[a]ll persons deprived of their liberty,"[93] among members of the Organization of the American States, in an international document with binding power.

11.4.2 International rules regarding the environment

Different from the rights of prisoners that go back to the seventeenth century, environmental protection became a concern to the international community only in the early 1970s when an international agenda emerged with the Protocol of Stockholm, "the first U.N. gathering to examine the state of the human environment."[94] The document declared "principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."[95] Since Stockholm, the "global awareness of environmental issues increased dramatically, as did international environmental law-making proper,"[96] paving the growth of environmental discussions around the globe.

The Rio Declaration came about twenty years after the Stockholm, in 1992, reaffirming the principles stated in Stockholm, and with the task to "systematiz[e] and restat[e] existing normative expectations regarding the environment, as well as of boldly posit[ing] the legal and political underpinnings of sustainable development."[97] Both Declarations, Stockholm and

88 Ibid, Article 5.2.
89 Ibid.
90 Ibid.
91 Ibid, Article 5.3.
92 Ibid, Articles 5.4, 5.5, and 5.6.
93 Ibid, Article 5.2.
94 Paolo Galizzi, *supra* note 5.
95 U.N. Report of the United Nations, *supra* note 18.
96 Günter Handl, "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development," *United Nations Audiovisual Library of International Law,* (1992), available at http://legal.un.org/avl/ha/dunche/dunche.html (retrieved 3 December 2020).
97 Ibid.

Rio, although not binding documents, encompassed principles that either was customary law at the time of their creation or became customary law after the declarations, which reinforces their normative force.[98]

The two significant landmarks reflect the international community awareness at the time of their creation. For instance, one year before Stockholm, in 1971, Greenpeace,[99] EarthWatch Institute,[100] and Ocean Conservancy[101] were founded. But, also, the international declarations forged the understanding the world has today about the environment and sustainable development. Several other national, regional and international documents, policies, acts, and N.G.O.s were influenced by the principles stated in the Stockholm and Rio declarations. In the context of Part III of this book—Alternatives to Globalization in Environmental Law—it is possible to see that when one discusses environmental hazards in prisons in Brazil as human rights violations, that in fact environmental law and human rights are not naturally dissociated nor should their conceptual spaces be dissociated.

11.4.3 Initial relations between human rights and the environment

Almost two decades after the first international document regarding the environment, and contemporary with the Rio Declaration, the first relations between human rights and the environment began to occur. Those relations came into the discussions in 1972 but, "at the conference, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected."[102] Only in 1989 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities "inaugurate[d] a study on the connections between human rights and the environment,"[103] that ended in the appointment of a special rapporteur on human rights and the environment, Ms. Fatma Zohra Ksentini.[104] The special rapporteur delivered a final report in 1994 that "marked a turning point in the United Nations' consideration of human rights and the environment"[105]

98 See Günther Handl, *supra* note 93.
99 Greenpeace website, available at https://www.greenpeace.org/international/ (retrieved 3 December 2020).
100 EarthWatch website, available at https://earthwatch.org (retrieved 3 December 2020).
101 Ocean Conservancy website, available at https://oceanconservancy.org/ (retrieved 3 December 2020).
102 Günther Handl, *supra* note 93.
103 Neil A. F. Popovic, *supra* note 6, p. 490.
104 Ibid.
105 Neil A. F. Popovic, *supra* note 6, p. 491.

Ksentini affirmed that "a few instruments of a binding legal character have established a direct link between the environment and human rights."[106] The special rapporteur recalls that, although the 1972 Stockholm Declaration does not directly mention a human right to a satisfactory environment, it does state that:

> [m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[107]

Ksentini further affirmed the two-way relation of human rights and the environment stating that "[e]nvironmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, to a satisfactory standard of living…to dignity and the harmonious development of one's personality…to peace, etc."[108] She added that "human rights violations in their turn damage the environment,"[109] quoting examples such as the right to development, participation, and information.

Finally, the special rapporteur praised the work of the regional and international human rights bodies for "enforcing the right to a satisfactory environment"[110] and for recognizing "validity of complaints of human rights violations based on ecological considerations."[111] Here one is reminded that the Organization of the American States issued the Additional Protocol to the American Convention on Human Rights in 1988 that entered into force in 1999, affirming the "right to a healthy environment."[112] Nevertheless, the IACourtHR took almost 20 years to "recognize…an 'autonomous' right to a healthy environment under the American Convention, in an Advisory Opinion delivered on February 7, 2018."[113]

106 Fatma Zohra Ksentini, *Final Report on United Nations, Economic and Social Council, Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Human Rights and the Environment*, E/CN.4/Sub.2/1994/9 (2004), available at https://digitallibrary.un.org/record/226681/files/E_CN.4_Sub.2_1994_9-EN.pdf (retrieved 3 December 2020), p. 59.

107 U.N. Report of the United Nations, *supra* note 18.

108 Fatma Zohra Ksentini, *supra* note 103, p. 60.

109 Ibid, p. 61.

110 Ibid, p. 59.

111 Ibid.

112 Organisation of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador,"* 1988, available at http://www.oas.org/juridico/english/treaties/a-52.html (retrieved 3 December 2020), Article 11.

113 Maria L. Banda, *supra* note 7.

11.4.4 Initial relations of environmental hazards and human rights in prisons

Although the first relations between environment and human rights took place in the late 1980s, the notion is still evolving in the international community. The recognition of an autonomous right to a healthy environment under the American Convention is recent, and its effects cannot be entirely understood in the daily basis practice in areas such as the treatment of prisoners and prison conditions. Nonetheless, governments, national agencies, N.G.O.s, and even human rights experts have not properly developed the concept that prisons, as man-made environments, are subject to hazards that affect the human rights of a particularly vulnerable population. The ninety-three-page Ksentini report, for instance, did not dedicate one single line to prison conditions or prisoners' rights.

Nevertheless, prisoner rights groups recently began to relate environmental hazards to human rights in prisons. The Human Rights Defense Center initiated the Prison Ecology Project, to "examine the intersection between criminal justice and environmental justice, including the impact of detention facilities on the environment (such as sewage spills into local waterways from prisons and jails), and the impact of the environment on prisoners and prison staff."[114] This group, with the support of another 138 organizations and individuals, has addressed a letter to the U.S. E.P.A., asking it to include prison issues in its 2020 Environmental Agenda.[115] Even having recognized the relations between prisons and environment back in 2007,[116] the E.P.A. did not mention it in its 2020 Environmental Justice Agenda.[117]

Not much has been written about the relation of environmental hazards in prisons and human rights violations. However, the development in the last decades laid the foundation to relate the environmental risks in prisons with specific violations of human rights. The special rapporteur Ksentini has

> stressed how vulnerable certain peoples, populations, groups or categories of persons are to ecological hazards…[and] has pointed out that the poor and disadvantaged, minority groups, women, children, migrant workers, and their families, refugees and *displaced persons* [emphasis added] are generally those most affected and least protected.[118]

114 Human Rights Defense Center website, available at https://www.humanrightsdefensecenter.org/about/ (retrieved 3 December 2020).

115 See Human Rights Defense Center, *supra* note 34.

116 See Environmental Protection Agency of the United States, Federal Prisons to Get Environmental Checks, available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/ac0e8764a666f41685257323006756ab.html (retrieved 3 December 2020).

117 See Environmental Protection Agency, *supra* note 33.

118 Fatma Zohra Ksentini, *supra* note 103, p. 60.

Although not explicitly mentioned, the special rapporteur on human rights and the environment provides the first clue to consider prisoners to be the subject of special attention regarding environmental hazards. According to Nikki L. Behnke, a Program Specialist at the United States Agency for International Development (U.S.A.I.D.), prisoners are "involuntarily displaced people,"[119] which in turn makes them vulnerable to environmental hazards according to U.N. special rapporteur Ksentini.

As an involuntarily displaced person, "the State takes [the prisoner] into its custody and holds him there against his will…[thus] the Constitution [or the international human rights rules] imposes upon it a correspondent duty to assume some responsibility for his safety and general well-being."[120] In that situation, prisoners cannot interact with the environment to avoid harms to their life, health, or dignity in the same way that non-prisoners can. Thus, prisoners are particularly affected by environmental hazards in prisons.

11.5 Environmental hazards and human rights in *Presídio Central*

Water infiltration, leaking, humidity stains, fungi, mold, makeshift electrical networks, nonexistent sewerage system, overcrowding, feces, urine, remains of food, rats, cockroaches, exposure to extreme temperatures,[121] and exposure to harmful chemicals are all factors that constitute the physical environment in *Presídio Central*. In addition, there is a lack of data concerning water, soil, and air contaminants, and Brazilian authorities do not provide precise information about the harms caused by these threats to the life, health, and dignity of the inmates.

However, the relation between those environmental threats and the violations of prisoners' rights are presented in some scientific studies. Law professor John V. Jacobi paints a picture of the health of the inmates in the U.S. while in prison and also when they are released. The conclusion is that "[t]he two million adult prisoners in the U.S do not reflect a cross-section of America…, they are sicker."[122] He based his conclusions on the data provided by the Re-Entry Policy Council formed by the Council of State Governments, and the National Commission on Correctional Health Care. Conditions such as "chronic illness, communicable diseases, and severe

119 Nikki L. Behnke et al, *supra* note 38.

120 Brenna Helppie-Schmieder, "Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?" 110 (3) *Northwestern Law Review* (2016), p. 648.

121 See Table 1, part 3.3.

122 John V. Jacobi, "Prison Health Public Health: Obligations and Opportunities," 31 *American Journal of Law and Medicine* (2005), p. 449.

mental disorders among people in jail and prison is far greater than among other people of comparable ages."[123]

Regarding communicable diseases:

> [c]ompared to the general population, it has been estimated that "rates of human immunodeficiency virus (HIV) infection…are 8 to 10 times higher, rates of hepatitis C are 9 [to] 10 times higher, and rates of tuberculosis are 4 [to] 7 times higher."[124]

Those higher rates are also observed concerning chronic illness such as asthma and mental illness. In *Presídio Central*, the leading cause of death is communicable diseases. "According to a survey conducted up to October 2011, among 229 deaths, bronchopneumonia represented 53.23% of the cases, followed by…tuberculosis… 33.14%."[125] Those rates are completely divergent with the outside Brazilian population, in which the communicable diseases represent only 14% of the causes of deaths.[126] In reference to tuberculosis alone, the World Health Organization (W.H.O.) affirms that "[p]rison conditions can fan the spread of disease through overcrowding, poor ventilation, weak nutrition, inadequate or inaccessible medical care, etc."[127] Also, the W.H.O. affirms that environmental factors such as water supply, sanitation facilities, food and climate influence the spread of communicable diseases.[128]

The environmental hazards in *Presídio Central* described above not only affect the inmates but also, employees, families, and population nearby. Jacobi reinforces that "[t]he failure of prisons to properly treat prisoners with infectious diseases or sexually transmitted diseases endangers not only the prisoner, his fellow prisoners, and the staff, but also the broader community to which the prisoner returns when he is released."[129] Furthermore, the lack

123 John V. Jacobi, *supra* note 119, p. 450, quoting Re-entry Policy Council, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community, 157, 2005.

124 John V. Jacobi, *supra* note 119, p. 451, quoting Nicholas Freudenberg, "Jails, Prisons, and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health," 78 (2) *Journal of Urban Health* (2001), pp. 214, 217.

125 A.J.U.R.I.S. and others, quoted at 11.

126 B.N.D.E.S., Banco Nacional do Desenvolvimento, "Causas de mortes no Brasil," March 7, 2019, available at https://www.bndes.gov.br/wps/portal/site/home/conhecimento/noticias/noticia/causas-mortes-brasil, (retrieved 3 December 2020). According to the survey, 74% of the deaths are caused by non-transmissible diseases, and 12% are related to external causes.

127 World Health Organization, "Tuberculosis in Prisons," 2016, available at https://www.who.int/tb/areas-of-work/population-groups/prisons-facts/en/ (retrieved 3 December 2020).

128 World Health Organization, "Environmental Factors Influencing the Spread of Communicable Diseases," available at https://www.who.int/environmental_health_emergencies/disease_outbreaks/communicable_diseases/en/ (retrieved 3 December 2020).

129 John V. Jacobi, *supra* note 119, p. 466.

of information provided by the authorities hides the gravity of the situation, either by the range of the known hazards or by the existence of other environmental issues such as water, soil, and air contamination, and chemical exposure.

Even without counting the unknown hazards, the environment described in *Presídio Central* presents enough evidence of direct violations of human rights international standards for the treatment of prisoners. In addition to the general rules of the Universal Declaration of Human Rights and the American Convention of Human Rights, which prohibit "torture, cruel, inhuman or degrading treatment or punishment,"[130] and "guarantee physical, mental and moral integrity, as well as the inherent dignity of the human person,"[131] the Nelson Mandela Rules offer more specific standards that are applied in this case study. The standards do not explicitly refer the expression "environment," yet they refer to the physical environment, such as accommodation (Rules 12–17), personal hygiene (Rule 18), clothing and bedding (Rules 19–21), and food (Rule 22).

These specific conditions quoted in Table 11.2 create the physical environment in *Presídio Central*. The identified hazards directly violate general rules stated in the Universal Declaration of Human Rights and in the American Convention on Human Rights. Prisoners are subject to inhuman and degrading treatment or punishment,"[132] and their "physical, mental and moral integrity, as well as their inherent dignity"[133] are neglected, as well as that of their families and workers who must enter the facilities, and the population nearby, yet with unknown consequences.

Those facts were the main arguments of the case 13.353 filed by A. J.U.R.I.S. and others before the I.A.C.H.R., yet the plaintiffs did not mention a direct relation between human rights and the environment. Although these environmental hazards are the facts upon which the plaintiffs base their arguments, they could not go before an international or regional body specifically created to protect environmental rights. Instead, due to the lack of specific environmental machinery in international or regional levels, the alternative solution was to present the case before a regional system for the protection of human rights, in a clear use of the existing human rights machinery. The Inter-American system for the protection of human rights was not initially well-suited to protect non-individual rights, however, it was possible to access the system considering that environmental hazards impacted the general enjoyment of human rights.

In the Commission, the petition can make its way through a final report "with a finding of responsibility and recommendations, [however] such a

130 U.N. General Assembly Resolution 217/A, *supra* note 78.
131 American Convention, *supra* note 12, Article 5.
132 U.N. General Assembly Resolution 217/A, *supra* note 78.
133 American Convention, *supra* note 12, Article 5.

Table 11.2 Environmental hazards and violations of international standards in Presídio Central

Environmental hazards in Presídio Central	*International human rights standard violated*
• The current occupancy is approximately 4,591 prisoners, although the official capacity is 1,984 prisoners. • The cells were assembled, so that four individual cells gave way to a collective cell with eight cement beds with an improvised center a bathroom.	Rule 12. Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.
• Cracking on galleries mezzanine slabs, showing evidence of water infiltration from the cells' bathrooms. • Evidence of water infiltration through pavilions' expansion joints.	Rule 13. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
• Nonexistent sewerage system in the cells' bathrooms (private) and galleries (collective), with no drain box, with rudimentary mending through plastic bottles. • Sewage from cells' and galleries' bathrooms drained directly into the patios, running on the walls and open-air ditches in the patios.	Rule 15. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
• Evidence of precarious repairs on PVC water pipes in the cell bathrooms' plumbing extensions. • Temperatures vary from 0°C (32°F) in the winter to more than 35°C (95°F) in the summer, without any heating or cooling systems.	Rule 16. Adequate bathing and shower installations shall be provided so that every prisoner can, and may be required to, have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.

Environmental hazards in Presídio Central	*International human rights standard violated*
• Sewage drains into the inner courtyard, and prisoners adapt ditches and use blankets to contain human feces. • There are feces, urine, remains of food, dirt, rats, and cockroaches in the inner courtyard, where prisoners receive their children, their wives, their visitors, and have meals.	Rule 17. All parts of a prison regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.
• Inmates are deprived of hygienic materials and clothing and they are not provided with blankets, bedding, and towels.	Rule 18 1. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.
• In the absence of beds, prisoners are forced to sleep on the floor on foam mattresses or to improvise "aerial beds" made of cloth and plastic. • Inmates are deprived of hygienic material and clothing and they are not provided with blankets, bedding, and towels.	Rule 21. Every prisoner shall, in accordance with local or national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.

Sources: (1) Brazilian Engineering Appraisal and Expertise Institute of Rio Grande do Sul IBAPE/RS, Building Inspection Report, available at case 13.353 at Inter-American Commission on Human Rights; (2) A.J.U.R.I.S. and others, Petition in case #13.353 in the I.A.C.H.R., see references; (3) Nelson Mandela Rules, U.N. General Assembly Resolution 70/175, see references.

report is not legally binding."[134] Only the IACourtHR has the power to issue legally binding findings and awards.[135] This binding power is restricted to the states that accept the Court jurisdiction, and allows the execution of the "part of [the] judgment that stipulates compensatory damages…[to] be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."[136]

If a state complies with all the Commission's recommendations, the environmental issues and the resulting human rights violations will be remedied. If not, the case may be sent to the Court, which can issue binding decisions. In this case, the part of the decision that determines compensatory damages can be executed in the national courts. However, some questions remain: Would the ruling of the Court recognizing human rights violations in *Presídio Central* be sufficient to solve the environmental issues? Would it rest only on the political will of the concerned state to avoid international shaming? Would such a decision be enforceable in national courts? Those questions bring up the need for in-depth analyses of the reach of the recent recognition of an autonomous right to a healthy environment and of the use of human rights machinery to redress environmental issues. Those questions also open space for the development of new theories related to the reinforcement of the environmental machinery in international and regional levels, as well as the possibility of execution of the IACourtHR decisions determining structural measures or specific performance to solve environmental hazards, disregarding the limits of Article 68.2 of the American Convention.

11.6 Conclusion

The international human rights regime and the environmental movement developed since the 1948 Universal Declaration of Human Rights and the 1972 Declaration of Stockholm, gradually strengthening its relations until the 2018 IACourtHR, affirmed an autonomous right to a healthy environment under the American Convention. Nevertheless, even prisoners' treatment being an explicit human rights concern worldwide, there is still much to develop regarding environmental attention to prisons although they fit in the concept of man-made environment. Either as an autonomous human right or as a factor that impacts the enjoyment of other human rights, environmental issues in prisons are still being neglected, such as the example of the case of study of *Presídio Central*, Brazil.

The growing use of human rights machinery is a significant achievement for the realization of environmental rights, and the above-mentioned

134 Lea Shaver, "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?," 9 (4) *Washington University Global Studies Law Review* (2010), p. 652.

135 Lea Shaver, *supra* note 131, p. 654.

136 American Convention, *supra* note 12, Article 68.2.

advisory opinion reinforces this option, paving the way to environmental-only cases in international and regional human rights bodies. However, the enforceability of the IACourtHR's decisions determining structural measures or specific performance to solve environmental issues is still limited to the text of Article 68.2 of the American Convention, that only allows the execution of compensatory damages in national courts. This limit on the text opens space to the courts, experts, and advocates to keep advancing the interpretation connecting human rights and the environment in order to propose the creation of a specific environmental machinery in international and regional levels, or to strengthen the enforceability of the IACourtHR decisions related to environmental rights within the national courts.

Bibliography

Acebes, Cezar M. "Brazil's Correctional Houses of Horror." *Foreign Affairs* (3 December 2020). https://www.foreignaffairs.com/articles/brazil/2017-01-18/brazil-s-correctional-houses-horror.

Alston, Philip, and Ryan Goodman. *International Human Rights: The Successor to International Human Rights in Contex*t. 2nd ed., Oxford: Oxford University Press, 2013.

Armstrong, Andrea C. "Death Row Conditions Through an Environmental Justice Lens." 70 (2) *Arkansas Law Review* (2017): 203–226.

Atapattu, Sumudu. "The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law." 16 (1) *Tulane Environmental Law Journal* (2002): 65–126.

Banda, Maria L. "Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights." 22 (6) *ASIL Insights* (3 December 2020). https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human.

Bawole, Paulus. "Harmony with Nature for Sustainable Built Environment, Man Made and Natural Environment." (3 December 2020). https://www.irbnet.de/daten/iconda/CIB_DC22849.pdf

Behnke, Nikki L., et al. "Improving Environmental Conditions for Involuntarily Displaced Populations: Water, Sanitation, and Hygiene in Orphanages, Prisons, and Refugee and IDP Settlements." 8 (4) *Journal of Water Sanitation and Hygiene for Development* (2018): 785–791.

Bernd, Candice, et al. "America's Toxic Prisons: The Environmental Injustices of Mass Incarceration." (3 December 2020). https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/.

Bessler, John D. "The Concept of 'Unusual Punishments' in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual." 13 (4) *Northwestern Journal of Law & Social Policy* (2018): 307–416.

Bradford, Andrew Ryan. "An Examination of the Prison Environment: An Analysis of Inmate Concerns across Eight Environmental Dimensions." (3 December 2020). http://dc.etsu.edu/etd/2216.

Calabresi, Steven, and Bradley G. Silverman. "Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron." 1 *Michigan State Law Review* (2015): 123–124.

Darke, Sacha. *Conviviality and Survival, Palgrave Studies in Prisons and Penology*. Palgrave Macmillan, 2018.

Flynn, Nick. *Introduction to Prisons and Imprisonment*. Winchester: Waterside Press, 1998.

Galizzi, Paolo. "From Stockholm to New York, via Rio and Johannesburg: Has the Environment Lost Its Way on the Global Agenda?" 29 *Fordham International Law Journal* (2005): 952–1008.

Handl, Günter. "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development." *United Nations Audiovisual Library of International Law* (3 December 2020). http://legal.un.org/avl/ha/dunche/dunche.html.

Helppie-Schmieder, Brenna. "Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?" 110 (3) *Northwestern Law Review* (2016): 647–678.

Holt, Daniel W. E. "Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change," Sabin Center for Climate Change Law, Columbia Law School (3 December 2020). https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf.

Jacobi, John V. "Prison Health Public Health: Obligations and Opportunities." 31 *American Journal of Law and Medicine* (2005): 447–478.

Ksentini, Fatma Zohra. "*Final Report on United Nations, Economic and Social Council, Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Human Rights and the Environment*." (3 December 2020): https://digitallibrary.un.org/record/226681/files/E_CN.4_Sub.2_1994_9-EN.pdf.

Lewis, Bridget. "Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection." 8 (1) *Macquarie Journal of International and Comparative Environmental Law* (2012): 36–47.

Maranhão, Ney. "Meio Ambiente: Descrição Jurídico-Conceitual" (3 December 2020). http://www.lex.com.br/doutrina_27301129_MEIO_AMBIENTE_DESCRICAO_JURIDICO_CONCEITUAL.aspx.

Maurer, Peter. "Statement at the Annual Conference of the International Corrections and Prisons Association (ICPA)." October 27, 2014, available at https://www.icrc.org/en/document/annual-conference-international-corrections-and-prisons-association-icpa.

McGoldrick, Dominic. "Sustainable Development and Human Rights: An Integrated Conception." 45 (4) *The International and Comparative Law Quarterly* (1996): 811–812.

Pellow, David N. "Political Prisoners and Environmental Justice." 29 *Journal Capitalism Nature Socialism* (2018): 1–20.

Popovic, Neil A.F. "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment." 27 *Columbia Human Rights Law Review* (1996): 490.

Rabuy, Bernadette, and Daniel Kopf. "Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned." (3 December 2020). https://www.prisonpolicy.org/reports/income.html.

Rakia, Raven. "A Sinking Jail: The Environmental Disaster That Is Rikers Island." (15 March 2016). https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island.

Shaver, Lea. "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?" 9 (4) *Washington University Global Studies Law Review* (2010): 639–676.

Toch, Hans. *Living in Prison: The Ecology of Survival*. Palgrave MacMillan, 1977.

Conclusions

Indicator species and the future of environmental law

Paolo Davide Farah and Kirk W. Junker

When we speak of "the environment," people often think of the material world that is around humans, but not humans, as though environmental protection is a big nature reserve project. The relation between humans and non-humans is most often expressed as a matter of protection and force by the first over the latter and not in a way that strengthens coexistence of the different parts of the society.

It is therefore more helpful to speak of "ecology," because its root is the ancient Greek word "οἶκος" (*oikos*), which simultaneously could mean the house, the family, or the family's property.[1] Using our abstract concepts such as sustainable development, and our abstract tools, such as the law, our family is building and protecting our own house, not a nature reserve that is somewhere else. Seen this way, the remaining challenge is to see the house as the house of our family of humans; the common house of all of our family, not my house in the wealthy suburbs and yours in the impoverished city. While industrial environmental problems may have originally been seen as local water or air problems, solved by sending the waste or pollution to someone else's house, global challenges like climate disruption have reminded us that we were really just sending the pollution and dumping the waste in another room of our own house all along.

The example of emerging economies is noteworthy. The environmental crisis more severely affects that which falls under the umbrella of the Global South. It is precisely here that we need to look at innovative answers to global challenges. The aim of this edited collection is to have brought to the table a different perspective on environmental law and governance by including the voices of the countries that due to their location or to their status as emerging economies are, sadly, too often excluded from the discussion. International environmental law rose to prominence thanks to an effort of forward looking scholars and writers from a wide array of disciplines acknowledging an urgent need of developing a "consciousness that mankind might be imposing, by its

1 Henry George Liddell. *A Lexicon Abridged from Liddell and Scott's Greek-English Lexicon* (Oxford: Clarendon Press, 1984), οἶκος.

DOI: 10.4324/9781003160236-16

growing population and industrial and technological developments, an intolerable burden on the capacity of its environment to sustain either its existing activities or their growth."[2]

Global unity in the environmental realm and in other fields throughout history has often only reached when the very survival of humans—and more recently, nonhumans—is at risk. We are again reminded of the weakness of a reactionary approach with COVID-19. Our handling of the pandemic clarifies that even if, as a consequence of environmental degradation, something happens in the Global South, the connections with the Global North could not be put on hold. Physical borders are no longer able to contain environmental harms and this should push us to further reflect on the fact that we are part of a single family and single house.

Our relationship to our material house may be informed by descriptive natural sciences, but to live with other persons in those material conditions of the home, we need to understand human social practices. Communication, history, customs, and religions are all social practices that must be understood in order to enable our successful co-habitation. So is law. Law in this sense is one set of human social practices, invented by ourselves to serve our needs, including our need to negotiate our relationship to the material nature of the family house in which we all live. And within the law, there are many different models for how we establish the rules and implement the rules. The fact that the rules are limited by the material of our common house does not mean the rules are determined by the material of the house. The rules are determined by its inhabitants. We establish the social practices in many ways, including through legal practices.

However, these rules are established and implemented by the most unsustainable super-predator—humans—with no attention for other species' habitat and sustainability adaptation strategies.[3] Some humans are in fact able to respect and protect the ecosystem. Indigenous people, while representing a small share of global population, often have a deep and intimate connection with an ecosystem that places non-humans at the center. The rules that govern Indigenous people's concept of their house mirror those of nature, and social rules are based on the need of protecting habitat and biodiversity.[4] Legal tools exist or are developed for strengthening the contribution of local communities to the protection of our common house.[5] Heuristically and

2 Patricia Birnie, "The Development of International Environmental Law," 3 *British Journal of International Studies* 169 (1977) p. 172.

3 Furthermore, "More aggressive reductions in exploitation are required to mimic nonhuman predators, which represent long-term models of sustainability." Chris T. Darimont et al., "Human Impacts: The Unique Ecology of Human Predators," 349 *Science* 858, (2015) p. 859.

4 Stephen T. Garnett et al., "A Spatial Overview of the Global Importance of Indigenous Lands for Conservation," 1 *Nature Sustainability* 369 (2018) pp. 372–373.

5 For an analysis on how to leverage an intellectual property regime to protect intangible assets of Indigenous people see Paolo D. Farah and Riccardo Tremolada, "Conflict

by analogy, we can borrow, as in the case of indigenous people, some ideas for our social rules from the material rules of nature that we observe. For example,

> We define an indicator in biology as an organism that the presence, or lack thereof, provides a clear signal about the environmental conditions. Depending on the organism, its appearance can signal both a healthy ecosystem or [sic] an unhealthy one. These indicators can reveal information about many factors in an environment, including pollution levels, salinity, temperature and nutrient or food availability. There are many examples of indicator species. Indicator species can be anything from bacteria to more complex organisms such as plants and animals. While everything has evolved to live within certain thresholds, so all organisms are indicators of something; many are considered particularly sensitive and provide a good indication of the initial changes in environmental conditions.[6]

When it comes to indicator species among states, speaking by analogy, the complex organisms of the Global South give us clear signals about environmental conditions. Tuvalu, Kiribati, and the Federated States of Micronesia, for example, are state indicator species. To whom are these states giving indication? To all states—not just to other states of the Global South. As pointed out by Dr. Richard Byron-Cox of the Secretariat to the United Nations Convention to Combat Desertification, the well-being of the states of the Global South is not a matter of charity or pity, it is a necessity. Tamuna Beridze elaborated that the co-governance that is necessary, is not the governing of one state by other states (or even a union of states, such as the European Union), but is walking together with them, not only because it may be the morally correct thing to do, but because the facts of natural science tell us that it is physically, chemically, and biologically necessary.

A northern state need not be altruistic or beneficent to take action to improve this situation—it needs only be wise enough to see the indicator species' writing on the wall. Even a selfish, nationalistic northern state, acting rationally for only its own interest, would do so, if it understands the significance in meaning of an indicator state. However, the significance is not so straightforward. Economic inequalities due to climate disruption are unevenly distributed and more pronounced in the Global South.

Extreme weather events and catastrophes take place daily in the Global South, while in the Global North the perception of climate change is

---

between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage," 94 *Oregon Law Review* 125 (2015).

6 Adrianne Elizabeth, "Examples of Indicator Species," in *Sciencing*, July 31, 2019, available at https://sciencing.com/examples-indicator-species-16895.html (retrieved 9 March 2021).

different. Rather than increasing funding available for North-South cooperation, governments from the Global North are locating climate change in their economic agenda. Green growth and the creation of sustainably sound jobs are now prioritized over international cooperation, also as tools to address to the pandemic. The European Union (E.U.) will allocate thirty percent of its long-term budget to climate and in the United States, the Biden Presidential Administration is following a similar path by investing more than $1.7 trillion in measures to support the green transition. In neither case do plans for international cooperation with the Global South follow the same path. As pointed out by the Climate Action Network:

> the extra funding from Next Generation EU for the Neighborhood, Development and International Cooperation Instrument (NDICI) will be used exclusively to top up the provisioning of the External Action Guarantee […] Given the guarantee is dedicated for loans to the public and private sector, and the doubling of the EFSD+ investment target in the NDICI, the weight of grant-based finance to public authorities and Civil Society Organisations (CSOs) in the overall EU budget for external action is significantly reduced.[7]

Similarly, the U.S. seems to be more focused on internal matters and on the promotion of democracy than on climate cooperation.[8]

But climate disruption is not the only environmental issue. How will states acknowledge a scientifically informed reality? What tools will states use to prepare for and deflect the future that will occur when indicator species are destroyed? Were it not so tragic, it would almost be funny if someone were to answer these questions by saying "continue to do the same as has been done." The "business as usual" approach still used by international organizations characterizes the response to climate disruption. Economic systems and production and consumption models have not been questioned for their negative effects on the ecosystem but are offered as possible solutions to reduce G.H.G.s' emissions.

As supplemental measures to mitigation requirements under Article 3 of the Kyoto Protocol, the clean development mechanism (Article 12), emissions trading (Article 17), and joint implementation (Article 6) offer economic incentives to the participants.[9] Therefore, benefits are exploited and accrued

7 Climate Action Network Europe, "The EU's Recovery Plan: Next Steps to Deliver on the European Green Deal" (2020), p. 13, available at https://caneurope.org/content/uploads/2020/06/Assessment-EU-Recovery-Plan-CAN-Europe-June-2020.pdf (retrieved 17 April 2021).

8 Council on Foreign Relations, "What's Next for Foreign Aid Under Biden?" available at https://www.cfr.org/in-brief/whats-next-foreign-aid-under-biden (retrieved 13 April 2021).

9 Emissions trading was advocated to be added to the Kyoto Protocol by the United States of America. Ironically, even though emissions trading was in fact included, the U.S.A. never

by multinational business enterprises (M.B.E.) from the Global North. Yet with the globalization by northern states, either through old-fashioned colonialism or new-fashioned neo-liberal economic tools, that is precisely what is being done. Not only M.B.E. from the Global North are employing such tools, but so are emerging economies such as China. Despite different political and economic systems, some old habits die hard. Thus this book has described the failures of those old practices.

It is important to note that all remedies do not fit all cultures—to claim that they do, or that there is a "best practice" is to claim that cultural differences are irrelevant and that one size will fit all, like a cheap T-shirt. When "best practices" are claimed, they are usually best by some northern standard of practice and may well not fit the needs of a culture in the Global South. As a result, environmental improvements are not implemented and proposed practice transplantation is often rejected especially in the most sensitive fields.[10]

Sanchir Jargalsaikhan writes of the "curse" of best practices, pointing out that so-called best practices result in bypassing the established procedures of rehabilitation and pollution mitigation when it comes to mineral extraction in Mongolia. He notes that even when developing countries adopt institutions and tools that copy developed countries, they may not function the way they do in developed countries. He refers to this phenomenon as "isomorphism." Yet states continue to use these misfit tools, such as Mongolia's use of environmental impact statements, because they serve needs other than improving the environment, such as attracting sponsors and donors. The rationale behind the adoption of these "best practices" demonstrates how economic considerations of the state are prioritized over environmental ones.

Jargalsaikhan's critique of the notion of "best practices" is also an insight into how language can push us around.[11] To find the most powerful cultural forces, one need not look for obvious signs of intentional force like armies or forces of destabilization. Instead, how we couch the narrative and establish an argument can lead us to results without any force being necessary.

---

ratified the Kyoto Protocol. Norway successfully advocated that joint implementation be included in the Kyoto Protocol and Brazil successfully advocated that the clean development mechanism be included. Donald A. Brown, *American Heat: Ethical Problems with the United States' Response to Global Warming* (Oxford: Rowman and Littlefield Publishers, 2002) p. 187.

10 For an analysis of the problems that arise from legal transplants: Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences," (1998) 61 *The Modern Law Review* 11. For an analysis of the problems that arise from legal transplants: Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences," (1998) 61 *The Modern Law Review* 11 (1988).

11 Kenneth Burke has deftly reversed the usual relationship of words to things when he says that things are the signs of words, not the other way around. Kenneth Burke, "What Are the Signs of What? A Theory of 'Entitlement,'" 4 (6) *Anthropological Linguistics* (1962), pp. 1–23.

Negative economic consequences in the relations with partners may arise when a country attempts to boost environmental protection nationally or seeks to strengthen sovereignty over its natural resources. Indicators used by M.B.E. in their investment strategies such as the World Bank's "ease of doing business index" or a political risk assessment could be negatively affected by a state's maintaining its own environmental standards. With anything called "best practices," one must ask for whom or what purposes are the proposed practices "best"? If the "best" determination is made by a manufacturing concern that relies upon cheap labor, mineral extraction, or waste dumping in the Global South so as to collect its profits in Europe or North America, then those practices are not likely to be "best" for a manufacturing concern that does not have cheap labor, easily available waste dumping, and northern profit markets.

Jargalsaikhan, along with Professor Winfried Huck, inject the notion of "contestation" to the discussion. Indeed, the categories of geographic, legal, and social spheres that apply in some parts of the world, do not apply in others and are open to contestation when they are imposed, either intentionally or just as unintended consequences of globalization. Part of the traditional concepts that should be contested are the terms that we use to solve the problems, as we have seen with "best practices."

Another term that steers and frames the discussion is "globalization." The word "globalization" is a call to arms for some people, but a welcome mat for others. Globalization is not only a set of practices relating north to south, but also east to west. Tamuna Beridze illustrated how current European Union energy policies and practices extend the notion that the core member states govern the periphery states, both inside the Union, regarding the older and newer eastern states, and also regarding candidate states. Unequal power relations among Members States result in a lack of uniformity of a given policy, which in turn creates tensions. The relationship is characterized by having created the acronym P.I.G.S. for the states of Portugal, Ireland, Greece, and Spain, selling the idea to populists that these states were an economic burden on the Union, when in fact their debt service resulted in more profits for lenders than if those same states were not in debt.

Likewise, as Professor Huck explains, developing and emerging economies, combined in regional international organizations such as the Association of Southeast Asian Nations, the Caribbean Community and Common Market, and the African, Caribbean and Pacific Group of States, are expected to incorporate the normative concepts of the Global Agenda 2030 and the Sustainable Development Goals, despite being provided with insufficient financial resources. Dr. Byron-Cox's analysis shows that like some states of Europe (most notably the P.I.G.S. states), the Small Island Developing States (S.I.D.S.) of the Caribbean are paying debt service that produces more money for lenders than healthy partner economies would, and keeps indebted economies on their knees. It is difficult to walk together, when one of the pair is on its knees. The ongoing discussion about indicators in international law

provides valuable insights into the development, use and legitimacy of indicators for collecting substantial valid facts upon which to rely for further action.

Even the label "Global South," while getting us away from defining a people, state, or region by its economy (as for example, the phrase "developing country" does) nevertheless brings about its own challenges. Even worse than "developing countries" was its predecessor, "third world countries." But there was also something accurate about those old terms: they indicated plurality, whereas the term "Global South," linguistically, could lead one to believe without pausing to reflect, that we are describing states that find themselves all in the same situations, act together to address globalization and the implementation of sustainable development, and are all regarded by other states as a bloc. But all these states are not the same. On the other hand, the umbrella term "Global South" could be used prescriptively to suggest that plurality could be replaced by unity in analyzing environmental crises. Even if the social, cultural and economic situations the Global South differ, states can work and act together towards common goals.

Within the Global South, one can look to compare regions—such as the Association of Southeast Asian Nations, the Caribbean Community and Common Market, and the African, Caribbean and Pacific Group of States, all discussed by Professor Huck; the Economic Community of West African States or S.I.D.S., as discussed by Dr. Byron-Cox; or the aligned group of Brazil, Russia, India, China, and South Africa (B.R.I.C.S.), as presented by Adv. Shinde. Whereas S.I.D.S. are powerless, do not contribute to the climate disruption problem, and suffer some of the worst consequences of it, B.R.I.C.S. are producers of a quarter of the world's gross domestic product and 45% of carbon dioxide emissions.

To go a step beyond this volume, one can also see that a term that pushes us around is "stakeholder." Encouraged by Reagan-Thatcher neoliberalism of the 1980s, "stakeholder" entered the environmental lexicon in the 1990s when business demanded a seat in government decision-making. To dress the participation in a socially acceptable suit, business talked of "stakeholder participation." The term "citizen participation" would not have been enough, because even though businesses either consist of citizens or may even be legal persons themselves, the businesses wanted more than an equal position with other citizens. There was nothing in law or language deficient about calling such persons "interested parties" or "interested persons." Those terms would include N.G.O. and citizen groups, but those labels would not provide a privileged seat above the other citizens. And there is another problem with the term—it originates in gambling. To hold a stake is to have an interest in a wager or a bet. The ability of the environment to sustain the citizens simply cannot be conceptualized as a gamble.

Not raised often enough is the question of whether the structure of the state lends itself to environmental protection or sustainable development. Using the Ethiopian experience as a case study, Professor Ghebretekle questions whether the dual federalist structure promotes a race to the top or a race

to the bottom for member regions. By comparison, in looking at Mongolia's development since Soviet days, Sanchir Jargalsaikhan clearly sees decentralization as a benefit.

The book then turns to new practices for sustainable development implementation during this period called "globalization." Some states have attempted to adopt or adapt northern states' legal tools to their own systems in the Global South, such as the concept of "best practices," the federal structure of the state, the environmental impact statement, and public-private partnerships. Some of these adaptations have failed, while others show results in implementation, such as public-private partnerships for infrastructure projects in Nigeria.

George Nwangwu has presented a very convincing narrative of the advantages of public-private partnerships in infrastructure projects in Nigeria. Importantly, he is basing his narrative on ten real projects that he has studied, including mines, roads, dams, and parks. One of the advantages that he illustrates is that the state has not been an environmental protector because it has too little incentive to do so. From perhaps a "northern" perspective, what seems to be missing from that narrative is how the public could participate in such a way as to bring pressure on the state in a publicly-regulated system, without needing to bring in private interests to ensure environmental protection through contract risk control. Why had the state not enforced environmental law on itself in the past? There were no incentives to do so. Could the public's political pressure be that incentive? Can we have greater faith in state action if there are citizen suit provisions in the statutes for state failures? In Europe, citizen suits for international failures have shown some success, as when the Dutch N.G.O. Urgenda Foundation took its own government to court for failing to abide by Paris Agreement requirements, or when *Notre Affaire à Tous* and other citizens did the same against France.

Xi Yu points out that due to constant delay in Uganda, and other judicial problems in other countries, injured persons have now begun the more creative and inventive, though more difficult and expensive, practice of taking their cases to other fora. When faced with no tools with which to work at home, some citizens have turned to judicial systems from northern states, as in the case of *Okpabi v, Royal Dutch Shell*, where 42,500 Nigerians took their action extraterritorially to England, arguing that the parent company in Europe owed them a duty of care from oil pollution that is distinct from that of their subsidiary in Nigeria. And, as this book was going to press, Shell lost its final appeal before the Nigerian Supreme Court. After fifty-one years, Shell has agreed to obey the Nigerian Federal High Court and pay 110 million dollars as compensation to the community harmed by its oil spill in 1970.

Another new direction in which citizens can find relief that is not standard in the old models offered is the claim to environmental human rights. Like lawsuits against one's own state, and extraterritorial lawsuits, human rights actions are a growing mode of redress, where traditional statutory action against polluters is not available or not implemented. Implementation,

as Dr. Byron-Cox stated, means action. Thus the focus on action and implementation is not the classroom study of law, where one argues about the meaning of a text—it is a study of what people do. The connection of human rights to environmental protection is an even bigger issue in the Global South. In discussing poverty in the Caribbean and prisoner abuse in Brazil, chapters in this book have shown that human rights is one of the ways in which environmental law may follow different paths in the Global South, varying from traditional "environmental law," understood as state statutes prohibiting acts of pollution.

Another alternative path to follow that is citizen-driven is that of public participation rights. Dr. Byron-Cox and Dr. Prityi, who is legal advisor to the Ministry of the Environment in Slovenia, point out that the Aarhus Convention has served as an inspiration for other regions of the world. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (known as the "Escazú Agreement"), adopted under the auspices of the U.N. Economic Commission for Latin America and the Caribbean in 2018, follows a similar path as the Aarhus Convention in achieving the objectives associated with Principle 10 of the Rio Declaration. Prityi points out, however, that the Brundltand report says law cannot do the work of communities and they require a healthy dose of participation and communication in the process. Process democracy is, however, based upon procedural rights, such as those afforded by the Aarhus Convention. The counterfactual example, when it comes to process rights of participation was presented in Mongolia. Thus, Sanchir Jargalsaikhan concludes that because Mongolia is not in the Aarhus Convention or Espoo Convention, no concept of "meaningful" public consultation is present.

Professor Santana, Judge Periera, and Dr. Byron-Cox of the U.N. take us to far points of environmental law that lead us to think beyond the chapters of this book. Dr. Byron-Cox tells us that the weakest states—in his example, the S.I.D.S.—are effectively "indicator species" states, and Judge Santana tells us the same about prisoners—persons with the least freedom to alter and enable their environment are indicator species for individual human rights. In this sense, both the S.I.D.S. and the prisoner, like the indicator species in biology, serve as a measure of the environmental conditions that exist in a given locale. Note that the indicator species is not to be pitied or looked down upon, yet we dare not ignore it. As Dr. Byron-Cox tells us, what we do with the indicator species foretells what will happen with the rest of the species—us—in time, if the system continues in its current mode.

On the whole, this book thematically addresses the problems, the international and comparative law issues, the barriers and constraints caused by the globalization of environmental law, as it is implemented in the Global South and emerging economies. The Global South and emerging economies are no longer passive actors in the environmental global discourse. Rather, they are proactively and assertively shaping, advancing, and furthering environmental law.

Index