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Global Law and the Environment

Robert V. Percival

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GLOBAL LAW AND THE ENVIRONMENT

Robert V. Percival*

Abstract: This Article explores three areas in which globalization is profoundly affecting the development of a global environmental law. First, countries increasingly are borrowing law and regulatory innovations from one another to respond to common environmental problems. Although this is not an entirely new phenomenon, it is occurring at an unprecedented pace. Second, lawsuits seeking to hold companies liable for environmental harm they have caused outside their home countries are raising new questions concerning the appropriate venue for such transnational liability litigation and the standards courts should apply for enforcement of foreign judgments. Third, nongovernmental organizations are playing an increasingly important role in influencing corporate behavior by promoting greater informational disclosure and transparency to mobilize informed consumers.

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* Robert F. Stanton Professor of Law & Director of the Environmental Law Program, University of Maryland School of Law. The author would like to thank Peter Hogge, Esther Houseman, Molly Madden, and Megan Marzec for their research assistance with this article.

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INTRODUCTION

As this symposium confirms, the concept of “global law” has sufficiently matured that the term “global law” may no longer need to appear in quotation marks. This change reflects the profound effect globalization is having on the development of law and legal systems throughout the world, particularly in the environmental law field. As global environmental law develops, traditional distinctions between domestic and international law, and private and public law, are blurring.

This Article discusses the concept of global environmental law and then explores three areas in which globalization is profoundly affecting its development: adoption of transnational regulatory norms, transnational litigation, and transparency initiatives. Part I briefly explains the phrase “global environmental law” and its growing use. Part II discusses how countries increasingly borrow law and regulatory innovations from one another and adopt their own approaches to respond to common environmental problems. Although this is not an entirely new phenomenon, it is occurring at an unprecedented pace, at least in part because transnational regulatory norms to protect the environment are no longer developed primarily in a “top down” manner through multilateral consensus agreements. As this Part explains, this development is reflected in the outcomes of the 2009 Copenhagen and 2010 Cancún climate change negotiations that failed to produce a long sought-after global agreement to control emissions of greenhouse gases (GHGs). The Part also explores the regional movement to create global norms to regulate emissions of air pollutants from international maritime operations. It then discusses how countries are increasingly learning from one another and borrowing regulatory standards. This advancement

is illustrated by the global growth of bans on unreasonably dangerous products, such as asbestos and gasoline lead additives. As countries learn from the experience of others, regulatory innovations with diffuse origins are spreading more rapidly around the globe.

Part III examines the growth of transnational liability litigation as another source of emerging global law, as parties seek to hold companies liable for environmental harm they have caused outside their home countries. These lawsuits are raising new questions concerning the appropriate venue for such transnational liability litigation and the standards courts should apply for enforcement of foreign judgments. This Part focuses primarily on the rapidly metastasizing global litigation between residents of the oil-polluted Oriente region of Ecuador and the Chevron Corporation. In February 2011, this litigation, which initially had been filed in the United States during the early 1990s, ultimately produced the largest environmental judgment in history—an \$18 billion judgment against Chevron issued by a court in Ecuador. This Part also examines litigation by workers in Central American banana plantations who allegedly were rendered sterile by exposure to Dibromo-3-Chloropropane (DBCP), a pesticide banned in the United States because of its reproductive toxicity, and litigation against the British trading firm, Trafigura, for dumping toxic waste on a beach in the Côte d’Ivoire. Each of these cases reflects a new global legal landscape where poor plaintiffs from developing countries are seeking to hold accountable wealthy and powerful corporations that previously would be immune from challenge.

Part IV reviews emerging quasi-public/quasi-private global transparency and disclosure initiatives championed by nongovernmental organizations (NGOs) and private enterprises in collaboration with regulatory authorities. This Part explores how NGOs are playing an increasingly important role in influencing corporate behavior by promoting greater informational disclosure and transparency to mobilize informed consumers. These include the Equator Principles governing funding of development projects by multinational banks, the Roundtable on Sustainable Palm Oil, and the Sustainable Apparel Coalition. These initiatives, as well as the Dodd–Frank Wall Street Financial Reform legislation’s disclosure provisions concerning conflict minerals and payments to foreign governments, are promoting a new corporate ethic for assessing the environmental implications of development projects and “greening” the supply chains of multinational enterprises.

I. WHAT IS GLOBAL ENVIRONMENTAL LAW?

In my previous scholarship I explored the concept of global environmental law and the forces contributing to its emergence.¹ In this work I maintain that global environmental law is a useful concept to describe how environmental law is developing throughout the world without seeking rigidly to separate the field into domestic and international, or public and private environmental law.

“Global law” and “global environmental law” now have become part of the popular lexicon. This assertion is illustrated by Figures I and II that display the relative frequency with which these terms appeared in English-language books from 1940 to 2008, as revealed through use of Google’s Ngram research tool.² These figures demonstrate that the frequency with which both terms were used surged during the 1990s.

1. See generally Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 MD. J. INT’L L. 37 (2010); Robert V. Percival, *The Globalization of Environmental Law*, 26 PACE ENVTL. L. REV. 451 (2009); Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009).

2. This tool enables researchers to determine the frequency with which various terms appear in the enormous database of books scanned by Google. *Books Ngram Viewer*, GOOGLE, <http://ngrams.googlelabs.com/info> (last visited Oct. 17, 2011).

FIGURE I. FREQUENCY OF THE APPEARANCE OF THE TERM “GLOBAL ENVIRONMENTAL LAW” IN ENGLISH LANGUAGE BOOKS FROM 1940 TO 2008³

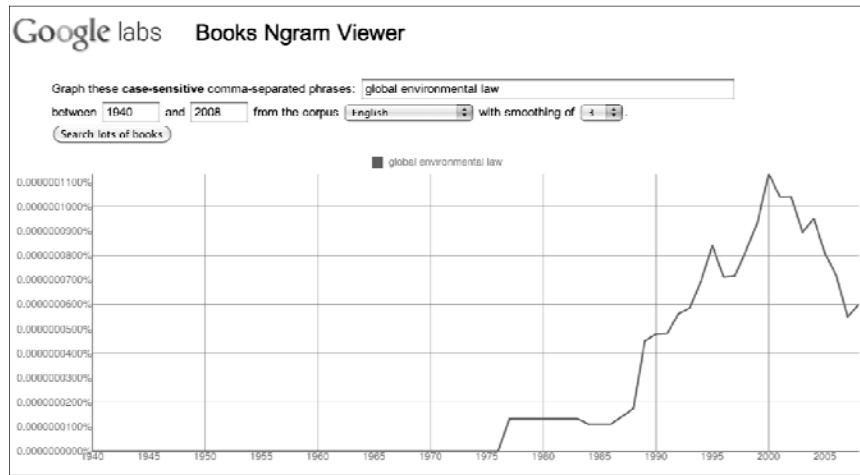
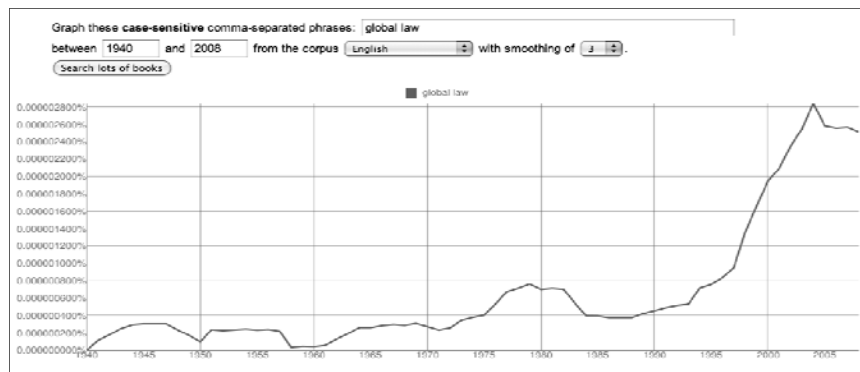


FIGURE II. FREQUENCY OF THE APPEARANCE OF THE TERM “GLOBAL LAW” IN ENGLISH LANGUAGE BOOKS FROM 1940 TO 2008⁴



3. Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, John Orwant, Steven Pinker, Martin A. Nowak & Erez Lieberman Aiden, *Google Ngram Viewer*, GOOGLE, <http://ngrams.googlelabs.com> (last visited Sept. 19, 2011); see also Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, SCIENCE, Jan. 14, 2011, at 176.

4. Michel et al., *supra* note 3.

The use of the term “global environmental law” appears to better capture the complex realities of current developments in the environmental law field, because traditional disciplinary distinctions between domestic and international law, and between private and public law, continue to erode, as demonstrated below. Among the factors contributing to this phenomenon are the greater connectedness of civil society throughout the world,⁵ growth of international trade and multinational corporate enterprises, increased concern for the environment throughout the world, and greater global collaboration between environmental officials and NGOs. As multinational companies push for greater harmonization of regulatory standards, NGOs are assisting regulators to improve transboundary enforcement.⁶ Despite the current anti-environmental fervor of the Republican-controlled U.S. House of Representatives,⁷ global concern for the environment has surged to a point where a company’s environmental neglect in any remote corner of the world is unlikely to pass without notice in its home venue. As a result, norms defining acceptable corporate behavior are converging, even in jurisdictions that have not formally updated their regulatory standards. Whether one believes that globalization or the current evolutionary path of legal norms is desirable or undesirable, global law is here to stay.

II. EMERGING TRANSNATIONAL ENVIRONMENTAL REGULATORY NORMS

The increasing integration of the global economy has given greater force to the need for harmonization and coordination of national regulatory policies. For example, following the global financial crisis of

5. This central feature of globalization—improvements in communication technology and the rise of the internet—was popularized by journalist Thomas L. Friedman in his book *THE WORLD IS FLAT* (2005).

6. *MAKING LAW WORK: ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT* 553–54 (Durwood Zaelke et al. eds., 2005), available at http://www.inece.org/mlw/Chapter6_NGOCComplianceStrategies.pdf.

7. Paul Quinlan, ‘Anti-Environmental’ House Freshman Leads Charge Against Obama’s Clean Water Agenda, *N.Y. TIMES GREEN*, (May 3, 2011), <http://www.nytimes.com/gwire/2011/05/03/03greenwire-anti-environmental-house-freshman-leads-charge-98149.html> (last visited Aug. 27, 2011); see also Dina Fine Maron & Saqib Rahim, *Democrats Mount Rear-Guard Action Against Republican Assault on EPA Climate Rules*, *N.Y. TIMES GREEN* (Feb. 17, 2011), <http://www.nytimes.com/cwire/2011/02/17/17climatewire-democrats-mount-rear-guard-action-against-re-29952.html> (last visited Aug. 27, 2011); Kate Sheppard, *The Most Anti-Environment Congress Ever?*, *MOTHER JONES BLUE MARBLE* (Sept. 12, 2011, 12:36 PM), <http://motherjones.com/blue-marble/2011/09/most-anti-environment-congress-ever>.

2008, particular effort was made to strengthen coordination of global economic policy.⁸ This was achieved in part by broadening the representation on the Basel Committee on Banking Supervision to include representation from each of the members of the G-20 major economies of the world.⁹ In addition, the Basel Committee adopted Basel III regulatory standards to govern capital adequacy and liquidity of banks.¹⁰ The Basel negotiations illustrate a trend that is occurring in environmental areas as well—multilateral treaties are being deemphasized in favor of informal agreements on coordinated regulatory policies.¹¹

Informal multilateral agreements ultimately contribute to an emerging species of global law: transnational norms defining acceptable and unacceptable corporate conduct. By 1999, the United Nations listed a total of 229 multilateral treaties relating to the environment, a significant jump from the forty-seven environmental treaties that existed through 1970.¹² However, many now believe that we have passed the high point of global efforts to negotiate multilateral treaties to address the planet's environmental problems.¹³ To be sure, negotiations continue on some important global environmental treaties, including an effort to create a legally binding instrument on global mercury emissions.¹⁴ However, the negotiation of new international treaties no longer seems to be the primary focal point of developing global environmental law.¹⁵ Replacing it is a new paradigm: countries increasingly emphasize bilateral negotiations and informal efforts to coordinate regulatory policies and to

8. Press Release, Basel Comm., Initiatives in Response to the Crisis by the Basel Comm. (Mar. 30, 2009), <http://www.bis.org/press/p090330.htm>.

9. Press Release, Basel Comm., Basel Committee Broadens its Membership (June 10, 2009), <http://www.bis.org/press/p090610.htm>. This included adding Argentina, Indonesia, Saudi Arabia, South Africa, and Turkey as well as Hong Kong SAR and Singapore. *Id.*

10. Press Release, Basel Comm., Basel III Rules Text and Results of the Quantitative Impact Study Issued by the Basel Committee (Dec. 16, 2010), <http://www.bis.org/press/p101216.htm>.

11. See David Doniger, *The Copenhagen Accord: A Big Step Forward*, SWITCHBOARD (Dec. 21, 2009), http://switchboard.nrdc.org/blogs/ddoniger/the_copenhagen_accord_a_big_st.html (suggesting that the formal negotiating process under the UNFCCC has failed).

12. *Environmental Law Instruments*, UNITED NATIONS ENV'T PROGRAMME, http://hqweb.unep.org/Law/Law_instruments/index_complete_list.asp (last visited Aug. 28, 2011).

13. See Robert Falkner et al., *International Climate Policy after Copenhagen: Towards a 'Building Blocks' Approach*, 1 GLOBAL POL'Y 252, 252 (2010), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1758-5899.2010.00045.x/full>.

14. See, e.g., Melanie Ashton et al., EARTH NEGOTIATIONS BULL. (Int'l Inst. for Sustainable Dev.) (June 8, 2010), <http://www.iisd.ca/download/pdf/enb2802e.pdf>.

15. Falkner et al., *supra* note 13.

borrow regulatory innovations from one another.¹⁶ As the rest of this section demonstrates, this paradigm shift is illustrated by how the nations of the world are responding to the problems of (1) climate change, (2) air pollution from global maritime operations, and (3) unreasonably dangerous substances such as asbestos and gasoline lead additives.

A. *The Search for an Elusive Post-Kyoto Global Response to Climate Change*

Beginning with the first United Nations Conference on the Human Environment, held in Stockholm in 1972, the nations of the world convene global “earth summits” at ten-year intervals.¹⁷ Interest and participation has increased over the years. Although 113 nations attended the summit in Stockholm,¹⁸ 178 nations attended the 1992 Rio Earth Summit.¹⁹ At the Rio conference, the U.N. Framework Convention on Climate Change (UNFCCC) was signed,²⁰ setting in motion a process designed to culminate in legally binding limits on global emissions of GHGs. The U.S. Senate quickly ratified the UNFCCC in October 1992.²¹

Following the success of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, there was considerable optimism that a similar approach could be used successfully to combat climate change.²² Things started out well. In December 1997, the Kyoto Protocol to the UNFCCC was adopted, specifying modest reductions in GHG emissions

16. *Id.*

17. *The History of Sustainable Development in the United Nations*, U.N. CONF. ON SUSTAINABLE DEV., <http://www.uncsd2012.org/rio20/index.php?menu=22> (last visited Aug. 28, 2011) (discussing Rio Earth Summit of 1992 and Johannesburg Earth Summit of 2002); *see also About Rio+20*, U.N. CONF. ON SUSTAINABLE DEV., <http://www.uncsd2012.org/rio20/index.php?menu=17> (last visited Aug. 28, 2011) (discussing the June 2012 Conference on Sustainable Development to take place in Brazil).

18. Stockholm 1972 - Participants, U.N. ENV'T PROGRAMME, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1519&l=en> (last visited June 2, 2011).

19. *United Nations Conference on Environment and Development (UNCED)*, 12 ENCYCLOPÆDIA BRITANNICA MICROPÆDIA 149 (15th ed. 2010) (“The Earth Summit was the largest gathering of world leaders in history.”).

20. *Id.*

21. *UN Framework Convention on Climate Change*, U.S. ENVTL. PROTECTION AGENCY (Apr. 14, 2011), http://epa.gov/climatechange/policy/international_unfccc.html.

22. C. Boyden Gray, *Copenhagen Failure vs. Montreal Success*, ATLANTIC COUNCIL NEW ATLANTICIST POL'Y & ANALYSIS BLOG (Dec. 9, 2009), http://www.acus.org/new_atlanticist/copenhagen-failure-vs-montreal-success.

below a 1990 emissions baseline that developed countries were to achieve during the period from 2008 to 2012.²³ Action on emissions controls for developing countries was deferred out of considerations of fairness because these countries had contributed so little to the existing buildup of GHGs in the atmosphere.²⁴

But things soon went wrong. Although it was understood that rapidly developing countries like China and India would have to commit to controlling their GHG emissions in the future,²⁵ President George W. Bush used the failure of the Kyoto Protocol to require China or India to reduce their emissions of GHGs as a justification for withdrawing U.S. assent to the Kyoto Protocol.²⁶ Shortly after taking office, he also repudiated a campaign pledge to support legislation to control emissions of carbon dioxide.²⁷ President George W. Bush's retraction undercut his new Environmental Protection Agency (EPA) Administrator, Christie Todd Whitman, who had just returned from an international conference of environmental ministers in Trieste, where she had assured her counterparts that the United States would act to control its GHG emissions.²⁸ As the expiration date of the Kyoto Protocol's compliance period approaches at the end of 2012, it has proven impossible to reach a global consensus on a new treaty to combat climate change.

This was confirmed at the 15th Conference of the Parties (COP-15) to the UNFCCC held in Copenhagen in December 2009. Participants in a Conference of the Parties (COP-13) held in Bali in December 2007 adopted the "Bali Road Map" to establish a timetable for negotiating a successor to the Kyoto Protocol.²⁹ This adoption set a timetable for completing a new global agreement by the end of 2009.³⁰ However, in the months before the Copenhagen Conference in December 2009, it

23. *Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Aug. 28, 2011).

24. *Id.*

25. See *Climate Change: The Big Emitters*, BBC NEWS (July 4, 2005), <http://news.bbc.co.uk/2/hi/science/nature/3143798.stm> (noting the sharp increase in emissions from China and India).

26. See David E. Sanger, *Bush Seeks Middle Ground on Global Warming*, N.Y. TIMES (June 11, 2001), <http://www.nytimes.com/2001/06/11/world/11CND-PREXY.html>.

27. BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 82–85, 88–90 (2008).

28. *Id.* Gellman reports that Cheney engineered this stunning policy reversal by carefully excluding EPA and the State Department from having any input into the decision and ensuring that Bush would sign the confirming document minutes before Whitman and the Secretary of State arrived at the White House to protest.

29. *The United Nations Climate Change Conference in Bali*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/meetings/cop_13/items/4049.php (last visited Aug. 28, 2011).

30. *Id.*

became apparent that a comprehensive global agreement to limit all significant sources of GHG emissions would be very difficult to achieve, particularly because of continuing disagreements between developed and developing nations.³¹ In early September 2009 the government of India released a report projecting that India's emissions of GHGs could quadruple over the next twenty years.³² But, India's Environment Minister Jairam Ramesh emphasized that on a per capita basis India's emissions would remain below the per capita emissions of developed countries.³³ Five independent studies released by India's government project that the country's emissions will rise from 1.4 billion tons in 2008 to between 4 billion and 7.3 billion tons in 2031.³⁴ The country's per capita emissions are forecast to rise to between 2.77 and nearly 5 tons per capita compared to a global average of 4.22 tons per capita in 2005.³⁵ At the same time, Chinese economists released a study concluding that it would cost China \$438 billion annually to reduce the country's GHG emissions in 2030.³⁶

Further progress has stalled. At the Asian-Pacific Economic Cooperation (APEC) summit in Singapore in November 2009, President Obama agreed to a proposal by Lars Løkke Rasmussen, the prime minister of Denmark, to postpone seeking a new, legally binding global treaty to reduce emissions of GHGs at the Copenhagen climate conference.³⁷ The decision reflected the reality that insufficient progress has been made in preliminary negotiating sessions to prepare the way for a global consensus on a new treaty. Instead, participants in the Copenhagen summit agreed they would try to save face by announcing a "political agreement" on GHG controls, leaving many difficult issues to be resolved in subsequent negotiations.³⁸ Some argued that this delay

31. Tom Zeller Jr., *Ahead of Copenhagen Climate Talks, Voices of Hope and Discord*, N.Y. TIMES GREEN, (Nov. 10, 2009, 4:21 PM), <http://green.blogs.nytimes.com/2009/11/10/ahead-of-copenhagen-climate-talks-voices-of-hope-and-discord>.

32. James Lamont et al., *India's Growth Set to Lift Emissions Fourfold*, FIN. TIMES, Sept. 3, 2009, at 3.

33. *Id.*

34. *Id.*

35. *Id.*

36. Kathrin Hille & Fiona Harvey, *China's High Price for Cuts in Emissions*, FIN. TIMES, Sept. 2, 2009, at 6.

37. David Adam et al., *No Deal, We're Out of Time, Obama Warns*, GUARDIAN, Nov. 16, 2009, at 1; see also Jonathan Watts, *Copenhagen Climate Summit Hopes Fade as Obama Backs Postponement*, GUARDIAN (Nov. 15, 2009), <http://www.guardian.co.uk/environment/2009/nov/15/obama-copenhagen-emissions-targets-climate-change>.

38. Watts, *supra* note 37.

would enable the 192 nations participating in the negotiations to “get it right” rather than being pressured into hasty compromises at Copenhagen.³⁹

In the hopes of reigniting progress, leaders of particular countries announced their own standards to combat global climate change. For example, a week before the Copenhagen Conference, both the United States and China revealed what they were willing to do to reduce their emissions of GHGs. In line with the Waxman–Markey Bill⁴⁰ that passed the House in June 2009, President Obama announced that the United States would promise to reduce its GHG emissions by seventeen percent below 2005 levels by 2020.⁴¹ He also promised to attend part of the Copenhagen Conference while on his way to Sweden to accept the Nobel Peace Prize.⁴² China announced that Premier Wen Jiabao would attend the Copenhagen Conference.⁴³ While China did not pledge to reduce the absolute level of its GHG emissions, it announced that it would seek to reduce the “carbon intensity” of its economy (levels of carbon dioxide emissions per unit of gross domestic product) by forty to forty-five percent by 2020.⁴⁴

Observers viewed both the U.S. and Chinese pledges in glass-half-empty/glass-half-full terms. They represented progress in the sense that for the first time both nations—the two largest emitters of GHGs in the world—made serious promises to the international community to start controlling their emissions. Yet the pledges were disappointing to many environmentalists because they clearly were inadequate to achieve the G-20’s previously announced goal of containing global warming to no more than two degrees Celsius.⁴⁵ While the United States had proposed

39. *Id.*

40. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

41. Press Release, White House, President to Attend Copenhagen Climate Talks (Nov. 25, 2009), <http://www.whitehouse.gov/the-press-office/president-attend-copenhagen-climate-talks>.

42. Darren Samuelsohn & Lisa Friedman, *Obama Announces 2020 Emissions Target, Dec. 9 Copenhagen Visit*, N.Y. TIMES GREEN (Nov. 25, 2009), <http://www.nytimes.com/cwire/2009/11/25/25climatewire-obama-announces-2020-emissions-target-dec-9-22088.html>.

43. Associated Press, *China Vows to Slow Carbon Emissions Growth*, MSNBC.COM (Nov. 26, 2009), http://www.msnbc.msn.com/id/34160921/ns/us_news-environment/t/china-vows-slow-carbon-emissions-growth.

44. *Id.*

45. Ben Webster, *Proposed Cuts in CO2 Can't Stop a Catastrophe, Says Lord Stern*, TIMES (London), Dec. 7, 2009, at 7; *see also* Ben Webster, *Copenhagen Emissions Targets 'Not Enough to Avert Catastrophic Warming'*, TIMES (London) (Dec. 7, 2009), <http://www.timesonline.co.uk/tol/news/environment/article6946675.ece>; Jeffery Frankel, *The Copenhagen Accord: Real Progress Through 2020 Emission Goals?*, E. ASIA F. (Mar. 19, 2010),

to the Chinese leadership that the two countries package their proposals together as part of a “G-2” effort to influence the Copenhagen negotiations, the Chinese insisted that any coordination should be done in the larger context of the G-20.⁴⁶

Representatives from 193 countries participated in the Copenhagen Conference and 119 heads of state attended, including President Obama, who made the most of his brief time there by inserting himself into a meeting with the leaders of China, Brazil, India, and South Africa.⁴⁷ Obama’s personal effort helped produce “The Copenhagen Accord,”⁴⁸ an agreement between the United States and leaders of these rapidly developing countries that was applauded by most, but not all of the other countries.⁴⁹ The Accord recognizes “the scientific view that the increase in global temperature should be below 2 degrees Celsius”⁵⁰ and calls for consideration by 2015 of strengthening this long-term goal to 1.5 degrees Celsius.⁵¹ Developed countries “commit to implement” economy-wide GHG emissions reductions by 2020, while developing countries will implement “[n]ationally appropriate mitigation actions.”⁵² These reductions and actions were to be identified and reflected in submissions to the Conference of the Parties by January 31, 2010.⁵³ In the face of objections from Bolivia, Cuba, Nicaragua, Sudan, Tuvalu, and Venezuela, the Conference of the Parties simply agreed to “take note” of the Copenhagen Accord, rather than formally adopting it.⁵⁴

<http://www.eastasiaforum.org/2010/03/19/the-copenhagen-accord-real-progress-through-2020-emission-goals>.

46. *China Rejects G2, Short-Term Funds*, CHINA DAILY (Dec. 12, 2009), http://www.chinadaily.com.cn/bizchina/2009-12/12/content_9165554.htm.

47. David Corn & Kate Sheppard, *Obama’s Copenhagen Deal*, MOTHER JONES (Dec. 18, 2009, 5:46 PM), <http://motherjones.com/environment/2009/12/obamas-copenhagen-deal>.

48. The text of the Accord is provided in U.N. Climate Change Conference 2009, Copenhagen, Den., Dec. 7–19, 2009, *Rep. of the Conference of the Parties on its Fifteenth Sess.*, FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) [hereinafter *Copenhagen Accord*], available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

49. Heather Allen, *Countries Pull Together in Final Hours of Copenhagen*, SWITCHBOARD (Dec. 19, 2009), http://switchboard.nrdc.org/blogs/hallen/countries_pull_together_in_the.html.

50. *Copenhagen Accord*, *supra* note 48, at 5.

51. *Id.* at 7.

52. *Id.* at 6.

53. *Id.*

54. *Four Countries Hold Up Copenhagen Accord*, DECCAN HERALD (Dec. 19, 2009), <http://www.deccanherald.com/content/42118/four-countries-hold-up-copenhagen.html>; John M. Broder, *Climate Goal Is Supported by China and India*, N.Y. TIMES, Mar. 10, 2010, at A9, available at <http://www.nytimes.com/2010/03/10/science/earth/10climate.html>.

The outcome of the Copenhagen Conference reflects changing global political realities. China, Brazil, and India are now vitally important to the success of any global effort to control emissions of GHGs because of their rapidly growing economies and corollary GHG contributions. Their interests no longer are entirely congruent with the rest of the G-77 developing countries. China now is the world's leading emitter of GHGs, emitting 7.7 billion tons of carbon dioxide in 2009, compared to 5.4 billion tons by the United States, which is second in absolute terms.⁵⁵ However, in per-capita terms China's emissions are only about one-third those of the United States.⁵⁶

Although virtually all 193 nations agreed that climate change represents a global crisis that demands fundamental changes in the world's energy infrastructure, their failure to produce a legally binding document mandating these changes reflects another global political reality—international law is moving away from multilateral consensus agreements due to the lack of a global enforcement infrastructure. As discussed above, developing instead is a kind of “global law”; countries now borrow law from one another and a few principal approaches to common problems emerge.

Everyone understood the inadequacy of the commitments that were announced in Copenhagen.⁵⁷ This understanding itself was a positive development even if the failure to achieve more dramatic emission reduction commitments was disappointing to most observers. As the damaging effects of climate change become more visible, domestic political support for more dramatic action is likely to grow in many countries, even if it is unlikely that a legally binding international treaty will be adopted.

While much of the global press portrayed Copenhagen as a failure, some environmentalists disputed this assessment, arguing that it made a necessary end run around obstructionist countries that rendered the consensus-driven COP process ineffective.⁵⁸ Shortly after the

55. Mark McCormick & Paul Scruton, *An Atlas of Pollution: The World in Carbon Dioxide Emissions*, GUARDIAN, <http://image.guardian.co.uk/sys-files/Guardian/documents/2011/02/10/CarbonWeb.pdf> (last visited Aug. 28, 2011).

56. Simon Rogers & Lisa Evans, *World Carbon Dioxide Emissions Data by Country: China Speeds Ahead of the Rest*, GUARDIAN DATA BLOG (Jan. 31, 2011, 2:30 AM), <http://www.guardian.co.uk/news/datablog/2011/jan/31/world-carbon-dioxide-emissions-country-data-co2>.

57. See John Vidal et al., *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, GUARDIAN, Dec. 19, 2009, at 1, available at <http://www.guardian.co.uk/environment/2009/dec/18/copenhagen-deal>.

58. For example, David Doniger, Policy Director for the Natural Resources Defense Council's Climate Center, hailed the Copenhagen Accord as “a big step forward” and disputed arguments that

Copenhagen Conference adjourned, Yvo de Boer, the U.N. official who was in charge of the talks, called for an end to “fingerpointing” and “recriminations.”⁵⁹ His statement was widely viewed as a rebuke to British Climate Minister Ed Miliband, who had blamed China for blocking greater progress at Copenhagen, sparking an angry response from Chinese officials.⁶⁰

A major question following the Copenhagen Accord was how many countries would submit emission reduction commitments and nationally appropriate mitigation actions by the January 31, 2010 deadline. Although there was considerable concern that China and India would not participate in this process, both the Chinese and Indian governments transmitted letters to the United Nations agreeing to associate their countries with the Copenhagen Accord.⁶¹ China repeated its voluntary goal of reducing the carbon intensity of its economy by forty to forty-five percent below 2005 levels by 2020.⁶² India announced an aspirational target to reduce the carbon intensity of its economy by twenty to twenty-five percent below 2005 levels by 2020.⁶³ India’s Environment Minister Jairam Ramesh stated that by listing itself as joining the accord, the country strengthened its negotiation position on climate change.⁶⁴ As of April 2011, a total of 141 countries have agreed to the Copenhagen Accord.⁶⁵

B. Control of Emissions from Global Maritime Operations

Even though ocean shipping is a very energy-efficient mode of transport, ships are a significant, but as yet largely unregulated, source of GHG emissions.⁶⁶ The fuel that ships use is so dirty that it creates

it was a failure because it will not keep the global temperature rise below two degrees Celsius, it does not mandate specific emissions cuts, and the commitments are not legally binding. Doniger, *supra* note 11.

59. Fiona Harvey, *UN Urges End to Climate Wrangling*, FIN. TIMES, Dec. 24, 2009, at 4, available at <http://www.ft.com/cms/s/0/e7670746-efe3-11de-833d-00144feab49a.html#axzz1YSpTYNEm>.

60. *Id.*

61. Broder, *supra* note 54, at A9.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Copenhagen Accord*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5262.php (last visited Aug. 28, 2011).

66. Int’l Maritime Org. [IMO], Greenhouse Gas Emissions, <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/GHG-Emissions.aspx> (last visited Aug. 28, 2011).

enormous pollution; in fact, many ships use bunker fuel with such high sulfur content that it has been estimated that just sixteen of the world's largest ships can produce as much sulfur pollution as all of the world's cars.⁶⁷ It is also estimated that international shipping accounted for 870 million tons of GHG emissions in 2007, or 2.7% of global emissions.⁶⁸ Despite the significant pollution emitted by ocean-going ships, the Kyoto Protocol and UNFCCC do not speak directly to regulation of shipping emissions, and nations largely leave regulatory control to the International Maritime Organization (IMO).⁶⁹ But for decades the IMO has allowed ships to burn fuel containing up to 4.5% sulfur—4500 times more than the EU allows in gasoline.⁷⁰

1. *Efforts to Promote Further Reductions in Emissions from Ships*

In the absence of comprehensive environmental regulation for ships, countries and private shipping companies have fashioned various means to address the problem of shipping pollution. Countries have adopted multilateral agreements, entered into regional agreements, crafted their own regulatory standards, and one country has encouraged cooperation with private shipping companies. In addition, at least one shipping company has voluntarily undertaken measures to reduce its own pollution. An example of each one of these approaches is provided below.

First, in an attempt to reduce shipping pollution in the absence of a comprehensive global treaty, countries have entered into multilateral agreements, including Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL).⁷¹ As of the end of 2010, 150 countries, representing nearly all of the world's shipping, are parties to MARPOL.⁷² Different provisions of Annex VI authorize limitations

67. Fred Pearce, *How 16 Ships Create as Much Pollution as All the Cars in the World*, DAILY MAIL (London), Nov. 22, 2009, at 35, available at <http://www.dailymail.co.uk/sciencetech/article-1229857/How-16-ships-create-pollution-cars-world.html>.

68. Marine Env't Prot. Comm., Int'l Mar. Org., Executive Summary: Prevention of Air Pollution from Ships, Apr. 9, 2009, MEPC 59/4/7, at 6, available at http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D26046/4-7.pdf.

69. *See id.*

70. Pearce, *supra* note 67.

71. IMO, International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto (MARPOL): Annex VI: Prevention of Air Pollution from Ships, http://www5.imo.org/SharePoint/contents.asp?doc_id=678&topic_id=258#11 (last visited Aug. 28, 2011) [hereinafter MARPOL Annex VI].

72. IMO, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other

on the release of sulfur and nitrogen oxides from ship exhaust and the sulfur content of fuels.⁷³ They also allow countries to petition the IMO to establish emission control areas.⁷⁴

After it proved impossible to reach a global consensus on control of emissions from ships, countries have focused on fashioning regional approaches to combat this problem.

For example, on March 27, 2009, the United States and Canada petitioned the IMO to establish an emissions control area (ECA) encompassing the countries' coastlines.⁷⁵ The U.S.–Canada proposal was accepted in July 2009 at the 59th session of the Marine Environment Protection Committee (MEPC) of the IMO.⁷⁶ The North American ECA received formal approval at the 60th MEPC session in March 2010, and entered into force on August 1, 2011.⁷⁷

The North American ECA establishes a 230-mile buffer zone around the countries' coastlines.⁷⁸ While within this buffer zone, large ships will be subject to stricter emissions standards aimed at reducing the level of pollutants in the ships' emissions.⁷⁹ In order to achieve compliance with

Functions, at 101 (Aug. 1, 2011),

<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf>.

73. MARPOL Annex VI, *supra* note 71; *see also* IMO, International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto (MARPOL): The Protocol of 1997, http://www5.imo.org/SharePoint/contents.asp?doc_id=678&topic_id=258#30 (last visited Aug. 28, 2011) [hereinafter MARPOL Protocol of 1997].

74. IMO, The Protocol of 1997 (MARPOL Annex VI), <http://www.imo.org/ourwork/environment/pollutionprevention/airpollution/pages/the-protocol-of-1997-%28marpol-annex-vi%29.aspx> (last visited Aug. 28, 2011).

75. Press Release, U.S. Env'tl. Prot. Agency, U.S. Proposes to Slash Harmful Ship Emissions Along the Nation's Coastlines to Save Lives, (Mar. 30, 2009), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/b7129c28691a2b8685257589005ba9af!opendocument>. *See generally* IMO, *Sulphur Oxides (SOx) – Regulation 14*, <http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Sulphur-oxides-%28SOx%29-%E2%80%93-Regulation-14.aspx> (last visited Aug. 28, 2011) (describing ECAs as of October 2010).

76. Marine Env't Prot. Comm., IMO, Rep. on its 59th Sess., July 13–17, 2009, MEPC 59/24, at 29–30 (July 27, 2009), <http://www.uscg.mil/imo/mepc/docs/mepc59-report.pdf>.

77. Marine Env't Prot. Comm., IMO, Rep. on its 60th Sess., Mar. 22–26, 2010, MEPC 60/22, at 44 (Apr. 12, 2010), <http://www.uscg.mil/imo/mepc/docs/mepc60-report.pdf>.

78. Press Release, Env'tl. Prot. Agency, *supra* note 75; *see also* Marine Env't Prot. Comm., IMO, Interpretations of, and Amendments to, MARPOL Sulphur Oxides and Particulate Matter, MEPC 59/6/5, Annex II (Apr. 2, 2009), *available at* <http://www.epa.gov/nonroad/marine/ci/mepc-59-eca-proposal.pdf>.

79. Press Release, Env'tl. Prot. Agency, *supra* note 75; *see also* Marine Env't Prot. Comm., *supra* note 78.

the ECA, ships must use fuel with reduced sulfur content while within the ECA.⁸⁰ Additionally, starting in 2016, new ships will be subject to advanced technologies to control NO_x emissions.⁸¹ By 2020, the EPA anticipates these stringent emissions controls in the ECA will reduce shipping emission levels of NO_x, particulate matter (PM2.5), and SO_x respectively by 320,000, 90,000, and 920,000 tons.⁸² The EPA estimates that by 2020 the resulting pollution reduction could potentially save 8300 American and Canadian lives each year.⁸³

In addition to the ECA proposal, the United States is taking other steps to reduce shipping emissions. On April 30, 2010, the EPA issued a final rule for large ships equivalent to the standards adopted in amendments to Annex VI of MARPOL.⁸⁴ The emissions standards will have two stages of application. In 2011, all new engines will be required to employ more efficient engine technology, with anticipated NO_x reductions of fifteen to twenty-five percent below current levels.⁸⁵ In 2016, new engines will be required to employ high efficiency engine technology like selective catalytic reduction to achieve NO_x reductions of eighty percent below current levels.⁸⁶ In addition to these emission standards, EPA limited the sulfur content (maximum concentration of 1000 parts per million) of fuels to be used in U.S. waters.⁸⁷

After the December 2010 Cancún UNFCCC Conference failed to reach any international agreement for reducing GHG emissions from ships, Papua New Guinea proposed a reduction plan based on working with the private sector. Part of the plan involved charging vessels

80. *Ocean Vessels and Large Ships*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/otaq/oceanvessels.htm> [hereinafter *Ocean Vessels*]. From 2012 to 2014, vessels operating within the ECA cannot use fuel with sulfur concentrations greater than 10,000 parts per million (ppm). *Id.* Starting in 2015, the maximum allowable sulfur concentration in fuel is reduced to 1000 ppm. *Id.* In 2016, fuels will be subject to NO_x aftertreatment requirements. *Id.*

81. *Id.* NO_x and SO_x are terms that refer to the various oxides of nitrogen (NO, NO₂) and the various oxides of sulfur (SO₂ and SO₃), pollutants that can harm human health and the environment.

82. *See Ocean Vessels*, *supra* note 80.

83. Press Release, U.S. Env'tl. Prot. Agency, *supra* note 75.

84. *See Ocean Vessels*, *supra* note 80. The standards apply to all U.S.-flagged vessels with Category 3 marine diesel engines (engines with per-cylinder displacement of at least thirty liters). *Id.*

85. U.S. ENVTL. PROT. AGENCY, REGULATORY ANNOUNCEMENT, EPA-420-F-09-068, EPA FINALIZES MORE STRINGENT STANDARDS FOR CONTROL OF EMISSIONS FROM NEW MARINE COMPRESSION-IGNITION ENGINES AT OR ABOVE 30 LITERS PER CYLINDER 3 (2009), <http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f09068.pdf>.

86. *Id.*

87. *See Ocean Vessels*, *supra* note 80.

docking fees dependent on the level of carbon emitted.⁸⁸ However, negotiations toward an international agreement were again hampered by division over application of the principle of “common but differentiated responsibility.”⁸⁹ A group of developing countries including Argentina, Brazil, China, India, and Saudi Arabia opposed a global standard; as a result, all language regarding shipping was removed from the negotiating text.⁹⁰

Finally, at least one private shipping company has undertaken its own pollution reduction plan. In September 2010, the Danish firm Maersk Line, the world’s largest container shipping company, announced that it would voluntarily use low-sulfur fuel while at berth in the port of Hong Kong, which handles nearly one-eighth of the world’s container ship traffic. Along with Civic Exchange, a Hong Kong-based NGO, Maersk urged all other Hong Kong shipping carriers to make the same commitment.⁹¹ Maersk estimates that the switch to low-sulfur fuel will cost an extra one million dollars a year, but that it will reduce emissions from its ships by eighty percent.⁹²

In addition, in February 2011, Maersk announced that it had ordered a new fleet of the ten largest container ships ever built—ships specifically designed to reduce carbon emissions. The ships, which will be built by Daewoo Shipbuilding in South Korea, are to be called the “Triple E” class because they provide economies of scale, energy efficiency, and environmental improvements.⁹³ Maersk estimates that the ships will produce fifty percent less carbon emissions than existing ships operating between Asia and Europe.⁹⁴

88. See Richard Black, *Shipping to Steer Cleaner Carbon Course*, BBC NEWS (Dec. 6, 2010, 2:00 PM), <http://www.bbc.co.uk/news/science-environment-11931883>. The Papua New Guinea proposal relied on engagement with the Carbon War Room ship efficiency ratings system described *infra*, note 107. *Id.*

89. *Cancun Fails to Deliver on Ship Emissions*, SEAS AT RISK (Dec. 11, 2010), http://www.seas-at-risk.org/news_n2.php?page=363.

90. *Id.*; see also LLOYD’S REGISTER, THE OUTCOME OF COP 16 (2010), http://www.lr.org/Images/COP16%20briefing%20note_tcm155-205773.pdf. The estimated \$10 billion that would be raised by some form of carbon pricing could be devoted to developing countries’ transition to shipping industries with low carbon footprints. *Id.*

91. Pamela Boykoff, *Ship Firm Floats Plan to Cut Hong Kong Smog*, CNN (Sept. 7, 2010, 1:39 PM), <http://edition.cnn.com/2010/BUSINESS/09/07/maersk.hong.kong.pollution/index.html>.

92. *Id.*

93. John Vidal, *Future of Ships: 20 Storeys Tall and 860m Bananas on Board*, GUARDIAN, Feb. 22, 2011, at 15 [hereinafter *Future of Ships*]; see also John Vidal, *Maersk Claims New ‘Mega Containers’ Could Cut Shipping Emissions*, GUARDIAN (Feb. 21, 2011, 4:21 PM) [hereinafter *Mega Containers*], <http://www.guardian.co.uk/environment/2011/feb/21/maersk-containers-shipping-emissions>.

94. *Future of Ships*, *supra* note 93; *Mega Containers*, *supra* note 93.

2. *IMO Consideration of a Global Approach to Reduce Ship Emissions*

Although for years the IMO has continued to resist efforts to adopt a more global approach, in September 2010 the IMO's MEPC met in London to discuss methods and plans to reduce shipping emissions globally.⁹⁵ Developed nations represented at the meeting stressed the importance of equal treatment of all countries as necessary for the functional economic effect of market-based mechanisms.⁹⁶ Developing countries argued that the principle of "common but differentiated responsibility" reflected in the UNFCCC dictates that they should bear less of the burden of reducing emissions.⁹⁷

Two technical and operational measures examined at the London MEPC meeting included an Energy Efficiency Design Index (EEDI) and a Ship Energy Efficiency Management Plan (SEEMP).⁹⁸ The EEDI is a performance-based instrument that establishes a mandatory energy efficiency level for all new ships.⁹⁹ New ships can meet the required improvements in efficiency through any future cost-effective design measures.¹⁰⁰ The SEEMP is a compilation of best practices for fuel-efficient functioning of vessels.¹⁰¹ Although both the EEDI and SEEMP are currently voluntary measures, both measures were circulated to be considered for adoption by IMO parties at the July 2011 MEPC meeting.¹⁰²

While the London IMO meeting participants gave thorough consideration to multiple methods that could be components of a broader strategy to reduce shipping emissions, the parties were unable to reach

95. Will Nichols, *IMO Floats Proposal for Cap on Shipping Emissions*, BUSINESSGREEN (Sept. 29, 2010), <http://www.businessgreen.com/bg/analysis/1869813/imo-floats-proposal-cap-shipping-emissions>.

96. *Id.*

97. Interview with Peter Oppenheimer, Senior Counsel for Int'l Law, Nat'l Oceanic and Atmospheric Admin. (Oct. 12, 2010).

98. IMO, *Marine Environment Protection Committee (MEPC) 61st Session: 27 September to 1 October 2010* (Oct. 1, 2010), <http://www.imo.org/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-61st-Session.aspx>.

99. *Id.*

100. *Id.*

101. *Ship Energy Efficiency Management Plan*, INT'L CHAMBER OF SHIPPING, <http://www.shippingandco2.org/SEEMP.htm> (last visited Aug. 30, 2011).

102. *Proposed GHG amendments to MARPOL Convention Circulated for Adoption in 2011, as IMO Heads to Cancún Climate Change Conference*, INT'L MAR. ORG. (Nov. 25, 2010), <http://www.imo.org/MediaCentre/PressBriefings/Pages/GHG-amendments-criculated.aspx>.

an agreement.¹⁰³ Several potential deals were rejected at the meeting, including a carbon tax across the entire shipping industry and a shipping emissions cap-and-trade program.¹⁰⁴ The lack of agreement is largely attributable to differences between developed and developing countries regarding whether mandatory emission reductions should be part of an agreement.¹⁰⁵

Other factors complicating an agreement include the difficulty associated with measuring shipping emissions and whether to apply the GHG reduction and efficiency requirements to existing ships.¹⁰⁶ Measuring emissions from vessels registered and operating all over the world involves great practical difficulty.¹⁰⁷ Emissions are currently measured as a function of fuel use when ships refuel at port.¹⁰⁸ Additionally, ownership is complex in international shipping. A ship could be owned by a company in one country, registered in a second country, and operate between two additional countries.¹⁰⁹ These complexities in the measurement of individual vessel emissions and in vessel ownership make it difficult to attribute responsibility for shipping emissions to one particular country.

103. *Choppy Waters Ahead for Global Shipping Emissions Deal*, BUSINESSGREEN (Oct. 4, 2010), <http://www.businessgreen.com/bg/news/1870093/choppy-waters-ahead-global-shipping-emissions-deal>.

104. *Id.*

105. Nichols, *supra* note 95.

106. *Id.*

107. See Will Nichols, *Have the EU's Shipping Emissions Proposals Capsized?*, BUSINESSGREEN (Dec. 23, 2010), <http://www.businessgreen.com/bg/news/1933984/eus-shipping-emissions-proposals-capsized>. But see Black, *supra* note 88; *Smokestack Lightening*, THE ECONOMIST, Dec. 11, 2010, at 76, available at <http://www.economist.com/node/17676040>; Fiona Harvey, *Cancun – The Shipping News*, FIN. TIMES ENERGY SOURCE (Dec. 6, 2010, 11:57 AM), <http://blogs.ft.com/energy-source/2010/12/06/cancun-the-shipping-news>. Richard Branson founded the Carbon War Room project to create an online database grading over 60,000 commercial ships according to emissions produced. The project aims at producing a data hub to enable businesses and customers to make more informed business decisions regarding their carbon footprint from shipping. There is great potential for the website to serve as a tool to green corporations' supply chains and to allow government to assign differential landing charges according to ship emission levels. Black, *supra* note 88.

108. APOLLONIA MIOLA ET AL., JOINT RESEARCH CTR., REGULATING AIR EMISSIONS FROM SHIPS: THE STATE OF THE ART ON METHODOLOGIES, TECHNOLOGIES AND POLICY OPTIONS 23–24 (2010), http://ec.europa.eu/dgs/jrc/downloads/jrc_reference_report_2010_11_ships_emissions.pdf; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, [2 ENERGY] 2006 IPCC GUIDELINES FOR NATIONAL GREENHOUSE GAS INVENTORIES 3.10 (2006), http://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/2_Volume2/V2_3_Ch3_Mobile_Combustion.pdf.

109. PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE TECHBOOK: MARINE SHIPPING 2 (2010), <http://www.pewclimate.org/docUploads/MarineShipping.pdf>.

Another complicating factor is the issue of whether to apply standards retroactively to already-existing vessels. Even if the IMO were to establish standards applicable to new ships tomorrow, it would take a long time for reductions in shipping emissions to be felt throughout the vessel fleet. Most ships have a lifetime of at least twenty years; unless emission reduction requirements apply to existing ships, the full decrease in emissions will not take effect until the fleet turns over.¹¹⁰ But forcing existing ships to undergo retrofitting to meet increased standards could be an expensive proposition for ship owners and operators.

Ultimately, the inability of these broader international forums to reach agreements targeting shipping emissions increases the expectation that nations will turn to regional plans to achieve reductions.¹¹¹ The next IMO meeting was in July 2011, and post-Cancún, the IMO is still the primary holder of authority to regulate international shipping emissions.¹¹² However, the EU has pledged to regulate shipping emissions within its boundaries if substantial steps toward global agreement are not taken by 2012.¹¹³ If there are no steps toward international agreement by 2012, the EU plans to incorporate shipping emissions into the EU Emissions Trading Scheme for 2013.¹¹⁴

*C. Global Consensus on Unreasonably Dangerous Products:
Asbestos and Gasoline Lead Additives*

While harmonization will not generally result in unanimous adoption of certain norms, something close to unanimous adoption has been achieved regarding two unreasonably dangerous products: asbestos and gasoline lead additives. In the past, when the developed world banned or severely restricted the use of a product or chemical, companies often redoubled their efforts to create markets for it in the developing world. For example, when the EPA was considering phasing out all remaining uses of asbestos in the early 1980s, the Canadian asbestos industry's trade association, the Asbestos Institute, persuaded the World Bank's

110. Nichols, *supra* note 95.

111. *Choppy Waters Ahead*, *supra* note 103.

112. *Shipping Left to Plot GHG Course, for Now*, CARBON POSITIVE (Dec. 15, 2010), <http://www.carbonpositive.net/viewarticle.aspx?articleID=2218>.

113. *Id.*

114. *See* Nichols, *supra* note 107. However, a report by the Joint Research Centre of the European Commission challenges the enforceability of any such program. The report describes how any countries that try to exclude noncompliant vessels from docking could face legal action. If the ships are flying flags of countries outside of the territorial jurisdiction of the EU, excluding countries would need an extra-territorial basis for jurisdiction. *Id.*

fledgling Environment Division to promote greater use of asbestos in developing countries.¹¹⁵ When the Environmental Defense Fund exposed what had happened, World Bank President Barber Conable quickly apologized and vowed that it would not happen again.¹¹⁶

Today nearly all the developed world has formally banned or largely eliminated the use of asbestos. The International Ban Asbestos Secretariat lists fifty-five countries that have adopted national asbestos bans and two others—Singapore and Taiwan—that no longer use the product.¹¹⁷ While global consumption of asbestos had been declining, in recent years there has been a sharp increase in the use of this deadly product in China and India, which have not followed the lead of the developed world in banning or strictly controlling asbestos.¹¹⁸ China is now the world's largest consumer and second-largest producer of asbestos, using 626,000 metric tons of asbestos fiber in 2007 and mining 280,000 tons of it in 2008.¹¹⁹ India is the next largest consumer of asbestos, though it uses less than half as much as China.¹²⁰

The asbestos example illustrates that globalization has not entirely halted the export of unreasonably dangerous products from developed countries to the developing world. However, a greater success story for global health is the phaseout of leaded gasoline. Congress and the EPA banned the use of lead additives in gasoline, effective in 1986, after overwhelming evidence revealed that it contributed to widespread lead poisoning that caused extensive neurological damage in children.¹²¹ This phase-out is widely believed to be one of the greatest public health

115. Michael Huncharek, *Exporting Asbestos: Disease and Policy in the Developing World*, 14 J. PUB. HEALTH POL'Y 51, 52 (1993), available at <http://www.jstor.org/pss/3342826>; see also Rick Boychuck, *Asbestos Exports: Canada Helps a Killer Industry*, NEW INTERNATIONALIST, March 1988, at 26; Laurie Kazan-Allen, *Canadian Asbestos: A Global Concern*, INT'L BAN ASBESTOS SECRETARIAT (Oct. 23, 2003), http://ibasecretariat.org/lka_ottawa_conf_rep_03.php.

116. As a young attorney for the Environmental Defense Fund, I personally participated in these events, including the meeting with President Conable.

117. *Current Asbestos Bans and Restrictions*, INT'L BAN ASBESTOS SECRETARIAT (Jan. 6, 2011), http://ibasecretariat.org/alpha_ban_list.php. The EPA banned the most ubiquitous uses of asbestos in the 1970s. Although a judicial decision overturned the EPA's 1989 ban on all remaining uses of asbestos, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1229–30 (5th Cir. 1991), the court upheld the agency's ban on all new uses of asbestos, keeping the industry in a state of perpetual decline in the United States, *id.* at 1229.

118. Jim Morris & Te-Ping Chen, *A Ravenous Appetite for Asbestos*, CTR. FOR PUB. INTEGRITY (July 21, 2010), <http://www.publicintegrity.org/investigations/asbestos/articles/entry/2194>.

119. *Id.*

120. *Id.*

121. *See Small Refiner Lead Phasedown Task Force v. EPA*, 705 F.2d 506, 511, 531 (D.C. Cir. 1983).

triumphs for the EPA in the agency's more than four decades of operation. As indicated in the map below, which was prepared by the United Nations Environment Programme, today nearly all countries have phased out the use of leaded gasoline.¹²² Notwithstanding the handful of countries that still permit its use, leaded gasoline is a powerful example of how a global norm can arise without the need for a multilateral environmental agreement seeking to mandate its adoption.

FIGURE III. MAP SHOWING STATUS OF LEADED GASOLINE PHASE-OUT BY COUNTRY AS OF JANUARY 2011



III. TRANSNATIONAL LIABILITY LITIGATION

International law has failed to develop an effective system of liability and compensation for transboundary environmental harm, despite promises to do so that date as far back as the 1972 United Nations Conference on the Human Environment in Stockholm.¹²³ Principle 22 of the 1972 Stockholm Declaration pledged that “[s]tates shall co-operate to develop further the international law regarding liability and

122. U.N. Environment Programme, *Leaded Petrol Phase-out: Global Status January 2011*, http://www.unep.org/transport/PCFV/PDF/MapWorldLead_January2011.pdf (last visited Oct. 19, 2011).

123. This subject is explored in more detail in Percival, *supra* note 1.

compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”¹²⁴ Twenty years later at the Rio Earth Summit in 1992, the nations of the world adopted the Rio Declaration, which in nearly identical language directed states to “cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”¹²⁵

In the absence of an effective international law regime of liability and compensation for environmental torts involving people and corporate entities located in more than one country, transnational liability litigation has surged. These cases generally involve efforts to seek redress for harm that has not been successfully prevented by regulatory standards. In many cases the harm has arisen because developing countries do not have effective regulatory systems to control risky activities. In other cases, foreign plaintiffs have sought to piggyback on successful U.S. litigation. This section reviews five different attempts at transnational liability litigation: (1) tobacco litigation, (2) litigation against Chevron for oil pollution in Ecuador, (3) litigation against Occidental Petroleum for oil pollution in Peru, (4) Transnational DBCP Litigation, and (5) the *Trafigura* litigation. These lawsuits are part of the emergence of global law because they help to promote the development of global norms for acceptable corporate behavior and create pressure to clarify standards for enforcement of foreign judgments.

A. *Efforts by Foreign Governments to Hold U.S. Tobacco Companies Liable*

The first example of transnational liability litigation involves environmental health efforts by foreign governments to sue U.S. tobacco companies. Although efforts by private plaintiffs to recover in tort against these companies had been largely unsuccessful for decades, in November 1998 the U.S. tobacco industry settled lawsuits brought against it by the attorneys general of most states.¹²⁶ In the Master

124. United Nations Conference on the Human Environment, Stockholm, Swe., June 5–16, 1972, *Report of U.N. Conference on the Human Environment*, princ. 22, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), reprinted in 11 I.L.M. 1416 (1972).

125. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 13, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), reprinted in 31 I.L.M. 874 (1992).

126. Master Settlement Agreement (Nov. 23, 1998) Exhibit A,

Settlement Agreement the companies agreed to pay the states more than \$200 billion over twenty-five years to compensate the states for increased health care costs engendered by the victims of diseases caused by smoking.¹²⁷

In the wake of this settlement, several foreign governments brought lawsuits against tobacco manufacturers in U.S. courts.¹²⁸ These suits took one of two forms: suits to recover the government's health care expenses for citizens' tobacco-related illnesses¹²⁹ and suits to recover tax revenues lost due to alleged cigarette smuggling on the black market.¹³⁰ Many legal analysts believed that the United States was an ideal forum because of its liberal discovery rules and because the losing party would not be required to pay the prevailing party's costs.¹³¹ Despite the perceived advantages of a U.S. courtroom, all of these suits ultimately were dismissed.¹³²

Guatemala, Nicaragua, Ukraine, and Venezuela all filed suits in U.S. District Court for the District of Columbia to recover the costs of treating their citizens' tobacco-related illnesses.¹³³ Each country based its claim on the theory that since the 1970s tobacco manufacturers had been engaged in a conspiracy to conceal and misrepresent the health risks of smoking.¹³⁴ Guatemala's suit against Phillip Morris and several leading tobacco manufacturers was a landmark test case.¹³⁵ The court,

<http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf> (providing a list of participating States and their allocated percentages of the settlement agreement). Tobacco use is properly considered an environmental risk in light of the risks posed by exposure to second-hand smoke.

127. *See id.*

128. CTR. FOR COMMC'NS, HEALTH, & ENV'T, TOBACCO FACT SHEET, LITIGATION AGAINST THE TOBACCO INDUSTRY 2 (2000), http://www.ceche.org/publications/factshts/factsheets_files/toblitigation.pdf.

129. The Governments of Guatemala, Nicaragua, and Ukraine raised this claim. VANESSA BURROWS, CONG. RESEARCH SERV., RL33719, TOBACCO: SELECTED LEGAL ISSUES 2 (2007), <http://www.nationalaglawcenter.org/assets/crs/RL33719.pdf>.

130. Countries raising this claim included Canada, the European Community, Honduras, Ecuador, Belize, and political subdivisions of the Republic of Columbia. Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty First Century*, 16 DUKE J. OF COMP. & INT'L. L. 79, 102 (2006).

131. CTR. FOR COMMC'NS, HEALTH & ENV'T, *supra* note 128.

132. BURROWS, *supra* note 129.

133. Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law: Guatemalan Suit Against U.S. Tobacco Companies*, 94 AM. J. INT'L L. 516, 543 (2000).

134. *Id.*

135. *In re Tobacco/Gov't Health Care Costs Litig.*, 83 F. Supp. 2d 125 (D.D.C. 1999). In addition to common law tort claims, the Guatemalan government claimed violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and violations of federal and District of

applying the test for remoteness from the Supreme Court's decision in *Holmes v. Securities Investors Protection Corp.*,¹³⁶ dismissed the case for remoteness.¹³⁷ The doctrine of remoteness provides that a plaintiff cannot recover for harm flowing merely from the misfortunes of a third person caused by the defendant's action.¹³⁸ The court also found Guatemala's claims to be completely derivative of the choices made and the injuries suffered by individual citizens.¹³⁹ Thus, the several steps that the court would have to take to trace the defendant's action to the Guatemalan government's injury rendered the injury too remote and attenuated.¹⁴⁰ The court also found that Guatemala could not sue in a *parens patriae* action because the government could not articulate a sufficiently concrete quasi-sovereign interest apart from the particular interests of private parties.¹⁴¹

Suits brought by other foreign governments raised the same claims and were ultimately dismissed for remoteness. Nicaragua and Ukraine also saw their cases dismissed.¹⁴² Bolivia's¹⁴³ and Venezuela's¹⁴⁴ claims, filed in state court, were consolidated in multidistrict litigation.¹⁴⁵ Venezuela's claim ultimately was dismissed because the court held that the government's injuries were too remote, indirect, and derivative.¹⁴⁶ Panama's and Brazil's claims, both filed in Delaware state court,¹⁴⁷ also

Columbia antitrust laws. *Id.* at 127.

136. 503 U.S. 258 (1992).

137. *In re Tobacco*, 83 F. Supp. 2d at 126, 128.

138. *Id.* at 128.

139. *Id.* at 129.

140. *Id.* at 130. The court also found that it would have to develop complicated rules to apportion damages among different levels of injury. *Id.*

141. *Id.* at 133. The court found that Guatemala's interest in recovering for injuries to its treasury, incurred by paying millions to treat tobacco-related illnesses, was a proprietary, not quasi-sovereign, interest. *Id.* at 134.

142. Murphy, *supra* note 133, at 543; *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1071 n.1 (D.C. Cir. 2001).

143. *Republic of Bol. v. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

144. *Republic of Venez. ex rel. Garrido v. Philip Morris Cos.*, 827 So. 2d 339 (Fla. Dist. Ct. App. 2002).

145. *In re Tobacco/Gov't Health Care Costs Litig.*, 76 F. Supp. 2d 5, 6 (D.D.C. 1999).

146. *Republic of Venez.*, 827 So. 2d at 341.

147. Panama brought claims under Panamanian civil law and Brazil brought claims under Brazilian civil law. Both countries brought claims under Delaware law. *Republic of Pan. v. Am. Tobacco Co.*, No. 05C-07-181-RRC, 2006 WL 1933740, at *1 (Del. Super. 2006), *aff'd sub nom. State of São Paulo of Federative Republic of Braz. v. Am. Tobacco Co.*, 919 A.2d 1116 (Del. 2007).

were dismissed for remoteness and failure to meet the requirements for *parens patriae* standing.¹⁴⁸

In addition, Canada, the European Community, Honduras, Ecuador, Belize, and political subdivisions of the Republic of Columbia filed suit against U.S. tobacco manufacturers under the Racketeer Influenced and Corrupt Organizations Act (RICO) to recover costs incurred as a result of an alleged conspiracy to smuggle cigarettes on the black market.¹⁴⁹ Canada's¹⁵⁰ and Ecuador's¹⁵¹ claims were both dismissed when the court determined that the revenue rule barred the claims. The revenue rule provides that "courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns."¹⁵² The failure of these suits demonstrates that U.S. courts are generally hostile to tort litigation brought by foreign plaintiffs. However, even when transnational litigation fails in court, it serves a vital purpose, because it draws attention to environmentally destructive practices that companies should abandon.

B. Litigation Against Chevron for Oil Pollution in Ecuador

The hostility of U.S. courts towards tort litigation by foreign plaintiffs has also extended to lawsuits seeking recovery for environmental harm caused by U.S. corporations in other countries. The most significant example of such litigation is the decades-old battle between residents of Ecuador's Amazon region and the U.S. oil company that Ecuador's government had invited to develop oil resources in the country during the 1970s. This litigation may help reshape transnational norms concerning corporate behavior and standards of due process necessary for the enforcement of foreign judgments.

While a refusal by U.S. courts to grant relief often signaled the end of litigation by foreign plaintiffs, long-running litigation against Chevron for oil pollution in Ecuador may change this perception. For nearly two decades, residents of the Oriente region of Ecuador have been suing Texaco (and its successor corporation, Chevron). These residents are

148. *Id.* at *7–9. The governments also failed to establish the substantive applicable law of Panama and Brazil. *Id.* at *4.

149. See Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 265 (2006).

150. *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001).

151. *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359 (S.D. Fla. 2002), *aff'd sub nom. Republic of Hond. v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003).

152. *Att'y Gen. of Can.*, 268 F.3d at 109.

seeking compensation for, and remediation of, severe pollution from oil drilling operations that occurred during the 1970s.¹⁵³ Legal proceedings have ranged from the United States to Ecuador to the Permanent Court of Arbitration in The Hague. Most recently, these proceedings also returned to the United States; immediately before an Ecuadoran court issued an \$18 billion judgment against it, Chevron filed a racketeering lawsuit against the Ecuadoran plaintiffs and their attorneys in a U.S. court.

1. *Litigation Overview*

The litigation began in 1993 when Ecuadoran plaintiffs filed suit against Texaco in U.S. federal court under the Alien Tort Statute (ATS).¹⁵⁴ Texaco initially persuaded a federal trial court in New York to dismiss the litigation on the ground of *forum non conveniens*. But in *Jota v. Texaco, Inc.*,¹⁵⁵ the Second Circuit reversed this dismissal. The Second Circuit held that the district court should not have used the doctrine of *forum non conveniens* to dismiss the case without at least requiring the company to submit to Ecuador's jurisdiction.¹⁵⁶ In subsequent litigation the court affirmed the dismissal of the suit only on the condition that Texaco submit to the jurisdiction of the Ecuadoran courts.¹⁵⁷ This dismissal was widely viewed as Texaco's escape from liability.

The May 2003 refiling of the case in Ecuador by forty-eight residents of the afflicted Oriente region challenged this perception.¹⁵⁸ Chevron advanced three arguments in its defense: (1) everything it did in Ecuador was legal; (2) it spent \$40 million on environmental cleanup; and (3) the

153. See generally Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413 (2006) (discussing Texaco's exploitation of crude oil in Ecuador).

154. 28 U.S.C. § 1350 (2006). The ATS, which was adopted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, gives federal courts jurisdiction to hear a civil action by "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

155. *Jota v. Texaco Inc.*, 157 F.3d 153, 163 (2d Cir. 1998).

156. *Id.* at 153.

157. *Aguinda v. Texaco Inc.*, 303 F.3d 470, 478 (2d Cir. 2002).

158. Complaint, *Aguinda v. ChevronTexaco Corp.*, No. 002-2003 (Super. Ct. of Justice of "Nueva Loja" in Lago Agrio, May 7, 2003), http://www.contractormisconduct.org/ass/contractors/140/cases/750/866/chevrontexaco-aguinda_complaint.pdf (translated complaint); Lucien J. Dhooge, *Aguinda v. ChevronTexaco: Discretionary Grounds for the Non-recognition of Foreign Judgments for Environmental Injury in the United States*, 28 VA. ENVTL. L.J. 241, 242 (2010).

Ecuadoran government released it from further liability to the government in 1992 when Texaco left the country.¹⁵⁹ The plaintiffs claim that this settlement with an overly compliant government does not absolve Texaco of responsibility for the harm their activities caused to the individual plaintiffs in the lawsuit.¹⁶⁰

On May 21, 2010, Chevron filed a request for dismissal of a court-appointed expert and rejection of the expert's assessment that oil pollution in the Oriente region had caused \$27 billion in damages.¹⁶¹ Chevron claimed that the appointee, Richard Cabrera, worked directly with the plaintiffs and their consultants through ongoing contacts and provision of materials from the plaintiffs.¹⁶² Plaintiffs argued that Cabrera sought materials from both parties, but Chevron did not participate.¹⁶³ Chevron already argued that Cabrera was not independent in 2008 when Cabrera estimated damages at \$27 billion.¹⁶⁴ Chevron claimed that Cabrera's estimates exceeded the scope of his mandate and contained inconsistencies.¹⁶⁵

The evidentiary phase of the case in Ecuador ended in December 2010,¹⁶⁶ and final arguments were submitted to the court at the end of January 2011.¹⁶⁷ On February 14, 2011, the court in Lago Agria, Ecuador, released a 188-page decision awarding approximately \$8.6 billion in damages for the remediation of contaminated soils.¹⁶⁸ While far less than the \$27 billion estimated by the court-appointed expert, the judgment also included \$8.6 billion in punitive damages and an award of \$860 million to the plaintiffs, bringing the total judgment to \$18 billion.¹⁶⁹ Chevron is now scrambling to prevent any future enforcement

159. Percival, *supra* note 1, at 58.

160. *Id.*

161. *Chevron Asks Ecuador Court to Dismiss Key Expert*, REUTERS (May 24, 2010), <http://www.reuters.com/article/idUSTRE64N59320100524>.

162. *Id.*

163. *Id.*

164. *Id.*

165. Dhooge, *supra* note 158, at 260.

166. Hugh Bronstein, *Film Outtakes Steal Stage in Chevron Ecuador Case*, REUTERS (Jan. 11, 2011), <http://www.reuters.com/article/idUSN1024757420110111>.

167. Braden Reddall & Dan Levine, *Chevron Accuses Ecuadorean Plaintiffs of Extortion*, REUTERS (Feb. 1, 2011), <http://www.reuters.com/article/idUSTRE7110TH20110202>.

168. Ben Casselman et al., *Chevron Hit with Record Judgment*, WALL ST. J., Feb. 15, 2011, at A1 [hereinafter *Record Judgment I*]; see also Ben Casselman, *Chevron Hit with Record Judgment*, WALL ST. J. (Feb. 15, 2011) [hereinafter *Record Judgment II*], <http://online.wsj.com/article/0,,SB10001424052748703584804576144464044068664,00.html>.

169. SIMON BILLENNESS & SANFORD LEWIS, AN ANALYSIS OF THE FINANCIAL AND

of the judgment.¹⁷⁰

Since 2009, Chevron has vowed that it will not pay an enormous judgment and that it will fight in the courts of both Ecuador and the United States for decades if necessary. While some shareholders have urged the company to settle, Chevron spokesperson Don Campbell told the *Wall Street Journal*, “We’re not going to be bullied into a settlement” because the company has done nothing wrong.¹⁷¹

2. *Chevron’s RICO Lawsuit and the Battle over “Crude” Outtakes*

On February 2, 2011, Chevron filed suit against the Ecuadoran plaintiffs, their lawyers, and supporters from both the United States and Ecuador.¹⁷² Chevron filed the lawsuit under the Racketeer Influenced and Corrupt Organizations (RICO) Act,¹⁷³ alleging that the defendants’ “ultimate aim is to create enough pressure on Chevron in the United States to extort it into paying to stop the campaign against it.”¹⁷⁴ Chevron seeks a judicial declaration finding any judgment by the Ecuadoran court to be fraudulent and unenforceable.¹⁷⁵ Additionally, Chevron is asking for damages consistent with costs from defending the Ecuadoran lawsuit.¹⁷⁶ Chevron bases its claim on alleged collusion between the plaintiffs and Richard Cabrera, the expert who estimated damages and remediation costs at \$27 billion.¹⁷⁷ Chevron’s evidence centers on footage from the 2009 documentary *Crude* and plaintiffs’ documents release by the Ecuadoran plaintiffs’ former lawyer, Steven Donziger.¹⁷⁸

OPERATIONAL RISKS TO CHEVRON CORPORATION FROM AGUINDA V. CHEVRONTEXACO 5 (2011), http://chevrontoxico.com/assets/docs/Chevron-Ecuador_Risk_Analysis_Report_May2011.pdf.

170. *Record Judgment I*, *supra* note 168, at A1; *Record Judgment II*, *supra* note 168.

171. Ben Casselman, *Chevron Expects to Fight Ecuador Lawsuit in U.S.—As Largest Environmental Judgment on Record Looms, the Oil Company Reassures Shareholders it Won’t Pay*, WALL ST. J., July 20, 2009, at B3.

172. Reddall & Levine, *supra* note 167.

173. 18 U.S.C. §§ 1961–1968 (2006).

174. Amended Complaint at 1, *Chevron Corp. v. Donziger*, 1:11-cv-00691-LAK, 2011 WL 1805313 (S.D.N.Y. April, 20, 2011).

175. Press Release, Chevron Corp., *Chevron Files Fraud and RICO Case Against Lawyers and Consultants Behind Ecuador Litigation* (Feb. 1, 2011), http://www.chevron.com/chevron/pressreleases/article/02012011_chevronfilesfraudandricocaseagainstlawyersandconsultantsbehindecuadorlitigation.news.

176. *Id.*

177. Reddall & Levine, *supra* note 167.

178. *Id.* Documentary footage was obtained by Chevron through litigation in U.S. courts. Specifically, the district court and the Second Circuit addressed discovery requests from litigation in

Chevron obtained the documents referenced in Chevron's RICO lawsuit through a series of legal proceedings filed in the United States.¹⁷⁹ Chevron is using these documents to bolster its accusations of fraud; according to a Chevron spokesperson, "We've been able to uncover evidence of fraud, of attorney misconduct. It shows just how illegitimate the process in Ecuador has become."¹⁸⁰ As noted by at least one of the U.S. judges adjudicating Chevron's recent accusations, these statements make a striking contrast to the arguments used by Chevron in its forum non conveniens arguments.¹⁸¹

Chevron has been compelling discovery through a series of federal court filings throughout the United States. Defendants in these filings include the Ecuadoran plaintiffs' lawyers and experts used in the Ecuadoran litigation.¹⁸² Discovery was intended to support both the Ecuadoran litigation and Chevron's international arbitration claim.¹⁸³ Chevron's complaints include assertions that privileged information should also be released because of the crime-fraud exception. Courts have both accepted and rejected this assertion.¹⁸⁴ A judge in the Western

Ecuador relating to indictment of two lawyers representing Chevron. *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 291–92 (S.D.N.Y. 2010), *aff'd sub nom.* Chevron Corp. v. Berlinger, 629 F.3d 297, 306–11 (2d Cir. 2011); Mark Hamblett, *Chevron Presses Panel to Allow Review of Film's Raw Footage*, 243 N.Y.L.J. 1 (2010). As part of the defense for the two Chevron lawyers in Ecuador, Chevron sought subpoenas for outtake footage from a New York documentary filmmaker, who was hired by plaintiffs' counsel to film the litigation process from the plaintiffs' perspectives. *Chevron Corp.*, 709 F. Supp. 2d at 285. The Second Circuit granted Chevron's request. 629 F.3d at 310–11.

179. David R. Baker, *Chevron Tries to Turn Foes' Words Against Them*, S.F. CHRON., Dec. 29, 2010, at D1.

180. *Id.* at D5.

181. *See Chevron Corp.*, 709 F. Supp. 2d at 298–99 (noting that Chevron "extolled the virtues of the Ecuadorian legal system while the plaintiffs questioned its abilities and rectitude" during Chevron's earlier request for dismissal, and suggesting that the change to a more plaintiff-friendly national government may have something to do with this role reversal).

182. *See, e.g., In re Chevron Corp.*, 753 F. Supp. 2d 536, 538, 541 (D.M.D. 2010) (granting discovery request to compel documents from experts who suggested \$113 billion in damages was a more appropriate amount than the previous amount of \$27 billion).

183. *In re* Application of Chevron Corp., 762 F. Supp. 2d 242, 248 (D. Mass. 2010).

184. *Compare* *Chevron Corp. v. Camp*, Nos. 1:10mc27, 1:10mc28, 2010 WL 3418394, at *6, (W.D.N.C. Aug. 28, 2010) (finding that privileged information could be compelled for discovery), *with Chevron Corp.*, 762 F. Supp. 2d at 254, (finding that Chevron had not met the "heavy burden in establishing that narrow exception"), *and Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047-MSK-MEH, 2010 WL 3923092, at *11, (D. Colo. Oct. 1, 2010) (declining to decide the crime-fraud allegation and leaving it "to the discretion and jurisdiction of the Ecuadorian court"), *and In re Veiga*, 746 F. Supp. 2d 27, 46 (D.D.C. 2010) (declining to decide on the crime-fraud exception), *appeal dismissed*, No. 10-7145, 2010 WL 5140467 (D.C. Cir. Dec. 17, 2010), *and appeal dismissed*, No. 10-7144, 2011 WL 1765213 (D.C. Cir. Apr. 18, 2011).

District of North Carolina compelled discovery of privileged information and made the following statement:

While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill.¹⁸⁵

3. *Arbitration Suits Filed by Chevron at the Permanent Court of Arbitration*

As part of its defense strategy, Chevron has sought to multiply the venues in which the plaintiffs must fight by seeking the assistance of other tribunals. In September 2009, Chevron filed an international arbitration claim against the government of Ecuador in the Permanent Court of Arbitration in The Hague.¹⁸⁶ Chevron based its claim on what it calls the Ecuadoran government's "exploitation" of the lawsuit.¹⁸⁷ Specifically, Chevron claims that the government of Ecuador violated its obligations under the U.S.–Ecuador Bilateral Investment Treaty, other investment agreements, and international law.¹⁸⁸ Chevron alleges that the Ecuadoran government did this by colluding with the plaintiffs and their counsel, violating contracts with Texaco Petroleum,¹⁸⁹ and instigating an "inappropriate[] criminal[]" indictment and sanction of two Chevron lawyers.¹⁹⁰ Chevron is asking the tribunal to enforce its 1998 cleanup agreement with the government of Ecuador and the U.S.–Ecuador investment treaty.¹⁹¹

While Chevron's move was widely expected, many observers thought

185. *Camp*, 2010 WL 3418394, at *6.

186. Press Release, Chevron Corp., *Chevron Files International Arbitration Against the Government of Ecuador Over Violations of the United States–Ecuador Bilateral Investment Treaty* (Sept. 23, 2009), available at <http://www.chevron.com/news/press/release/?id=2009-09-23>; Angel Gonzalez & Ben Casselman, *Chevron Plaintiffs Ask U.S. Court for Action*, WALL ST. J., Jan. 15, 2010, at B3, available at <http://online.wsj.com/article/SB10001424052748704363504575003153443151606.html>.

187. Press Release, Chevron Corp., *supra* note 186.

188. *Id.*

189. *Id.*

190. *Ecuador v. Chevron*, No. 09 Civ. 9958(LBS), 2010 WL 1028349, at *2 (S.D.N.Y. March 16, 2010).

191. Press Release, Chevron Corp., *supra* note 186.

it would not occur until after litigation against the company concluded in Ecuadoran courts. Chevron claimed that it had no choice because “Ecuador’s judicial system is incapable of functioning independently of political influence.”¹⁹² Ecuadoran Attorney General Diego Garcia rejected Chevron’s effort to impugn the integrity of the Ecuadoran judiciary.¹⁹³ Garcia noted that the plaintiffs in the lawsuit before the Ecuadoran court are not parties to the arbitration proceeding Chevron has initiated in The Hague.¹⁹⁴ Ecuador brought suit in the Southern District of New York to enjoin the arbitration. However, the Southern District recognized the “arbitrability” of Chevron’s claim and denied the Republic of Ecuador’s request for an injunction and summary judgment against Chevron’s arbitration claim.¹⁹⁵ The Second Circuit affirmed an appeal of this judgment in 2011.¹⁹⁶

4. *Judicial Recusal and Judgment in the Ecuador Trial Court*

When the Ecuadoran trial court finally reached its judgment in February 2011, the judge issuing the decision was the third judge to hear the case in Ecuador. In September 2009, Judge Juan Núñez recused himself from the case after Chevron released video that the company claimed showed the judge was committed to ruling against the oil company.¹⁹⁷ In the video, which was posted on Chevron’s website, the judge reportedly refuses to reveal the verdict several times, but then responds “Yes, sir” to an inquiry as to whether Chevron “is the guilty party.”¹⁹⁸ The video also reportedly contains a discussion of how Chevron’s remediation funds will be spent and a suggestion that some could be used to pay off government officials. The video was covertly filmed by an Ecuadoran former contractor for Chevron who the oil company claims was acting entirely independently. While Judge Núñez claimed the video had been doctored and denied that he had prejudged

192. *Id.*

193. See Santiago Cueto, *Chevron Files for International Arbitration Claim Against Ecuador: Forum Shopping at the Hague?*, CHEVRON IN ECUADOR (Sept. 28, 2009), <http://www.chevronecuador.com/2009/09/chevron-files-international-arbitration.html>.

194. *See id.*

195. *Ecuador*, 2010 WL 1028349, at *2.

196. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 388 (2d Cir. 2011).

197. David R. Baker, *Judge in Case Against Chevron Recuses Himself in Wake of Tapes*, S.F. CHRON., Sept. 5, 2009, at D1; see also David R. Baker, *Judge Recuses Himself in Suit Against Chevron*, SFGATE.COM (Sept. 5, 2009), http://articles.sfgate.com/2009-09-05/business/17205188_1_tapes-videos-case.

198. *Id.* (internal quotation marks omitted).

the case,¹⁹⁹ Washington Pezántes, the attorney general of Ecuador, asked the judge to recuse himself.²⁰⁰ In October 2010, the Judicial Council disbarred Judge Núñez for his conduct in the case.²⁰¹ Judge Núñez's successor, Judge Leonardo Ordonez, was replaced in October 2010 at the request of Chevron.²⁰² Chevron based this request on Judge Ordonez's alleged failure to investigate evidence of collusion between the plaintiffs and Cabrera, the expert who estimated up to \$27 billion in damages.²⁰³

Judge Nicolás Zambrano, the third judge, presided over the final phases of this case and rendered the \$18 billion verdict on February 14, 2011. The judgment includes \$5.39 billion to restore polluted soil, \$1.4 billion to create a health system for the community, \$800 million to treat people affected by the pollution, \$600 million to restore polluted water sources, \$200 million to help native species recover, \$150 million to supply water to the community from unpolluted sources, and \$100 million to create a community cultural reconstruction program.²⁰⁴ It also includes \$8.6 billion in punitive damages and an award of \$860 million to the plaintiffs.²⁰⁵ A Chevron spokesman denounced the judgment as "illegitimate," "unenforceable," "the product of fraud," and "contrary to the legitimate scientific evidence."²⁰⁶

199. Mercedes Alvaro & Angel Gonzalez, *Judge in Chevron Dispute Says Video Doctored*, WALL STREET J., Sept. 2, 2009, at B6, available at <http://online.wsj.com/article/SB125186165368578445.html>.

200. Mercedes Alvaro, *Judge in Chevron Case Agrees to Step Aside*, WALL ST. J., Sept. 7, 2009, at B5, available at <http://online.wsj.com/article/SB125208172990086901.html>.

201. Alexandra Valencia, *Ecuador Disbars Judge Who Heard Chevron Case*, REUTERS (Oct. 28, 2010), <http://www.reuters.com/article/idUSN2815738920101029>.

202. *Id.*

203. *Id.*

204. Isabel Ordonez, *A Breakdown of the \$8.6 Billion Chevron Judgment*, WALL STREET J. LAW BLOG (Feb. 14, 2011, 4:15 PM), <http://blogs.wsj.com/law/2011/02/14/a-breakdown-of-the-8-billion-chevron-judgment>.

205. See BILLENNESS & LEWIS, *supra* note 169.

206. Press Release, Chevron Corp., *Illegitimate Judgment Against Chevron in Ecuador Lawsuit, Chevron to appeal in Ecuador, enforcement blocked by U.S. and international tribunals* (Feb. 14, 2011), http://www.chevron.com/chevron/pressreleases/article/02142011_illegitimatejudgmentagainstchevrontonecuadorlawsuit.news; see also *Record Judgment I*, *supra* note 168; *Record Judgment II*, *supra* note 168.

5. *Chevron's Efforts to Block Enforcement of the Ecuadoran Judgment*

Six days before the Ecuadoran court issued its judgment, Chevron won a temporary restraining order from a federal district court in New York prospectively blocking enforcement in any court in the world of any judgment related to the case.²⁰⁷ The order is premised on Chevron's allegations that the plaintiffs and their lawyers are engaged in a racketeering conspiracy to shake down the company.²⁰⁸ At a hearing in New York on February 8, 2011, Chevron alleged that lawyers and plaintiffs' experts had doctored evidence.²⁰⁹

Ironically, Texaco could have had the lawsuit decided by courts in the United States during the early 1990s, but it was the company that insisted that Ecuador was a more convenient forum.²¹⁰ The federal court in New York dismissed the case on the condition that the company accept the jurisdiction of the Ecuadoran courts.²¹¹ After a change of government, Ecuador did not become the friendly forum Chevron had anticipated.²¹²

The editors of the *Wall Street Journal* denounced the litigation against Chevron in an editorial entitled "Shakedown in Ecuador."²¹³ The editorial declared that the "Ecuador suit is a form of global forum shopping, with U.S. trial lawyers and NGOs trying to hold American companies hostage in the world's least accountable and transparent legal systems."²¹⁴ The *Journal* editors have thrice before denounced the lawsuit,²¹⁵ but what proves their "forum shopping" claim to be

207. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011).

208. *See id.* at 627, 634; Amended Complaint at 1, *Chevron Corp. v. Donziger*, 1:11-cv-00691-LAK, (S.D.N.Y. April 20, 2011), 2011 WL 1805313; Editorial, *Shakedown in Ecuador*, WALL ST. J., Feb. 16, 2011, at A16, available at <http://online.wsj.com/article/SB10001424052748703652104576121941625806096.html>.

209. *See* Michael D. Goldhaber, *Chevron Wins TRO Barring Ecuadorian Plaintiffs and Their Lawyers From Attempting to Enforce Ecuadorian Judgment*, AM. LAW. (Feb. 10, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202481024550>.

210. Kimerling, *supra* note 153, at 484.

211. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002).

212. *Donziger*, 768 F. Supp. 2d at 660 (S.D.N.Y. 2011); *see also In re application of Chevron*, 709 F. Supp. 2d 283, 288-99 (S.D.N.Y. 2010), *aff'd sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

213. *Shakedown in Ecuador*, *supra* note 208, at A16.

214. *Id.*

215. *Shakedown in the Rain Forest: The attempt to loot Chevron for \$27 billion is falling apart*, WALL ST. J., Sep. 23, 2010, at A22, available at

astonishingly false is the fact that the plaintiffs wanted the lawsuit litigated in New York federal court in 1993, but the case was dismissed in favor of the Ecuador forum at Chevron's behest in 2002.²¹⁶

The judgment of the court in Ecuador may spur legal battles in even more countries as the parties fight over its enforceability wherever Chevron has assets. Chevron's strategy of expanding the litigation to other courts and to the Permanent Court of Arbitration may have been an effort in part to exhaust the plaintiff's resources. But, because of the amount of money at stake—prior to the issuance of the judgment in Ecuador, Morgan Stanley predicted that Chevron ultimately would have to settle the case for between \$2 and 3 billion²¹⁷—hedge funds stepped in and provided extra money to the plaintiffs who have now been able to hire a major Washington law firm to assist with the growing litigation.²¹⁸

On March 7, 2011, Chevron obtained a preliminary injunction from the federal district judge in New York hearing Chevron's RICO litigation that barred the plaintiffs and their lawyers from seeking to enforce the \$18 billion judgment. Judge Lewis A. Kaplan ruled that there was "ample evidence of fraud in the Ecuadorian proceedings"²¹⁹ and "abundant evidence . . . that Ecuador has not provided impartial tribunals or procedures compatible with due process of law."²²⁰ He cited a report from a legal expert commissioned by Chevron that stated the judiciary in Ecuador is subject to political pressure from the government

<http://online.wsj.com/article/SB10001424052748703625304575115831733424838.html>; Bret Stephens, *Amazonian Swindle*, WALL ST. J., Oct. 30, 2007, at A18; see Ben Casselman, *Chevron Accuses Ecuador Plaintiffs*, WALL ST. J., Feb. 2, 2011, at B3; see also Ben Casselman, *Chevron Seeks to Turn Tables in Ecuador Case*, WALL ST. J. (Feb. 1, 2011, 7:04 PM), <http://online.wsj.com/article/SB10001424052748704358704576118694226628616.html>. This coverage has not escaped Chevron's notice. *Ecuador Lawsuit - News Coverage*, CHEVRON, <http://www.chevron.com/ecuador/newscoverage/> (last visited Sept. 3, 2011) (compiling Chevron-friendly articles).

216. Robert V. Percival, Letter to the Editor, *Texaco Asked for Ecuadorian Venue*, WALL ST. J., Feb. 22, 2011, at A14, available at <http://online.wsj.com/article/SB10001424052748704900004576152370171056008.html>.

217. Hugh Bronstein, *Chevron Case Keeps Ecuador Judge Up Late*, REUTERS, Feb 1, 2011, <http://in.reuters.com/article/idINN3124172720110131> (estimating that this figure is "about half of the company's most recent quarterly profit").

218. Rosario Gabino, *¿Como Pagan Los Ecuatorianos el Juicio Contra Chevron?*, BBC MUNDO (Feb. 18, 2011), http://www.bbc.co.uk/mundo/noticias/2011/02/110218_ecuador_chevron_financiamiento_rg.shtml; see also Scott Tong, *A Long, Long Legal Bet*, MARKETPLACE (Feb. 15, 2011), <http://marketplace.publicradio.org/display/web/2011/02/15/pm-a-long-long-legal-bet>; *Record Judgment I*, *supra* note 168, at A1; *Record Judgment II*, *supra* note 168.

219. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011).

220. *Id.* at 633.

and that Ecuador ranks among the lowest nations in assessments of the strength of the rule of law.²²¹ Luis Gallegos, Ecuador's ambassador to the United States, defended the country's judicial system and expressed "consternation that a U.S. court has elected to pass judgment on Ecuador's courts."²²² On September 19, 2011, the U.S. Court of Appeals for the Second Circuit vacated Judge Kaplan's injunction while refusing the plaintiffs' request to remove him from the case.²²³

Regardless of which side ultimately prevails on appeal, the litigation will have a profound effect on transnational environmental litigation. First, it may make multinational companies more reluctant to seek dismissal of litigation on forum non conveniens grounds if the result is submitting to the jurisdiction of foreign courts. It also may generate pressure for countries to refine their standards for enforcing foreign judgments.²²⁴ Finally, because Chevron no longer has assets in Ecuador, the battle over enforcement of the Ecuadoran judgment against it will

221. *Id.* at 634–35.

222. Lawrence Hurley, *Ecuador's U.S. Ambassador Speaks Out on Chevron Case*, N.Y. TIMES GREEN (Mar. 10, 2011), <http://www.nytimes.com/gwire/2011/03/10/greenwire-ecuadors-us-ambassador-speaks-out-on-chevron-c-86771.html>.

223. *Chevron Corp. v. Naranjo*, Nos. 11-1150-cv(L), 11-1264-cv(con), 11-2259-op(con), 2011 WL 4375022, at *1 (2d Cir. Sept. 19, 2011).

224. The United States is not a party to any international treaties on the reciprocal recognition and enforcement of foreign judgments. These matters are largely governed by state law, including the UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 Pt. II U.L.A. 39 (2002), which has been adopted by more than thirty U.S. states and territories, and general principles of comity. Mark Moedritzer, Kay C. Whittaker & Ariel Ye, *Judgments 'Made in China' But Enforceable in the United States?: Obtaining Recognition and Enforcement in the United States of Monetary Judgments Entered in China Against U.S. Companies Doing Business Abroad*, 44 INT'L LAW. 817, 819 (2010). For a final foreign judgment to be enforced in the United States, the foreign court must have been an impartial tribunal using principles that afford due process of law with personal jurisdiction over the defendant and subject matter jurisdiction over the controversy. *Id.* at 822.

One federal law that specifically addresses enforcement of foreign judgments was signed into law by President Obama in August 2010—the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), 28 U.S.C.A. §§ 4101–4105 (West Supp. 2011). The SPEECH Act, which was inspired by New York's 2008 Libel Terrorism Protection Act, makes libel judgments against U.S. writers obtained in foreign countries unenforceable in U.S. courts if they involve speech protected by the First Amendment to the U.S. Constitution. Andrew Albanese, *Obama Signs 'Libel Tourism' Law*, PUBLISHERS WKLY. (Aug. 12, 2010), <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/44148-obama-signs-libel-tourism-law.html>. The SPEECH Act is designed to deter "libel tourists" from seeking to use British courts where there are far more limited free speech protections to obtain judgments against U.S. writers for acts that would not be deemed libelous under U.S. law. The law is expected to increase pressure on Britain to revise its libel laws. Alex Spillious, *US Outlaws 'Libel Tourists' Who Turn to Britain*, THE DAILY TELEGRAPH, July 29, 2010, at 16; Alex Spillious, *US Law to Counter 'Libel Tourism' in British Courts*, THE TELEGRAPH (July 28, 2010, 8:00 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7915063/US-law-to-counter-libel-tourism-in-British-courts.html>.

continue in foreign courts, principally in the United States; as these courts continue to wrestle with the question of whether Ecuador's judicial system is entitled to respect, they may help shape global norms of due process. This in turn may influence the development of global law and how courts in other countries conduct themselves in their future proceedings.

C. *Carijano v. Occidental Petroleum Corporation*

The Chevron litigation is not the only ongoing case involving harm allegedly caused in a foreign country by a U.S. oil company. In 2007, Amazon Watch,²²⁵ a U.S. environmental group, and twenty-five members of the Achuar indigenous group from the Rio Corrientes River region in Peru filed suit against Occidental Petroleum and its subsidiary, Occidental Peruana (OxyPeru) in Los Angeles Superior Court.²²⁶ From the early 1970s to 2000, OxyPeru operated an extensive oil extraction, processing, and distribution site known as "Block 1-AB" in an area that encompassed lands both within and upstream from Achuar communities.²²⁷ Occidental allegedly used methods of crude oil processing that it knew violated both U.S. and Peruvian law, releasing oil and its byproducts into area waterways.²²⁸ The plaintiffs alleged that these activities polluted the waters of the Rio Corrientes, causing harm to soil, fish, plants, and animals, and illness in the Achuar communities.²²⁹ Members of the Achuar community suffered from high blood levels of lead and cadmium, gastrointestinal problems, kidney trouble, skin rashes, and aches and pains.²³⁰

Rather than bringing claims under the Alien Tort Statute, the plaintiffs raised common law tort claims including negligence, medical monitoring, and trespass.²³¹ Occidental removed the suit to federal

225. Amazon Watch took part in the suit after traveling to the region and producing a documentary film about the pollution in the region. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1223 (9th Cir. 2011). The case was initially decided in December 2010, *Carijano v. Occidental Petroleum Corp.*, 626 F.3d 1137 (9th Cir. 2010), but the Ninth Circuit later withdrew this opinion and issued a new opinion in June of 2011.

226. *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 823 (C.D. Cal. 2008).

227. *Id.* at 826.

228. *Carijano*, 643 F.3d at 1222.

229. *Carijano*, 548 F. Supp. 2d at 826.

230. *Carijano*, 643 F.3d at 1223.

231. *Carijano*, 548 F. Supp. 2d at 826. The plaintiffs also alleged strict liability, battery, injunctive relief or damages in lieu of injunction, wrongful death, fraud, trespass, public nuisance, private nuisance, intentional infliction of emotional distress, and violation of California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (West 2008).

district court and successfully moved for dismissal on the basis of forum non conveniens, arguing that Peru is a more convenient forum.²³² Under the doctrine of forum non conveniens, the district court found that Occidental met its burden of proving that Peru was a suitable forum²³³ and that the private interest factors²³⁴ and public interest factors²³⁵ were satisfied. Though there is a strong presumption in favor of a domestic plaintiff's choice of forum under the doctrine of forum non conveniens, the district court granted Occidental's motion to dismiss.²³⁶ The district court reasoned that although Amazon Watch is a California plaintiff, the fact that the Achuar are foreign plaintiffs lessened the deference given to their choice of forum.²³⁷

Plaintiffs appealed, and on December 6, 2010, the Ninth Circuit reversed the district court's decision. The Ninth Circuit held: (1) Occidental did not meet its burden of proving that Peru is a more convenient forum; (2) the court gave insufficient weight to the presumption in favor of the domestic plaintiff's choice of forum; and (3) the court abused its discretion in dismissing the lawsuit.²³⁸ The court found abuse of discretion because the trial court failed to place any mitigating conditions on its dismissal when it was justifiable to believe that Occidental would seek to dismiss the case under Peru's statute of limitations.²³⁹

232. *Carijano*, 548 F. Supp. 2d at 835.

233. *Id.* The court found that OxyPeru is subject to jurisdiction in Peruvian courts and adequate tort relief is available in this system. *Id.* at 828–29. The court rejected the plaintiffs' argument that the Peruvian court system was "too corrupt" to provide adequate tort relief. *Id.* at 831.

234. The private interest factors are:

(1) the residence of the parties and witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) "all other practical problems that make trial of a case easy, expeditious, and inexpensive."

Id. at 832 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

235. *Id.* at 833. These factors include "court congestion, local interest in resolving the controversy, and preference for having a forum apply a law with which it is familiar." *Id.*

236. *Id.* at 835.

237. *Id.* at 834.

238. *Carijano v. Occidental Petroleum Corp.*, 626 F.3d 1137, 1156 (9th Cir. 2010). On June 1, 2011, the court withdrew its initial opinion and filed an amended opinion. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011). The new opinion reaches the same result, reversing the district court.

239. *Carijano*, 643 F.3d at 1234. Plaintiffs had requested that the court apply the following conditions: "(1) any Peruvian judgment be satisfied; (2) Occidental waive any statute of limitations defense in Peru that would not be available in California; (3) Occidental agree to comply with United States discovery rules; and (4) Occidental translate documents from English to Spanish." *Id.*

This case suggests that U.S. courts assessing claims of forum non conveniens are paying more attention to the consequences of such dismissals by considering the state of law in other countries. While no U.S. court has rendered a judgment holding a U.S. corporation liable for environmental harm caused abroad, lawsuits seeking relief for such harm have contributed to an ongoing global debate over what constitutes appropriate corporate behavior when companies from developed countries engage in resource extraction in the developing world.²⁴⁰ How these cases are resolved in the future will help shape developing norms of global environmental law.

D. *Transnational DBCP Litigation*

Litigation brought by foreigners over exposure to a pesticide banned in the United States illustrates both the power and shortcomings of transnational tort litigation. In *Dow Chemical Co. v. Castro Alfaro*,²⁴¹ banana workers in Costa Rica, who allegedly had become sterile, claimed that they had been injured by a pesticide (1,2-Dibromo-3-Chloropropane, or DBCP) that the EPA had banned for use within the United States because of its reproductive toxicity.²⁴² The workers brought a tort action in Texas state court against Dow Chemical, the U.S. company that continued to produce the pesticide solely for the export market, as permitted by U.S. law.²⁴³ After the trial court dismissed the action on forum non conveniens grounds, the plaintiffs appealed to the Texas Supreme Court.²⁴⁴ By a vote of five to four, the court held that the case must be heard in Texas because Texas law did not recognize the doctrine of forum non conveniens.²⁴⁵ Shortly before the case was scheduled to go to trial in 1992, the eighty-two plaintiffs and their wives received a settlement worth nearly \$20 million.²⁴⁶

240. See generally, e.g., LUKE DANIELSON, GLOBAL PUB. POLICY INST., ARCHITECTURE FOR CHANGE: AN ACCOUNT OF THE MINING, MINERALS AND SUSTAINABLE DEVELOPMENT PROJECT (2006), http://www.sdsg.org/wp-content/uploads/2010/02/Architecture-for-Change-MMSD_Full_Report1.pdf (suggesting the development of environmental norms for extractive industries operating in developing countries).

241. 786 S.W.2d 674 (Tex. 1990).

242. The pesticide DBCP to which the plaintiffs were exposed had been banned in the United States since 1977. The history behind this ban is told in DEVRA DAVIS, WHEN SMOKE RAN LIKE WATER 195–200 (2002).

243. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2006).

244. *Castro Alfaro*, 786 S.W.2d at 675.

245. *Id.* at 679.

246. Rick Kennedy, *Fruit of the Poison Tree; In a Dallas Court, Costa Rican Banana Workers Claim a Banana Pesticide Left Them Sterile*, DALLAS OBSERVER (Mar. 10, 2005), available at

Similar litigation against U.S. chemical companies by 13,000 banana workers in six countries was settled for more than \$50 million.²⁴⁷

DBCP litigation also has been brought in Nicaraguan courts, with successful plaintiffs relying on U.S. courts to enforce their claims. Under Special Law 364 enacted in 2001 to make it easier for plaintiffs to recover for exposure to DBCP, Nicaraguan courts awarded more than \$2.1 billion in damages to plaintiffs.²⁴⁸ As described by Los Angeles Superior Court Judge Victoria Chaney, under this law “essentially anyone who obtains two required lab reports stating he is sterile and who claims to have been exposed to DBCP on a banana farm is entitled to damages; causation and liability are conclusively presumed.”²⁴⁹ Under special procedures prescribed by the law, the defendant must post a \$15 million bond and “has just 3 days to answer the complaint, the parties have 8 days to present evidence, and the court has 3 days to issue a judgment.”²⁵⁰

The law made DBCP claims so attractive that widespread fraud occurred. Judge Chaney ultimately dismissed several DBCP lawsuits brought in Los Angeles Superior Court against the Dole Food Company because of fraud occurring in Nicaragua.²⁵¹ The judge found the cases to be tainted by pervasive fraud by lawyers and others in Nicaragua who recruited plaintiffs who had never worked on banana plantations, falsified lab reports, and sought to intimidate witnesses who helped expose the fraud.²⁵² Judge Chaney dismissed *Tellez v. Dole*,²⁵³ a 2007

<http://www.dallasobserver.com/content/printVersion/285584>.

247. DAVIS, *supra* note 242, at 200.

248. See Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, WALL ST. J., Aug. 19, 2009, at A1, available at <http://online.wsj.com/article/SB125061508138340501.html> (referencing a “legal system that heavily favored plaintiffs” in describing the \$2.1 billion in judgments); Edvard Pettersson, *Dole Doesn’t Have to Pay Nicaraguan Verdict, U.S. Judge Rules*, BLOOMBERG (Oct. 21, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5nlMjavtrM> (referencing Special Law 364).

249. *Mejia v. Dole Food Co.*, No. BC340049, slip. op. at 23 (Cal. Super. Ct. June 17, 2009) (providing proposed findings of fact and conclusions of law supporting order terminating *Mejia* and *Rivera* cases for fraud on the court), available at http://online.wsj.com/public/resources/documents/WSJ-Dole_Chaney_ruling.pdf.

250. *Id.*

251. Stecklow, *supra* note 248.

252. *Id.*

253. Press Release, Dole Food Co., Los Angeles Superior Court Vacates Judgment and Dismisses Fraudulent Lawsuit Brought by Nicaraguans Claiming to Have Been Banana Workers (July 15, 2010), <http://www.dole.com/CompanyInformation/PressReleases/PressReleaseDetails/tabid/1268/Default.a>

case, which awarded six plaintiffs \$2.3 million for DBCP exposure.²⁵⁴ The drama surrounding the case included accusations of witness tampering and threats against witnesses, which were believed to have originated in Nicaragua.²⁵⁵ Judge Chaney based her dismissal on the “fraudulent conduct by plaintiffs’ lawyers and their agents [which] led to Dole being unable to properly defend itself from the claims.”²⁵⁶ This case marked the final DBCP case brought in Los Angeles court by Nicaraguan plaintiffs against Dole.²⁵⁷ In light of Judge Chaney’s conclusions concerning pervasive fraud in Nicaragua, it is unlikely Nicaraguan DBCP judgments will be enforced by U.S. courts. However, Judge Chaney did specifically state that her conclusions only applied to cases involving Nicaraguan plaintiffs and that no evidence of fraud had been presented involving DBCP plaintiffs from any other country.²⁵⁸

Like the Chevron litigation in Ecuador, the DBCP cases have spawned their own legal sparring over a pro-plaintiff documentary film called *BANANAS!**.²⁵⁹ In 2009, Dole filed suit against the producers of the film arguing that it defamed the company.²⁶⁰ Four months after filing the defamation litigation, Dole agreed to drop the lawsuit.²⁶¹ However, a Los Angeles court ordered the company to pay the defendants \$200,000 in legal fees pursuant to a California law designed to discourage SLAPP suits.²⁶²

spx?contentid=11722.

254. Richard Clough, *Dole Proposes New Settlements*, L.A. BUS. J. (May 31, 2010), <http://www.labusinessjournal.com/news/2010/may/31/dole-proposes-new-settlements/>, available at 2010 WLNR 12198414.

255. Anthony McCartney, *LA Judge in Banana Workers Case Cites Threats*, ASSOCIATED PRESS (June 7, 2010).

256. Victoria Kim, *Judge Cites Fraud, Throws Out Award to Dole Workers*, L.A. TIMES, July 16, 2010, at AA3 [hereinafter *Judge Cites Fraud*] (stating also that “massive fraud [had been] perpetrated on this court”); see also Victoria Kim, *Judge Throws Out Verdict Awarding Millions To Dole Workers*, L. A. TIMES (July 16, 2010) [hereinafter *Judge Throws Out Verdict*], <http://articles.latimes.com/2010/jul/16/local/la-me-dole-20100716>.

257. Kim, *Judge Cites Fraud*, *supra* note 256, at AA3; Kim, *Judge Throws Out Verdict*, *supra* note 256.

258. *Mejia v. Dole Food Co.*, No. BC340049, slip. op. at 24 (Cal. Super. Ct. June 17, 2009), http://online.wsj.com/public/resources/documents/WSJ-Dole_Chaney_ruling.pdf.

259. Gina Keating, *Dole Sues “Bananas” Documentary Maker*, REUTERS (July, 8, 2009), <http://www.reuters.com/article/idUSTRE5677C520090708>.

260. *Id.*

261. Deborah Crowe, *Dole Drops Lawsuit Against Bananas! Filmmaker*, L.A. BUS. J., Oct. 15, 2009.

262. Matthew Belloni, *Dole Hit with \$200,000 Penalty Over Movie Lawsuit*, REUTERS (Nov. 29, 2010), <http://www.reuters.com/article/2010/11/29/us-dole-idUSTRE6AS0S020101129>. SLAPP suits are lawsuits brought to discourage members of the public from criticizing businesses, with

E. *The Trafigura Litigation*

One final example of transnational litigation is the *Trafigura* toxic waste disposal lawsuit, which demonstrates that even foreign corporations may not be able to conceal the environmental consequences of their activities in some remote corner of the world. As countries in the developed world began to regulate toxic waste disposal more stringently in the late 1970s and early 1980s, often the developing world served as a dumping ground for toxic waste from industrialized countries. In August 1986, the *Khian Sea*, a ship loaded with 15,000 tons of ash from incinerators in Philadelphia, sought to dump its cargo on a beach in the Bahamas but was turned away by Bahamian authorities.²⁶³ For the next sixteen months the ship sailed in search of a destination for its cargo, only to be turned away by six different countries. In January 1988, 3000 tons of the ash were dumped in Haiti before the operation was stopped.²⁶⁴ The ship was then turned away from five more countries before the rest of the ash disappeared into the Indian Ocean somewhere between Singapore and Sri Lanka, after the ship had been renamed to conceal its identity.²⁶⁵

When a ship named the *Karin B*, which was operated by an Italian company, dumped 8000 drums of toxic waste including PCBs in a Nigerian fishing village in 1988, Nigeria recalled its ambassador to Italy and forced the waste to be taken back to Italy.²⁶⁶ These and other incidents gave impetus to the adoption in 1989 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (“Convention”).²⁶⁷ While the Convention bans hazardous waste exports unless the government of the receiving country has

SLAPP standing for “Strategic Lawsuit Against Public Participation.” See generally GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 212–22 (1984) (discussing the authors’ study into 241 SLAPP cases).

263. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1184 (6th ed. 2009).

264. *Id.*

265. Jerry Schwartz, *The Trash that Wouldn’t Be Thrown Away*, ASSOCIATED PRESS, Sept. 2, 2000, available at Factiva, Doc. No. aprs000020010803dw930i2bu.

266. PERCIVAL ET AL., *supra* note 263.

267. U.N. Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Basel, Switz., Mar. 20–22, 1989, *Final Act of the Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes*, Resolution 2, UNEP/IG.80/L.12, reprinted in 28 I.L.M. 649, 656 (1989).

consented to receiving the waste,²⁶⁸ it does not establish any regime of liability for harm caused by waste dumping.²⁶⁹

In August 2006, a ship operated by the British trading firm Trafigura dumped hundreds of tons of toxic waste in Abidjan, Côte d'Ivoire, after failing in an effort to offload the waste in the Netherlands.²⁷⁰ Exposure to the waste allegedly resulted in some deaths and caused severe health problems in thousands of the people exposed to it.²⁷¹ After the company reached a \$198 million settlement with the government of Côte d'Ivoire for cleanup costs,²⁷² a lawsuit was brought against it in London on behalf of 31,000 Côte d'Ivoire residents.²⁷³ The class action sought \$160 million in damages for health problems caused by exposure to the waste. Trafigura defended by blaming the waste dump on an "independent contractor."²⁷⁴ It aggressively threatened to bring libel actions against media outlets that published reports favorable to the claimants.²⁷⁵ Yet when *The Guardian* revealed emails allegedly showing efforts by Trafigura to cover up its involvement in the waste dumping, Trafigura quickly announced in September 2009 that it had reached a £30 million settlement with attorneys for the plaintiffs.²⁷⁶ While attorneys for the plaintiffs expressed approval of the settlement, Greenpeace argued that

268. *Id.* at Art. 6, reprinted in 28 I.L.M. at 664 (setting out notification rules).

269. *Id.* at Art. 12, reprinted in 28 I.L.M. at 668 (directing parties to adopt, "as soon as practicable, . . . rules and procedures in the field of liability . . .").

270. David Leigh, *Oil Trader Trafigura Faces Criminal Charges Over Attempt to Offload Toxic Waste in Netherlands*, GUARDIAN, June 2, 2010, at 21 [hereinafter *Oil Trader*]; see also David Leigh, *Trafigura Faces Criminal Charges Over Attempt to Offload Toxic Waste*, GUARDIAN (June 1, 2010, 8:09 PM) [hereinafter *Trafigura*], <http://www.guardian.co.uk/world/2010/jun/01/trafigura-trial-toxic-waste-netherlands>.

271. David Leigh, *Dirty Business – How UK Firm Covered Up Toxic Oil Disaster*, GUARDIAN, Sept. 17, 2009, at 1 [hereinafter *Oil Disaster*]; see also David Leigh, *How UK Oil Company Trafigura Tried to Cover Up African Pollution Disaster*, GUARDIAN (Sept. 16, 2009, 10:08 PM) [hereinafter *African Pollution*], <http://www.guardian.co.uk/world/2009/sep/16/trafigura-african-pollution-disaster>.

272. The \$198 million settlement Trafigura paid the Ivorian government in 2007 exempted the company from any legal proceedings in Côte d'Ivoire. Gilbert Kreijger, *Dutch Court Fines Trafigura Over Ivory Coast Waste*, REUTERS, July 23, 2010, <http://uk.reuters.com/article/idUKTRE66M1SB20100723>. Trafigura, however, denied any wrongdoing when it paid the settlement. *Id.*

273. Editorial, *Oil Waste Scandal: The Polluter Must Pay*, GUARDIAN, Sept. 17, 2009, at 30, available at <http://www.guardian.co.uk/commentisfree/2009/sep/17/compensation-trafigura-victory>.

274. *Id.*

275. *Oil Disaster*, *supra* note 271, at 1; *African Pollution*, *supra* note 271.

276. David Leigh, *Greenpeace Continues Pursuit of Oil Trader Over Toxic Waste*, GUARDIAN, Sept. 21, 2009, at 12, available at <http://www.guardian.co.uk/world/2009/sep/20/greenpeace-trafigura-toxic-waste>.

the company should still be prosecuted for manslaughter for deaths caused by the waste dumping.²⁷⁷

Trafigura was criminally prosecuted in the Netherlands for the company's actions in Amsterdam prior to the 2006 waste dumping in Abidjan.²⁷⁸ Prosecutors charged that Trafigura attempted to dispose of waste cheaply in the Netherlands by concealing the toxicity of the waste in order to avoid specialized dumping procedures.²⁷⁹ Complaints from surrounding residents led Trafigura to pump the waste back on board the tanker after an initial attempt to dispose of it.²⁸⁰ The criminal prosecution in the Dutch court was brought against Trafigura, the Ukrainian captain of the tanker, which carried and disposed of the waste, and a London-based junior Trafigura employee.²⁸¹ All defendants were convicted, and the Dutch court fined the company €1 million for breaking European regulations on waste export to developing countries, harming the environment, and concealing "the harmful nature of the waste."²⁸² The court sentenced the Ukrainian tanker captain to a five-month, suspended jail sentence for concealing the waste's harmful nature and for forgery in reporting the waste to Dutch authorities.²⁸³ The junior Trafigura employee was sentenced to a six-month suspended jail sentence and a €25,000 fine for concealment of the waste's harmful nature.²⁸⁴ However, the City of Amsterdam was acquitted; although the city oversees the port and had been charged with "leaving dangerous waste in the hands of someone not qualified to process it,"²⁸⁵ the court found that the port was acting as a public body and therefore immune from prosecution.²⁸⁶ Additional charges against Trafigura's chief executive officer were dropped,²⁸⁷ although these charges may be re-

277. *Id.*

278. *Oil Trader*, *supra* note 270, at 21; *Trafigura*, *supra* note 270.

279. *Oil Trader*, *supra* note 270, at 21; *Trafigura*, *supra* note 270.

280. *Oil Trader*, *supra* note 270, at 21; *Trafigura*, *supra* note 270.

281. *See Oil Trader*, *supra* note 270, at 21; *Trafigura*, *supra* note 270.

282. Kreijger, *supra* note 272.

283. *Id.*

284. *Id.*

285. *See Oil Trader*, *supra* note 270, at 21; *Trafigura*, *supra* note 270.

286. Kreijger, *supra* note 272.

287. *See Oil Trader*, *supra* note 270, at 21 ("It has been ruled that the company's chief executive, Claude Dauphin, should not face personal charges."); *Trafigura*, *supra* note 270 (same). *But see* Jurjen van de Pol, *Trafigura CEO Ruling Should be Re-examined in Ivory Coast Case*, *Court Says*, BLOOMBERG (July 6, 2010, 5:08 AM), <http://www.bloomberg.com/news/2010-07-06/trafigura-ceo-ruling-on-ivory-coast-must-be-reviewed-dutch-top-court-says.html> (describing how the issue of whether Trafigura Beheer BV Chief Executive Officer Claude Dauphin also should be prosecuted was being reviewed by a Dutch court).

examined.²⁸⁸ Shortly after the Dutch court's ruling, Trafigura indicated that it would "study the court's findings with a view to appeal."²⁸⁹ Additionally, Trafigura maintained its employee's innocence and stated it would continue to provide legal assistance to the employee.²⁹⁰

The *Trafigura* litigation demonstrates that corporations based in the United States are not the only multinationals to be subject to transnational litigation as a result of their operations abroad. Companies with global operations no longer can be confident that they can conceal the environmental consequences of their activities in some remote corner of the world. Global networks of activists are now able to question corporate activities even in remote areas and to seek legal redress for environmental harm. Even if the lawsuits do not succeed, the harsh light of publicity may serve as a catalyst for changes in corporate behavior. For this reason, NGOs increasingly are turning to transparency and disclosure strategies, as discussed below.

IV. PRIVATE TRANSNATIONAL TRANSPARENCY INITIATIVES

Private parties are now playing a major role in the emergence of global environmental law, which features "new actors, new institutions, and new rules" that are very different from international law's traditional focus on relations between sovereign states.²⁹¹ Among the most striking recent developments is the growth of private initiatives to promote increased transparency concerning the activities of multinational corporations and their environmental impacts. This Part discusses three such initiatives: (1) the Equator Principles that require environmental assessments for major development projects funded by multinational banks, (2) the Palm Oil Roundtable, and (3) efforts to "green the supply chains" of major corporations.

288. Kreijger, *supra* note 272.

289. *Probo Koala Updates*, TRAFIGURA (July 23, 2010), http://web.archive.org/web/20100725164253/http://www.trafigura.com/our_news/probo_koala_updates.aspx#nrN78o5pUE34 (accessed by searching "http://www.trafigura.com/our_news/probo_koala_updates.aspx" on the Internet Archive's main page—<http://www.archive.org>—and selecting the snapshot from July 25, 2010).

290. *Id.*

291. This was noted a decade ago by Philippe Sands in his discussion of the evolution of international law in *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 556 (2001).

A. *The Equator Principles*

On June 4, 2003, a group of large banks that finance major development projects announced the adoption of the Equator Principles. These principles commit the banks to follow common standards for assessing the environmental risks of the projects they fund and to require environmental management plans for controlling those risks. These standards are based on the practices of the World Bank's International Finance Corporation. There are currently seventy Equator Principle Financial Institutions (EPFIs).²⁹² These seventy EPFIs provide more than eighty percent of project financing in developing nations.²⁹³

Because of the lack of transparency in both the Equator Principles and the banking industry, it is difficult to ascertain whether banks are only financing projects that are environmentally sound and rejecting the others.²⁹⁴ It is also difficult to determine whether banks are requiring projects to be amended before providing financing.²⁹⁵ The Equator Principles have no external mechanism for compliance or accountability, which leads many critics to believe that the Principles mean little.²⁹⁶ One method of addressing this concern is a new requirement that clients with projects that have significant environmental and social concerns create a grievance mechanism for the affected community to voice those concerns.²⁹⁷ "Informal regulators" (i.e., NGOs and civil society) are using the grievance mechanism, as well as public shame, to ensure that EPFIs comply with the Principles.²⁹⁸

One example of an NGO utilizing a grievance mechanism deals with the financing of the Finnish company Metsa-Botnia's Orion paper-pulp

292. *About the Equator Principles*, EQUATOR PRINCIPLES ASS'N, <http://www.equator-principles.com/index.php/about-ep/about> (last visited Sept. 6, 2011).

293. Steven Ferrey, *The Failure of International Global Warming Regulation to Promote Needed Renewable Energy*, 37 B.C. ENVTL. AFF. L. REV. 67, 113 (2010).

294. Andrew Hardenbrook, Note, *The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility*, 40 VAND. J. TRANSNAT'L L. 197, 227 (2007).

295. *Id.*

296. Natalie L. Bridgeman & David B. Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVTL. L. REV. 187, 220–21 (2008).

297. *Id.* at 217.

298. *See id.* at 219 ("For example, at an October 2007 seminar on sustainable finance sponsored by HSBC Mexico, UNEP Finance Initiative, and the Mexican Government's National Ecological Institute, a presenter from ABN AMRO showed photos of protestors and NGO campaign ads in her presentation while making the point that 'informal regulators' . . . are requiring compliance with voluntary standards such as the Equator Principles.").

mill in Uruguay.²⁹⁹ The Orion paper-pulp mill project in Uruguay was a significant project estimated to increase the GDP of Uruguay by two percent per year.³⁰⁰ Argentina, however, opposed the project, arguing that it would pollute the River Uruguay—shared by both countries—while bringing no financial benefit to Argentina.³⁰¹ The Centre for Human Rights and Environment (CEDHA) invoked the Equator Principles in its campaign to stop financing for the project.³⁰² The CEDHA complaint stated that the project did not take into consideration serious harm to local communities and valuable natural resources.³⁰³ While CEDHA was not able to stop the construction of the mill,³⁰⁴ it did succeed in convincing ING to withdraw from the \$480 million project, shocking the project finance world.³⁰⁵ ING was known as a leading advocate for the Equator Principles, and many consider the negative publicity a major reason for the company's decision to withdraw.³⁰⁶ However, after ING withdrew, Calyon, another bank that had signed onto the Equator Principles, stepped in to finance the project.³⁰⁷

B. Roundtable on Sustainable Palm Oil

Another important set of private initiatives have sought to reduce environmental destruction caused by palm oil production. In 2009, world vegetable oil production totaled about 150 million tons, approximately forty million of which were palm oil.³⁰⁸ Although palm oil is entirely

299. Vivian Lee, Note, *Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay*, 6 NW. U. J. INT'L HUM. RTS. 354, 359–61 (2008).

300. *U.S. Votes in Favor of Int'l Loan for Uruguay Pulpmill Project*, U.S. FED. NEWS, Nov. 21, 2006, available at 2006 WLNR 20482976.

301. Lee, *supra* note 299, at 360.

302. *Id.*

303. *Id.* at 360–61.

304. *See id.* at 361 (noting that the project has been in operation since September 11, 2007).

305. *Id.* at 364; *see also* Letter from A. Cohen Stuart, ING Group, to J.D. Taillant, Ctr. for Human Rights & Env't, (Apr. 12, 2006), available at http://web.archive.org/web/20101202194025/http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ing-pullout-letter-april-12-2006.pdf (accessed by searching "http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ing-pullout-letter-april-12-2006.pdf" on the Internet Archive's main page—<http://www.archive.org>—and selecting the snapshot from Dec. 2, 2010) (indicating ING's pullout from the Metsa-Botnia project).

306. "With or Without IFC Support", *Botnia's Mill Goes Ahead*, MERCOPRESS (June 14, 2006, 9:00 PM), <http://en.mercopress.com/2006/06/14/with-or-without-ifc-support-botnia-s-mill-goes-ahead>.

307. Lee, *supra* note 299, at 364.

308. *Sustainable Palm Oil*, ROUNDTABLE ON SUSTAINABLE PALM OIL, <http://www.rspo.org/?q=page/789> (last visited Sept. 6, 2011).

free of genetically modified (GM) plants and has the highest yield per hectare of any oil, its production has significant environmental consequences.³⁰⁹ Palm oil production destroys not only tropical forests,³¹⁰ but also peatland, whose destruction emits large amounts of stored carbon dioxide.³¹¹ Palm oil is mainly produced in tropical areas of Asia, Africa, and South America, and its production has generated extreme deforestation in some areas.³¹² In May 2008, Unilever announced that it would use only palm oil that was certified as sustainable by 2015, and it would support the call for a moratorium for any further deforestation for palm oil in Indonesia.³¹³ Palm oil can be used as biofuel, and many palm oil projects initially were funded as Clean Development Mechanism (CDM) projects and Joint Implementation (JI) projects pursuant to the Kyoto Protocol.³¹⁴ However, companies in the European market have been turning away from funding these projects, due to their perceived environmental harm and their consequent reputational risk.³¹⁵

In 2001, the World Wildlife Foundation (WWF) began a dialogue to promote sustainable palm oil production.³¹⁶ This interchange led to an informal discussion among Aarhus United UK Ltd., Gold Hope Plantations Berhad, Migros, Malaysian Palm Oil Association, Sainsbury's, and Unilever in 2002.³¹⁷ These organizations became the foundation for the Roundtable on Sustainable Palm Oil (RSPO).³¹⁸ Over 200 participants from sixteen countries attended the first official meeting of the RSPO, which took place in Malaysia in August 2003.³¹⁹ The organizations adopted a Statement of Intent, a non-legally binding

309. *Id.*

310. *Id.*

311. Caitlin Randall, *Carbon Market Takes Sides in Palm Oil Battle*, CARBON FIN. (Nov. 20, 2007), <http://www.carbon-financeonline.com/index.cfm?section=features&id=10864&action=view&return=home>.

312. *Sustainable Palm Oil*, *supra* note 308.

313. Letter from Gavin Neath, Senior Vice President, Unilever, to Marcel Silvius, Wetlands Int'l, *available at* <http://wetlands.org/WatchRead/tabid/56/ArticleType/ArticleView/ArticleID/2145/PageID/1365/Default.aspx> (follow "Moratorium on deforestation on palm oil production" download hyperlink; then open "Unilever letter") (last visited Oct. 18, 2011).

314. Randall, *supra* note 311.

315. *Id.*

316. *History*, ROUNDTABLE ON SUSTAINABLE PALM OIL, <http://www.rspo.org/?q=page/10> (last visited Sept. 6, 2011).

317. *Id.*

318. *Id.*

319. *Id.*

expression of support for the RSPO.³²⁰ The RSPO was formally established on April 8, 2004 under Article 60 of the Swiss Civil Code.³²¹ Currently, there are 416 members, 85 affiliate members, and 36 supply chain associates.³²² Members are expected to develop and implement plans of action within the framework of the Roundtable to promote sustainable palm oil production, procurement, and consumption, as well as to act transparently and regularly inform the RSPO of plans to promote sustainable palm oil production, procurement, and consumption.³²³

While the RSPO is helping to reduce the environmental impact of palm oil production, severe deforestation problems remain.³²⁴ A report from Wetlands International states that deforestation from palm oil production is worse than previously expected.³²⁵ Between 2005 and 2010, about one-third (almost 353,000 hectares) of Malaysia's total peat swamps were cleared on the island of Borneo alone, according to the report.³²⁶ Deforestation is significantly worse than the government claimed.³²⁷ The total 510,000 hectares of peat swamps cleared in Malaysia in this time period is conservatively estimated to have released twenty million tons of carbon dioxide annually.³²⁸ While many palm oil firms in the area are under pressure from the RSPO to produce sustainably, many palm oil producers have avoided doing so due to the strong palm oil demand from India and China.³²⁹ The Wetlands International report calls for an end to incentives for biofuels production in the European Union because it can increase demand for palm oil crops and contribute to deforestation.³³⁰

320. *Id.*

321. *Id.*

322. *Who is RSPO?*, ROUNDTABLE ON SUSTAINABLE PALM OIL, <http://www.rspo.org/?q=page/9> (last visited Sept. 6, 2011).

323. *RSPO Statutes, By-Laws and Code of Conduct: Art. 4.3*, ROUNDTABLE ON SUSTAINABLE PALM OIL, <http://www.rspo.org/?q=page/896> (last visited Sept. 6, 2011).

324. Tom Young, *Report Targets Carbon Impact of Malaysian Palm Oil*, BUSINESSGREEN (Feb. 2, 2011), <http://www.businessgreen.com/bg/news/2023434/report-targets-carbon-impact-malaysian-palm-oil>.

325. *Id.*

326. Press Release, Wetlands Int'l, *New Figures: Palm Oil Destroys Malaysia's Peatswamp Forests Faster than Ever* (Feb. 1, 2011), <http://www.wetlands.org/NewsandEvents/NewsPressreleases/tabid/60/articleType/ArticleView/articleId/2583/Default.aspx>.

327. *Id.*

328. *Id.*

329. Young, *supra* note 324.

330. *Id.*

Other private initiatives have sought to pressure companies and organizations to reduce their use of non-sustainable palm oil. In November 2007, Greenpeace published a report stating that major companies, including Nestlé, Cargill, and Unilever, were contributing to global warming through the use of non-sustainable palm oil.³³¹ In addition, in May 2011, two teenagers received national publicity for their campaign to convince Girl Scouts of the USA to remove palm oil from Girl Scout cookies.³³² After major environmental groups endorsed their crusade,³³³ the teenagers met with officials of the national organization who promised to look for substitutes for palm oil in their cookies.³³⁴

C. *NGO-Private Partnerships and Efforts to Promote “Green Supply Chains”*

A final example of an important private initiative is the formation of environmentally conscious NGO-private partnerships. Companies that adhere to high environmental standards while operating in the developed world often are not as scrupulous in seeking to protect workers or the environment when operating in developing countries. Some corporations claim to be unaware of, or unable to prevent all, environmental or worker safety problems in the companies that are part of their supply chain.³³⁵ In recent years NGOs have worked to highlight these problems in an effort to encourage companies to green their supply chains.³³⁶ These efforts have the potential to improve environmental and working conditions in developed countries even when regulatory standards do not require such improvements.

331. Laura Crowley, *Unilever Commits to Sustainable Palm Oil*, FOODNAVIGATOR.COM (May 2, 2008), <http://www.foodnavigator.com/Financial-Industry/Unilever-commits-to-sustainable-palm-oil>.

332. Julie Jargon, *Cookie Crumbles for Girl Scouts, as Teens Launch Palm-Oil Crusade*, WALL ST. J., May 20, 2011, at A1, available at <http://online.wsj.com/article/SB10001424052748704281504576327733659636782.html>.

333. *Id.*

334. Julie Jargon, *Teens Await Resolution on Palm Oil in Cookies*, WALL ST. J., May 25, 2011, at A6; see also Julie Jargon, *Girl Scouts Bake Up Plan To Tackle Cookie Worries*, WALL ST. J. (May 24, 2011, 3:19 PM), <http://online.wsj.com/article/SB10001424052702303654804576343552112339650.html>.

335. David Barboza, *Reform Stalls in Chinese Factories*, N.Y. TIMES, Jan. 5, 2008, at C1; available at <http://www.nytimes.com/2008/01/05/business/worldbusiness/05sweatshop.html>.

336. See Michele M. Betsill & Elisabeth Corell, *NGO Influence in International Environmental Negotiations: A Framework for Analysis*, 1 GLOBAL ENVTL. POL. 65 (2001), available at <http://www.polisci.colostate.edu/fac/mb/NGO%20Influence.pdf> (using as an example Greenpeace's success in pressuring Gerber to drop genetically modified products from its baby food).

In January 2011, a coalition of thirty-four Chinese environmental protection organizations led by the Beijing-based Institute of Public and Environmental Affairs released a report assessing the environmental health and safety records of Chinese companies that supply twenty-nine multinational technology companies.³³⁷ Of the twenty-nine companies, Apple's suppliers placed last because of industrial pollution and exposure of workers to health risks.³³⁸ In response, Apple released its own Apple Supplier Responsibility Progress Report³³⁹ shortly before its annual meeting with shareholders. The company disclosed that its own audit of its suppliers had found instances of unsafe working conditions, improper handling of toxic chemicals, and the use of underage labor by some of its suppliers in China.³⁴⁰

In March 2011, a group of clothing manufacturers, retailers, and environmental groups announced the formation of the Sustainable Apparel Coalition that will assess the environmental impact of every element of apparel production in order to provide consumers with "sustainability scores" for each product.³⁴¹ The thirty founding members of the coalition include major retailers such as Wal-Mart and J.C. Penny, the Environmental Defense Fund, and the EPA.³⁴² Chairman of the new coalition is the famous former mountain climber Rick Ridgeway, who runs Patagonia's sustainability efforts.³⁴³ The initial focus of the Coalition will be to assist companies in greening their supply chains.³⁴⁴

Some large retailers, such as Wal-Mart, have pioneered their own form of "retail regulation" by refusing to carry products that do not meet various environmental criteria, for example, products that may contain certain toxic substances.³⁴⁵ But the latest initiatives go a significant step

337. INST. OF PUB. & ENVTL. AFF., *THE OTHER SIDE OF APPLE* 20 (2011), <http://www.ipe.org.cn/Upload/file/IT/Report-IT-Phase-Four-EN.pdf>.

338. *See id.* at 28.

339. APPLE INC., *APPLE SUPPLIER RESPONSIBILITY: 2011 PROGRESS REPORT*, 1 (2011), http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2011_Progress_Report.pdf.

340. Rob Schmitz, *Apple Admits Child Labor Growing Problem at its China Factories*, MARKETPLACE (Feb. 15, 2011), <http://marketplace.publicradio.org/display/web/2011/02/15/am-apple-suppliers-face-accusations-of-child-labor-suicides/>.

341. *See The Sustainable Apparel Index*, SUSTAINABLE APPAREL COALITION, <http://www.apparelcoalition.org/apparel-index> (last visited June 2, 2011).

342. Tom Zeller Jr., *Clothes Makers Join to Set 'Green Score,'* N.Y. TIMES, Mar. 1, 2011, at B1, available <http://www.nytimes.com/2011/03/01/business/01apparel.html>.

343. Press Release, Sustainable Apparel Coalition, Apparel Industry Leaders Launch Sustainable Apparel Coalition (Mar. 1, 2011), <http://www.apparelcoalition.org/content/apparel-industry-leaders-launch-sustainable-apparel-coalition>.

344. *See id.*

345. Lyndsey Layton, *Wal-Mart Turns to 'Retail Regulation' to Ban Flame Retardant*, WASH.

further by requiring companies to make affirmative inquiries concerning conditions at their suppliers in developing countries.

Private and NGO efforts to encourage companies to research their suppliers more carefully should be bolstered by provisions in the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act).³⁴⁶ Section 1502 of the Dodd–Frank Act added a subsection to the Securities Exchange Act of 1934 (Exchange Act) regarding conflict minerals.³⁴⁷ The new provision requires disclosure to the Securities Exchange Commission (SEC) of whether minerals used by companies originated in the Democratic Republic of Congo or an adjoining country.³⁴⁸ On December 15, 2010, the SEC proposed regulations regarding conflict mineral disclosures.³⁴⁹ The four primary metals covered by the legislation that are widely used by electronics manufacturers are tin, tungsten, tantalum, and gold.³⁵⁰ It is hoped that these regulations will help mobilize companies to pay more attention to the sources of the raw materials they use.³⁵¹ The complexity of the reporting will depend on the length of the chain-of-custody, or the number of times the minerals exchange hands from extraction to production.³⁵²

There have been varying reactions to the proposed regulations.³⁵³ The electronics industry, which has dealt with conflict minerals issues for several years,³⁵⁴ has been supportive. Hewlett-Packard, for example, posted a letter of support, stating that this provision will provide much-

POST, Feb. 27, 2011, at A4.

346. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 and 15 U.S.C.) [hereinafter Dodd–Frank Act].

347. 124 Stat. at § 1502.

348. *Id.* at § 1502(b).

349. Conflict Minerals, 75 Fed. Reg. 80948 (proposed Dec. 23, 2010) (to be codified 17 C.F.R. pts. 229 & 249), available at <http://www.sec.gov/rules/proposed/2010/34-63547.pdf>.

350. Meggin Thwing Eastman & Jesse Shoemaker-Hopkins, *Dodd-Frank Not Just About Banks: Conflict Minerals Reporting Requirements Will Affect Chipmakers, Other Electronics Firms*, RISKMETRICS GROUP (Jan. 18, 2011, 11:12 AM), <http://blog.riskmetrics.com/esg/2011/01/dodd-frank-conflict-minerals.html>.

351. See Dave Meyer, *Using Materiality Analysis to Drive Corporate Social Responsibility & Sustainability in the Supply Chain*, KINAXIS SUPPLY CHAIN EXPERT COMMUNITY (Jan. 18, 2011, 11:32 PM), <https://community.kinaxis.com/people/DRMeyer/blog/2011/01/18/using-materiality-analysis-to-drive-corporate-social-responsibility-sustainability-in-the-supply-chain>.

352. *Id.*

353. See Brian Zabcik, *Out of Africa: Dodd-Frank Tackles the Use of Conflict Minerals*, CORP. COUNS. (Nov. 16, 2010), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202474894167>.

354. *Id.*

needed transparency in companies' supply chains and reduce the use of conflict minerals.³⁵⁵ Jewelers, however, have not been as enthusiastic.³⁵⁶ Patrick Dorsey, general counsel of Tiffany & Company, wrote a letter to the SEC in September 2010, stating that the increasing use of recycled metal by gold smelters makes tracing the origin of much of the gold nearly impossible.³⁵⁷ Dorsey urged the SEC to define gold as a conflict mineral only when there was reason to suspect that it might have originated in the Democratic Republic of Congo or a neighboring country.³⁵⁸ Others are criticizing the proposed regulations by arguing that they are a departure from the SEC's mission of protecting investors and ensuring market integrity and that they inject foreign policy into federal securities regulation.³⁵⁹

Section 1504 of the Dodd–Frank Act requires companies in extractive industries to disclose to the SEC payments made to foreign governments for the purpose of commercial development of oil, natural gas, or minerals. This provision is designed to help make it harder for corrupt foreign government officials to seek bribes because they would have to be publicly disclosed by the company paying them. The Foreign Corrupt Practices Act (FCPA),³⁶⁰ which prohibits bribery of foreign officials by companies traded on U.S. stock exchanges,³⁶¹ has been a major force in spreading respect for the rule of law in developing countries.³⁶² Enforcement of the FCPA makes it easier for companies to resist solicitations for bribes and spreads respect for legal norms throughout the supply chain of multinational enterprises. The transparency provisions in the Dodd–Frank Act are likely to bolster efforts by NGOs

355. Press Release, Hewlett-Packard, HP Commends Enactment of Conflict Minerals Legislation, (July 21, 2010), <http://www.hp.com/hpinfo/newsroom/press/2010/100721b.html>.

356. Zabcik, *supra* note 353.

357. See Letter from Patrick B. Dorsey, Gen. Counsel, Tiffany & Co., to Elizabeth M. Murphy, Sec'y, Sec. Exch. Comm'n (Sept. 29, 2010), *available at* <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-17.pdf>.

358. *Id.*

359. *The Dodd-Frank Act: New Disclosure Requirements for Reporting Issuers Engaged in Extractive Enterprises or Using Conflict Minerals*, SHEARMAN & STERLING, LLP (Jul. 29, 2010), <http://www.shearman.com/files/Publication/1304d12f-1229-46be-963b-c45db1ae9c16/Presentation/PublicationAttachment/883bc9a2-3934-4633-9c38-7537baa09984/CM-072910-New-Disclosure-Requirements-for-Reporting-Issuers-Engaged-in-Extractive-Ente.pdf>.

360. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

361. 15 U.S.C. § 78dd-1.

362. See John Bussey, *The Rule of Law Finds Its Way Abroad—However Painfully*, WALL ST. J., June 24, 2011, at B1 (reporting that Trace International, a U.S. NGO that conducts FCPA compliance training, has seen a surge in the number of companies in developing countries who are using its services).

and private companies to green supply chains and to spread respect for legal norms such as the FCPA's prohibition on bribery.

CONCLUSION

Globalization is having a profound impact on legal systems throughout the world. International law traditionally focused primarily on relations between states, but relations between states and private multinational enterprises are becoming of central importance in a globalized world. In an effort to more effectively control risks generated by multinational enterprises, countries are borrowing regulatory innovations from one another at a rapid rate and increasing efforts to coordinate regulatory policy. Distinctions between domestic and international law and between private and public law are diminishing in force. The traditional "top-down" approach of negotiating multilateral international agreements is giving way to a variety of "bottom-up" initiatives that often involve greater participation by NGOs. The result is the emergence of global law, which is not a set of globally harmonized regulatory standards, but rather a term to describe the more complex set of phenomena that are occurring in several fields of law, particularly environmental law.

This Article explored various aspects of the emergence of global environmental law and the changing path by which global environmental norms are emerging. Even as efforts to achieve global consensus on a successor to the Kyoto Protocol have faltered, regional responses to climate change are alive and well. For example, regional and other efforts to control air pollution from ships are progressing, and the movement to ban the remaining uses of asbestos and leaded gasoline has made global strides.

In response to perceived harm caused by the operations of multinational corporations, plaintiffs are bringing transnational liability litigation in both their own countries and in countries where such corporations are headquartered. Liability awards, such as an Ecuadoran court's \$18 billion judgment against the Chevron Corporation for oil pollution in Ecuador, may speed the development of reciprocity norms for transnational enforcement of environmental judgments. Even when transnational litigation fails in court, it can shine a global spotlight on environmentally destructive practices that companies would be wise to abandon.

Finally, transparency initiatives promoted by coalitions of NGOs and corporations also are a new and vibrant part of the complex architecture of global environmental law. In an interconnected world of multinational enterprises, companies no longer can claim ignorance of, or inability to affect, occupational and environmental conditions in their supply chains

even in remote parts of the world. Transparency works precisely because of the emergence of global environmental norms; previously tolerated risks, such as exposing the residents of developing countries to toxic waste, are no longer tolerated in the developed world. In the emerging world of global environmental law, the golden rule is extending its reach to every corner of the planet.