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Environmental Justice and International Environmental Law

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Standing for *excellence*. Reaching for *justice*.

Environmental Justice and International Environmental Law

Carmen G. Gonzalez¹

Abstract

Environmental justice lies at the heart of many environmental disputes between the global North and the global South as well as grassroots environmental struggles within nations. However, the discourse of international environmental law is often ahistorical and technocratic. It neither educates the North about its inordinate contribution to global environmental problems nor provides an adequate response to the concerns of nations and communities disproportionately burdened by poverty and environmental degradation. This article examines some of the root causes of environmental injustice among and within nations from the colonial period to the present, and discusses several strategies that can be used to integrate environmental justice into the broader corpus of international law so as to promote social and economic justice while protecting the planet's natural resources for the benefit of present and future generations.

Introduction

The global economy is currently exceeding ecological limits, and is producing a variety of destructive impacts, including climate change, desertification, deforestation, degradation of arable land, freshwater shortages, depletion of fish stocks, unprecedented species extinction, and widespread chemical contamination of air, land, and water.² The United Nations Millennium Ecosystem Assessment concluded that human economic activity during the last half century has produced more rapid and severe ecosystem degradation than in any comparable era of human history. The loss of ecosystem services intensifies poverty, exacerbates inequality, and poses significant obstacles to the

¹ Professor of Law, Seattle University School of Law. The author would like to thank Shawkat Alam, Richard Delgado, Sheila Foster, Eileen Gauna, Angela Harris, David Skover, and Faith Stevelman for helpful comments on an earlier draft of this chapter.

² See J.G. Speth, *The Bridge at the Edge of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability*, New Haven: Yale University Press, 2008, pp. 1-9; W. Sachs and T. Santorius (eds.) *Fair Future: Resource Conflicts, Security and Global Justice*, London and New York: Zed Books, 2007, pp. 22-24.

achievement of the Millennium Development Goals. Ecosystem degradation will also diminish the benefits that future generations derive from the planet's natural capital.³

The primary cause of global environmental degradation is the unsustainable consumption of environmental resources by the planet's most economically privileged inhabitants, most of whom reside in the global North or in the industrial centers of the global South.⁴ Twenty percent of the world's population consumes approximately 85 percent of the planet's timber, 70 percent of its energy, and 60 percent its food.⁵ This population is also responsible for more than 90 percent of the world's annual production of hazardous waste, some of which is exported to Southern countries and contributes to illness and widespread environmental harm.⁶

While the affluent reap the benefits of unsustainable economic activity, the burdens of resource depletion, land degradation, and pollution are borne disproportionately by the global South and by the most vulnerable communities in both the North and the South, including indigenous peoples, racial and ethnic minorities, and the poor. Some scholars

³ See United Nations Millennium Ecosystem Assessment (2005), *Synthesis Report: Ecosystems and Human Well-Being*. Online. Available HTTP: <<http://www.maweb.org/documents/document.356.aspx.pdf>> (accessed 28 December 2011), pp. 1-24.

⁴ See W. Sachs and T. Santorius, op. cit., pp. 77-80; W. E. Rees and L. Westra, "When Consumption Does Violence: Can There be Sustainability and Environmental Justice in a Resource-Limited World?," in J. Agyeman, R.D. Bullard and B. Evans (eds.) *Just Sustainabilities: Development in an Unequal World*, Cambridge, Massachusetts: MIT Press, 2003, p. 116; C. Gonzalez, "Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade," *Denver University Law Review*, 2001, vol. 32, pp. 1001-02.

⁵ See W. Sachs, *Planet Dialectics: Explorations in Environment and Development*, London and New York: Zed Books, 1999, p. 171; T. Athanasiou, *Divided Planet: The Ecology of Rich and Poor*, Athens, Georgia: University of Georgia Press, 1998, p. 53.

⁶ See D.N. Pellow, *Resisting Global Toxics: Transnational Movements for Environmental Justice*, Cambridge, Massachusetts: MIT Press, 2007, p.8; Gonzalez 2001, op. cit., pp. 991-92.

have described the ecological segregation of the world's population along economic and racial lines as "eco-apartheid."⁷

This chapter uses the framework of environmental justice to analyze the response of international environmental law to the social, economic and environmental disparities between the North and the South and between privileged and vulnerable communities within each nation. Efforts to understand the role of environmental justice in international environmental law are complicated by the inherent ambiguity of the term and by the failure of many environmental treaties to explicitly reference ethics and justice. The chapter begins by defining environmental justice and discussing its application to North-South environmental conflicts and grassroots environmental struggles. It then examines the colonial and post-colonial roots of environmental injustice among and within nations, and highlights several legal strategies to promote a more equitable and sustainable social order. The chapter concludes by calling for an approach to international environmental law that recognizes historic injustices, and seeks holistic solutions that integrate international human rights law, international environmental law, and international economic law.

Environmental Justice: North and South

This chapter adopts a four-part definition of environmental justice consisting of distributive justice, procedural justice, corrective justice, and social justice.⁸ Distributive justice calls for the fair allocation of the benefits and burdens of natural resource

⁷ See Rees and Westra, *op. cit.*, pp. 100-103.

⁸ See R.R. Kuehn, "A Taxonomy of Environmental Justice," *Environmental Law Reporter*, 2000, vol. 30, p. 10681.

exploitation among and within nations.⁹ Procedural justice requires open, informed and inclusive decision-making processes.¹⁰ Corrective justice imposes an obligation to provide compensation for historic inequities and to refrain from repeating the conduct that caused the harm.¹¹ Social justice, the fourth and most nebulous aspect of environmental justice, recognizes that environmental struggles are inextricably intertwined with struggles for social and economic justice.¹² Environmental injustice cannot be separated from economic inequality, race and gender subordination, and the colonial and post-colonial domination of the global South.¹³ As a practical matter, environmental disputes frequently involve several aspects of environmental justice, and do not fit neatly into one of the four categories.

Environmental justice has an important North-South dimension. Through their overconsumption of the planet's natural resources, wealthy countries have contributed disproportionately to a variety of environmental problems, including climate change, deforestation, and the hazardous waste trade. Despite their far smaller contribution to global environmental degradation, poor countries bear most of the harm due to their vulnerable geographic locations, lack of resources for climate change adaptation and

⁹ See D. French, "Sustainable Development and the Instinctive Imperative of Justice in the Global Order" in D. French (ed.) *Global Justice and Sustainable Development*, Leiden: Martinus Nijhoff Publishers, 2010, p. 8.

¹⁰ See Kuehn, op. cit., p. 10688.

¹¹ See K. Mickelson, "Competing narratives of justice in North-South environmental relations: the case of ozone layer depletion," in J. Ebbesson and P. Okowa (eds.) *Environmental Law and Justice in Context*, Cambridge: Cambridge University Press, 2009, pp. 299-300.

¹² See C. G. Gonzalez, "An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms," *University of Pennsylvania Journal of International Law*, 2011, vol. 32, p. 728; R. Guha, *Environmentalism: A Global History*, New York: Longman, 2000, p. 105.

¹³ See Gonzalez 2001 op. cit., pp. 1014; T. Yang, "International Environmental Protection: Human Rights and the North-South Divide" in K.H. Mutz et al. (eds.) *Justice and Natural Resources: Concepts, Strategies and Applications*, Washington, DC: Island Press, 2002 p. 94-98.

disaster response, and lack of administrative infrastructure to regulate waste disposal, logging, mining, and petroleum development.¹⁴ In addition to this *distributive injustice*, North-South relations are also plagued by *procedural inequities*. The North dominates decision-making in the International Monetary Fund (IMF), the World Bank, the World Trade Organization (WTO), and multilateral environmental treaty fora as a consequence of its greater economic and political clout. While the South can present alternative points of view, the preferences of the powerful generally dictate the substantive outcomes.¹⁵ *Corrective injustice* is evident in the plight of small island states whose very existence is threatened by climate change, but who possess no legal mechanism to obtain compensation or cessation of the harmful conduct.¹⁶ In addition, North-South environmental conflicts reflect broader *social injustice* because they are inextricably intertwined with colonial and post-colonial economic policies that impoverished the global South and facilitated the North's appropriation of its natural resources.¹⁷

The concept of environmental justice draws its moral force from the social struggles that gave birth to environmental justice movements in both the North and the South.

Beginning in the 1980s, the environmental justice movement emerged in the United States in response to the concentration of polluting industry and hazardous waste disposal

¹⁴ See R. Anand, *International Environmental Justice: A North-South Dimension*, Burlington, Vermont: Ashgate, 2004, pp. 128-30; Gonzalez 2001, op. cit., pp. 987-1000.

¹⁵ See, Anand, op. cit., pp. 132-33; P. Hossay, *Unsustainable: A Primer for Global Environmental and Social Justice*, London and New York: Zed Books, 2006, pp. 191-98; R. Peet, *Unholy Trinity: The IMF, World Bank and WTO*. London and New York: Zed Books, 2003, pp. 200-04.

¹⁶ See M. Burkett, "Climate Reparations," *Melbourne Journal of International Law*, 2009, vol.10, pp. 513-520.

¹⁷ See C.G. Gonzalez, "Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology," *Georgetown International Environmental Law Review*, 2007, vol. 19, pp. 595-602.

facilities in low-income and minority communities.¹⁸ The movement soon expanded to encompass additional environmental issues, including access to parks and open space; farmworker exposure to pesticides; inequities in disaster preparedness and emergency response; workplace health and safety; access to healthy and affordable food; and enhancement of tribal regulatory authority over indigenous lands.¹⁹ Environmental justice advocates alleged distributive injustice in the form of disproportionate exposure to environmental hazards; procedural unfairness in environmental decision-making; corrective injustice due to inadequate environmental enforcement; and social injustice because environmental degradation cannot be separated from other problems plaguing low income communities and communities of color (such as unemployment and underfunded schools).²⁰

Environmental justice struggles are taking place on every continent. Among the most prominent are the conflicts between indigenous peoples and transnational mining, oil, and logging corporations,²¹ the resistance of Nigeria's ethnic minorities to environmentally devastating oil drilling in the Niger Delta,²² and the challenge by transnational agrarian movements to corporate-dominated free trade policies that undermine rural livelihoods,

¹⁸ See L. Cole and S. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, New York: New York University Press, 2001, pp. 19-33; R.D. Bullard, "Environmental Justice in the Twenty-First Century" in R.D. Bullard (ed.) *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*. San Francisco: Sierra Club Books, 2005, pp. 18-25

¹⁹ See Gonzalez 2007, op. cit., pp. 727-28; A.H. Alkon, A.H. and J. Agyeman, J., "Introduction: The Food Movement as Polyculture" in A.H. Alkon and J. Agyeman (eds.) *Cultivating Food Justice: Race, Class, and Sustainability*, Cambridge, Massachusetts: MIT Press, 2011, pp. 4-10; D.N. Suagee, "Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability," *Widener Law Symposium*, 1998, vol 3, pp. 236-39.

²⁰ See Kuehn, op. cit., pp. 10685, 10689, 10694-95, 10700-02.

²¹ See A. Gedicks, "Resource Wars against Native Peoples" in Bullard 2005, op. cit., pp. 168-187.

²² See T. Agbola and M. Alabi, M., "Political Economy of Petroleum Resource Development, Environmental Injustice and Selective Victimization: A Case Study of the Niger Delta Region of Nigeria," in Agyeman, Bullard & Evans, op. cit., pp. 271-86.

exacerbate poverty and hunger, and degrade the environment.²³ Many environmental justice struggles in the global South, including the Chipko movement in India and the struggles against reckless exploitation of the Brazilian Amazon, have been spearheaded by local and indigenous communities in opposition to development projects that threaten their lands, livelihoods, and natural resources.²⁴ Historian Ramachandra Guha and economist Joan Martinez-Alier have dubbed these grassroots social movements “the environmentalism of the poor.”²⁵

The Root Causes of Environmental Injustice

In order to remedy environmental injustice, it is important to understand its historic roots. When European nations conquered America, plundered its riches, dispossessed its original inhabitants, and uprooted and enslaved millions of Africans to toil in its plantations, the European powers laid the groundwork for contemporary disparities in wealth and well-being.²⁶ The riches of the New World triggered a scramble among European countries for colonies in Asia, Africa, and the Americas. By 1800, Europe controlled 55 percent of the global land mass. By 1914, 84.4 percent of the planet’s territory was under the effective control of Europe and the United States.²⁷

²³ See P. McMichael, “Peasants Make Their Own History, But Not Just as They Please . . . ,” in S.M. Borras, Jr., M. Edelman, and C. Kay (eds.) *Transnational Agrarian Movements Confronting Globalization*, Chichester, UK: Wiley-Blackwell, 2008, pp. 42-47.

²⁴ See Guha, op. cit., pp. 99-100, 115-119.

²⁵ See op. cit., pp. 98-108; R. Guha and J. Martinez-Alier, *Varieties of Environmentalism: Essays North and South*, London: Earthscan, 1997, pp. 3-21.

²⁶ See J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492-1830*, New Haven: Yale University Press, 2006, pp. 85-108.

²⁷ See J.M. Cypher and J.L. Dietz, *The Process of Economic Development*, London and New York: Routledge, 1997, pp. 69, 89.

Colonialism transformed subsistence economies into economic satellites of Europe, and wreaked havoc on the peoples and environments of the colonized territories. Asia, Africa, and Latin America were incorporated into the global economy as exporters of raw materials and importers of manufactured products. Mining, logging, and plantation agriculture destroyed forests, displaced indigenous communities, and disrupted local ecosystems. The diversion of prime agricultural lands to export production created poverty and inequality by concentrating landholding in the hands of local elites, converting farmers into landless peasants, promoting the use of slave labor, and degrading the natural resource base necessary for food production. Resistance to colonial domination was brutally repressed.²⁸

Colonialism also introduced racial hierarchies that linger to the present day. The colonial enterprise was justified by the ideology of European racial and cultural superiority. Europeans asserted a moral obligation (the “white man’s burden”) to subjugate non-white “savages” in order to “civilize” them and convert them to Christianity.²⁹ Post-colonial elites would later internalize European cultural norms and subordinate indigenous communities in the name of modernization and development.³⁰ Beginning in the 19th century, the United States would invoke the ideology of Euro-American racial superiority

²⁸ See Hossay, op. cit., pp. 52-55; C.G. Gonzalez, “Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development,” *Transnational Law & Contemporary Problems*, 2004, vol. 14, pp. 433-37.

²⁹ See R. Gordon, “Saving Failed States: Sometimes a Neocolonialist Notion,” *American University Journal of International Law and Policy*, 1997, vol. 19, pp. 929-40; Elliott, op. cit., p. 85.

³⁰ See J. Ngugi, “The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa,” *Wisconsin International Law Journal*, 2002, vol. 20, 324-26; R. Stavenhagen, “Indigenous Peoples and the State in Latin America: An Ongoing Debate,” in R. Sieder (ed.) *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy*, New York: Palgrave MacMillan, 2002, pp. 24-26.

and the duty to spread democracy as a justification for its interventions in Latin America and its invasion, occupation, and annexation of large chunks of Mexican territory.³¹

The 19th century Latin American wars of liberation and the post-World War II anti-colonial struggles yielded political independence, but did not eliminate the former colonies' crippling dependence on the export of agricultural commodities, minerals, and other primary products. As explained by Argentine economist Raul Prebisch and confirmed by subsequent studies, specialization in primary products is economically disadvantageous because it renders countries vulnerable to market volatility and to the declining terms of trade for primary products relative to manufactured goods.³²

Seeking to overcome the colonial legacy, many nations in the global South embarked on a state-led development strategy known as import substitution industrialization (ISI) in the decades following the Great Depression and the Second World War. These countries sought to industrialize their economies by substituting imported manufactured goods with domestically produced equivalents.³³ Beginning in the 1960s, these nations came together as the Group of 77 (G-77) to demand the establishment of a New International Economic Order (NIEO), under the auspices of the United Nations, that would restructure the international economic system in their favor in order to achieve a more equitable

³¹ See R. F. Acuña, *Occupied America: A History of Chicanos*, 7th edn, New York: Longman, 2011, pp. 46-47; J. Gonzalez, *Harvest of Empire: A History of Latinos in America*, New York: Viking Penguin, 2000, pp. 28-78.

³² See Cypher & Dietz, *op. cit.*, pp. 171-79.

³³ See C. G. Gonzalez, "China in Latin America: Law, Economics, and Sustainable Development," *Environmental Law Reporter*, 2010, vol. 40, p. 10173.

distribution of global wealth.³⁴ Recognizing that Southern poverty was due to Northern dominance of the international economic system, the G-77 nations demanded full and effective participation in global governance, debt forgiveness, technology transfer, special trade preferences, and stabilization of export prices for the commodities produced by the global South.³⁵ They asserted permanent sovereignty over the natural resources located within their territories and the right to nationalize foreign companies exploiting these resources. In other words, the G-77 nations attempted to leverage their control over the raw materials needed by the global North in order to create a more just economic order.³⁶ The G-77 nations (whose current membership far exceeds the original 77 members) remain a significant force in international environmental negotiations, and their demands for justice have profoundly influenced international environmental law. Given the lack of a precise definition of developing countries in most environmental treaties, the G-77 nations are generally regarded as “developing countries” in treaties that impose differential obligations on Northern and Southern countries.³⁷

The debt crisis of the 1980s marked the demise of both the NIEO and ISI and ushered in the free market economic reforms known as the Washington Consensus. Lured into borrowing money from commercial banks to finance expensive development projects, many Southern nations struggled to repay these loans. In order to secure IMF and World Bank assistance, these debtor nations were required to adopt a standard recipe of free

³⁴ See L. Rajamani, *Differential Treatment in International Law*, Oxford: Oxford University Press, 2006, pp. 17-18.

³⁵ Op. cit., p. 18; R.Gordon and J.H. Sylvester, “Deconstructing Development,” *Wisconsin International Law Journal*, 2004, vol. 22, pp. 56-58.

³⁶ See R. Gordon, “The Dawn of a New, New International Economic Order?” *Law and Contemporary Problems*, 2009, vol. 72, pp. 142-49.

³⁷ See Rajamani, op. cit., pp. 92, 115.

market reforms that included privatization of industry and public services; trade liberalization; curtailment of government expenditures on health, education, and social programs; the implementation of laws and policies favorable to foreign investors; and the maximization of primary product exports in order to service the foreign debt. These policies were designed to put an end to state-led development strategies and to open up the global South to foreign exporters and investors.³⁸

Far from producing economic prosperity, the Washington Consensus resulted in sharp increases in poverty and inequality. By promoting specialization in primary commodities, the Washington Consensus reinforced the South's dependence on the export of raw materials rather than fostering investment in more dynamic economic sectors.³⁹ The lifting of tariff and non-tariff barriers in the agricultural sector rendered small farmers in the global South destitute by placing them in direct competition with highly subsidized U.S. and EU agribusiness.⁴⁰ The opening of domestic markets to cheap, imported manufactured goods jeopardized nascent industries – particularly in Latin America. Finally, the mass privatizations of the 1990s enabled transnational corporations to dominate key economic sectors in the global South and to invest in oil production.⁴¹

The Washington Consensus' emphasis on export-led growth facilitated the global North's overconsumption of the planet's natural resources by increasing the supply and lowering

³⁸ See Gordon 2009, op. cit., pp. 145-50; Gonzalez 2010 op. cit., pp. 10173-74.

³⁹ See Gordon 2009, op. cit., pp. 149-50.

⁴⁰ See Gonzalez 2004, op. cit., p. 466.

⁴¹ See Gonzalez 2010, op. cit., pp. 10174, 10177.

the price of primary commodities.⁴² The intense competition among debt-ridden Southern countries to maximize exports in order to obtain badly needed foreign exchange drove down prices and encouraged overproduction and overconsumption. Much of the environmental degradation in the global South has been caused not by local consumption of natural resources but by export-oriented production designed to satisfy Northern demand.⁴³ For example, chemical-intensive agro-export production in the global South accelerated deforestation, eroded agrobiodiversity, depleted aquifers, and contaminated water supplies with toxic agrochemicals. It also drove subsistence farmers from the land, fractured the integrity of rural communities, and accelerated rural-to-urban migration.⁴⁴

Scholars, activists, and Southern governments have argued that the global North owes an ecological debt to the global South for the North's current and historic appropriation of a disproportionate share of the planet's natural resources.⁴⁵ Having prospered on the basis of resources extracted from its colonial possessions, the global North continues to exploit the timber, minerals, petroleum, and agricultural products of the global South at prices that do not reflect social and environmental externalities. In addition, the global North industrialized rapidly and cheaply by using more than its fair share of the global commons (including the planet's limited ability to absorb greenhouse gases), and its per capita ecological footprint continues to dwarf that of the global South.⁴⁶ Based on

⁴² See op. cit., p. 10174; J. Martinez-Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*, Cheltenham, UK: Edward Elgar Publishing, 2002, p. 220.

⁴³ See Rees & Westra, op. cit., pp. 105, 110.

⁴⁴ See Gonzalez 2004, op. cit., pp. 467-471.

⁴⁵ See K. Mickelson, "Competing narratives of justice in North-South environmental relations: the case of ozone layer depletion," in Ebbesson & Okowa, op. cit., pp. 153-57.

⁴⁶ See A. Simms, *Ecological Debt: The Health of the Planet & the Wealth of Nations*, London: Pluto Press, 2005, pp. 86-109; D. McLaren, "Environmental Space, Equity and the Ecological Debt," in J. Agyeman,

empirical evidence regarding material and energy flows from extraction of natural resources through production of finished goods, economists J. Timmons Roberts and Bradley Parks confirmed that Northern economies “are draining ecological capacity from extractive regions by importing resource-intensive products and have shifted their environmental burdens to the South through the export of waste.”⁴⁷

The ecological debt concept is particularly compelling in the context of climate change, and it has achieved at least partial recognition in binding legal instruments. Between 1880 and 1990, the global North was responsible for 84 percent of all fossil fuel-related carbon dioxide emissions and 75 percent of all deforestation-related carbon dioxide emissions.⁴⁸

The United Nations Framework Convention on Climate Change (UNFCCC) acknowledges the North’s disproportionate contribution to climate change by noting in its preamble “that the largest share of historical and current global emissions has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and developmental needs.”⁴⁹ In order to mitigate this North-South distributive inequity, Article 3(1) of the UNFCCC requires the global North to take the lead in combatting climate change.⁵⁰

Bullard & Evans, *op. cit.*, pp. 30-32; Martinez-Alier, *op. cit.*, pp. 213-229; Rees & Westra, *op. cit.*, pp. 109-112.

⁴⁷ See J.T. Roberts and B.C. Parks, *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy*, Cambridge, Massachusetts: MIT Press, 2007, p. 168.

⁴⁸ See K. Mickelson, “Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation,” *Osgoode Hall Law Journal*, 2005, vol. 43, pp. 154-55.

⁴⁹ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), preamble ¶3.

⁵⁰ *Op. cit.*, art. 3(1).

The beneficiaries of the Washington Consensus are the transnational corporations that dominate the world economy. By promoting trade and investment while restricting the ability of the state to intervene in the economy, the Washington Consensus increased corporate power. Corporations comprise fifty-three of the hundred largest economies in the world. They produce half of the world's greenhouse gas emissions and control half of the world's extraction of oil, gas, and coal. Due to their economic power and political influence, corporations are adept at evading regulatory oversight and democratic control.⁵¹ The oil industry, for example, has left a trail of destruction in the global South -- including massive deforestation, contamination of surface water and groundwater, decimation of fish and wildlife, destruction of crops and livestock, air pollution, and both physical and economic injury to local and indigenous communities.⁵²

The burdens of the Washington Consensus are borne disproportionately by the planet's poorest and most marginalized communities. According to the 2011 Human Development Report published by the United Nations Development Programme (UNDP), economic inequality and environmental degradation have increased in most countries and regions in recent decades. Poor and indigenous rural communities that depend on natural resources for physical and economic survival are harmed by declining fish stocks, soil erosion, water scarcity, desertification, and deforestation. Women are particularly affected because they are often responsible for subsistence farming, gathering of fuel wood, water collection, and cooking (which exposes them to toxic indoor air pollution).

⁵¹ See Speth, *op. cit.*, pp. 166-73.

⁵² See J. Kimerling, "Oil, Lawlessness and Indigenous Struggles in Ecuador's Oriente" in H. Collinson (ed) *Green Guerrillas: Environmental Conflicts and Initiatives in Latin America and the Caribbean*, Montreal: Black Rose Books, pp. 62-65.

In urban areas, slum dwellers face the greatest risks from climate change-related sea level rises and increases in extreme weather events due to precarious living conditions, inadequate disaster preparation and response, and lack of social safety nets.⁵³ When Hurricane Katrina hit New Orleans in 2005, the African-American poor were disparately impacted because they resided in flood-prone parts of the city and were inadequately protected by governmental authorities.⁵⁴ In general, “the most disadvantaged people carry a double burden of deprivation: more vulnerable to the wider effects of environmental degradation, they must also cope with threats to their immediate environment posed by indoor air pollution, dirty water and unimproved sanitation.”⁵⁵

Finally, even nations that reject the Washington Consensus have adopted economic development strategies that mimic the development paths of the global North and impose disparate environmental burdens on vulnerable populations. China, for example, pursued an unorthodox development strategy based on proactive state intervention in the economy. However, its “grow first, clean up later” economic policies have produced environmental degradation of staggering proportions within China, and have contributed to global environmental problems, such as climate change, transboundary air pollution, and the illegal timber trade.⁵⁶ Despite government efforts to promote environmental protection, China’s environment continues to deteriorate, and government reports confirm a rapidly rising death rate due to cancer, especially in poor rural villages located

⁵³ See United Nations Development Programme (UNDP), *Human Development Report 2011: Sustainability and Equity: A Better Future for All*, New York: Palgrave MacMillan, 2011, pp. 4-5, 28-30, 51, 59.

⁵⁴ See Gonzalez 2007, op. cit., p. 590.

⁵⁵ UNDP, op. cit., p. 5.

⁵⁶ See Gonzalez 2010, op. cit., pp. 10175-76.

near factories.⁵⁷ Invoking the need for local sacrifices to promote national well-being, even populist Southern governments, such as the left-of-center regimes in Ecuador, Bolivia, Venezuela, and Brazil, have embraced growth-at-any-cost development strategies based on mining and petroleum extraction despite these industries' devastating impacts on the livelihoods and natural resources of impoverished rural and indigenous communities.⁵⁸

Environmental Justice and International Law

In order to foster equitable and effective solutions to global environmental problems, international environmental law must be informed by a morally compelling narrative that recognizes the historic roots of environmental injustice and seeks to provide redress to the nations and communities disproportionately burdened by environmental degradation. Regrettably, the discourse of international environmental law is often technocratic and ahistorical. It does not educate the world's wealthy about their inordinate contribution to global environmental problems, and it frequently alienates the world's poor, who demand fairness and equity in the distribution of the planet's finite resources. As one observer points out in connection with climate change, "[p]ublic outrage in the United States at the collapse in the livelihood of hundreds of millions is virtually non-existent. A discussion distinct from 'caps' and 'trades', and 'costs to the average consumer' will help to illuminate [the] suffering of the climate vulnerable, and the developed world's

⁵⁷ See A. Jacobs, "In China, Pollution Worsens Despite New Efforts," *New York Times*, July 28, 2010; L. Liu, "Made in China: Cancer Villages," *Environment Magazine*, March/April 2010. Online. Available HTTP: <<http://www.environmentmagazine.org/Archives/Back%20Issues/March-April%202010/made-in-china-full.html>> (accessed 23 August 2011).

⁵⁸ See E. Gudynas, "Más allá del nuevo extractivismo: transiciones sostenibles y alternativas al desarrollo," in F. Wanderley (ed.) *El desarrollo en cuestión. Reflexiones desde América Latina*, La Paz, Bolivia: Oxfam, 2011, pp. 385-390.

understanding of its own responsibility.”⁵⁹ Re-framing international environmental law with justice at its core may facilitate the development of international environmental regimes that are more effective and more responsive to the inequities in global resource allocation.

Environmental justice requires the mitigation of structural inequities that impose a disproportionate share of the environmental costs of global economic activity on the global South and on vulnerable populations in both affluent and poor countries. These inequities include subordination based on class, race, gender, ethnicity, and other characteristics as well the injustices visited on the South through colonial and post-colonial practices. Environmental justice necessitates the implementation of measures to scale back the North’s overconsumption of the world’s resources, to reduce North-South inequality, to curb the power of transnational corporations, and to guarantee full and effective participation in international, national, regional and local governance by Southern nations and vulnerable communities. Lastly, environmental justice calls for a bold re-thinking of the dominant economic paradigm so as to promote economic and social development while respecting the planet’s biophysical limits.

While international environmental law may not be able to address all of these challenges anytime soon, the remainder of this chapter describes several strategies for bringing justice to the forefront of environmental protection and mitigating the stark disparities in social and economic development within and among nations.

⁵⁹ See Burkett, *op. cit.*, pp. 510-11.

Environmental Human Rights

Environmental justice is grounded in international human rights, including the rights to life, health, and cultural integrity, the right to be free from race and sex discrimination, the rights to information, participation, and redress for environmental harm, and the emerging right to a healthy environment.⁶⁰ Human rights and environmental protection are inextricably intertwined. The enjoyment of internationally protected human rights depends upon a healthy environment, and serious environmental degradation is often accompanied by human rights abuses. Similarly, environmental protection is strengthened by the exercise of human rights, such as the right to information and the right to participate in governmental decision-making.⁶¹ Invoking human rights law and institutions when human rights are threatened by environmental degradation ensures that “the environment does not deteriorate to the point where the human right to life, the right to health, the right to a family and private life, the right to culture, the right to safe drinking water, or other human rights are seriously impaired.”⁶²

Human rights law is based on the natural law notion that human beings possess certain inalienable, permanent and fundamental rights by virtue of their humanity, and that these rights may not be compromised in favor of competing interests, such as economic efficiency.⁶³ Recognizing entitlements as human rights protects them from the tyranny of the majority, the dictatorship of the minority, and the reciprocal exchange of obligations

⁶⁰ See Gonzalez 2007, op. cit., p. 626.

⁶¹ See D. Shelton, “Environmental Rights” in Philip Alston (ed.) *Peoples’ Rights*, New York: Oxford University Press, 2001, pp.187-94; Gonzalez 2001, op. cit., pp. 1014-15.

⁶² Shelton 2001, op. cit., p. 187.

⁶³ See F. J. Garcia, “The Global Market and Human Rights: Trading Away the Human Rights Principle,” *Brooklyn Journal of International Law*, 1999, vol. 25, pp. 69-76.

that takes place in the negotiation of international trade and investment agreements.⁶⁴ Thus, in the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights upheld the indigenous community's property rights over ancestral lands, and rejected Paraguay's contention that a bilateral investment agreement precluded the country from giving effect to these rights. The Court concluded that the enforcement of bilateral commercial treaties "should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among states."⁶⁵

Although most human rights treaties do not contain explicit environmental provisions, global and regional human rights tribunals have interpreted these agreements to permit claims against states based on human rights violations caused by inadequate environmental protection.⁶⁶ These tribunals have recognized that environmental degradation may interfere with the rights to life, health, property, privacy, food, water, and an adequate standard of living and with the collective rights of indigenous peoples to their ancestral lands and resources.⁶⁷ Human rights tribunals have held that states have a

⁶⁴ See Shelton 2001, op. cit., pp. 187-194; Gonzalez 2007, op. cit., pp. 777-78.

⁶⁵ *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006), ¶140.

⁶⁶ See J. Knox, "Climate Change and Human Rights Law," *Virginia Journal of International Law*, 2009, vol. 50, pp. 168-70; D. Shelton, "The Environmental Jurisprudence of International Human Rights Tribunals" in R. Picolotti and J.D. Taillant (eds.) *Linking Human Rights and the Environment*, Tucson: University of Arizona Press, 2003, pp. 11-12.

⁶⁷ See D. Shelton, "Environmental Rights and Brazil's Obligations in the Inter-American Human Rights System," *George Washington International Law Review*, 2009, vol.40, pp. 750-67; A. Boyle, "Human Rights or Environmental Rights? A Reassessment," *Fordham Environmental Law Review*, 2007, vol. 18, p. 487; Knox 2009, op. cit., pp. 170-78.

duty to refrain from directly violating these rights and an obligation to protect these rights by regulating the conduct of private parties.⁶⁸

Human rights violations linked to environmental degradation have been recognized under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights despite the lack of explicit environmental human rights provisions in these treaties. The African Charter on Human and People's Rights and the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights (San Salvador Protocol) do recognize substantive environmental human rights.⁶⁹ International human rights law is therefore an essential tool for victims of environmental injustice.

A human rights approach to environmental protection reveals some of the deficiencies of the current state-centric model of international environmental law. Most environmental treaties seek to constrain environmentally deleterious behavior, but do not address human impacts. The environmental treaty regime tends to focus on transboundary consequences or impacts on the global commons, but lacks mechanisms to address harm that is purely domestic.⁷⁰ Environmental treaties generally lack citizen complaint mechanisms, and human rights tribunals are often the only international forum in which victims of

⁶⁸ See Knox 2009, op. cit., pp. 170-71, 178-79.

⁶⁹ See S. Kravchenko and J.E. Bonine, *Human Rights and the Environment: Cases, Law, and Policy*, Durham, North Carolina: Carolina Academic Press, 2008, pp. 3-4.

⁷⁰ See H.M. Osofsky, "Learning from Environmental Justice: A New Model for International Environmental Rights," *Stanford Environmental Law Journal*, 2005, vol. 24, 71-131, pp. 78-87.

environmental injustice can challenge governmental action or inaction related to the environment.⁷¹

International environmental law can better address environmental injustice by incorporating complaint procedures into environmental treaties so as to permit members of civil society to bring claims against states for non-compliance – whether or not such non-compliance results in transboundary harm. This approach is not unprecedented. The Aarhus Convention, for example, creates a Compliance Committee of independent experts and authorizes any member of the public and any non-governmental organization (NGO) to file a communication with the Committee alleging a party's non-compliance. The Compliance Committee can issue declarations of non-compliance, make recommendations to the party concerned, suspend the party's rights under the treaty, or make recommendations to the Meeting of the Parties regarding the imposition of punitive measures.⁷² In addition, the North American Agreement on Environmental Cooperation (NAAEC), popularly known as the NAFTA environmental side agreement, permits members of the public to file complaints against the parties (the United States, Canada, and Mexico) for failure to effectively enforce their environmental laws. However, this mechanism is less effective than that of the Aarhus Convention because it is controlled by the very governments whose conduct is challenged and because the public is largely excluded from the decision-making process. Moreover, the process results in a non-

⁷¹ See Shelton 2003, op. cit., pp.1-2.

⁷² See S. Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements," *University of Colorado Journal of International Environmental Law and Policy*, 2007, vol. 18, pp. 10-18, 30.

binding “factual record” rather than a legal determination on the merits of the complaint.⁷³

The Aarhus Convention is a groundbreaking contribution to procedural human rights that promotes environmental justice by empowering citizens to challenge governmental non-compliance with environmental commitments. Individuals and NGOs can bring claims of non-compliance against their own country or against any other party to the treaty in order to secure the rights guaranteed therein, including access to information, public participation, and access to justice. The Convention’s complaint process promotes transparency, democracy, and accountability, and serves as a potential model for citizen participation in future environmental treaties.⁷⁴

An environmental justice approach to environmental protection must be particularly attentive to public participation by vulnerable communities. Poverty, illiteracy, lack of information, and government indifference or hostility have excluded vulnerable communities from effective participation in decision-making regarding climate change, biodiversity protection, and environmental impact assessments for local, regional or national development projects.⁷⁵ Once again, the Aarhus Convention’s minimum requirements for access to information, public participation, and access to justice are

⁷³ See J.H. Knox, “The Neglected Lessons of the NAFTA Environmental Regime,” *Wake Forest Law Review*, 2010, vol. 45, p. 397; T. Yang, “The Effectiveness of the NAFTA Environmental Side Agreement’s Citizen Submission Process: A Case Study of Metales y Derivados,” *University of Colorado Law Review*, 2005, pp. 463-74.

⁷⁴ See M. Fitzmaurice, “Environmental justice through international complaint procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation” in Ebbesson & Okowa, *op. cit.*, pp. 222-23; Kravchenko 2007, *op. cit.*, pp. 1-2.

⁷⁵ See S. Kravchenko, “The Myth of Public Participation in a World of Poverty,” *Tulane Environmental Law Journal*, 2009, vol. 23, pp. 35-46.

instructive. The Convention requires governments to provide support to groups and organizations to facilitate participation in environmental decision-making. Among the types of support provided by parties and non-parties are financial grants, technical assistance, capacity-building, and free legal representation offered by the government or financed by domestic or foreign donors.⁷⁶

Reducing North-South Inequality through Differential Treatment

Environmental justice requires recognition and redress of the enduring inequalities between states arising from the colonial encounter and the post-colonial development practices described in this chapter. One important tool to mitigate North-South inequality is differential treatment in international law. Norms of differential treatment in favor of Southern countries are designed to redress historic inequities, and have been utilized in both international economic law and international environmental law. While differential treatment has been on the wane in international economic law since the early 1990s, it has been on the rise in international environmental law.⁷⁷ The following subsections explore the principles that have arisen to promote differential treatment: (1) special and differential treatment in international trade law; and (2) common but differentiated responsibility in international environmental law.

International Economic Law: Special and Differential Treatment

Differential treatment in international law may appear to violate the doctrine of sovereign equality of states – the notion that states possess equal rights and duties as members of

⁷⁶ See op. cit., pp. 48-55)

⁷⁷ See Rajamani, op. cit., pp. 47-48.

the international community. However, differential treatment is entirely consistent with international law and is justified by the need to promote social and economic development. Given the economic disparities among states, formal equality would exacerbate poverty and inequality. Differential treatment seeks to narrow the gap between the colonizers and the formerly colonized by providing more advantageous treatment to the latter. Since states have the sovereign right to elect to be bound by treaties that confer special treatment on other states, differential treatment in international legal instruments does not run afoul of international law.⁷⁸

Differential treatment has its origins in the demands of the G-77 nations for a more equitable distribution of the planet's resources. Differential norms were adopted initially in international economic law and were subsequently incorporated into international environmental law.⁷⁹

The global South has long been acutely aware that economic and social development is constrained by the rules governing international trade. The 1947 General Agreement on Tariffs and Trade (GATT) was negotiated when most of the South was under colonial rule. The GATT benefited the global North by reducing tariffs on manufactured goods, but it did not address the global South's needs for economic diversification and industrialization or compel the global North to open its highly protected agricultural markets to Southern imports.⁸⁰ By the mid-1950s, Southern nations had mobilized to demand a variety of measures to promote economic development, including removal of

⁷⁸ See *op. cit.*, pp. 2, 48-49.

⁷⁹ See *op. cit.*, pp. 17-19, 48-49.

⁸⁰ See Gonzalez 2010 *op. cit.*, pp. 10178-79; Gonzalez 2004, *op. cit.*, pp. 456-57.

the global North's trade-distorting agricultural subsidies and import barriers; preferential market access and non-reciprocal tariff reductions for Southern country products; and the right to protect infant industries through tariffs, subsidies and quotas.⁸¹

The concerted efforts of the global South introduced the principle of special and differential treatment into the GATT through a series of amendments that permitted (but did not require) the global North to provide differential and more favorable treatment to its Southern trading partners.⁸² Pursuant to this principle, Southern countries were granted preferential market access and non-reciprocal tariff concessions, and were not required to become parties to all of the side agreements resulting from the 1973-79 Tokyo Round of trade negotiations.⁸³

However, the advantages of special and differential treatment generally proved illusory. The benefits of preferential market access to Northern markets declined as Northern tariff levels were reduced. The most significant products of the global South (clothing, textiles, agriculture) were either excluded or received less preference. Because the norms imposing differential treatment were often drafted in aspirational rather than mandatory language, the compliance of the global North was strictly voluntary, and non-compliance did not result in sanctions.⁸⁴ For example, GATT article XXXVII requires Northern countries to "accord high priority" to the export products of interest to the global South

⁸¹ See Gonzalez 2010, op. cit., p. 10179; F. Ismail, "Rediscovering the Role of Developing Countries in GATT Before the Doha Round," *Law and Development Review*, 2008, vol. 1, pp. 59-67.

⁸² See Ismail, op. cit., 2008, pp. 65-67.

⁸³ See Gonzalez 2007, op. cit., pp. 633-34.

⁸⁴ See op. cit., pp. 634-635.

and to refrain from introducing or increasing import barriers to such products.⁸⁵ However, this provision excuses Northern countries from complying with these obligations if they invoke “compelling reasons,” including contrary legal obligations.⁸⁶ In other words, “developed countries may escape from those so-called commitments by legislating against them.”⁸⁷

The WTO, which succeeded the 1947 GATT, eroded differential treatment by imposing the same obligations on all countries but merely giving the global South more time to comply. The WTO failed to phase out the Northern import barriers on clothing, textiles and agricultural products, but managed to constrain the development options of Southern nations. Reinforcing the free market reforms imposed by the IMF in the wake of the debt crisis, the WTO required the global South to eliminate the import barriers that had formerly protected domestic industries from more technologically advanced foreign competitors; restricted the ability of the state to use tariffs and subsidies to promote dynamic new industries; and imposed new and expensive obligations on the global South in the areas of intellectual property, services, and investment.⁸⁸

The free market reforms imposed by international trade and financial institutions deprive the global South of the protectionist tools used by the global North and by the rising powers of the global South to achieve economic prosperity. The United States, Germany,

⁸⁵ See General Agreement on Tariffs and Trade (GATT) 1947, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948), Art. XXXVII(1).

⁸⁶ See op. cit., Art. XXXVII(1).

⁸⁷ Y.S. Lee, *Reclaiming Development in the World Trading System*. Cambridge: Cambridge University Press, p. 35.

⁸⁸ See op. cit., pp. 41-43; F.J. Garcia, “Beyond Special and Differential Treatment,” *Boston College International and Comparative Law Review* 2004, vol. 27, pp. 297-99.

France, Japan, the United Kingdom, China, South Korea, and Taiwan deployed a broad array of state interventionist measures (industrial policy) in order to diversify and industrialize their economies. These measures included subsidies, tariffs, state financing of major industries, local content requirements, technology transfer requirements, and even state-sponsored theft of intellectual property through industrial espionage.⁸⁹

Regrettably, nations that arrive at the pinnacle of economic success through protectionism often advocate free trade so as to “kick away the ladder” and prevent others from climbing up.⁹⁰

As a matter of fairness and justice, the regulatory framework for international trade must be modified to permit Southern countries to make use of tariffs, subsidies, and other protectionist measures to end their dangerous and debilitating dependence on the export of primary commodities. Only a regime of asymmetrical obligations that facilitates economic diversification in the global South through industrial policy while restricting protectionism in the global North will enable the global South to overcome the colonial legacy. Indeed, in response to the dissatisfaction of the global South with the current WTO framework, the ministerial declaration that launched the Doha Round of WTO negotiations re-affirmed the commitment of WTO members to special and differential treatment and pledged that “all special and differential treatment provisions shall be

⁸⁹ See H. Chang 2003, “The East Asian Development Experience” in H. Chang (ed.) *Rethinking Development Economics*, London and New York: Anthem Press, 2003, pp. 111-17; H. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective*, London and New York: Anthem Press, 2002, pp. 19-51, 59-66; Gonzalez 2010, op. cit., pp. 10174-75.

⁹⁰ See Chang 2002, op. cit., pp. 4-5.

reviewed with a view to strengthening them and making them more precise, effective and operational.”⁹¹

International Environmental Law: Common But Differentiated Responsibility

States differ in terms of their contribution to global environmental degradation, their vulnerability to environmental harm, and their capacity to address environmental problems. Northern proposals to protect the global environment without taking these differences into account have sparked skepticism in the global South.⁹² Indeed, Northern environmentalism was initially regarded as yet another effort to “kick away the ladder” and perpetuate Southern poverty by depriving the global South of the polluting technologies that the North had used to industrialize.⁹³

Despite its initial skepticism, the global South has been an active partner in the development of international environmental law. However, Southern nations have generally articulated a different concept of environmentalism. While the North has typically focused on global environmental problems (such as ozone depletion, climate change, and biodiversity loss), the South has often pressed for action on environmental problems with more immediate impacts on vulnerable local populations, including desertification, food security, the hazardous waste trade, access to safe drinking water

⁹¹ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), ¶44.

⁹² See Gonzalez 2001, op. cit., pp. 1008-09.

⁹³ See R. Falk, “The Second Cycle of Ecological Urgency: An Environmental Justice Perspective” in Ebbesson & Okowa 2009, op. cit., p. 45.

and sanitation, and indoor air pollution caused by lack of access to sustainable energy.⁹⁴

As awareness of the potentially devastating local and global consequences of climate change grew, the South demanded an aggressive response based on the North's disproportionate contribution to the problem.⁹⁵

During the major diplomatic conferences on the environment convened by the United Nations, the South has emphasized responsibility for historic environmental harm and the need to address poverty and inequality.⁹⁶ From the 1972 Stockholm Conference through the 2002 World Summit on Sustainable Development, the South played an instrumental role in the development of soft law principles and treaty mechanisms that introduced differential treatment into international environmental law so as to foster social and economic development. The relevant soft law principles include Principles 3, 5, 6, and 9 of the Rio Declaration on Environment and Development, which endorse the right to development, require states to cooperate to decrease disparities in living standards, express concern for the special needs and circumstances of developing countries (particularly the least developed and most environmentally vulnerable), and recognize the need for technology transfer to achieve sustainable development.⁹⁷ The relevant treaty mechanisms include provisions exempting the South from substantive obligations (such as the Kyoto Protocol, which does not impose binding emission reduction obligations on

⁹⁴ See Gonzalez 2001, *op. cit.*, pp. 1008-09; L. Guruswamy, "Energy Justice and Sustainable Development," *Colorado Journal of International Environmental Law and Policy*, 2010, vol.12, pp. 235-38.

⁹⁵ See Roberts & Parks, *op. cit.*, pp. 132-50.

⁹⁶ See K. Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers," *Yearbook of International Environmental Law*, 2000, pp. 70-71.

⁹⁷ See *Rio Declaration on Environment and Development* (1992), Report of the U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I)(1992), reprinted in 31 I.L.M. 874 (1992), Principles 3, 5, 6 and 9; Rajamani, *op. cit.*, p. 60.

Southern countries); giving Southern countries more time to comply (such as the Montreal Protocol's differential phaseout schedules for ozone-depleting chemicals); and conditioning the South's duty to comply with treaty provisions on the North's transfer of financial resources and technology (such as the Convention on Biological Diversity and the UNFCCC).⁹⁸

The principle of common but differentiated responsibility is perhaps the most significant expression of differential treatment in international environmental law. Principle 7 of the Rio Declaration articulates the principle as follows:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.⁹⁹

The principle of common but differentiated responsibility finds use in international environmental law to impose asymmetrical obligations on the North and the South in light of (1) the North's disproportionate contribution to global environmental degradation; (2) the North's superior financial and technical resources; and (3) the

⁹⁸ See D. Shelton, "Describing the elephant: international justice and environmental law," in Ebbesson & Okowa, *op. cit.*, p. 62.

⁹⁹ *Rio Declaration on Environment and Development*, *op. cit.*, Principle 7.

South's economic and ecological vulnerability.¹⁰⁰ The principle of common but differentiated responsibility appears in a variety of environmental treaties, including the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the UNFCCC, the Kyoto Protocol, the Convention on Biological Diversity, and the United Nations Convention on the Law of the Sea (UNCLOS).¹⁰¹

Notwithstanding the incorporation of common but differentiated responsibility into so many treaties, its meaning remains contested – particularly in the climate change negotiations. From the perspective of the global South, the principle acknowledges “the historic, moral, and legal responsibility of the North to shoulder the burdens of environmental protection, just as it has enjoyed the benefits of economic and industrial development largely unconstrained by environmental concerns.”¹⁰² However, there is disagreement as to whether the principle operates in terms of corrective or distributive injustice. One prominent scholar argues that the principle “provides a corrective justice basis for obliging the developed world to pay for past harms as well as present and future harms” through the transfer of financial resources and technology.¹⁰³ Others are not persuaded that the principle unequivocally mandates Northern financing of Southern adaptation and mitigation measures.¹⁰⁴ To the extent that the principle merely requires the North to scale back its own emissions in order to permit the South to increase its

¹⁰⁰ See C.D. Stone, “Common But Differentiated Responsibilities in International Law,” *American Journal of International Law*, 2004, vol. 98, pp. 279-80.

¹⁰¹ See Gonzalez 2007, op. cit., p. 632.

¹⁰² Mickelson 2000, op. cit., p. 70.

¹⁰³ See D. Shelton, “Describing the elephant: international justice and environmental law,” in Ebbesson & Okowa, op. cit., pp. 67-68.

¹⁰⁴ See J. Brunnée, “Climate change, global environmental justice and international environmental law,” in Ebbesson & Okowa, op. cit., pp. 325-26.

emissions to the degree necessary to improve living standards, then the principle would appear to be more consistent with distributive justice.

Northern countries, however, have refused to accept responsibility for historical acts of environmental degradation, and have instead attributed their leadership role in the climate regime to their greater wealth, technical expertise, and capacity to take response measures.¹⁰⁵ In addition to refusing to ratify the Kyoto Protocol, the United States went so far as to submit an interpretive statement on Principle 7 of the Rio Declaration rejecting legal responsibility for past actions.¹⁰⁶

The global North's ahistorical understanding of global environmental problems is one of the fundamental obstacles to North-South environmental collaboration. This ahistorical approach to international environmental dialogue "seeks to wipe the colonial past from our collective memories and start afresh, as if past patterns of exploitation have little bearing on current inequities, and the efforts of developing countries to raise them time and again are no more than special pleading."¹⁰⁷ Instead of acknowledging responsibility for past wrongs, the global North ascribes its differential commitments under the climate regime and other environmental treaties to *noblesse oblige* -- benevolence, morality, and good will. This justification ensures that the North's obligations are drafted in discretionary rather than binding language, and are included in soft law rather than hard law instruments. The North's ahistorical approach is inconsistent with the polluter pays

¹⁰⁵ See Rajamani, *op. cit.*, pp. 76, 81.

¹⁰⁶ See J.D. Kovar, "A Short Guide to the Rio Declaration," *University of Colorado Journal of International Environmental Law and Policy*, 1993, vol. 4, pp. 129-30.

¹⁰⁷ Rajamani, *op. cit.*, p. 87.

principle, which requires the polluter to bear the cost of environmental degradation. It is also at odds with the climate regime's use of 1990 as the baseline for mitigation – a baseline that grandfathers the historical emissions of the global North.¹⁰⁸

The principle of common but differentiated responsibility, no matter how contested or how imperfectly implemented, serves as a reminder of the historic and contemporary unequal contributions to global environmental degradation and as an important vehicle for securing North-South environmental justice. Southern countries do bear responsibility for their own polluting behavior, and must contribute their fair share to collective solutions. International environmental law must continue to right historic wrongs by apportioning responsibility on the basis of past and current contribution to environmental degradation– as well as vulnerability and capacity to address environmental problems.

Mitigating the Power of Transnational Corporations

From the oil drilling operations of Chevron/Texaco in Ecuador to the mining activities of New Orleans-based Freeport-McMoran in Indonesia, corporations are frequently implicated in serious human rights and environmental abuses. While corporations have begun to adopt voluntary codes of conduct, the magnitude of corporate influence in the global economy requires a stronger response.¹⁰⁹

¹⁰⁸ See *op. cit.*, pp. 86-87.

¹⁰⁹ See A. Sinden, "Power and responsibility: why human rights should address corporate environmental wrongs," in D. McBarnet, A. Voiculescu & T. Campbell (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press, 2009, pp. 501-503.

An environmental justice approach to international environmental law requires creative use of international and domestic law to regulate the extraterritorial conduct of transnational corporations. When these corporations engage in environmentally irresponsible conduct in the global South, they are externalizing the costs of economic activity on local populations while internalizing the economic benefits. The geographic separation between the home state and the host state obscures the injury and may prevent shareholders and the public in the home state from experiencing moral culpability.¹¹⁰ Furthermore, if these activities proceed via a subsidiary, the legal separation between the parent company in the home state and the subsidiary in the host state may make it difficult for the legal system to hold the parent company and its shareholders liable despite the profits that they derive from this activity.¹¹¹ Under well-settled legal principles, the corporate subsidiary is deemed a separate legal person, and the parent company is not generally liable for the actions of its subsidiary.¹¹² Because Southern governments are often implicated in human rights and environmental abuses or are vulnerable to exploitation by transnational corporations due to their staggering foreign debts, the host country may not be able to adequately regulate the corporation's activities. Transnational regulation may therefore be the best solution.¹¹³ While a full discussion of this dauntingly complex topic must await another day, the remainder of this section considers several regulatory strategies that may promote socially responsible corporate behavior.

¹¹⁰ See Yang 2002, op. cit., p. 105.

¹¹¹ See J. Overland, "A Multi-Faceted Journey: Globalisation, Transnational Corporations, and Corporate Social Responsibility" in S. Alam, N. Klein and J. Overland (eds.) in *Globalisation and the Quest for Social and Environmental Justice: the Relevance of International Law in an Evolving World Order*, New York: Routledge, 2011, pp. 136-37.

¹¹² See A. De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment*, Cheltenham, UK: Edward Elgar Publishing Limited, 2011, pp. 83-84.

¹¹³ See Yang 2002, op. cit., pp. 97, 105-06.

Some scholars have argued that corporations should be treated like states under international human rights law in view of the power they wield over individuals and over debt-ridden developing countries desperate for foreign investment.¹¹⁴ Transnational corporations, like states, could elect to be bound by human rights treaties, and would be subject to *jus cogens* norms and to norms that have achieved the status of customary international law. Transnational corporations, like states, would also be liable for complicity in the human rights violations of another state, including knowingly aiding and assisting; directing and controlling; and coercing another state in the commission of human rights violations.¹¹⁵ The problem with this approach is that corporations would likely refuse to be bound by human rights treaties and refuse to consent to the jurisdiction of international or regional human rights tribunals. In the absence of consent, there may be no mechanism to enforce applicable customary international law norms against recalcitrant corporations.

A second strategy calls for legislation in the home state subjecting the corporation to liability in the host state for violations of legal norms abroad. This strategy may be appealing to victims of human rights and environmental abuses if significant barriers frustrate justice in the host state. An example of this approach is the U.S. Alien Tort Claims Act (ATCA), which gives federal courts jurisdiction over civil suits by aliens for torts “committed in violation of the law of nations or a treaty of the United States.”¹¹⁶ ATCA is a 1789 federal statute that lay dormant for nearly two centuries until it served as

¹¹⁴ See Sinden, *op. cit.*, p. 519.

¹¹⁵ See De Jonge, *op. cit.*, pp. 150-51.

¹¹⁶ See Alien Torts Claims Act, 28 U.S.C. §1350.

the basis for a 1980 federal court judgment against a former Paraguayan government official for torture under cover of governmental authority. The statute has subsequently been invoked against transnational corporations for complicity in human rights violations.¹¹⁷ Despite high profile settlements in cases brought against Unocal and Shell, few ATCA cases have been successful due, in part, to the significant procedural hurdles that these cases encounter, including the doctrines of *forum non conveniens*, act of state, political question, sovereign immunity, and comity.¹¹⁸ In addition, the plaintiffs will need to establish the liability of the parent for breaches that are most commonly committed by its subsidiaries.¹¹⁹ Thus, the threat of a successful lawsuit in the home state may not be sufficient to deter misconduct in the host state. In addition, on September 17, 2010, the U.S. Court of Appeals for the Second Circuit ruled in the case of *Kiobel v. Royal Dutch Petroleum* that corporations cannot be sued under the ATCA because no international tribunal has ever held a corporation liable for human rights violations.¹²⁰ In October 2011, the U.S. Supreme Court granted certiorari to hear this case.¹²¹ The decision will determine the fate of corporate liability in the United States under the ATCA.

A third strategy is extraterritorial legislation in the home state regulating the conduct of its corporations abroad or state responsibility for failure to regulate. Many states already impose liability on corporations for money-laundering and bribery in their operations abroad, and could expand existing legislation to encompass human rights and

¹¹⁷ See De Jonge, *op. cit.*, pp. 100-01.

¹¹⁸ See *op. cit.*, pp. 99-100; 108-17.

¹¹⁹ See Overland, *op. cit.*, p. 138.

¹²⁰ See De Jonge, *op. cit.*, pp. 105-06.

¹²¹ See M. Sacks, "Supreme Court to Rule on Corporate Personhood for Crimes Against Humanity," *Huffington Post*, October 17, 2011. Online. Available HTTP: <http://www.huffingtonpost.com/2011/10/17/supreme-court_n_1015953.html> (accessed 26 November 2011).

environmental standards.¹²² States that fail to regulate could be held responsible for the extraterritorial conduct of their corporate nationals. Under customary international law, states have a duty to refrain from causing transboundary harm, including a due diligence obligation to regulate the conduct of private parties within their territories. States that have ratified the ICESCR have an additional obligation to ensure that corporations under their jurisdiction and control respect economic, social and cultural rights in other countries.¹²³ Where a state has actual or constructive knowledge that extraterritorial corporate activity (such as oil drilling) may violate human rights (including environmental human rights) and fails to exercise due diligence to prevent such violations, the state may incur liability on that basis.¹²⁴ Furthermore, capital exporting countries that enter into bilateral investment treaties (BITs) with capital importing countries may be liable for the human rights violations of their corporate nationals to the extent that the BITs restrict the ability of the host state to regulate the foreign investor in a manner that protects human rights.¹²⁵

A fourth strategy is to incorporate sustainable development into BITs and free trade agreement investment chapters. These agreements have historically protected foreign investors while limiting the regulatory authority of the host state.¹²⁶ For example, arbitration tribunals have interpreted the key operative clauses of BITs to require host state governments to compensate foreign investors when health, safety, and

¹²² See De Jonge, *op. cit.*, pp. 91-93.

¹²³ See R. McCorquodale and P. Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law," *Modern Law Review*, 2007, vol. 70, pp. 617-19.

¹²⁴ See *op. cit.*, pp. 619-21

¹²⁵ See *op. cit.*, pp. 621-23.

¹²⁶ See X. Fuentes, "The Impact of Foreign Investment Rules on Domestic Law" in D. French, *op. cit.*, pp. 192-203.

environmental regulations diminish the profitability of the investment – with little or no deference to the state’s exercise of regulatory authority and with no opportunity for the state to complain of the foreign investor’s conduct.¹²⁷ Drawing upon the model investment agreement developed by the International Institute for Sustainable Development, states might enter into BITs that: (1) make sustainable development the objective of the agreement and affirm the right of the host state to regulate in the public interest; (2) revise the substantive obligations of the host state to explicitly preserve regulatory flexibility; (3) require the host state to adopt high levels of environmental and human rights protection in its national legislation; (4) require foreign investors to comply with domestic and international human rights and environmental norms; (5) establish civil liability in the investor’s home state for breach of these domestic and international norms; and (6) permit the host state to make counterclaims against the foreign investor for failure to comply with the obligations set forth in the BIT.¹²⁸ This approach imposes standards of conduct on transnational corporations, requires the home country of the foreign investor to more closely monitor and regulate the extraterritorial activities of its companies, and expands the rights of victims of human rights and environmental abuses. Indeed, these BITs should also include a hierarchy of norms clause that recognizes the primacy of human rights and environmental norms in the event of a conflict with other BIT obligations.

¹²⁷ See *op. cit.*, pp. 199-206.

¹²⁸ See H. Mann et al., et al. (2005). International Institute for Sustainable Development Model International Agreement for Sustainable Development. Available HTTP: <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (accessed 28 December 2011).

The foregoing list of regulatory strategies is illustrative rather than exhaustive. It highlights the need for creative interventions to ensure corporate accountability for extraterritorial misconduct.

Re-conceptualizing Development

Climate change jeopardizes the health and well-being of present and future generations, and represents the single greatest threat to sustainable development. It is also one of the most devastating manifestations of a deeper problem: a failed development model premised on the fallacy of unlimited economic growth. Since the Second World War, Northern trade, aid and financial institutions have trumpeted the growth-at-any-cost economic model as the solution to global poverty and inequality.¹²⁹ This model equates human flourishing with economic growth as measured by GDP and pays scant heed to distributional equity or ecological limits. GDP growth is accomplished by consuming ever-increasing amounts of natural resources and discharging vast quantities of pollution.¹³⁰ This economic model “has brought us to the point where sustained material growth destroys ecosystems, impoverishes the planet, diminishes the human spirit, and visits violence upon whole poor communities.”¹³¹ The world’s wealthiest countries (the United States, the European Union, and Japan) and its rising powers (China, India, Russia, and Brazil) are currently responsible for almost 70 percent of global greenhouse gas emissions, and these emissions are growing.¹³² This practice is sustainable only if

¹²⁹ See Sachs & Sartorius, *op. cit.*, pp. 30-31.

¹³⁰ See Speth, *op. cit.*, pp. 7-9, 107-119.

¹³¹ Rees & Westra, *op. cit.*, p. 107.

¹³² See Climate Analysis Indicators Tool (CAIT), Version 9.0, Washington, DC: World Resources Institute, 2011. Online. Available HTTP:<<http://cait.wri.org>> (accessed 28 December 2011). This figure is based on emissions data for 2005, and does not include anthropogenic greenhouse gas emissions associated with deforestation.

poor countries freeze their development and consume only a fraction of the planet's resources. If all countries of the world simultaneously pursue the growth at any cost economic model, the result would be global environmental catastrophe.¹³³ It is therefore necessary to develop alternative models of economic development that require reductions in per capita energy and resource consumption by the affluent so as to create the ecological space necessary to improve the living standards of the poor.

One solution to the impasse in the climate change negotiations is a reinvigorated conception of common but differentiated responsibility that imposes differential mitigation obligations on *all* nations based on historic responsibility, vulnerability, and capacity to reduce greenhouse gas emissions. Popularly known as contraction and convergence, this approach would cap and reduce greenhouse gas emissions by allocating emissions entitlements to each nation based on the above criteria with the ultimate goal of having Northern and Southern per-capita emissions converge. Excluding the global South from mandatory emissions caps is fundamentally unjust because it equates countries like India and China (with their significant and growing emissions) with Sudan and Tuvalu (with their minimal emissions, limited capacity, and significant vulnerability) and guarantees gridlock in the climate negotiations as the planet teeters on the brink of catastrophe.¹³⁴ The contraction and convergence approach to climate change will promote environmental justice by scaling back the North's overconsumption of the

¹³³ See C. Flavin and G. Gardner, "China, India, and the New World Order" in Worldwatch Institute, *State of the World 2006: Special Focus: India and China*, New York: W.W. Norton & Company, 2006, pp. 16-18; Gonzalez 2001, op. cit., pp. 1002-1003.

¹³⁴ See J. Ngugi, "The 'Curse' of Ecological Interdependence: Africa, Climate Change and Social Justice" in W.H. Rodgers, Jr. et al. (eds.) *Climate Change: A Reader*, Durham: Carolina Academic Press, 2011, pp. 982-83.

planet's resources so that the South will be able to improve living standards—instead of simply grandfathering the global North's emissions based on the climate regime's 1990 baseline.¹³⁵

Foregrounding justice in the climate change negotiations can also produce a new model of economic development that reduces greenhouse gas emissions, improves the well-being of the world's poor, and facilitates the transition to renewable energy. A large percentage of humanity relies on animal dung, crop residues, rotted wood, and other forms of biomass for energy. Biomass can be used for cooking and heating, but it exacts a terrible toll on the health of women and children exposed to indoor pollution, and produces black carbon, a powerful contributor to global warming. In addition, biomass cannot provide the energy necessary to power water pumps and agricultural machinery or to provide water filtration and lighting for homes and schools – all of which contribute to the fulfillment of the Millennium Development Goals of reducing hunger, increasing access to safe water and sanitation, and providing primary education.¹³⁶ Instead of ignoring the plight of the most vulnerable, climate negotiators should deploy the Kyoto Protocol's Clean Development Mechanism (CDM) and develop new mechanisms in the Kyoto Protocol's successor to finance renewable energy projects (such as small scale hydroelectric, wind, or solar power) in the poorest countries of the global South in order to simultaneously reduce black carbon emissions, decrease indoor air pollution, contribute to the achievement of the Millennium Development Goals, and enable

¹³⁵ See Simms, *op. cit.*, pp. 171-77.

¹³⁶ See Guruswamy, *op. cit.*, pp. 233-38.

countries in the global South to leapfrog the fossil fuel-based development path taken by the global North.¹³⁷

An environmental justice approach to climate policy would prioritize the needs of the most vulnerable by placing greater emphasis on climate adaptation. Consistent with the principle of common but differentiated responsibility, the nations that contributed the most to climate change would have an obligation to increase the adaptive capacity of the poorest, least culpable, and most vulnerable.¹³⁸ Indeed, some have argued that climate change poses such severe threats to global security that the global North should embark on an adaptation program on the scale of the post-World War II Marshall Plan.

Adaptation funds should focus on the poorest countries and target the neediest segments of society.¹³⁹ Adaptation funding would build resilience to climate change, combat poverty and inequality, contribute to the fulfillment of the Millennium Development Goals, and promote North-South cooperation. Climate change adaptation will require coordination of environmental policy with trade, investment, finance, immigration, public health, land use, energy, and national security law and policy. As one observer puts it, “climate change adaptation policy is going to transcend environmental law quickly and decisively.”¹⁴⁰

¹³⁷ See R. Gordon, “Climate Change and the Poorest Nations: Further Reflections on Global Inequality,” *University of Colorado Law Review*, 2007, vol. 78, p. 1615.

¹³⁸ See Ngugi 2011, op. cit. p. 985.

¹³⁹ See R. Verchik, “Adaptive Justice” in Rodgers, op. cit., pp. 891-93.

¹⁴⁰ See J. B. Ruhl, “Climate Change Adaptation and the Structural Transformation of Environmental Law,” *Environmental Law*, 2010, vol. 40, p. 415.

Conclusion

Environmental injustice is rooted in colonial and post-colonial economic policies that subordinated the global South and enabled the global North to secure a disproportionate share of the planet's finite resources. One of the obstacles to the achievement of environmental justice is the fragmentation of international law into three distinct fields: international economic law, international human rights law, and international environmental law. If international law is to advance environmental protection and social and economic development, then environmental justice norms and policies must be integrated into the broader corpus of international law. The achievement of environmental justice also requires cooperation and collective action among nations to regulate the extraterritorial conduct of transnational corporations. Economic and environmental cooperation between the global North and the global South must rest on a shared understanding of historic injustices and a shared commitment to right these injustices for the benefit of present and future generations.

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